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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. South Africa

Military service extended to non-white inhabitants of South West Africa by Proclamation 198 of 1980 which amended the South Africa Defence Act 44 of 1957 — Mandate for South West Africa and South Africa — Relationship of international law and municipal law

SOUTH WEST AFRICA, SUPREME COURT[1]

BINGA v. THE ADMINISTRATOR-GENERAL FOR SOUTH WEST AFRICA AND OTHERS, JUDGEMENT OF 22 JUNE 1984[2]

(Berker JP; Mouton and Strydom JJ)

SOUTH AFRICA, SUPREME COURT, APPELLATE DIVISION

BINGA v. THE CABINET FOR SOUTH WEST AFRICA AND OTHERS, JUDGEMENT OF 24 MARCH 1988[2]

(Rabie ACJ; Corbett, Van Heerden, Hefer and Grosskopf JJA)

SUMMARY: *The facts* — In 1980 the State President of the Republic of South Africa, acting under Section 38 of the South West Africa Constitution Act 39 of 1968, issued two proclamations relating to the defence of the Republic of South Africa. By Proclamation 198 of 1980 the South African Defence Act 44 of 1957 was amended and provisions relating to eligibility for military service were extended to include the non-white inhabitants of South West Africa. By Proclamation R131 of 1980 the Administrator-General of South West Africa was made responsible for the registration and enrolment of persons eligible for military service in the South West Africa Territory Force. In October 1977 Mr. Binga received notice of Proclamation 198 and was ordered to report for military service for the South West Africa Territory Force/South African Defence Force at the Port of Walvis Bay.

Mr. Binga made an application to the Court joining the Administrator-General for South West Africa, the South African Minister of Defence and the Exemption Board for the South West Africa Territory Force as defendants. He submitted:

(i) That the legislative powers of the South African Parliament over the territory of South West Africa were qualified by, and subject to, the terms of the Mandate of South West Africa which had been formulated by the Council of the League of Nations in 1920, and which had been incorporated by statute into South African municipal law;

(ii) That Proclamation 198 and Proclamation R131 were unlawful because they contravened Article 4 of the Mandate which prohibited use of the mandated territory and its indigenous population for military purposes and the applicant was not therefore liable for military service; and

(iii) That by issuing the notice relating to military service at the Port of Walvis Bay, an area which was outside the mandated territory of South West Africa, the Administrator-General had exceeded the grant of authority conferred by Proclamation R131 and the notice was therefore unlawful and should be set aside.

Mr. Binga also made an alternative submission that the South African Parliament did not have competence to legislate for South West Africa because the United Nations had unilaterally terminated the Mandate for South West Africa by General Assembly resolution 2145 (XXI) of 21 October 1966 and Security Council resolution 276 (1970) of 30 January 1970 and that, following the advisory opinion of the International Court of Justice in 1971,[3] South Africa's continued presence and administration of the area was both illegal and invalid.

Held (unanimously): — The application was dismissed.

Per Justice Mouton: (1) The testing of legislation enacted by the South African Parliament or of amendments made to existing legislation, by reference to the terms and provisions of the Mandate for South West Africa, went beyond the scope of the judicial function of the municipal courts in South Africa. Responsibility for the supervision and proper enforcement of the Mandate for South West Africa lay with the international political community acting under the aegis of the United Nations General Assembly. The advisory opinion of the International Court of Justice in 1971 supported this view. The Court would, therefore, be prohibited from examining the validity of Proclamation 198 and Proclamation R131, even though judicial scrutiny was not restricted by Section 59(2) of the Republic of South Africa Constitution Act 31 of 1961 (pp. 469-475).

(2) Although the Supreme Court of South West Africa was no longer a division of the Supreme Court of South Africa, the final appeal from the South West African courts was to the Appellate Division of the Supreme Court of South Africa. The Court would, therefore, remain bound by previous decisions of the Appellate Division relating to the Mandate for South West Africa (p. 474).

(3) The Advisory Opinion of the International Court of Justice in 1971 did not provide authoritative guidance on the question of the termination of the Mandate for South West Africa; judicial statements on the lawfulness of South Africa's continued presence in South West Africa were, therefore, to be regarded as *obiter dicta*. The United Nations was not competent to determine or modify unilaterally the international status of South West Africa. This view was reflected in the Advisory Opinion of the International Court of Justice in 1950[4] and in the various resolutions and deliberations of the United Nations Organization which had sought cooperation from the Republic of South Africa in the final settlement of the South West Africa situation, and which had recognized the continuing authority of the Republic over South West Africa pending such settlement (pp. 475-477).

Per Justice Strydom: (1) Internal sovereignty was dependent upon the exercise of exclusive and effective control rather than upon international recognition. Although the international community regarded the Mandate for South West Africa as terminated, the Government of South Africa continued to exercise exclusive and effective control over the territory. The Court was, therefore, satisfied that the Government had internal sovereignty and was competent to legislate for the territory. Obligations incurred by international treaties and the resolutions of international organizations could be distinguished from customary international law in that they required incorporation into municipal law by legislative act before the courts of South Africa would give effect to them. General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970) had not been incorporated into municipal law and therefore could not affect the rights of individuals in South West Africa. The advisory opinions of the International Court of Justice on the status of South West Africa were also not binding upon South Africa. In cases of conflict between municipal law and international law or international opinion the courts must give effect to municipal law. Proclamations 198 and R131 would therefore be upheld (pp. 477-480).

(2) A finding that the Government of South Africa exercised exclusive and effective control was conclusive with regard to the applicant's contention that the Mandate had been terminated. The Court was not competent to determine whether the Government of South Africa still regarded the territory as falling within its sovereignty and it also made it unnecessary for the Court to determine the validity or existence of the Mandate, or whether the Government exercised *de jure* or *de facto* control in South West Africa (p. 481).

(3) The terms of the Mandate for South West Africa had not been incorporated into the municipal law of South Africa. The South African Parliament enjoyed unlimited legislative power over the territory which was in no way curtailed by the terms of the Mandate. The applicant's contention that the Proclamations were in conflict with superior provisions of municipal law must fail (pp. 482-485).

Mr. Binga appealed to the Appellate Division of the Supreme Court of South Africa. On appeal, he maintained:

(i) That section 38(1) of the South West Africa Constitution Act 39 of 1968 did not confer powers upon the State President to make laws which conflicted with the Mandate for South West Africa. Proclamation 198, he alleged, was contrary to article 4 of the Mandate and was therefore invalid; and

(ii) That the applicant could not be called for military service at Walvis Bay because section 1(1) of Proclamation 198 restricted liability for non-whites to military service within the territory of South West Africa.

Held (unanimously): — The appeal was dismissed.

(1) Under the terms of section 38(1) of the South West Africa Constitution Act 39 of 1968 as amended by section 1 of the South West Africa Constitution Amendment Act 95 of 1977, the South African Parliament had conferred upon the State President of the Republic of South Africa plenary powers of

legislation in respect of South West Africa which were as wide as those possessed by Parliament itself. Even if it was assumed in the appellant's favour, therefore, that the provisions of the Mandate for South West Africa had been incorporated into municipal law by legislative act, these provisions remained subject to repeal or amendment by the State President acting under section 38(1). It was not to be presumed that Parliament when enacting the South West Africa Constitution Act 39 of 1968 had intended to give effect to international obligations arising under the Mandate for South West Africa. Section 38(1) did not indicate an intention to limit the exercise of power by the State President to that which was in conformity with the terms of the Mandate. It was therefore unnecessary to consider whether Proclamation 198 was contrary to Article 4 of the Mandate (pp. 486-495).

(2) The reference to the territory of South West Africa in Section 1(1) of Proclamation 198 related to the class of non-whites who were now eligible for military service. The words were intended to restrict the effects of Proclamation 198 to the non-white inhabitants of the territory of South West Africa; they were not intended to restrict the performance of military service by this class to the territory of South West Africa. Under section 138 of the Defence Act the Minister of Defence could direct the performance of military service anywhere within or outside the Republic. The notice relating to the performance of military service at the Port of Walvis Bay was therefore valid (pp. 495-499).

[The text of the judgements delivered in the Supreme Court of South West Africa follows.]

MOUTON J: This application was originally brought by Eduard Binga in his capacity as father and natural guardian of his son Erick Binga. Erick has in the meantime attained majority and has been substituted as applicant.

By notice of motion the applicant seeks an order, calling upon the respondents to show cause:

(i) (*a*) Why the above honourable Court should not declare that the said Erick Binga is not liable for national service in the South West Africa Territory Force/South African Defence Force;

(*b*) Why the notice dated November 1982, directing the said Erick Binga to render national service at Walvis Bay, should not be set aside as wrongful and unlawful.

The further relief prayed for, as set out in the notice of motion, has fallen away and need not to be mentioned.

The first respondent is the Administrator-General for the Territory of South West Africa. This office was established by order of the State President-in-Council in Proc 180 of 1977 issued under s 38 of the South West Africa Constitution Act 39 of 1968. By Proc 181 of 1977 the Administrator-General was empowered by the said State President to make laws by proclamation in the *Official Gazette of the Territory of South West Africa*, for that territory, and in any such law to repeal or amend any legal provisions, including any Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein, save the said s 38.

The second respondent is the Minister of Defence.

The first and second respondents do not oppose this application and abide the Court's decision. The third respondent appeared in opposition.

The notice mentioned in prayer (1)(*b*) above, to call up the applicant for military service, was directed to him and was given in terms of *Government Notice* AG 149 of 17 October 1980. This *Government Notice* published Proc 198 of 1980 for general information in South West Africa.

Proclamation 198 of 1980, issued by the State President of the Republic of South Africa, extended liability for military service in South West Africa to non-white inhabitants of the territory.

By Proc R131 (of the Republic) the State President of the Republic of South Africa transferred authority to the Administrator-General for the administration of certain provisions of the Defence Act 44 of 1957 in South West Africa.

In exercising this power, the State President acted under the powers vested in him by s 38 of the South West Africa Constitution Act 39 of 1968.

By the Schedule to Proc 131 of 1980, the administration of the provisions of the said Defence Act is to be carried out by the Administrator-General in and in respect of the territory concerning the registration and enrolment of persons who are required to register or enrol in any unit of the citizen force or commando forming part of the South West Africa Territory Force.

Consequently, as foreseen by s 68 of the Defence Act 1957, an Exemption Board for the South West Africa Territory Force was established. This Board is the third respondent herein and, as stated, its authority to call up Erick Binga is challenged.

The applicant states in his founding affidavit that the proclamations passed by the State President of the Republic of South Africa, including No 131 of 1980, themselves purport to be authorized by a statute passed in the Republic, namely s 38 of the South West Africa Constitution Act 39 of 1968. He says that the South African Parliament has no power to make laws for the territory of South West Africa.

Furthermore, as Walvis Bay, where he has been ordered to render service, is not part of the mandated territory of South West Africa and does not fall within the area over which the first respondent purports to exercise authority, the said notice is unlawful.

By virtue of art 22, part 1 (Covenant of the League of Nations) of the Treaty of Peace with Germany signed at Versailles on 28 June 1919, the principle to be applied to territories such as the present South West Africa was "that the well-being and development of such people form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Government."

This article also specifically provides:

> There are territories, such as South West Africa … which owing to the sparseness of their population, of their small size, of their remoteness from the centres of civilization or their geographical contiguity to the territory of the mandatory, and other circumstances, can best be administered under the laws

of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population."

In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge. The degree of authority, control or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates.

Thereafter, on 17 December 1920, the Council of the League of Nations formulated the mandate for South West Africa. Thereby a mandate is conferred upon His Britannic Majesty to be exercised by the Government of the Union of South Africa, namely to administer the territory on behalf of the League of Nations in accordance with the following provisions which, in terms of art 22 para 8 of the Covenant of the League of Nations, shall be explicitly defined by the Council of the League of Nations.

The terms were so defined, of which the following are relevant:

Article 2: The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

Article 3: The mandatory shall see that the slave trade is prohibited and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the Control of Arms Traffic, signed on 10 September 1919, or in any convention amending the same.

Article 4: The military training of the natives, otherwise than for purposes of internal police and local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5: Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6 requires annual reports to be made to the satisfaction of the Council of the League of Nations.

Mr. *Farlam*, for applicant, says that:

(1) The expression "securities for the performance of this trust should be embodied in this Covenant" and "administered … subject to the safeguards above mentioned in the interests of the indigenous population …" in art 22 of the Covenant of the League of Nations;

(2) The following terms formulated in the mandate for South West Africa, viz.

> The mandatory shall have full power of administration and legislation over the territory subject to the present mandate … The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate."

indicate that South Africa's wide legislative powers are always qualified by and subject to the terms of the mandate.

(3) Furthermore, so the argument runs, the South African Parliament has acknowledged that it was bound by the terms of the mandate in the following instances:

(3) (1) The Treaty of Peace and South West Africa Mandate Act 49 of 1919 was issued

> "for carrying into effect, insofar as concerns the Union of South Africa, the Treaty of Peace between His Majesty the King and certain other powers; and for carrying into effect any mandate issued in pursuance of the Treaty to the Union of South Africa with reference to the territory of South West Africa ..."

See also Act 32 of 1921 (s 2).

(3) (2) The preamble to the South West Africa Constitution Act 42 of 1925 *inter alia* provides that

> the Government of the Union of South Africa possesses full power of administration and legislation over the territory … as an integral portion of the Union but *subject to the terms of the said mandate* …" and
>
> "… it is expedient that further authority should be conferred upon the Government of the Union in respect of *giving effect to the said mandate*, in that the Government of the Union is, under the said mandate, to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory";

and for the constitution of a legislative body

> "to make laws therefor, *subject always to the provisions* of the said mandate ..."

(4) In further support of his argument, Mr. *Farlam* refers to *R v Offen* 1934 SWA 73 at 78, where VAN DEN HEEVER J said the[5] "full powers of legislation which the Governor-General and his delegate, the Administrator, enjoyed *by virtue of the mandate* and the provisions of Act 49 of 1919 ..."

In this connection reference was also made to *Winter* v *Minister of Defence and Others*[6] 1940 AD 194 at 197, *R* v *Christian*[7] 1924 AD 101 at 112, *Verein für Schutzgebietsanleihen EV* v *Conradie NO* 1937 AD 113 at 133, 148 and 150.[8]

The applicant submitted that the "Grundnorm" or composite constitution of South Africa's legislative competence in respect of South West Africa were the terms of the mandate, and those statutes which received the mandate into SA municipal law as set out above.

Identical submissions were considered by the Appellate Division, consisting of 11 Judges of Appeal, in *S* v *Tuhadeleni and Others* 1969 (1) SA 153 (A).[9]

In that case the question of law reserved was whether insofar as the provisions of s 59 (2) of the Republic of South Africa Constitution Act 31 of 1961 may purport to deprive the Courts of their jurisdiction to enquire into or pronounce upon the validity of the Terrorism Act 83 of 1967 and s 5 of the General Law Amendment Act 62 of 1966, they are valid and binding in South West Africa.

In dealing with this subsection, STEYN CJ also dealt with the question whether the mandate was a source for a restrictive construction of the subsection. It was put thus at 171A:[10]

> "The contention here is that, by implication arising from the terms of the mandate, the rights conferred by it upon the inhabitants of the territory are entrenched against violation by Act of Parliament; that Parliament has recognized this limitation upon its powers; that the Courts are of necessity the guardians of this entrenchment; that they have accordingly, under the fundamental law of the territory, been vested with jurisdiction to declare invalid any Act passed by Parliament which offends against the mandate, and that Parliament could not have intended to annul this jurisdiction when it enacted s 59 (2)."

The learned Chief Justice dealt with the matter on the basis that the mandate still exists and decided (at 173F) that the mandate did not contemplate

> "any such unexpressed limitation upon the powers of Parliament as is contended for. It would rather seem that the parties concerned were content to leave enforcement of the obligations under the mandate to procedures and restraints available in the international field. It was presumably to that intent that provision was made in art 6 for annual reports by the mandatory to the satisfaction of the Council of the League, indicating, *inter alia,* the measures taken to carry out the obligations assumed under arts 2, 3, 4 and 5."[11]

In the opinion of the Court, the testing of legislation against the terms of the mandate is not in conformity with its judicial function.

In the Court's opinion "the constitutional impediment urged by counsel for appellants does not exist".

In my opinion support for the above view that one must look to the international political field for the enforcement of obligations under the mandate is to be found in the judgment of the International Court of Justice of 21 June 1971.

Paragraph 102, dealing with Resolution 2145 and the 1966 judgments, reads:

> "On the other hand, the Court declared that: … 'any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the

mandatory and the competent organs of the League'. To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking."[12]

See also para 103:

"… it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League 'in the pursuit of its collective, institutional activity, to require the due performance of the mandate in discharge of the sacred trust', was specifically recognized. (Ibid. at 29.) Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce in that capacity, on the conduct of the mandatory with respect to its constitutional obligations, and competent to act accordingly."[13]

Dugard, in his work on *The South West Africa/Namibia Dispute*, analysed the opinion and at 483 writes:

> "The Court then turns to Resolution 2145 (xxi). It holds that the mandate was an agreement in the nature of a treaty"

(in this respect, says the author in a footnote, it relies on the finding of the Court in the 1962 South West Africa proceedings: *1962 ICJ Reports* 330)

> "which rendered it liable to termination in the event of a fundamental breach. The principle that treaties may be terminated in this way is a customary rule of international law (now codified in art 60(3) of the Vienna Convention on the Law of Treaties) which was to be considered as impliedly included in the mandates system."[14]

The writer continues at 486:

> "The Court finds that the General Assembly, as political successor to the Council for the League, was the appropriate body to decide whether South Africa had violated her obligations under the mandate. This conclusion follows logically from the 1966 decision of the Court to the effect that it was for a political and not a legal body to decide whether the mandate had been violated."

The author says this at 407:

> "To this moment there is no judicial finding in existence to the effect that the South African administration of the territory violates the provisions of the mandate."

Looking back into history, one finds that Lord Balfour said in the League Council that

"the machinery of the Mandates Commission, the machinery of the Council of the League of Nations, the machinery of the Assembly of the League are all contrived to make it quite impossible that any transaction of general interest should take place except in full glare of the noonday sun of public opinion". To the same effect is Lord Lugard, member of the Permanent Mandates Commission. See Cockram *South West African Mandate* at 344-345.

It was argued on behalf of applicant that since this Court is no longer a Division of the Supreme Court of South Africa, it is not bound by the Appeal Court's decision in the *Tuhadeleni* case as it was pronounced under the old arrangement. Before the change brought about by Proc 222 of 1981, the then Division of the Supreme Court having judicial authority in the territory was bound by the decisions of the said Appellate Division. In terms of s 14(1)(*b*) of Proc 222 of 1981, the Appellate Division of the Supreme Court of South Africa is still the Court of Appeal in the matters therein mentioned.

As such this Court will be bound by any decision of the Appellate Division which is relevant to the issues on appeal.

The argument was that the Appellate Division now forms part of the South West African judicial system and only judgements of the Appellate Division given under that system should be followed. That is exactly what the Appellate Division did in *Tuhadeleni*'s case, when it came to its decision against the background of the mandate, South African legislation pertaining to South West Africa, and decided cases.

It is therefore my opinion that this Court is bound by the decision in *S v Tuhadeleni* 1969 (1) SA 153 (A).[15]

The Defence Act 44 of 1957 was made applicable to South West Africa by s 153 thereof.

In terms of s 3(2) any member of the SA Defence Force may at all times be employed on service in defence of the Republic.

As set out above by Proc 198 of 1980 of the State President of the Republic of South Africa, the Defence Act was, for purposes of its application in South West Africa, amended to include non-whites as being liable for military service.

The question is whether this amendment is an Act passed by Parliament as envisaged in s 59(2) of Act 32 of 1961.

Obviously it was not passed by Parliament, but is the result of the powers vested in the State President by s 38 of the South West Africa Constitution Act 39 of 1968. It is an amendment of an Act of Parliament by virtue of powers granted by an Act of Parliament. Such an enactment is not covered by the provisions of s 59(2), which leaves it open for scrutiny by the Court. Applicant says this amendment militates against the terms of the mandate and as such is invalid. It has already been pointed out that the testing of legislation against the provisions of the mandate does not fall within this Court's function.

It follows that the provisions of the Defence Act 44 of 1957, as applied to South West Africa and as amended by Proc 198 of 1980, cannot be tested by this Court against the terms of the mandate for South West Africa.

This, however, does not end the matter, because it was also submitted on behalf of applicant that the mandate conferred by the Council of the League of Nations was terminated by resolution 2145 of the General Assembly of 27 October 1966, duly endorsed by the Security Council in its resolution 276 (1970).

It is further argued that the advisory opinion of the International Court of Justice, of 21 June 1971, was to the effect that the mandate had been terminated by 6A resolution 2145 (XXI), as endorsed by the Security Council in its resolution 276 (1970), and that consequently all acts by South Africa in South West Africa thereafter are illegal and invalid.

In considering the above-mentioned opinion, it must be borne in mind that the Court's opinion was sought on the question what the legal consequences for States were of the continued presence of South Africa in South West Africa, notwithstanding Security Council resolution 276 (1970).

In discussing the legal effects of this opinion, *Dugard* (at 487) observes that

> "resolutions of the General Assembly are recommendatory and not legally binding, except in certain exceptional cases"

and, as far as resolution 276 (1970) is concerned:

> "in the absence of a finding that the situation in Namibia threatens international peace, the Resolution is only recommendatory: South Africa's legal obligation to withdraw from South West Africa arises from resolution 2145 (xxi) (see note 65 at 489) and States are only obliged to apply the customary rules of non-recognition to South West Africa; resolution 276 may, however, authorize States to (take) up a position in their legal relationships with South Africa which would otherwise have been in conflict with rights possessed by that country." (1971 *ICJ Reports* at 137.)

This judgement is no authority on the question of the revocation of the mandate and, insofar as it deals with the questions of invalidity and illegality of acts by South Africa, any findings thereon must be considered *obiter*.

The question of the revocation of the mandate has apparently never been submitted to the International Court of Justice for decision.

There was no provision for such revocation under the League of Nations and when that League came to an end, the fate of the mandated territories was a matter for reciprocal agreement. The Charter of the United Nations and its trusteeship system also did not solve the problem. See *Dugard* at 401-408.

Dugard (at 404) is of the opinion that the question whether the United Nations is competent, under prevailing provisions of the Charter, to determine and modify, unilaterally, the international status of the territory, must be answered in the negative.

> "The position is that none of the opinions of the Court, nor its judgements of 1962 and 1966, give a clear answer to the question of termination of the South West Africa mandate, let alone to the question of United Nations power to terminate or revoke the mandate. As mentioned above, even the very existence of the mandate has been left undecided since the July 1966 decision."

At 407 this author continues:

> The argument is often advanced that the numerous resolutions of the General Assembly on the mandated territory must be considered as authoritative findings. No matter how anxious one may be to read more into the Court's opinions and judgments, the truth is that nothing can be found anywhere to support the supposition that the General Assembly has the power to judge (and condemn) the mandatory's administration of the territory. Even if one accepts the General Assembly's power to discuss the mandate and to make recommendations in terms of art 10 of the Charter, such power does not permit the General Assembly to pass binding decisions on the matter. It would also be wrong, as was indicated above, to consider that the General Assembly's resolutions on South West Africa have acquired legislative force of a supranational kind. The 'declaration' of 27 October 1966 that South Africa 'has failed to fulfil its obligation of the mandated territory' is based on very doubtful — if on any — authority."

The advisory opinion of the International Court of Justice of 11 July 1950 concludes that

> "competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations". (1950 Opinion at 143.)[16]

This in effect means that the initiative to alter the mandate lay with South Africa, and not with the United Nations, which could not, on its own, alter the status of the territory. See *Cockram* at 356.

After the Security Council passed its resolution in January 1970, the British representative explained the British abstention from voting on the ground that

> "the adoption of resolutions which are ineffective or inoperable cannot serve the interests of the people of the territory or of the United Nations".

The British Foreign Secretary, Sir Alec Douglas-Home, told the House of Commons while

> "the legal status of South West Africa is still in doubt, and pending clarification on the legal position, we acknowledge that the South African Government continues in practice to exercise *de facto* control over South Africa".

This approach is also increasingly manifest in the subsequent deliberations and resolutions of the United Nations Organization itself.

Thus, on 30 September 1978, by its resolution 435 (1978), the Security Council, taking note, among others, of the relevant communications from the Government of South Africa, calls upon South Africa to cooperate with the Secretary-General in the implementation of this resolution and of the proposal set out in document S/12636 of 10 April 1978.

In a supplementary report by the Secretary-General to the Security Council on 2 December 1978 (S12950) it appears that he was anxious to obtain, *inter alia*, clarification from South Africa on South Africa's willingness to cooperate in the implementation of resolution 435 (1978) and the continuation of the exer-

cise of South Africa's authority in Namibia pending full implementation of the proposal for settlement.

The Secretary-General in this document reports that approval of the SA Government was obtained on, *inter alia*, the following points:

— South Africa reiterates its willingness to cooperate in the implementation of resolution 435 (1978).

— South Africa reaffirms that it will retain authority in Namibia pending the implementation of the proposal.

This to my mind demonstrates clearly that the Security Council of the United Nations deems the cooperation of South Africa necessary for a settlement of the South West African situation and is anxious for South Africa to retain its authority in the territory pending a settlement.

It is common knowledge that Security Council resolution 435 (1978), supplemented by document S12950 among others, is still today the basis of negotiations between the United Nations and the Republic of South Africa for a South West African settlement.

I am under these circumstances therefore of the opinion that the Republic of South Africa acted within the bounds of its authority over the Territory of South West Africa when the State President issued Proc 131 of 1980 and Proc 198 of 1980.

The application therefore is dismissed with costs, which costs include the costs of two counsel.

STRYDOM J: The applicant attacks the validity of Proc 198 of 1980 as published in this territory by Proc AG 149 of 17 October 1980. The said proclamations have the effect of applying the Defence Act 44 of 1957 to all the indigenous people of this territory. Until the publication of such proclamations the said Act was only applicable to the white people of the territory.

Applicant, who, according to the documents filed is a member of SWAPO and who sympathizes with their cause, was called up for national service. In order to escape from the predicament in which he suddenly found himself, application was made to the third respondent in order to obtain exemption from military service. This application was turned down, whereupon the present motion proceedings were instituted.

There was no appearance on behalf of the first and second respondents but the third respondent was represented by Mr. *Roux*, assisted by Mr. *Burger*.

Mr. *Farlam*, assisted by Mr. *Gauntlett* on behalf of the applicant, launched a two-pronged attack on the validity of the said proclamations. Firstly it was contended by him that as the mandate, being part of the "Grundnorm" by which the South African Government derives its competency to administer and hence to legislate for the territory, was terminated, the Government, being thereafter only a *de facto* Government, could not validly legislate for the territory.

Secondly, and if the mandate was still in existence, Mr. *Farlam* argued that the mandate is part of the municipal law of the land and that all legislation applicable to the territory must therefore be subject to the provisions set out in

the mandate. The said proclamations whereby Act 44 of 1957 was extended to the indigenous people of the territory are in conflict with art 4 of the mandate and therefore invalid.

As far as his first line of attack is concerned, namely that the mandate was terminated, Mr. *Farlam* relied on General Assembly resolution 2145 (XXI) as later confirmed by Security Council resolution 276 (1970). Among writers of international law there is great divergence of opinion as to whether such termination of the mandate is valid or not. Some writers seem to accept the situation without commenting on the legality or otherwise thereof. (See, e.g., Booysen *Volkereg: 'n Inleiding* at 153 *et seq*.; Wiechers *Staatsreg* 3rd ed. at 450 *et seq*.; Dugard *The South West Africa/Namibia Dispute*; Brownlie *Principles of Public International Law* at 466 *et seq*.; Starke *Introduction to International Law* 8th ed.; Akehurst *A Modern Introduction to International Law* 3rd ed. and Solomon Slonim *South West Africa and the United Nations: An International Mandate in Dispute* at 321 footnote 38 and at 338 *et seq*.)

Whatever the position may be, I think that as far as the international community is concerned, it must be accepted that in that sphere the mandate is regarded as being terminated. (See Booysen (op. cit. at 158).)

That, however, is not the end of the matter. It does not necessarily follow that because externally the South African Government's presence in the territory is regarded as illegal (although the Government is recognized as the *de facto* administrator of the territory by certain states, e.g., America and Britain, see *Booysen* (op. cit. at 171)), that internally municipal Courts will give effect to that specific finding. Internal sovereignty, in the sense of the exercising of exclusive and effective control over a particular territory, is in my view not dependent on the recognition by other States. If we, sitting as a municipal Court, are satisfied that the control by the South African Government over the territory is effective and exclusive, we are, in my opinion, obliged to give effect to the Government's will as, *inter alia*, expressed in its legislation, irrespective of what the position may be as far as the international community is concerned. (See *Madizimbamuto* v *Lardner-Burke*[17] *NO and Another NO* 1968 (2) SA 284 (RAD) at 309ff; *Booysen* (op. cit. at 161).)

This, in my opinion, stems from the fact that in South Africa, as in British and other Commonwealth Courts, municipal Courts are obliged, in cases of conflict between municipal law and international law, and for that matter international opinion, to give effect to the former. (See *Brownlie* (op. cit.) at 45ff); *Starke* (op. cit. at 89ff) and *Nduli and*[16] *Another* v *Minister of Justice and Others* 1978 (1) SA 893 (A) at 906.)

Although non-recognition will have consequences on the international plane, this will, however, not directly influence the internal or domestic situation. (See generally, e.g., *Booysen* (op. cit. at 167ff); *Akehurst* (op. cit. at 60ff) and *Starke* (op. cit. at 149ff).)

Sitting as a municipal Court it is in my opinion therefore necessary to determine to what extent the problem which we are facing is to be determined by the dictates of international law, as was argued before us, or, after all is said and done, whether it falls to be decided purely and simply according to the law of the land. This, again, will in my opinion depend on whether this Court, sitting as

a municipal Court, is bound by decisions and resolutions of the United Nations and other international organizations *mero motu* and therefore obliged to give effect thereto.

Although it was accepted by RUMPFF CJ in *Nduli and Another* v *Minister of Justice and Others* (*supra* at 906) that the rules of customary international law are to be regarded as part of our law "as are either universally recognized or have received the assent of this country …", it follows that decisions of the United Nations, of the nature here under discussion, are not part of customary international law. This is perhaps to state the obvious but is necessary because certain decisions of that body may be a source of international law. (*Vide Starke* (op. cit. at 59-61).)

Obligations incurred by international treaty and resolutions by international organizations such as the United Nations stand on a different footing from international customary law and, generally speaking, a South African Court, and for that matter a Court of this territory, will only give effect thereto if such treaty or resolution was incorporated by legislative act into the laws of the land. In *Pan American World Airways Inc.* v *SA Fire and Accident Ins Co Ltd* 1965 (3) SA 150 (A) at 161, STEYN CJ said the following:

> "… the conclusion of a treaty is … an executive and not a legislative act. As a general rule the provisions of an international instrument so concluded are not embodied in our municipal law except by legislative process. In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject."[19] (See also *Olivier* v *Wessels* 1904 TS 235 at 241; *Ex parte Savage and Others* 1914 CPD 827 at 830; *L & H Policansky* v *Minister of Agriculture* 1946 CPD 860 at 865; *Maluleke* v *Minister of Internal Affairs* 1981 (1) SA 707 (BSC) at 712F-G and *Booysen* (op. cit. at 309).)

General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970), confirming the former, never became part of our law and can therefore not affect the rights, one way or another, of individuals in this territory. Neither is this Court bound by any of the advisory opinions expressed by the International Court of Justice.

That does not mean that this Court, sitting as a municipal Court, is ignoring the opinion of the international community but such opinion should at least prompt the Court to investigate the internal situation. However, once the Court has come to the conclusion that the South African Government is in effective control of the Territory, that is the end of the matter. (See *R v Ndhlovu and Others* 1968 (4) SA 515 (RAD) at 522.)[20]

As far as the internal situation is concerned the position is simply that the Government of South Africa is the only administrator and legislator for this territory. No rival to its authority exists and Mr. *Farlam* was not so bold as to suggest that such authority was in any way challenged. Nor can it be said that the role as a serious challenger is being fulfilled by the United Nations Council for South West Africa established by the General Assembly on 19 May 1967. (*Vide* H. Booysen and G. E. J. Stephan "Decree No 1 of the United Nations Council for South West Africa" 1975 *SAYIL* 63ff.)

Although the Government of South Africa, because of the nature of the mandate conferred upon it, did not exercise full sovereign power over the territory, the Appellate Division in *R* v *Christian* 1924 AD[21] 101 came to the conclusion that the Government has internal sovereignty over the inhabitants of the territory. (See also Wiechers *Staatsreg* 3rd ed. at 452.)

In *S* v *Tuhadeleni and Others* 1969 (1) SA 153 (A) the Appellate[22] Division "placed beyond all doubt the unlimited supremacy of the South African Parliament over South West Africa" (*Dugard* (op. cit. at 423)). Commenting on *S* v *Tuhadeleni and Others* (*supra*), *Wiechers* (op. cit. at 35) states as follows:

> "Alhoewel die Hof nie uitdruklik beslis dat die Parlement die hoogste Wetgewer vir Suidwes-Afrika is nie, moet die gevolgtrekking noodwendig volg. Dit beteken dat die ou vraag na die staatsregtelike soewereiniteit oor Suidwes-Afrika uiteindelik in die guns van die Suid-Afrikaanse Parlement beslis is."
>
> ["Although the Court did not expressly decide that [the South African] Parliament is the supreme legislative body for South West Africa, that conclusion necessarily follows [from its decision]. This means that the old question of the constitutional sovereignty over South West Africa has eventually been resolved in favour of the South African Parliament."]

Although a measure of change was brought about by the amendment of s 38 of the South West Africa Constitution Act 39 of 1968, by the granting of extensive powers to the State President, this, in my opinion, did not detract in any way from South Africa's effective and exclusive control over the territory, and this is so irrespective of whether the mandate still exists or not. In fact Mr. *Farlam* conceded that South Africa is the *de facto* Government of the territory.

I am furthermore of the opinion that once this Court has come to the conclusion that the South African Government is exercising effective and exclusive control over this territory it would not be competent for this Court, sitting as a municipal Court, to determine whether that Government regards this territory as still falling under its sovereignty or not, as that is something which only the South African Government is competent to decide. As there is ample evidence of this fact we are precluded from deciding otherwise notwithstanding the resolutions terminating the mandate and the acceptance thereof by the international community.[23] (See *Post Office* v *Estuary Radio* [1967] 3 All ER 663 at 682 and *R* v *Jiouvanni* 1933 SWA 26 at 29.)

I am further of the opinion that the above conclusion, namely that the Government of South Africa has internal sovereignty over the territory, makes it unnecessary and of no practical value for this Court to determine whether such Government is exercising its authority over the territory as a *de facto* or a *de jure* Government.

Sitting as a municipal Court and having come to the conclusion that the South African Government has internal sovereignty over the territory, it does, in my opinion, not take the matter any further to know whether the South African Government itself regards the mandate as still valid and in existence or not. A certificate by the Government could of course have eased the Court's task in that it would have been a complete answer to the one or the other of Mr. *Farlam*'s

arguments, depending on the attitude expressed therein. (See *Booysen* (op. cit. at 160ff); *Brownlee* (op. cit. at 54); *Akehurst* (op. cit. at 68); *Starke* (op. cit. at 170ff) and *S* v *Devoy* 1971 (3) SA 899 (A) at 906E-907A.)[24]

However, because of my findings above, such a course need not be followed.

In my opinion, and for the reasons set out above, it follows that Mr. *Farlam*'s first contention, namely that because of the termination of the mandate by the United Nations the South African Government cannot validly legislate for this territory, must fail.

This brings me to counsel's second line of attack, namely that the mandate, if in existence, is part of our law and the said proclamations, being in conflict with art 4 thereof, are therefore invalid.

To succeed on this basis Mr. *Farlam* had to overcome the hurdle of *S* v *Tuhadeleni and Others* 1969 (1) SA 153 (A).[25]

In this respect he argued firstly that *Tuhadeleni*'s case is distinguishable; secondly, and in the alternative, that the judgement was delivered *per incuriam* and thirdly, further in the alternative, that the decision is not binding upon this Court and that it is not to be followed.

The first and second arguments set out above concern the application of s 59(2) of the Constitution Act 32 of 1961. In *Tuhadeleni*'s case the Appellate Division held that s 59(2) precluded the Court from pronouncing upon the validity of an Act of Parliament, in this case the Terrorism Act 83 of 1967, which was applicable on the territory.

Section 59(2) of Act 32 of 1961 provides as follows:

> "No Court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament other than an Act which repeals or amends or purports to repeal or amend the provisions of ss 108 or 118."

Counsel then argued that the proclamations with which we are concerned are not Acts of Parliament, are therefore not protected by s 59(2) and, that being the case, this Court is not precluded from pronouncing upon the validity, or otherwise, thereof.

In the alternative Mr. *Farlam* argued that in *Tuhadeleni*'s case the Appellate Division was plainly unaware or forgetful of the fact that the predecessor to s 59(2), namely s 2 of the South Africa Act Amendment Act 9 of 1956, did not apply to South West Africa. The significance of this antecedent, so it is argued, is patent, namely that, in enacting Act 9 of 1956 — which gave force of law to the Separate Representation of Voters Act 46 of 1951 — Parliament plainly never intended to legislate for the territory. If that is so, then in the absence of any contrary indication it must follow that in re-enacting s 2 of Act 9 of 1956 in virtually identical terms in s 59(2) of Act 32 of 1961, Parliament's intention remained consistent.

It was submitted by counsel that, had this important consideration not been lost from mind, the Appellate Division's finding in regard to the applicability of s 59(2) to Acts of Parliament in South West Africa would have been otherwise.

Because of the conclusion to which I have come I find it unnecessary to decide these points and will, for purposes of my decision, accept the correctness of counsel's argument.

In *S* v *Tuhadeleni* (*supra*) STEYN CJ, after considering the ambit of s 59(2) of Act 32 of 1961, came to the conclusion that the said section precluded the Court from pronouncing upon the validity of the Terrorism Act 83 of 1967. That was, however, not the end of the matter. At 171A-B the following was stated:

> "The source of other indications advanced for a restrictive construction of the subsection is the mandate. The contention here is that, by implication arising from the terms of the mandate, the rights conferred by it upon the inhabitants of the territory are entrenched against violation by Act of Parliament; that Parliament has recognized this limitation upon its powers; that the Courts are of necessity the guardians of this entrenchment; that they have accordingly, under the fundamental law of the territory, been vested with jurisdiction to declare invalid any Act passed by Parliament which offends against the mandate, and that Parliament could not have intended to annul this jurisdiction when it enacted s 59(2)."[26]

Considering the ambit of such entrenchment, if in existence, STEYN CJ concluded as follows:

> "It would amount to a complete and unconditional limitation upon the power of Parliament, present or future and immutable, except with the consent of the Council of the League of Nations under art 7 of the mandate, to legislate in conflict with the terms of the mandate. Because it would be a limitation which Parliament could not remove without such consent, s 59(2) would, to the extent to which it purports to derogate from that limitation, be of no force or effect; and that, indeed, is the alternative submission made on behalf of the appellants."
>
> (At 171D-E.)[27]

After coming to the conclusion that the mandate did not contemplate "any such unexpressed limitation upon the powers of Parliament as is contended for" (at 173G), STEYN CJ stated the following at 173H:[28]

> "I may add that had a further curb been contemplated in the form of an absolute restraint, mentioned above, upon the legislative powers of Parliament, the mandatory would have been bound to introduce such a curb into its Constitution in order to bring it into operation. Even if it had been explicitly provided for in the mandate, that would not have made it part of the law of the land enforceable by our Courts. (*Pan American World Airways Incorporated* v *SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 161.)"[29]

In coming to the conclusion that the Terrorism Act 83 of 1967 is valid also in South West Africa, STEYN CJ not only considered the effect of s 59(2) of Act 32 of 1961 in respect of enactments of Parliament which are also applicable to South West Africa, but also whether Parliament's power to legislate for South West Africa is subject to and limited by the terms of the mandate so that an enactment which is in conflict with such terms is not saved by s 59(2).

The decision of the Court on this latter aspect is not *obiter*, as was argued by Mr. *Farlam*, but was given by the Court on submissions made by the appellants in that case, and which, if they were correct, would have had the effect of the appellants succeeding notwithstanding the Court's previous finding on s 59(2).

I have therefore come to the conclusion that even if applicant is correct in saying that *Tuhadeleni*'s case can be distinguished from this case to the extent argued by counsel and accepted by me or that the Court reached its conclusion on s 59(2) *per incuriam*, it does not really assist the applicant because *Tuhadeleni*'s case also decided that the terms of the mandate are not part of our municipal law and that Parliament's power to legislate for South West Africa is not in any way limited by such terms, which, on counsel's second submission, is exactly the point which we must decide in this case.

All that then remains is counsel's final contention, namely that we, sitting as the High Court of South West Africa, are no longer bound by decisions of the Appellate Division of the Supreme Court of South Africa.

It was argued by counsel that the *Tuhadeleni* case was a judgement of the Appellate Division of South Africa at the time when the South West Africa Division was still a constituent part of the Supreme Court of South Africa. This, however, is no longer the case as the Supreme Court of South West Africa has been constituted a separate Court which is no longer part of the South African judicial structure. (*Vide* Proc 222 of 1981.) Although in terms of s 14(1)(*b*) of the said proclamation the Appellate Division remains as Appeal Court, it now forms part of the South West African judicial system and is the Appellate Division of South West Africa.

We were referred by counsel to cases such as *R* v *Masuka and Others* 1965 (2) SA 40 (R); *S* v *Gandu* 1981 (1) SA 997 (Tk) and *Smith* v *Attorney-General, Bophuthatswana* 1984 (1) SA 196 (BSC). In those specific instances the various Judges held that they were no longer bound by decisions of the Appellate Division of South Africa. All those cases have one factor in common, which is not present in this particular case, and that is that the Appellate Division of South Africa is no longer their Court of Appeal.

Although our judicial structure has to a certain extent undergone a change, such change is more apparent than real. The final say in respect of appeals does not rest with us but is still in the hands of the Appellate Division of South Africa. The common law in this territory is still the Roman Dutch law which is the common law of the Republic of South Africa. (See s 1 (1) of Proc 21 of 1919 and *R* v *Goseb* 1956 (2) SA 696 (SWA). That decision was given at a time when the Court was still the High Court of South West Africa.) A great part of our statute law originated in the Republic or was South African statute law which was made applicable to the territory. It further follows that our statute law is to be interpreted against the background of our common law which is, as stated above, the same as that of the Republic of South Africa. (See *Estate Wege* v *Strauss* 1932 AD 76 at 80.) In *S* v *Moloto* 1980 (3) SA 1081 (BSC), which was decided after the independence of Bophuthatswana but when the Appellate Division of South Africa was still that State's Appeal Court, the following was said by Hiemstra CJ at 1084C-E:

> "The State contended that, sitting in an independent country, I am not bound to post-independence Appellate Division decisions. It is, however, not disputed that an appeal lies from this Court to the South African Appellate Division. That is the effect of reg 14(1) of Proc R76 of 1977 of the Republic of South Africa, continued after independence by s 91(*a*) of the Constitution Act of Bophuthatswana. The South African Appellate Division is to this country what the Judicial Committee of the Privy Council up to 1950 was to the Union of South Africa. There is no question that South African Courts, including the Appellate Division, considered themselves bound to Privy Council decisions, at least on Roman Dutch law. (See, *inter alia*, R S Welsh in 1950 *SALJ* at 227.) In any event it stands to reason that no court can apply a law different from that which will in the same case be applied by its Court of appeal if there should be an appeal."

I respectfully agree with this statement and would imagine that what was said therein in respect of post-independence decisions of the Appeal Court would similarly apply to decisions of that Court prior to independence.

For the reasons set out above we are not in the same position as the Appellate Division was after appeals to the Privy Council were abolished. (See also the cases referred to above.) In this respect, CENTLIVRES CJ stated the following in *John Bell Co Ltd* v *Esselen* 1954 (1) SA 147 (A) at 154:

> "As this Court is now the final Court in respect of appeals from Courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of those appeals, of departing from an erroneous decision of the Privy Council."

In *Acting Master, High Court* v *Estate Mehta* 1957 (3) SA 727 (SR) MORTON J declined an invitation to differ from the Appellate Division of South Africa even though such Division was no longer his Court of Appeal and states that all decisions by the South African Appellate Division were still binding "until dissented from or overruled by the Federal Supreme Court or by the Privy Council or have been avoided by legislation". (See at 732F-733A.)

In a subsequent appeal to the Federal Supreme Court, that Court claimed for itself the same right as the Appellate Division in *John Bell & Co Ltd* v *Esselen* (*supra*), namely the right to depart from erroneous decisions by its erstwhile Court of Appeal. (See *Estate Mehta* v *Acting Master, High Court* 1958 (4) SA 252 (FC).)

As to the basis on which this right was exercised, the following was stated at 255F:

> "And this Court, as the successor to the Appellate Division in the system of appeals, should also exercise it. As far as this Court is concerned it would not, in departing from a decision of the Appellate Division, be differing from a decision of a Court which was at one time superior to it."

For the reasons set out above I have come to the conclusion that we are bound by decisions of the Appellate Division and consequently that we are bound by that Court's decision in the *Tuhadeleni* case.

It follows, therefore, that, as the terms of the mandate are not part of our municipal law, it cannot be said that legislation which is in conflict therewith must give way thereto.

It further follows that Proc 198 of 1980 and Proc AG149 of 1980, even if they are repugnant to the mandate, which, in the circumstances, it is not necessary to decide, are valid.

As we are bound by *Tuhadeleni*'s case, no useful purpose will be served to discuss further the various cases and legislation to which we were referred by Mr. *Farlam* as authority for his submission that the mandate was incorporated in our municipal law. Most, if not all, of those cases and legislation were discussed by STEYN CJ in giving the Court's decision. As far as legislation subsequent to the decision in *Tuhadeleni*'s case is concerned, this has not in any way changed the situation and neither was it submitted that that was the case.

For the reasons set out above I agree with the order made herein by my Brother MOUTON.

BERKER JP concurred.

[Report: 1984 (3) SA 949.]

[The text of the judgement of the Appellate Division of the Supreme Court of South Africa follows.]

Van Heerden, JA: Section 37(1) of the South West Africa Constitution Act 39 of 1968 provides that nothing in the Act contained shall be construed as in any manner abolishing, diminishing or derogating

"from those full powers of administration and legislation over the territory as an integral portion of the Republic which have hitherto been vested in the Republic."

In terms of s 37(2) those full powers of administration are expressly reserved to the State President who may exercise them himself or delegate them to be exercised by the Administrator-General. Section 38(1) reads as follows:

"(1) The State President may by proclamation in the *Gazette* make laws for the territory, with a view to the eventual attainment of independence by the said territory, the administration of Walvis Bay and the regulation of any other matter and may in any such law —

(*a*) repeal or amend any legal provision, including this Act, except for the provisions of ss (6) and (7) of this section, and any other Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein; and

(*b*) repeal or amend any Act of Parliament, and make different provision, to regulate any matter which, in his opinion, requires to be regulated in consequence of the repeal or amendment of any Act in terms of para (*a*)."

Section 38(6) and (7), read with s 35 of the Republic of South Africa Constitution Fifth Amendment Act 101 of 1980 and s 97 of the Republic of South Africa Constitution Act 110 of 1983, provides that any proclamation issued un-

der s 38 (1) shall be tabled in Parliament which may by resolution disapprove of such proclamation or any provision thereof. Should this happen, the proclamation or provision concerned shall cease to be of force, but not with retrospective effect.

It was under the powers vested in him by s 38 that the State President promulgated the proclamation to which reference is made hereinafter.

Section 153 (1) of the Defence Act 44 of 1957 provides that the Act is also applicable in South West Africa ("the territory"). Of immediate relevance for present purposes is s 2(1)(*b*) in terms of which the Act does not apply, save for immaterial exceptions, to females or persons who are not White persons defined in s 1 of Act 30 of 1950.

By Proc 198 of 1980 (*Government Gazette* 4300) the State President amended s 2 of the Defence Act as regards its application in the territory. All that need be mentioned is that in terms of s 1(1)(*b*) of the schedule to the proclamation the words "or persons who are not White persons as defined in s 1 of … Act 30 of 1950" were deemed not to form part of s 2(1)(*b*) of the Defence Act. A consequence of the amendment, if valid, was that non-White inhabitants of the territory could also be called up to render national service in terms of the Defence Act.

On 1 August 1980 the Administrator-General by AG 105 (*Official Gazette* 4237) notified for general information that in terms of a determination made by the Minister of Defence under s 7 of the Defence Act certain units of the Defence Force had been organized in and as the South West Africa Territory Force ("SWATF"). On the same date Proc 131 of 1980 was published by the State President. Section 2(1) of the schedule to the proclamation provides for the vesting in the Administrator-General of the administration of the provisions of chaps IV, V, VII, VIII and IX of the Defence Act in and in respect of the territory insofar as those provisions apply or relate to or in respect of, *inter alia*, any unit or member of the SWATF by virtue of the fact that such unit or member is a unit or member of the South African Defence Force, and the registration, enrolment and allotment of persons as contemplated by chap VIII of the Act. For the purposes of s 2(1) any reference to the Minister of Defence in ss 21, 22, 35, 37, 44, 56, 62, 66A, 67, 68 and 70*bis*, and to the Minister of Labour in ss 68, 69 and 70*bis* of the Act has to be construed as a reference to the Administrator-General (s 2(2)).

By virtue of the powers conferred upon the Administrator-General by Proc 131 of 1980 he appointed an exemption board for the territory (the third respondent in this appeal). The function of the third respondent was and is to consider in terms of s 69 of the Defence Act applications for deferment of or exemption from service under the Act.

In November 1982 the appellant, an inhabitant of the territory who was still a minor, was notified by the SWATF that he had been allotted to the Second South African Infantry Battalion for the purpose of rendering national service at Walvis Bay from 10 January 1983 to 4 January 1985. The appellant then applied in terms of s 69 of the Defence Act for exemption from service but his application was turned down by the third respondent. This led to the institution of proceedings on behalf of the appellant in the Supreme Court of South West Africa. In the main prayers as set out in the notice of motion orders were sought (*a*)

declaring that the appellant was not liable for national service in the SWATF or the South African Defence Force, and (*b*) setting aside the aforesaid notice directing the appellant to render national service at Walvis Bay. The alternative relief sought was a review of the third respondent's decision to reject the appellant's application for exemption. As far as the main prayers were concerned, it was alleged that the South African Parliament was not competent to legislate for the territory and that the laws made for the territory under s 38 of the South West Africa Constitution Act were therefore invalid, and that in any event the appellant was not obliged to render national service at Walvis Bay, which does not form part of the territory. The first and second respondents cited were the Administrator-General and the Minister of Defence, but the application was opposed only by the third respondent.

The application was heard by a Full Bench of the Supreme Court of South West Africa. Judgements were delivered by Mouton J and by Strydom J, in whose judgement Berker JP concurred (1984 (3) SA 949). It appears from the judgement of Mouton J (at 958) that at some stage, probably during the hearing of the application, the appellant abandoned his alternative prayer. It furthermore appears from the judgements that the appellant contended:

(1) that as a result of the adoption of resolution 2145 (XXI) by the General Assembly of the United Nations the mandate for the territory was terminated; that consequently as from the date of revocation of the mandate South Africa has only been in *de facto* control of the territory, and that its powers in this regard do not include the power to conscript residents of the territory for military service;

(2) that if the mandate still exists, Parliament is not competent to legislate in conflict with the mandate and that Proc 198 of 1980, which is repugnant to art 4 of the mandate, is therefore invalid;

(3) that, if the proclamation is valid, the appellant is not obliged to render national service outside the territory.

The Court *a quo* rejected contentions (1) and (2) but, for reasons which are not apparent, did not deal with the third contention. The application was consequently dismissed with costs but the appellant was granted leave to appeal to this Court.

In their original heads of argument in this Court counsel for the appellant advanced the same contentions as in the Court *a quo*. Shortly before the hearing of the appeal, however, this Court was informed that the appellant was abandoning the contentions that the mandate had been terminated and that Parliament may not legislate in conflict with the mandate. In the result the only submissions made in this Court were:

(*a*) that Parliament did not intend to empower the State President to make laws in conflict with the mandate and that Proc 198 of 1980 was consequently invalid, and

(*b*) that the appellant could not have been called up to render national service at Walvis Bay.

At the hearing of the appeal a few preliminary points arose. Firstly, because of the transfer of powers from the Administrator-General to the Cabinet for South West Africa effected by s 29 of Proc R101 of 1985, application was made for the substitution of the Cabinet for the Administrator-General as first respondent. There was no objection to this application and there does not appear to be any reason why it should not be granted.

Secondly, the appellant sought leave to supplement the application. Neither the founding nor the supporting affidavit contained a specific allegation that the appellant is a non-White person. In their heads of argument counsel for the third respondent relied upon this *lacuna* and the purpose of the application made to this Court was to adduce evidence that the appellant is in fact a non-White.

Accordingly it was alleged in an affidavit made in support of the application that the appellant is a Black inhabitant of the territory. The application was not opposed by the third respondent and since the main prayers of the original application were clearly based upon the premise that non-White inhabitants of the territory may not validly be called up for military service under the Defence Act, and also because argument in the Court *a quo* proceeded, and the Court's judgement was based, upon the assumption that the appellant was indeed a non-White, the application should in my view be granted.

Thirdly, the question was raised whether the registering officer who had issued the call-up notice should not have been joined as a respondent. Section 62 of the Defence Act provides that the Minister of Defence, or any person acting under his authority, shall appoint an officer of the South African Defence Force ("SADF") as the registering officer for the purposes of chap VIII of the Act. The officer so appointed must prepare selection lists (s 66(1)) and allot each year to the Citizen Force, the Commandos or the South African Police, *inter alios*, persons whose names have been included in a selection list for the year concerned (s 67(2)). Section 2(1), read with s 2(2)(*a*) of Proc 131 of 1980 and with s 62 of the Defence Act, empowers the Administrator-General, or any person acting under his authority, to appoint a registering officer for the territory, and s 2(2)(*e*) provides that any reference to a registering officer in chap VIII of the Defence Act shall, in relation to the registration and allotment in terms of that chapter of persons who are resident in the territory, be construed as including a reference to a registering officer appointed by or under the authority of the Administrator-General.

As already stated, the call-up notice in question was issued in the name of the SWATF and at the hearing of the appeal it was assumed that the appellant had been allotted to the Second South African Infantry Battalion by a registering officer appointed by or under the authority of the Administrator-General. The question raised by this Court was consequently whether this officer should have been joined as a respondent.

Subsequent to the hearing of the appeal the appellant's attorneys requested this officer to sign a consent to be joined as a party. In response Colonel Potgieter filed an affidavit from which it appears that on 6 August 1980 he was appointed under the authority of the Minister of Defence as the representative, in the territory, of the registering officer for the SADF; that on 3 October 1980 — i.e., subsequent to the promulgation of Proc 131 of 1980 — he was appointed by the

Administrator-General as registering officer for the SWATF, that he still holds both appointments, and that the notice calling up the appellant was issued under his authority. Colonel Potgieter also stated that he was prepared to abide the judgement of this Court provided that his affidavit was received in amplification of the record. Counsel for the appellant reacted by filing a supplementary note — to which I shall revert — and in effect consented to the evidence set out in the affidavit being placed before this Court. In the result it is unnecessary to decide whether the deponent should have been joined as a respondent.

I now turn to the first main contention advanced by counsel for the appellant in this Court, viz. that Proc 198 of 1980 is invalid because it is in conflict with art 4 of the mandate, the material part of which reads as follows:

> "The military training of the natives, otherwise than for the purposes of internal police and the local defence of the territory, shall be prohibited."

The thrust of the contention was that the mandate became part of the statute law of South Africa; that although Parliament may repeal or amend the law incorporating the mandate, it has not done so, and that in enacting s 38 of the South West Africa Constitution Act the Legislature did not intend to confer upon the State President the power to make laws in conflict with the mandate. In this regard it was argued that in *S v Tuhadeleni and Others* 1969 (1) SA 153 (A),[30] this Court did not find that the mandate had not become part of the constitution of the territory, but merely concluded that the mandate had not become entrenched against repeal or amendment by Act of Parliament.

In *Tuhadeleni*'s case the appellants had been arraigned on charges of contravention of provisions of Act 83 of 1967 (the main charges) and of Act 44 of 1950, as amended by Act 62 of 1966 (the alternative charges). They were convicted on the main charges and for present purposes it is unnecessary to refer to the proceedings in regard to the alternative charges. Before the charges were put to the appellants notice had been given that they would plead that the trial Court had no jurisdiction to try them on the main charges. The ground upon which the appellants relied was that Act 83 of 1967 was invalid insofar as it purported to apply in the territory in that it was enacted subsequent to the termination of the mandate by General Assembly resolution 2145 (XXI). In reply the State contended that by virtue of the provisions of s 59(2) of the Republic of South Africa Constitution Act 32 of 1961 ("the Constitution Act"), the trial Court had no jurisdiction to pronounce upon the validity of the statutory provisions under which the charges were framed. This contention was upheld by the trial Court which eventually reserved two questions of law for consideration by this Court. The first question concerned the ambit and effect of s 59(2) of the Constitution Act and the second question the validity of that subsection insofar as it related to legislative provisions applying in the territory.

This Court, *per* Steyn CJ, found that there was nothing ambiguous in the phrases "no court of law" and "any Act passed by Parliament" which were employed in s 59(2) of the Constitution Act and, having considered the context of s 59(2) in the Act as a whole and the historical background of the subsection, came to the conclusion that it was also applicable to Acts of Parliament applying in the territory.

Steyn CJ went on to consider a submission relative to the second question of law which ran along these lines: Parliament recognized the limitation imposed on its legislative powers by the provisions of the mandate; the Courts were consequently vested with jurisdiction to declare invalid any Act of Parliament which offended against the mandate, and hence s 59(2) was, to the extent that it derogated from the above limitation, of no force and effect.

Steyn CJ rejected this submission on two grounds. The first was that the mandate itself did not place an express or implied limitation upon the powers of Parliament to legislate for the territory. (Part of the reasoning of Steyn CJ in this regard was assailed by counsel for the appellant in the present matter but, since it was conceded that Parliament may legislate in conflict with the mandate, nothing appears to turn on the criticism.) The second ground was that, had a curb on the legislative powers of Parliament been contemplated, it would not have been made part of the law of the land enforceable by the Courts unless South Africa as mandatory had introduced the curb into its Constitution, and that had not been done.

Counsel for the appellant submitted that Steyn CJ was dealing only with the question whether the mandate had become incorporated into South African law in such a way that Parliament itself could not repeal or amend its provisions, and that he did not address himself to the further question whether the mandate had become part of the constitution of the territory and therefore applied, unless repealed or amended by Parliament. Relying on Act 49 of 1919, Act 42 of 1925 and *dicta* in the judgements of this Court *in R* v *Christian* 1924 AD 101,[31] *Verein Für Schutzgebietsanleihen EV v Conradie NO* 1937 AD 113[32] and *Winter v Minister of Defence and Others* 1940 AD 194,[33] counsel went on to submit that the mandate had indeed become part of South African statute law, although not entrenched against conflicting Acts of Parliament.

For reasons which will appear, I find it unnecessary to deal with this submission. I shall therefore assume, in favour of the appellant, that in some way or another the provisions of the mandate became part of the so-called composite constitution of the territory.

On this assumption the real question, as regards the first main contention of counsel for the appellant, is whether s 38(1) of the South West Africa Constitution Act empowers the State President to make laws in conflict with the mandate. It will be recalled that the subsection is couched in very wide terms. It confers upon the State President the power to make laws for the territory not only with a view to the eventual attainment of independence by the territory and the administration of Walvis Bay, but also "the regulation of any other matter". In particular the State President may repeal or amend *any legal provision*, including the Act (except for the provisions of ss (6) and (7)) and any other Act of Parliament insofar as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein.

It is instructive to compare the present wording of s 38(1) with that of the subsection as originally enacted. Until it was amended by s 1 of the South West Africa Constitution Amendment Act 95 of 1977, s 38(1) merely empowered the State President to make laws for the territory in relation to any matter in regard to which the Assembly for South West Africa could not make ordinances. Section 38(2) moreover provided that a law so made would have effect in and for the territory so long and as far only as it was not repugnant to or inconsistent with an

Act of Parliament which applied in the territory. These limitations on the powers of the State President were removed by s 1 of Act 95 of 1977 which substituted s 38(1) and (2), as it now reads, for the original subsections. In particular the new s 38(1) expressly empowered the State President to legislate in conflict with Acts of Parliament applying in the territory and authorized him to make laws for the territory with a view to "the regulation of any … matter". In short, what Parliament did was to confer upon the State President plenary powers of legislation (in respect of the territory) as wide as those possessed by Parliament itself, or, to adapt the words of Lord Fitzgerald in *Hodge* v *The Queen* (1883) 9 AC 117 at 132, powers as ample as Parliament in the plenitude of its powers could bestow. It bears repetition to emphasize that those powers include the power to repeal or amend any legal provision or Act of Parliament relating to or applying in the territory, and if the mandate was indeed incorporated in an Act of Parliament or in some legal provision, it may be repealed or amended by the State President. The only relevant curb on these wide powers is to be found in s 38(7) which in effect gives Parliament the right to veto a law made by the State President. But apart from these provisions relating to a disapproval of a proclamation issued by the State President under s 38(1), the section imposes no limitations on the ambit of the State President's legislative powers in respect of the territory. And, as was stated in *Collins v Minister of the Interior and Another* 1957 (1) SA 552 (A) at 565, if a legislative authority has plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on that matter.

In *The Queen v Burah* (1887) 3 AC 889, a decision of the Privy Council concerning the legislative powers of the Indian Legislature in terms of an Imperial Act, Lord Selborne said (at 904-5):

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

This passage was quoted with approval in *James* v *Commonwealth of Australia* 1936 AC 578 at 613-614, and if restrictions on the plenary powers of a Legislature are not constructively to be enlarged, then *a fortiori* in a case where no limitations have been imposed a court should not be astute to find that a restriction is implied.

Counsel for the appellant also sought to rely on a presumption that Parliament does not intend to violate its international obligations, i.e., that Parliament intends to fulfil, rather than to break, such obligations. *In casu*, so it was argued,

there is consequently a presumption that Parliament did not intend to confer upon the State President the power to legislate in conflict with the international obligations created by the mandate. In this regard counsel placed particular reliance on the following *dictum* of Lord Denning in *R* v *Secretary of State for Home Affairs and Another; Ex parte Bhajan Singh* [1975] 2 All ER 1081 (CA) at 1083, relating to a convention to which the United Kingdom was a party:

> "The Court can and should take the convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties."[34]

It is clear, however, from other English cases that in interpreting legislation one does not start with the *a priori* assumption that Parliament intended to fulfil its treaty obligations, i.e., an assumption that can only be displaced by indications of a contrary intention. Thus, in *Salomon* v *Commissioners of Customs and Excise* [1966] 3 All ER 871 (CA) at 875, Diplock LJ said:[35]

> "Where by a treaty Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the government has legislated, which it may do in anticipation of the coming into effect of the treaty as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties … and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."

See also *The Andrea Ursula* [1971] 1 All ER 821 (PDA).

In *Salomon*'s case Diplock LJ went on to point out (at 876) that even for the limited purpose of resolving ambiguities in legislation an international convention is to be consulted only if there is cogent evidence that the statute concerned was intended to give effect to the convention.

In the present case there is nothing ambiguous in s 38(1) of the South West Africa Constitution Act. As already pointed out, it confers in clear terms extensive powers of legislation upon the State President in regard to the territory, without imposing any restriction whatsoever on the ambit of the State President's legislative competence. Moreover, there is no indication that, in enacting the Act, Parliament intended to give effect to such international obligations as the

mandate imposed and may still be in existence. Indeed, the Act contains no reference whatsoever to the mandate. The aforesaid presumption consequently finds no application in this appeal.

Counsel for the appellant also placed some reliance on the decision of the Privy Council in *Jerusalem-Jaffa District Governor and Another* v *Suleiman Murra and Others* 1926 AC 321 (PC).[36] That case concerned an Order in Council which authorized the High Commissioner for Palestine to make ordinances for the peace, order and good government of Palestine subject to a provision that no order should be passed which should in any way be repugnant to or inconsistent with the provisions of the mandate for Palestine. The question arose whether an ordinance made by the High Commissioner was invalid on the ground that it was an infringement of art 2 of the mandate, and in this regard Viscount Cave said that if the ordinance was in fact inconsistent with the provisions of the mandate it would infringe the conditions of the Order in Council and would therefore be invalid. Now, had s 38 of the South West Africa Constitution Act contained a provision similar to that in the Order in Council — in other words, had it provided that the State President could not make a law in conflict with the mandate for South West Africa — this case would have been in point. But since, as has repeatedly been emphasized, s 38(1) contains no such limitation, the remarks of Viscount Cave have no relevance for the purposes of this appeal.

It follows that the contention that s 38(1) does not empower the State President to legislate in conflict with the mandate cannot be upheld. It is accordingly unnecessary to consider whether Proc 198 of 1980 is repugnant to art 4 of the mandate.

I proceed to deal with the second main contention of counsel for the appellant, viz. that the appellant is in any event not liable to render national service at Walvis Bay which has never been part of the territory and which, since 31 August 1977, has again been administered as part of the Cape Province (Proc R202, *Regulation Gazette* 2525 of that date). The essence of this contention is that Proc 198 of 1980 applies only in the territory and therefore does not have extra-territorial operation.

As already pointed out, s 2(1)(*b*) of the Defence Act provides that the Act shall not apply to persons who are not White persons as defined in s 1 of Act 30 of 1950. In terms of s 3(2) of the Act any member of the Defence Force may be employed at any time on, *inter alia*, service in defence of the Republic, service in the prevention or suppression of terrorism and service in the prevention or suppression of internal disorder in the Republic. The Republic includes the territory and "service in the defence of the Republic" includes military service for the prevention or suppression of any armed conflict outside the Republic which, in the opinion of the State President, is or may be a threat to the security of the Republic (s 1).

Section 153 provides that the Act shall apply also in the territory and in terms of s 138 any training required to be undergone or and any service to be performed under the Act shall be undergone or performed in such areas or at such places, *whether within or outside the Republic*, as the Minister of Defence may direct.

It seems clear, therefore, that prior to the amendment of s 2 of the Act by Proc 198 of 1980 any White male citizen of South Africa, including an inhabitant of the territory, who had been included in a selection list prepared under s

66, could have been called up to render national service in any area or at any place, in or outside the Republic, designated by the Minister. That much was indeed conceded by counsel for the appellant.

Insofar as Proc 198 of 1980 is material to this appeal, s 1(*b*) merely provides that, in the application of the Defence Act "in the territory", the words "or persons who are not White persons as defined in … Act 30 of 1950" shall be deemed not to form part of s 2(1)(*b*) of the Defence Act. The effect, and only effect, of this amendment was that from the date of promulgation of the proclamation the Act was applicable to all the male inhabitants of the territory whereas it did not apply to non-White inhabitants of South Africa. Apart from amendments of ss 62, 63 and 64 of the Act, which are not relevant in the present context, the proclamation did not modify any of the other provisions of the Act, and in particular did not amend s 138. It would appear, therefore, that since the promulgation of the proclamation both White and non-White inhabitants of the territory are liable to be called up to render national service at any place designated by the Minister, whether inside or outside the Republic (including the territory).

Counsel for the appellant, however, laid stress on the words "in the territory" which appear in s 1(1) of Proc 198 of 1980, and submitted that there are in effect two Defence Acts, one applying in South Africa and having extra-territorial effect (but not applicable to non-Whites), and another applying only in the territory. In my view the submission is without merit. There is in substance and form only one Defence Act which, however, has a wider application in respect of the inhabitants of the territory than in respect of those of South Africa. Far from restricting the operation of the Act in the territory, Proc 198 of 1980 extended its scope. Insofar as s 1(1)(*b*) of the proclamation, read with s 2(1)(*b*) of the Act, is concerned, the only purpose of the qualifying phrase "in the territory" was to restrict the deeming provision to the territory. It was clearly not intended to qualify the other provisions of the Act to which reference has been made above.

The proclamation could have amended s 2(1)(*b*) of the Act to read as follows:

"(1) This Act shall not apply —

. . .

(*b*) except insofar as it relates to any auxiliary or nursing service established under this Act, to females or persons, save inhabitants of South West Africa, who are not White persons …"

As I understood counsel for the appellant, he conceded that, had s 2(1)(*b*) been amended to read as above, White and non-White male inhabitants of the territory could have been called up to render military service outside the territory. In essence, however, Proc 198 of 1980 achieved the same effect as the postulated amendment would have had; in other words s 1(1)(*b*) merely removed, in respect of the territory, the impediment as to race contained in s 2(1)(*b*) of the Act. It follows that the appellant could validly have been called upon to render service outside the territory.

On the assumption that Proc 198 of 1980 is valid, counsel for the appellant initially conceded that the appellant could have been allotted to a unit of the South African Defence Force, not being a unit of the SWATF, provided that that unit was stationed in the territory. It was only after the attention of counsel for the respondent had been drawn to the provisions of s 2(1)(*c*) of the schedule to Proc 131 of 1980 that counsel for the appellant, in reply, relied thereon. That subsection reads as follows:

> "2 (1) Subject to the provisions of this proclamation, the administration of the provisions of the Defence Act contained in chaps IV, V, VII, VIII and IX thereof shall be carried on by the Administrator-General in and in respect of the territory insofar as those provisions apply or relate to or in respect of —
>
> …
>
> (*c*) the registration and enrolment, as contemplated in the said chap VIII, of persons who are required to or may apply for such registration or enrolment in terms of the provisions contained in that chapter and are resident in the territory, and the allotment as so contemplated of such persons to any unit of the Citizen Force or the commandos *forming part of the South West Africa Territory Force*." (my italicizing)

Counsel for the appellant went on to submit that in view of the italicized words a registering officer appointed by the Administrator-General may allot inhabitants of the territory only to a unit of the Citizen Force or the commandos which has been incorporated into the SWATF, and that the Second South African Infantry Battalion is not such a unit. In this regard counsel relied on Proc AG 105 of 1980, the schedule to which contains a list of the units of the South African Defence Force which had been organized in and as the SWATF, and which does not include the said battalion. However, counsel could not give this Court the assurance that further units had not been added to the SWATF subsequent to 1 August 1980.

It will be recalled that in the appellant's main prayer (*b*) an order was sought setting aside "the notice … directing the … (appellant) to render national service at Walvis Bay". However, nowhere in the appellant's supporting affidavit was the point made that the notice was invalid on the ground that the appellant had been allotted to a unit which did not form part of the SWATF. Nor did the affidavit contain a specific averment that the said battalion was not a unit of the SWATF. Indeed, in para 4.4 of his affidavit the appellant stated:

> "It is a matter of no consequence to me that I have been called up by the South West Africa Territory Force and not the South African Defence Force. In truth and in fact there is no essential difference between the two."

In setting out the grounds upon which he had been advised that the call-up notice was invalid, the appellant relied on the alleged invalidity of proclamations of the State President issued under s 38 of the South West Africa Constitution Act, and furthermore merely stated that he could not have been ordered to render service at Walvis Bay, which was not part of the territory, and which did not fall within the area over which the Administrator-General purported to exercise authority. It therefore appears that apart from the attack on the validity of the proclamations the only case which the respondents were called upon to meet

was that the appellant could not have been directed to render national service outside the territory. The questions whether the appellant could have been allotted to a unit not forming part of the SWATF and, if so, whether the battalion was such a unit, were simply not raised by the appellant.

It follows that should the appellant now be allowed to rely on the provisions of s 2(1)(*c*) of Proc 131 of 1980 it would amount not merely to the raising of a new point of law in support of a case made out in the Court *a quo*, but in effect to the introduction of a new cause of action which the respondents, two of whom did not oppose the application, were not called upon to meet. And it is certainly not inconceivable that had the appellant averred that he could not have been allotted to a unit not forming part of the SWATF, and that the Second South African Infantry Battalion was such a unit, the second respondent may have opposed the application. Had he done so, then, apart from the possibility that he may have introduced relevant evidence, his counsel could have advanced argument on the ambit and interpretation of chap VIII of the Defence Act read with Proc 131 of 1980. In my view this Court should consequently refrain from considering the submission in question.

In any event, and as already pointed out, Colonel Potgieter alleged in his affidavit that he was not only appointed as registering officer for the territory by the Administrator-General ("his first capacity"), but that he also held a similar appointment in respect of the territory pursuant to a power exercised under the authority of the Minister of Defence in terms of s 62 of the Defence Act ("his second capacity"). He also alleged that by virtue of his dual capacity he was authorized to allot the appellant to the Second South African Infantry Battalion and that he in fact did so. He did, however, concede that the battalion is not a unit of the SWATF.

In their aforesaid supplementary note counsel for the appellant did not dispute that, acting in his second capacity, Colonel Potgieter could have allotted the appellant to the battalion, but contended that he could not have done so in either his first capacity or in both capacities. In my view, however, Colonel Potgieter merely intended to convey that by virtue of the powers vested in him as a result of the dual appointment, he had the necessary authority to allot the appellant either to a unit of the SWATF or to a SADF unit not forming part of the SWATF, and that in allotting the appellant he exercised that composite authority. He certainly did not say that when he made the allotment he was not invoking the authority conferred by his second appointment.

Counsel for the appellant also sought to place some reliance on the fact that the call-up instructions were issued on a form headed "Suidwes-Afrika Gebiedsmag", but this in itself does not justify the inference that Colonel Potgieter intended to act only in his first capacity.

It follows that, even if it is assumed that Colonel Potgieter could not have allotted the appellant to the battalion in his first capacity, it would appear that he could have done so — and in fact did so — by virtue of the composite powers conferred upon him. And should there be any doubt in this regard, it cannot be resolved in favour of the appellant who did not in his application advance the proposition that he could not have been allotted to a unit not forming part of the SWATF.

It remains to consider the question of costs. The only function of an exemption board appointed under s 68 of the Defence Act, as it read in 1982 and applied in the territory, was to consider applications for deferment of or exemption from service. Such an application could be made by any person liable to serve in terms of s 21(1) or 35(1) of the Act or any interested person acting on behalf of such person. An exemption board's powers could therefore be exercised only in respect of a person validly required to render service under the Act. In particular, it was no part of the function of such a board to call up a person for military service or to decide whether a call-up notice had validly been issued.

As already stated, the appellant's application for exemption from service was refused by the third respondent. Since the alternative prayer sought a review of this refusal, it was necessary to join the third respondent as a party. And since the abandonment of the alternative prayer in the Court *a quo* was not accompanied by a tender of costs, the third respondent was entitled to be represented for the purpose of procuring an order of costs in its favour. Such an order was in fact made.

The appellant's notice of appeal was directed against the order dismissing the application as well as against the order of costs. The third respondent was consequently entitled to oppose the appeal for the limited purpose of safeguarding the order as to costs. However, the third respondent prepared voluminous heads of argument and presented full argument in this Court on the merits of the appeal. The only justification proffered by counsel for the third respondent for this course of action was that the third respondent, as part of the structure of the Defence Force, has an indirect interest in the outcome of the appeal. Such a nebulous interest is, however, clearly not to be equated with a legal interest in the issues raised in this Court or in the relief sought in the appellant's main prayers. Hence it is necessary to make a special order as to costs.

The following orders are made:

(1) The Cabinet for South West Africa is substituted for the Administrator-General as first respondent in this appeal.

(2) The appeal is dismissed with costs which are to include the costs relating to the application for leave to appeal.

(3) The costs are to be taxed as if the third respondent opposed the appeal, and one counsel appeared, for the limited purpose of defending the order as to costs made by the Court *a quo*.

Rabie ACJ, Corbett JA, Hefer JA and Grosskopf JA concurred.

[Report: 1988 (3) SA 155.]

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2. United Kingdom of Great Britain and Northern Ireland

Court of Appeals

(a) Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, and Related Appeals; *(b)* In re International Tin Council; *(c)* Maclaine Watson & Co. Ltd. v. International Tin Council; *and (d)* Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)*: Judgements of 27 April 1988*[37]

These four judgements were given by the Court of Appeals regarding the International Tin Council, and involved matters related to international law and international organizations, including the United Nations. The following is a general introduction by the Court to all four judgements:

MACLAINE WATSON v. DEPARTMENT OF TRADE

General Introduction

by the court

Kerr L.J.

Background

In October 1985 the International Tin Council ("I.T.C.") announced that it was unable to meet its liabilities and collapsed with debts running into hundreds of millions of pounds. The 17 plaintiffs in the actions from which the present appeals arise are a number of large creditors. Eleven are ring-dealing members — known as brokers — of the London Metal Exchange and six are banks. The brokers had entered into contracts with the I.T.C. for the sale or purchase of tin on the standard Form B of the London Metal Exchange. The I.T.C. defaulted on these contracts and the brokers claim some _120 million on account of their breach. The banks had made loans to the I.T.C. totalling some _30 million. None of them has been repaid. It is said that these and other transactions were concluded when it must have been obvious to those in control of the I.T.C. that there were no longer any funds available to meet the resulting liabilities. In other contexts these allegations would be referred to as fraudulent trading on a massive scale. But the court has not seen any evidence on behalf of the defendants dealing with the events which in fact occurred, since the defendants have successfully maintained, on various grounds, that the proceedings are not maintainable. Accordingly, these are not issues with which the present appeals are concerned. Nor are we concerned with any individual transactions or the resulting figures. The claims of the creditors in the present actions appear to be merely a sample from the bulk. But the inference of gross mismanagement, to put it no higher, is overwhelming.

The I.T.C. is an international organization created and continued in force by treaties known as International Tin Agreements ("I.T.A."). The first, I.T.A.1, was concluded in 1954. The current one, I.T.A.6, was concluded in 1982. The headquarters of the I.T.C. have been in London throughout. The parties to the treaties and members of the I.T.C. are sovereign states which have changed to some extent from time to time, and the European Economic Community ("E.E.C.") has become a member of the. I.T.C. by becoming a party to I.T.A.6. The members are divided into producers and consumers of tin. The council is composed of the members, and the decisions are taken by a voting system involving distributed majorities between producers and consumers and weighted votes. The objective is to regulate the world production and consumption of tin in an orderly manner, if necessary (as it was after 1982) by the imposition of export controls, and to maintain a measure of stability in the world price of tin. For this purpose the members contribute to a large "buffer stock" in cash or tin for sales or purchases designed to maintain the world price within a bracket of floor and ceiling figures determined by the council from time to time. In addition the council has power to borrow to finance the buffer stock operations with the authority of the members.

In the traditional terms of international law the objectives of the members of the I.T.C. fall to be regarded as *jure imperii*. But the attainment of its objectives also necessarily involved trading — on the London Metal Exchange and the Tin Market in Penang — and loan transactions on a massive scale which would in themselves clearly be regarded as operations conducted *jure gestionis*. And, unlike the practice of states in relation to other treaties creating international organizations whose objectives involve systematic trading, neither I.T.A.6 nor any of its predecessors contain any exclusion or limitation of the liability of the members for the unpaid debts of the organization, let alone any provision for warning third parties dealing with the organization that the members would not stand behind it. No such warnings appear to have been given at any time.

International organizations have proliferated since the war, and similar ones to the I.T.C. exist for other commodities, such as sugar, cocoa, coffee and wheat, whose headquarters are also in the United Kingdom. But the scale of operations in the present case is staggering, and the outcome without precedent. On the evidence before us the turnover of the I.T.C. in the year of 30 June 1984 was of the order of £3 billion, equivalent to more than 300,000 tonnes of tin, about twice as much as the I.T.C.'s estimate for the total world consumption for 1983. No figures have so far been published for 1984-85. But it seems clear that production levels thereafter exceeded demand to such an extent that the price of tin could only be maintained at or just above the floor price in force, which remained unaltered, by means of vast purchases by the buffer stock manager ("B.S.M.") in order to support the price. This appears to have been a hopeless quest despite being fuelled by large scale borrowings. Trading appears only to have been financed by a provision of capital of some 5 per cent. of sales. In the end, on 24 October 1985, the B.S.M. announced that the I.T.C. was unable to meet its obligations. It has not traded since. Its members have evidently left it to its fate, at any rate so far as these proceedings are concerned.

The financial collapse of the I.T.C. is an unprecedented event on the international scene. Other minor international organizations have run into financial difficulties. But none has been abandoned by its members, let alone with emphatic disclaimers of liability to the creditors and failure to put the organization in funds to meet its undisputed debts. It is said that the present situation is under consideration among the members. But nothing has so far been paid to the creditors, and all attempts at recovery have been strenuously resisted. These have ranged from direct claims against members to applications for the winding up of the I.T.C., for the appointment of a receiver of the I.T.C., and for disclosure of the nature, value and location of the I.T.C's assets. Only the last of these has so far succeeded; and the outcome of all of them is now under appeal to this court.

The issues in outline

The legal problems involved in these proceedings are unprecedented, not only in our courts but evidently anywhere. It would be inappropriate to consider them solely by reference to English law in isolation. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and the domestic law of this country.

Turning to the latter, in pursuance of the I.T.A. treaties and a "Headquarters Agreement" between the I.T.C. and the United Kingdom concluded in 1972, the I.T.C. was granted "the legal capacities of a body corporate" in this country by an Order in Council made in 1972 which continued in force in relation to I.T.A.6. But the I.T.C. was not incorporated. Its status remained formally unchanged, and it was common ground that in international law it had "legal personality". The conferment of the "the legal capacities of a body corporate" is a time honoured phrase which has been in use for more than 30 years in our domestic legislation in relation to the facilities granted in this country to international organizations created by treaty. But its meaning and effect have never been considered. In the present situation it raises acute problems about the status of the I.T.C. and the claims made directly against its members. Are they under any liability, either concurrently with the I.T.C. or secondarily in the event that the I.T.C. defaults on its obligations? Or can they claim to be in the same position as the shareholders of a limited liability company because the I.T.C. has been given the capacity to contract in its own name and did so? Alternatively, can the members be held liable as undisclosed principals on whose behalf the I.T.C. contracted as agent?

Then there are other problems. The I.T.C. was granted immunities from suit and legal process except (so far as relevant) in respect of the enforcement of arbitration awards. The London Metal Exchange contracts contained arbitration clauses and resulted in large awards in favour of the broker plaintiffs against the I.T.C. But only one of the bank loans was made subject to a provision for arbitration, so that the failure to repay the others can only result in judgements against the I.T.C. It now claims immunity in respect of them, and it resists the application for a winding up order on the ground that this would be inappropriate in relation to an international organization and that such an order would in any event not fall within the exception of enforcement of an arbitration award.

Next, there is the doctrine of the "non-justiciability" in our courts of rights and obligations arising under treaties — such as I.T.A.1 to 6 — which have not been incorporated into our domestic law. The scope and effect of this doctrine is uncertain and poses many problems in the present context. In particular it is invoked as a defence to the receivership application on the ground that a receiver, standing in the shoes of the I.T.C., would be unable to enforce in our courts whatever claims (if any) the I.T.C. might have against its members, since these would require the interpretation and application of I.T.A.6.

Finally, the claims against the members other than the United Kingdom raise problems of sovereign immunity. This doctrine was regarded as absolute when the present technique in our domestic legislation concerning international organizations originated after the last war, and it was still so regarded in 1972, when the relevant Order in Council was made. But the State Immunity Act 1978 created a number of potentially relevant exceptions, in particular in the context of commercial transactions. Are these exceptions applicable to the various ways in which the plaintiffs' claims are presented, if they can otherwise be maintained? And there is also a claim by the E.E.C., as an appendix to this aspect, that it is equally entitled to sovereign immunity, at any rate in the courts of its member states. This issue had been adjourned below and was argued for the first time in this court.

The proceedings before us occupied some 34 days including the issue concerning the E.E.C., in comparison with 29 days at first instance. The parties were represented by about 30 counsel and 15 firms of solicitors. We were referred to over 200 authorities, statutes and jurisprudential writings, ranging from *Blackstone's Commentaries* to the present-day publications of international lawyers. Particularly in the direct actions the arguments have been presented far more widely than below. In the judgements which follow we cannot deal with all of the submissions which have been addressed to us. We confine ourselves to those which we consider to be of major relevance for and against our conclusions on the issues which need to be decided, in a forensic scenario which appears to be wholly novel. In this connection we found an echo at the beginning of the famous judgement of Marshal C.J. in *Schooner Exchange v. McFaddon* (1812) 7 Cranch (U.S.) 116, 136, to which we were referred amidst so much other material:

> "In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this."

The parties

The 17 plaintiffs have already been referred to as 11 brokers and six banks. We only mention some of them by name hereafter, mainly for the purpose of the title of the relevant actions. Their names will appear in the orders made in the light of our judgements. But the judgements themselves will not be concerned with the procedural details of the multifarious orders made at first instance.

The defendants to the proceedings, apart from the I.T.C. itself, are its present members as signatories of I.T.A.6. The United States of America and some others withdrew upon the expiry of I.T.A.5 in 1982. Beginning with the host country, they are as follows in the direct actions brought against all the members:

United Kingdom, Australia, Belgium, Canada, Denmark, the European Economic Community (E.E.C.), Finland, France, Federal Republic of Germany, Greece, India, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, Netherlands, Nigeria, Norway, Sweden, Switzerland, Thailand, Zaire. The writs against the foreign states were all served on them outside the jurisdiction pursuant to leave given *ex parte* under R.S.C., Ord. 11. The states are now challenging the jurisdiction to serve them. In the case of the claims against the United Kingdom it was agreed that the proceedings should be brought against the Department of Trade and Industry pursuant to section 17 of the Crown Proceedings Act 1947. In the case of the E.E.C. all but the first proceedings were brought against the European Commission pursuant to articles 210 and 211 of the E.E.C. Treaty and the European Communities Act 1972, and in these actions the Commission was also served within the jurisdiction. For convenience we will nevertheless often refer to the defendants (apart from the I.T.C.) as "the member states".

The proceedings under appeal

There are before us some 30 appeals, cross-appeals and applications. But at this stage we are not concerned with the details. Effectively there are appeals against five judgements given in relation to a number of combined actions and other proceedings. The defendants' response to all of them was that the claims should be struck out, either on the ground that they disclosed no reasonable cause of action, etc., or that the defendants were entitled to sovereign immunity, or both. These pleas succeeded in all cases save in regard to an application that the I.T.C. should disclose the nature, value and location of its assets. With that exception all of the plaintiffs' claims have been struck out. But, as already mentioned, every party has appealed or cross-appealed against every order of substance made against it, including one aspect of an order for costs in favour of the member states with which they were dissatisfied.

Of the five judgements under appeal two dealt with overlapping issues raised in four actions. These were called the "direct actions" because all involved claims made directly against members of the I.T.C. Three of them were brought against all the members (including in one case the I.T.C. itself, but that is of no consequence) and were struck out in a judgement[38] delivered by Staughton J. The fourth was brought against the department[39] alone and was struck out by Millett J. Although these two judgements in part raise differing issues, both in relation to the plaintiffs and the defendants, the principal issues — as to the nature of the I.T.C. and the possible liability of its members on contracts made in the name of the I.T.C. — are common to both. It is therefore convenient to combine the two resulting appeals into one judgement.[40]

The remaining three judgements were all delivered by Millett J., and in each case the I.T.C. was the sole defendant. The resulting appeals are[5] conveniently described as the "winding up appeal",[41] the "receivership Appeal"[42] and the "disclosure of assets appeal".[43] The plaintiffs are appealing in the first two and the I.T.C. in the latter.

It follows that the convenient course is to deal with all these appeals by means of four judgements given in that order, which was also the order in which we heard the appeals. The order below was different and appears from the dates of the judgements mentioned hereafter. We will deal with the E.E.C.'s claim for sovereign immunity at the end of our judgements in the direct action.

Against this background we now turn to our judgements, which must inevitably be lengthy. But before we do so we would like to express our gratitude to all concerned — in particular the solicitors — in giving us so much help with the logistic arrangements for this unusual series of appeals and for the most helpful way in which the documentation — contained in some 80 ring files — was managed and indexed. We must also record our appreciation of the lucidity of the submissions of counsel, and the invaluable assistance provided by their "skeleton arguments" and additional summaries of their submissions at various stages of this unusual series of appeals.

Finally, we would like to draw attention to the concluding general remarks in the judgement of the court in the disclosure of assets appeal concerning the deplorable history which has brought the I.T.C. and its unfortunate creditors to the present juncture.

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3. United States of America

(*a*) United States District Court, Southern District of New York

UNITED STATES OF AMERICA (PLAINTIFF) AGAINST THE PALESTINE LIBERATION ORGANIZATION, ET AL. (DEFENDANTS), JUDGEMENT OF 29 JUNE 1988[44]

Question of the Palestine Liberation Organization (PLO) to maintain its office in conjunction with its work as a Permanent Observer to the United Nations — United Nations Headquarters Agreement — United States Anti-Terrorism Act of 1987

Appearances of Counsel:

For The Attorney General:

Rudolph W. Giuliani, United States Attorney
Richard W. Mark, Assistant United States Attorney
Southern District of New York
New York, New York 10007

John R. Bolton, Assistant Attorney General
Mona Butler
David J. Anderson
Vincent M. Garvey
United States Department of Justice
Civil Division
Washington, D.C. 20530

For Defendants Palestine Liberation Organization, PLO Mission, Zuhdi Labib Terzi, Riyad H. Mansour, Nasser Al-Kidwa and Veronica Kanaan Pugh:

Ramsey Clark
Lawrence W. Schilling
New York

*For Defendant Riyad H. Mansour:**
Leonard B. Boudin
Michael Krinsky
David Golove
Nicholas E. Poser
David B. Goldstein
Rabinowitz, Boudin, Standard, Krinsky & Lieberman
New York

*For the United Nations, amicus curiae:***
Keith Highet
Joseph D. Pizzurro
Curtis, Mallet-Prevost, Colt & Mosle
New York

*For the Association of the Bar of the City of New York, amicus curiae:***
Sheldon Oliensis, President
Saul L. Sherman
Stephen L. Kass
Association of the Bar of the City of New York
New York

Palmieri, J.:

The Anti-terrorism Act of 1987[45] (the "ATA"), is the focal point of this lawsuit. At the center of controversy is the right of the Palestine Liberation Organization (the "PLO") to maintain its office in conjunction with its work as a Permanent Observer to the United Nations. The case comes before the court on the government's motion for an injunction closing this office and on the defendants' motions to dismiss.

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*The following counsel moved to dismiss on Mr. Mansour's behalf and filed a brief. Following that motion, Messrs Clark and Schilling appeared for Mr. Mansour.

**The United Nations and the Association of the Bar of the City of New York both requested leave to appear as *amici curiae*. The court finds that both *amici* have an adequate interest in the litigation, even at the district court level, and that their participation is desirable. Leave to file is therefore granted. See S. & E.D.N.Y. Gen. R. 8; cf. Fed. R. App. P. 29; S. Ct. R. Prac. 36.3. It should be added that Mr. Carl-August Fleischhauer, Under-Secretary-General and Legal Counsel of the United Nations, was permitted to address the court at the outset of the arguments of counsel that took place on June 8, 1988.

I

Background

The United Nations' Headquarters in New York were established as an international enclave by the *Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations*[46] (the "Headquarters Agreement"). This agreement followed an invitation extended to the United Nations by the United States, one of its principal founders, to establish its seat within the United States.[47]

As a meeting place and forum for all nations, the United Nations, according to its Charter, was formed to:

> "maintain international peace and security …; to develop friendly relations among nations, based on the principle of equal rights and self-determination of peoples …; to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character …; and be a centre for harmonizing the actions of nations in the attainment of these common ends".

Charter of the United Nations, Article 1. Today, 159 of the Members of the United Nations maintain missions to the United Nations in New York. United Nations Protocol and Liaison Service, *Permanent Missions to the United Nations No. 262* 3-4 (1988) (hereinafter "*Permanent Missions No. 262*"). In addition, the United Nations has, from its incipiency, welcomed various non-member observers to participate in its proceedings. See *Permanent Missions to the United Nations: Report of the Secretary-General*, 4 U.N. GAOR C.6 Annex (agenda item 50) 16, 17 ¶14, United Nations document A/939/Rev. 1 (1949) (hereinafter *Permanent Missions: Report of the Secretary-General*). Of these, several non-member nations,[48] intergovernmental organizations[49] and other organizations[50] currently maintain "permanent observer missions" in New York.

The PLO falls into the last of these categories and is present at the United Nations as its invitee. See Headquarters Agreement, §11, 61 Stat. at 761 (22 U.S.C. §287 note). The PLO has none of the usual attributes of sovereignty. It is not accredited to the United States[51] and does not have the benefits of diplomatic immunity.[52] There is no recognized State it claims to govern. It purports to serve as the sole political representative of the Palestinian people. See generally Kassim, *The Palestine Liberation Organization Claim to Status: A Juridical Analysis Under International Law*, 9 Den. J. International L. & Policy 1 (1980). The PLO nevertheless considers itself to be the representative of a State, entitled to recognition in its relations with other Governments, and is said to have diplomatic relations with approximately 100 countries throughout the world. *Idem*, at 19.

In 1974, the United Nations invited the PLO to become an observer at the United Nations[53] to "participate in the sessions and the work of the General Assembly in the capacity of observer".[54] The right of its representatives to admission to the United States as well as access to the United Nations was immediately challenged under American law. Judge Costantino rejected that challenge in *Anti-Defamation League of B'nai B'rith v. Kissinger*, Civil Action No.

74 C 1545 (E.D.N.Y. November 1, 1974). The court upheld the presence of a PLO representative in New York with access to the United Nations, albeit under certain entrance visa restrictions which limited PLO personnel movements to a radius of 25 miles from Columbus Circle in Manhattan. It stated from the bench:

> "This problem must be viewed in the context of the special responsibility which the United States has to provide access to the United Nations under the Headquarters Agreement. It is important to note for the purposes of this case that a primary goal of the United Nations is to provide a forum where peaceful discussions may displace violence as a means of resolving disputed issues. At times our responsibility to the United Nations may require us to issue visas to persons who are objectionable to certain segments of our society."

Idem, transcript at 37, partially excerpted in Department of State, 1974 *Digest of United States Practice in International Law*, 27, 28.

Since 1974, the PLO has continued to function without interruption as a permanent observer and has maintained its Mission to the United Nations without trammel, largely because of the Headquarters Agreement, which we discuss below.

II

The Anti-Terrorism Act

In October 1986, members of Congress requested the United States Department of State to close the PLO offices located in the United States.[55] That request proved unsuccessful, and proponents of the request introduced legislation with the explicit purpose of doing so.[56]

The result was the ATA, 22 U.S.C. §§5201-5203. It is of a unique nature. We have been unable to find any comparable statute in the long history of Congressional enactments. The PLO is stated to be "a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States." 22 U.S.C. §5201(b). The ATA was added, without committee hearings,[57] as a rider to the Foreign Relations Authorization Act for Fiscal Years 1988-1989, which provided funds for the operation of the State Department, including the operation of the United States Mission to the United Nations. Pub. L. 100-204 §101, 101 Stat. 1331, 1335. The bill also authorized payments to the United Nations for maintenance and operation. *Idem*, §102(a)(1), 101 Stat. at 1336; see also *idem*, §143, 101 Stat. at 1386.

The ATA, which became effective on March 21, 1988,[58] forbids the establishment or maintenance of "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 PLO, if the purpose is to further the PLO's interests. 22 U.S.C. §5202(3). The ATA also forbids spending the PLO's funds or receiving anything of value except informational material from the PLO, with the same *mens rea* requirement. *Idem*, §§5202(1) and (2).

The House version of the spending bill contained no equivalent provision, and the ATA was only briefly discussed during a joint conference which covered the entire spending bill. The House conferees rejected, 8-11, an exemption for the Mission, after which they acceded to the Senate's version. 133 Cong. Rec. S

18,193 ¶14 (daily ed. December 16, 1987). See 113 *idem*, S 18,186, S 18,189 (statements of Sen. Helms); see also H.R. Conf. Rep. No. 475, 100th Cong., 1st Sess., 170-71 (1987).

Ten days before the effective date, the Attorney General wrote the Chief of the PLO Observer Mission to the United Nations that "maintaining a PLO Observer Mission to the United Nations will be unlawful", and advised him that upon failure of compliance, the Department of Justice would take action in federal court. This letter is reproduced in the record as item 28 of the Compendium prepared at the outset of this litigation pursuant to the court's April 21, 1988 request to counsel (attached as Appendix B). It is entitled "Compendium of the Legislative History of the Anti-Terrorism Act of 1987, Related Legislation, and Official Statements of the Department of Justice and the Department of State Regarding This Legislation". The documents in the Compendium are of great interest.

The United States commenced this lawsuit the day the ATA took effect, seeking injunctive relief to accomplish the closure of the Mission. The United States Attorney for this District has personally represented that no action would be taken to enforce the ATA pending resolution of the litigation in this court.

There are now four individual defendants in addition to the PLO itself.[59] Defendant Zuhdi Labib Terzi, who possesses an Algerian passport but whose citizenship is not divulged, has served as the Permanent Observer of the PLO to the United Nations since 1975. Defendant Riyad H. Mansour, a citizen of the United States, has been the Deputy Permanent Observer of the PLO to the United Nations since 1983. Defendant Nasser Al-Kidwa, a citizen of Iraq, is the Alternate Permanent Observer of the PLO to the United Nations. And defendant Veronica Kanaan Pugh, a citizen of the United Kingdom of Great Britain and Northern Ireland, is charged with administrative duties at the Observer Mission. These defendants contend that this court may not adjudicate the ATA's applicability to the Mission because such an adjudication would violate the United States' obligation under section 21 of the Headquarters Agreement to arbitrate any dispute with the United Nations. Apart from that, they argue, application of the ATA to the PLO Mission would violate the United States' commitments under the Headquarters Agreement. They assert that the court lacks subject-matter and personal jurisdiction over them and that they lack the capacity to be sued. Fed. R. Civ. P. 12(b)(1) and (2); 17(b). Defendant Riyad H. Mansour additionally moves to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).[60] Plaintiff, the United States, moves for summary judgement. Fed. R. Civ. P. 56.

III

Personal jurisdiction over the defendants

The PLO maintains an office in New York. The PLO pays for the maintenance and expenses of that office. It maintains a telephone listing in New York. The individuals employed at the PLO's Mission of the United Nations maintain a continuous presence in New York. There can be little question that it is within the bounds of fair play and substantial justice to hail them into court in New York. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). The limitations that the due process clause places on the exercise of personal juris-

diction are the only ones applicable to the statute in these circumstances. 22 U.S.C. §5203(b). Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). The PLO does not argue that it or its employees are the beneficiaries of any diplomatic immunity owing to its presence as an invitee of the United Nations. We have no difficulty in concluding that the court has personal jurisdiction over the PLO and the individual defendants.

IV

The duty to arbitrate

Counsel for the PLO and for the United Nations and the Association of the Bar of the City of New York, as *amici curiae*, have suggested that the court defer to an advisory opinion of the International Court of Justice. *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. No. 77 (April 26, 1988) ("*U.N. v. U.S.*"). That decision holds that the United States is bound by Section 21 of the Headquarters Agreement to submit to binding arbitration of a dispute precipitated by the passage of the ATA. Indeed, it is the PLO's position that this alleged duty to arbitrate deprives the court of subject-matter jurisdiction over this litigation.

In June 1947, the United States subscribed to the Headquarters Agreement, defining the privileges and immunities of the United Nations Headquarters in New York City, thereby becoming the "host country" — a descriptive title that has followed it through many United Nations proceedings. The Headquarters Agreement was brought into effect under United States law, with an annex, by a Joint Resolution of Congress approved by the President on August 4, 1947.[61] The PLO rests its argument, as do the *amici*, on section 21(a) of the Headquarters Agreement, which provides for arbitration in the case of any dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement. Because interpretation of the ATA requires an interpretation of the Headquarters Agreement, they argue, this court must await the decision of an arbitral tribunal yet to be appointed before making its decision.

Section 21(a) of the Headquarters Agreement provides, in part:

> "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 …"

61 Stat. at 764 (22 U.S.C. § 287note) (emphasis added). Because these proceedings are not in any way directed to settling any dispute, ripe or not, between the United Nations and the United States, Section 21 is, by the terms, inapplicable.[62] The fact that the Headquarters Agreement was adopted by a majority of both Houses of Congress and approved by the President, see 61 Stat. at 768, might lead to the conclusion that it provides a rule of decision requiring arbitration any time the interpretation of the Headquarters Agreement is at issue in the United States courts. That conclusion would be wrong for two reasons.

First, this court cannot direct the United States to submit to arbitration without exceeding the scope of its article III powers. What sets this case apart from the usual situation in which two parties have agreed to binding arbitration for the settlement of any future disputes, requiring the court to stay its proceedings, cf. 9 U.S.C. §3 (1982),[63] is that we are here involved with matters of international policy. This is an area in which the courts are generally unable to participate. These questions do not lend themselves to resolution by adjudication under our jurisprudence. See generally *Baker v. Carr*, 369 U.S. 186, 211-13 (1962). The restrictions imposed upon the courts forbidding them to resolve such questions (often termed "political questions") derive not only from the limitations which inhere in the judicial process but also from those imposed by article III of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) ("The province of the court is, solely, to decide on the right of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive can never be made in this Court.") The decision in *Marbury* has never been disturbed.

The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative — the "political" — departments of the Government. As the Supreme Court noted in *Baker v. Carr*, *supra*, 369 U.S. at 211, not all questions touching upon international relations are automatically political questions. Nonetheless, were the court to order the United States to submit to arbitration, it would violate several of the tenets to which the Supreme Court gave voice in *Baker v. Carr*, *supra*, 369 U.S. at 217.[64] Resolution of the question whether the United States will arbitrate requires "an initial policy determination of a kind clearly for nonjudicial discretion"; deciding whether the United States will or ought to submit to arbitration, in the face of a determination not to do so by the executive,[65] would be impossible without the court "expressing lack of the respect due coordinate branches of government"; and such a decision would raise not only the "potentiality" but the reality of "embarrassment from multifarious pronouncements by various departments on one question". It is for these reasons that the ultimate decision as to how the United States should honour its treaty obligations with the international community is one which has, for at least 100 years, been left to the executive to decide. *Goldwater v. Carter*, 444 U.S. 996, 996-97 (1979) (vacating, with instructions to dismiss, an attack on the President's action in terminating a treaty with Taiwan); *Clark v. Allen*, 331 U.S. 503, 509 (1947) ("President and Senate may denounce a treaty and thus terminate its life") (quoting *Techt v. Hughes*, 229 N.Y. 222, 243 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920)); *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918) (redress for violation of international accord must be sought via executive); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602 ("the question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts") (1889); *accord Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888). Consequently the question whether the United States should submit to the jurisdiction of an international tribunal is a question of policy not for the courts but for the political branches to decide.[66]

Section 21 of the Headquarters Agreement cannot provide a rule of decision regarding the interpretation of that agreement for another reason: treating it as doing so would require the courts to refrain from undertaking their constitutionally mandated function. The task of the court in this case is to interpret the ATA in resolving this dispute between numerous parties and the United States. Interpretation of the ATA, as a matter of domestic law, falls to the United States courts. In interpreting the ATA, the effect of the United States' international obligations — the Charter of the United Nations and the Headquarters Agreement in particular — must be considered. As a matter of domestic law, the interpretation of these international obligations and their reconciliation, if possible, with the ATA is for the courts. It is, as Chief Justice Marshall said, "emphatically the province and duty of the judicial department to say what the law is". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That duty will not be resolved without independent adjudication of the effect of the ATA on the Headquarters Agreement. Awaiting the decision of an arbitral tribunal would be a repudiation of that duty.

Interpreting section 21 as a rule of decision would, at a minimum, raise serious constitutional questions. We do not interpret it in that manner. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979). It would not be consonant with the court's duties for it to await the interpretation of the Headquarters Agreement by an arbitral tribunal, not yet constituted, before undertaking the limited task of interpreting the ATA with a view to resolving the actual dispute before it.

In view of the foregoing, the court finds that it is not deprived of subject-matter jurisdiction by section 21 of the Headquarters Agreement and that any interpretation of the Headquarters Agreement incident to an interpretation of the ATA must be done by the court.

V

The Anti-Terrorism Act and the Headquarters Agreement

If the ATA were construed as the Government suggests, it would be tantamount to a direction to the PLO Observer Mission at the United Nations that it close its doors and cease its operations *instanter*. Such an interpretation would fly in the face of the Headquarters Agreement, a prior treaty between the United Nations and the United States, and would abruptly terminate the functions the Mission has performed for many years. This conflict requires the court to seek out a reconciliation between the two.

Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. U.S. Const. art. VI, cl. 2. Wherever possible, both are to be given effect. E.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 690, *modified*, 444 U.S. 816 (1979); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Clark v. Allen*, *supra*, 331 U.S. at 510-11; *Chew Heong v. United States*, 112 U.S. 536, 550 (1884). Only where a treaty is irreconcilable with a later enacted statute and Congress has

clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence. E.g., *The Chinese Exclusion Case*, *supra*, 130 U.S. at 599-602 (finding clear intent to supersede); *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884) (same, decided on the same day as *Chew Heong*, *supra*, which found no such intent); *South African Airways v. Dole*, 817 F.2d 119, 121, 125-26 (D.C. Cir.) (Anti-Apartheid Act of 1986, directing the Secretary of State to "terminate the Agreement Between the United States of America and the Government of the Union of South Africa" irreconcilable with that treaty), *cert. denied*, 108 S. Ct. 229, 98 L.E.2d 188 (October 13, 1987); *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). Compare *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (finding no clear intent to abrogate treaty); *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22 (same); *Cook v. United States*, 288 U.S. 102, 119-20 (1933) (same).

The long-standing and well-established position of the Mission at the United Nations, sustained by international agreement, when considered along with the text of the ATA and its legislative history, fails to disclose any clear legislative intent that Congress was directing the Attorney General, the State Department or this Court to act in contravention of the Headquarters Agreement. This court acknowledges the validity of the Government's position that Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States. *Whitney v. Robertson*, *supra*, 124 U.S. 193-95; *The Head Money Cases*, *supra*, 112 U.S. at 597-99. However, unless this power is clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations. This is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half. Recently, the Supreme court articulated it in *Weinberger v. Rossi*, *supra*, 456 U.S. at 32:

> "It has been maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains …"

Accord *Trans World Airlines*, *supra*, 466 U.S. at 252; *Washington v. Fishing Vessel Association*, *supra*, 443 U.S. at 690; *Menominee Tribe of Indians*, supra, 391 U.S. at 412-13; *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Clark v. Allen*, *supra*, 341 U.S. at 510; *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132, (1923) (Sutherland, J., dissenting); *Chew Heong*, *supra*, 112 U.S. at 602 (1884).

The American Law Institute's recently revised *Restatement (Third) Foreign Relations Law of the United States* (1988) reflects this unbroken line of authority:

> "§115. Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States.

" '(1) (a) An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States *if the purpose of the act to supersede the earlier rule or provision is clear* and if the act and the earlier rule or provision cannot be fairly reconciled' " (emphasis added)

We believe the ATA and the Headquarters Agreement cannot be reconciled except by finding the ATA inapplicable to the PLO Observer Mission.

A. The Obligations of the United States under the Headquarters Agreement

The obligation of the United States to allow transit, entry and access stems not only from the language of the Headquarters Agreement but also from forty years of practice under it. Section 11 of the Headquarters Agreement reads, in part:

> "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 …, (5) other persons invited to the Headquarters district by the United Nations … on official business". 61 Stat. at 761 (22 U.S.C. §287 note).[67] These rights could not be effectively exercised without the use of offices. The ability to effectively organize and carry out one's work, especially as a liaison to an international organization, would not be possible otherwise. It is particularly significant that section 13 limits the application of United States law not only with respect to the entry of aliens, but also their residence. The Headquarters Agreement thus contemplates a continuity limited to official United Nations functions and is entirely consistent with the maintenance of missions to the United Nations. The exemptions of section 13 are not limited to members, but extend to invitees as well.

In addition, there can be no dispute that over the 40 years since the United States entered into the Headquarters Agreement it has taken a number of actions consistent with its recognition of a duty to refrain from impeding the functions of observer missions to the United Nations. It has, since the early days of the presence of the United Nations in New York, acquiesced in the presence of observer missions to the United Nations in New York. See *Permanent Missions: Report of the Secretary-General*, *supra*, at 17 ¶14 (1949).

After the United Nations invited the PLO to participate as a permanent observer, the Department of State took the position that it was required to provide access to the United Nations for the PLO. *1974 Digest of United States Practice in International Law*, 27-29; 1976 *Digest of United States Practice in International Law*, 74-75. The State Department at no time disputed the notion that the rights of entry, access and residence guaranteed to invitees include the right to maintain offices.

The view that under the Headquarters Agreement the United States must allow PLO representatives access to and presence in the vicinity of the United Nations was adopted by the court in *Anti-Defamation League of B'nai B'rith v. Kissinger*, *supra*; see also *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 526-27 (D. Mass. 1986). The United States has, for 14 years, acted in a manner consistent with a recognition of the PLO's rights in the Headquarters

Agreement. This course of conduct under the Headquarters Agreement is important evidence of its meaning. *O'Connor v. United States*, 479 U.S. 27 XX, 107 S. Ct. 347, 351, 96 L.E.2d 206, 214 (1986).

Throughout 1987, when Congress was considering the ATA, the Department of State elaborated its view that the Headquarters Agreement contained such a requirement. Perhaps the most unequivocal elaboration of the State Department's interpretation was the letter of J. Edward Fox, Assistant Secretary for Legislative Affairs, to Dante Fascell, Chairman of the House Committee on Foreign Affairs (November 5, 1987):

> "The United States has acknowledged that [the invitations to the PLO to become a permanent observer] give rise to United States obligations to accord PLO observers the rights set forth in sections 11 to 13 of the Headquarters Agreement. See, e.g., *1976 Digest of United States Practice in International Law* 74-75. The proposed legislation would effectively require the United States to deny PLO observers the entry, transit, and residence rights required by sections 11-13 and, as a later enacted statute, would supersede the Headquarters Agreement in this regard as a matter of domestic law.
>
> "The proposed legislation would also … break a 40-year practice regarding observer missions by nations hosting U.N. bodies and could legitimately be viewed as inconsistent with our responsibilities under sections 11 to 13 of the United Nations Headquarters Agreement …"[68]

Shortly before the adoption of the ATA, during consideration of a report of the Committee on Relations with the Host Country by the General Assembly of the United Nations, the United States representative noted "that the United States Secretary of State had stated that the closing of the mission would constitute a violation of United States obligation under the Headquarters Agreement". United Nations document A/C.6/42/SR.58 (November 25, 1987) at ¶3.

He had previously stated that "closing the mission, in our view, and I emphasize this is the executive branch, is not consistent with our international legal obligations under the Headquarters Agreement". Partial transcript of the 126th Meeting of the Committee on Relations with the Host Country, at 4 (October 14, 1987). And the day after the ATA was passed, State Department spokeswoman Phyllis Oakley told reporters that the ATA, "if implemented, would be contrary to our international legal obligations under the Headquarters Agreement, [so the administration intends] … to engage in consultations with the Congress in an effort to resolve this matter". Department of State daily press briefing at 8 (December 23, 1987).[69]

It seemed clear to those in the executive branch that closing the PLO mission would be a departure from the United States practice in regard to observer missions, and they made their views known to members of Congress who were instrumental in the passage of the ATA. In addition, United States representatives to the United Nations made repeated efforts to allay the concerns of the United Nations Secretariat by reiterating and reaffirming the obligations of the United States under the Headquarters Agreement.[70] A chronological record of their efforts is set forth in the advisory opinion of the International Court of Justice, *United Nations v. United States*, *supra*, 1988 *I.C.J.* No. 77 ¶¶11-22, slip op. at 5-11 (April 26, 1988). The United Nations Secretariat considered it nec-

essary to request that opinion in order to protect what it considered to be the United Nations' rights under the Headquarters Agreement.[71] The United Nations' position that the Headquarters Agreement applies to the PLO Mission is not new. 1979 *United Nations Juridical Yearbook* 169-79; see 1980 *United Nations Juridical Yearbook* 188 ¶3.

> "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The interpretive statements of the United Nations also carry some weight, especially because they are in harmony with the interpretation given to the Headquarters Agreement by the Department of State. *O'Connor*, *supra*, 479 U.S. at XX 107 S. Ct. at 351, 96 L.E.2d at 214.

Thus the language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations.

B. Reconciliation of the ATA and the Headquarters Agreement

The lengths to which our courts have sometimes gone in construing domestic statutes so as to avoid conflict with international agreements are suggested by a passage from Justice Field's dissent in *Chew Heong*, *supra*, 112 U.S. at 560, 560-61 (1884):

> "I am unable to agree with my associates in their construction of the act … restricting the immigration into this country of Chinese laborers. That construction appears to me to be in conflict with the language of that act, and to require the elimination of entire clauses and the interpolation of new ones. It renders nugatory whole provisions which were inserted with sedulous care. The change thus produced in the operation of the act is justified on the theory that to give it any other construction would bring it into conflict with the treaty; and that we are not at liberty to suppose that Congress intended by its legislation to disregard any treaty stipulations."

Chew Heong concerned the interplay of legislation regarding Chinese laborers with treaties on the same subject. During the passage of the statute at issue in *Chew Heong*, "it was objected to the legislation sought that the treaty of 1868 stood in the way, and that while it remained unmodified, such legislation would be a breach of faith to China …" *Idem* at 569. In spite of that, and over Justice Field's dissent, the Court, in Justice Field's words, "narrow[ed] the meaning of the act so as measurably to frustrate its intended operation". Four years after the decision in *Chew Heong*, Congress amended the act in question to nullify that decision. Ch. 1064, 25 Stat. 504. With the amended statute, there could be no question as to Congress's intent to supersede the treaties, and it was the later enacted statute which took precedence. *The Chinese Exclusion Case*, *supra*, 130 U.S. at 598-99 (1889).

The principles enunciated and applied in *Chew Heong* and its progeny, e.g., *Trans World Airlines*, *supra*, 466 U.S. at 252; *Weinberger v. Rossi*, *supra*, 456 U.S. at 32; *Menominee Tribe of Indians*, *supra*, 391 U.S. at 413; *McCulloch v. Sociedad de Marineros*, *supra*, 372 U.S. at 21-22; *Pigeon River*, *supra*, 291

U.S. at 160; *Cook v. United States*, *supra*, 288 U.S. at 119-20, require the clearest of expressions on the part of Congress. We are constrained by these decisions to stress the lack of clarity in Congress's action in this instance. Congress's failure to speak with one clear voice on this subject requires us to interpret the ATA as inapplicable to the Headquarters Agreement. This is so, in short, for the reasons which follow.

First, neither the Mission nor the Headquarters Agreement is mentioned in the ATA itself. Such an inclusion would have left no doubt as to Congress's intent on a matter which had been raised repeatedly with respect to this act, and its absence here reflects equivocation and avoidance, leaving the court without clear interpretive guidance in the language of the act. Second, while the section of the ATA prohibiting the maintenance of an office applies "notwithstanding any provision of law to the contrary", 22 U.S.C. §5202(3), it does not purport to apply notwithstanding any *treaty*. The absence of that interpretive instruction is especially relevant because elsewhere in the same legislation Congress expressly referred to "United States law (including any treaty)". 101 Stat. at 1343. Thus Congress failed, in the text of the ATA, to provide guidance for the interpretation of the act, where it became repeatedly apparent before its passage that the prospect of an interpretive problem was inevitable. Third, no member of Congress expressed a clear and unequivocal intent to supersede the Headquarters Agreement by passage of the ATA. In contrast, most who addressed the subject of conflict denied that there would be a conflict: in their view, the Headquarters Agreement did not provide the PLO with any right to maintain an office. Here again, Congress provided no guidance for the interpretation of the ATA in the event of a conflict which was clearly foreseeable. And Senator Claiborne Pell, Chairman of the Senate Foreign Relations Committee, who voted for the bill, raised the possibility that the Headquarters Agreement would take precedence over the ATA in the event of a conflict between the two.[72] His suggestion was neither opposed nor debated, even though it came in the final minutes before passage of the ATA.

A more complete explanation begins, of course, with the statute's language. The ATA reads, in part:

> "It shall be unlawful, if the purpose be to further the interests of the PLO …
>
> * * *
>
> (3) Notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by, the PLO …" 22 U.S.C. §5202(3).

The Permanent Observer Mission to the United Nations is nowhere mentioned *in haec verba* in this act, as we have already observed. It is nevertheless contended by the United States that the foregoing provision requires the closing of the Mission, and this in spite of possibly inconsistent international obligations. According to the Government, the act is so clear that this possibility is nonexistent. The Government argues that its position is supported by the provision that the ATA would take effect "notwithstanding any provision of law to

the contrary", 22 U.S.C. §5202(3), suggesting that Congress thereby swept away any inconsistent international obligations of the United States. In effect, the Government urges literal application of the maxim that in the event of conflict between two laws, the one of later date will prevail: *leges posteriores priores contrarias abrogant*.

We cannot agree. The proponents of the ATA were, at an early stage and throughout its consideration, forewarned that the ATA would present a potential conflict with the Headquarters Agreement.[73] It was especially important in those circumstances for Congress to give clear, indeed unequivocal guidance, as to how an interpreter of the ATA was to resolve the conflict. Yet there was no reference to the Mission in the text of the ATA, despite extensive discussion of the Mission in the floor debates. Nor was there reference to the Headquarters Agreement, or to any treaty, in the ATA or in its "notwithstanding" clause, despite the textual expression of intent to supersede treaty obligations in other sections of the Foreign Relations Authorization Act, of which the ATA formed a part.[74] Thus Congress failed to provide unequivocal interpretive guidance in the text of the ATA, leaving open the possibility that the ATA could be viewed as a law of general application and enforced as such, without encroaching on the position of the Mission at the United Nations.

That interpretation would present no inconsistency with what little legislative history exists. There were conflicting voices both in Congress and in the executive branch before the enactment of the ATA. Indeed, there is only one matter with respect to which there was unanimity: condemnation of terrorism. This, however, is extraneous to the legal issues involved here. At oral argument, the United States Attorney conceded that there was no evidence before the court that the Mission had misused its position at the United Nations or engaged in any covert actions in furtherance of terrorism.[75] If the PLO is benefiting from operating in the United States, as the ATA implies, the enforcement of its provisions outside the context of the United Nations can effectively curtail that benefit.

The record contains voices of Congressmen and Senators forceful in their condemnation of terrorism and of the PLO and supporting the notion that the legislation would close the mission.[76] There are other voices, less certain of the validity of the proposed Congressional action and preoccupied by problems of constitutional dimension.[77] And there are voices of Congressmen uncertain of the legal issues presented but desirous nonetheless of making a "political statement".[78] During discussions which preceded and followed the passage of the ATA, the Secretary of State[79] and the Legal Adviser to the Department of State,[80] a former member of this court, voiced their opinions to the effect that the ATA presented a conflict with the Headquarters Agreement.

Yet no member of Congress, at any point, explicitly stated that the ATA was intended to override any international obligation of the United States.

The only debate on this issue focused not on whether the ATA would do so, but on whether the United States in fact had an obligation to provide access to the PLO. Indeed, every proponent of the ATA who spoke to the matter argued that the United States did not have such an obligation. For instance, Senator Grassley, after arguing that the United States had no obligation relating to the PLO Mission under the Headquarters Agreement, noted in passing that Con-

gress had the *power* to modify treaty obligations. But even there, Senator Grassley did not argue that the ATA would supersede the Headquarters Agreement in the event of a conflict. 133 Cong. Rec. S 15, 621-22 (daily ed. November 3, 1987). This disinclination to face the prospect of an actual conflict was again manifest two weeks later, when Senator Grassley explained, "as I detailed earlier …, the United States has *no international legal obligation* that would preclude it from closing the PLO Observer Mission". 133 Cong. Rec. S 16,505 (daily ed. November 20, 1987) (emphasis added). As the *Congressional Record* reveals, at the time of the ATA's passage (on December 15 in the House and December 16 in the Senate), its proponents were operating under a misapprehension of what the United States' treaty obligation entailed. 133 Cong. Rec. S 18,190 (daily ed. December 16, 1987) (statement of Sen. Helms) (closing the Mission would be "entirely within our Nation's obligations under international law"); 133 Cong. Rec. H 11,425 (daily ed. December 15, 1988) (statement of Rep. Burton) (observer missions have "no — zero — rights in the Headquarters Agreement").[81]

In sum, the language of the Headquarters Agreement, the long-standing practice under it and the interpretation given it by the parties to it leave no doubt that it places an obligation upon the United States to refrain from impairing the function of the PLO Observer Mission to the United Nations. The ATA and its legislative history do not manifest Congress's intent to abrogate this obligation. We are therefore constrained to interpret the ATA as failing to supersede the Headquarters Agreement and inapplicable to the Mission.

C. The continued viability of the ATA

We have interpreted the ATA as inapplicable to the PLO Mission to the United Nations. The statute remains a valid enactment of general application. It is a wide gauged restriction of PLO activity within the United States and, depending on the nature of its enforcement, could effectively curtail any PLO activities in the United States, aside from the Mission to the United Nations. We do not accept the suggestion of counsel that the ATA be struck down. The federal courts are constrained to avoid a decision regarding unconstitutionality except where strictly necessary. *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 568-72 (1947). In view of our construction of the statute, this can be fairly avoided in this instance. The extent to which to the First Amendment to the Constitution and the Bill of Attainder Clause, art. I, §9, cl. 3, guide our interpretation of the ATA is addressed in *Mendelsohn v. Meese*, *post*.

VI

Conclusions

The Anti-Terrorism Act does not require the closure of the PLO Permanent Observer Mission to the United Nations, nor do the act's provisions impair the continued exercise of its appropriate functions as a Permanent Observer at the United Nations. The PLO Mission to the United Nations is an invitee of the United Nations under the Headquarters Agreement and its status is protected by that Agreement. The Headquarters Agreement remains a valid and outstanding treaty obligation of the United States. It has not been superseded by the Anti-Terrorism Act, which is a valid enactment of general application.

We express our thanks to the lawyers in this case, especially those appearing for *amici curiae*, for their professional dedication and their assistance to the court.

The motion of the defendants to dismiss for lack of personal jurisdiction is denied.

The motion of the defendants to dismiss for lack of subject-matter jurisdiction is denied.

The motion of the defendants to dismiss for lack of capacity, which was not briefed, is denied.

Mansour's motion to dismiss for failure to state a claim upon which relief may be granted is treated, pursuant to rule 12(b) of the Federal Rules of Civil Procedure, as a motion for summary judgement, Fed. R. Civ. P. 56, and is granted.

The motion of the United States for summary judgement is denied, and summary judgement is entered for the defendants, dismissing this action with prejudice.

SO ORDERED:

(*signed*) Edmund L. PALMIERI
United States District Judge

Dated: New York, New York
June 29, 1988

APPENDIX A

TITLE 22, UNITED STATES CODE (FOREIGN RELATIONS)

CHAPTER 61 — ANTI-TERRORISM — PLO

§5201. Findings; determinations

(*a*) Findings

The Congress finds that:

(1) Middle East terrorism accounted for 60 percent of total international terrorism in 1985;

(2) The Palestine Liberation Organization (hereafter in this title referred to as the "PLO") was directly responsible for the murder of an American citizen on the *Achile Lauro* cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen;

(3) The head of the PLO has been implicated in the murder of a United States Ambassador overseas;

(4) The PLO and its constituent groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad;

(5) The PLO covenant specially states that "armed struggle is the only way to liberate Palestine, thus it is an overall strategy, not merely a tactical phase";

(6) The PLO rededicated itself to the "continuing struggle in all its armed forms" at the Palestine National Council meeting in April 1987; and

(7) The Attorney General has stated that "various elements of the Palestine Liberation Organization and its allies and affiliates are in the thick of international terror".

(*b*) Determinations

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

§5202. Prohibitions regarding the PLO

It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after March 21, 1988:

(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; or

(2) To expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

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

§5203. Enforcement

(*a*) Attorney General

The Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this chapter.

(*b*) Relief

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

(*b*) United States Court of Appeals, District of Columbia Circuit

COMMITTEE OF UNITED STATES CITIZENS LIVING IN NICARAGUA v. REAGAN, JUDGEMENT OF 16 DECEMBER 1988[82]

Question of United States Government abiding by judgment of the International Court of Justice in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua — *Nature of the International Court of Justice and its judgments — Fifth Amendment to United States Constitution — Relationship of international law and municipal law*

(Gordon, *Senior District Judge*; Robinson and Mikva, *Circuit Judges*)

SUMMARY: *The facts*: — The Committee of United States Citizens Living in Nicaragua ("the Committee") was an association composed of several organizations opposed to United States foreign policy relating to Nicaragua. The Committee began proceedings in the United States courts concerning what it saw as the failure of the United States Government to abide by the judgment of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v. United States*) ("the *Nicaragua* case").[83] The International Court had held that United States support of the "Contra" rebel movement in Nicaragua violated principles of customary international law and treaty obligations arising under a bilateral agreement between Nicaragua and the United States.[84] The United States had denied that the Court had jurisdiction over the action and, before the International Court had given its judgment on the merits in the case, the United States Congress had approved continued financial material support for the rebel movement.

The Committee sought injunctive and declaratory relief against the Government's policy. The Committee alleged that the refusal of the United States to adhere to the judgment of the International Court was contrary to the obligations arising under Article 94 of the Charter of the United Nations,[85] as well as rules of customary international law. In addition they maintained that the obligation to comply with a decision of the Court was a peremptory norm of international law, or *jus cogens*, prevailing over both customary international law and treaties.

The Committee also asserted that the continued funding of the rebel movement contravened the Administrative Procedure Act and violated their rights under the First and Fifth Amendments to the United States Constitution.

The Government contended that the issues which were raised by the Committee's action were non-justiciable under the political question doctrine.

Held: — The claim was justiciable. The case was dismissed because it failed to state a claim upon which relief could be granted.

(1) No firm criteria had been established for the application of the political question exception to justiciability. Nevertheless, although certain aspects of the present action fell within the scope of the political question doctrine, the Government's contention that the entire basis of the litigation was non-justiciable was inappropriate. The claims of the Committee, however, wrongly pre-

sumed that individuals were vested with the right to enforce judgments of the International Court through proceedings in their national courts against their governments. The International Court operated upon the level of governments and its judgments did not vest rights in individuals. The Committee's attempts to circumvent this issue by asserting that the refusal of the United States Government to implement the judgment of the International Court was contrary to the principles of customary international law failed because its members lacked *locus standi* (pp. 253-254).

(2) The claims based upon the Fifth Amendment to the United States Constitution were too important to be rendered non-justiciable. Nevertheless, the Fifth Amendment submissions were dismissed because a claim upon which relief could be granted had not been established (pp. 254-255).

(3) (*a*)Whether a municipal court could remedy a violation of international law depended upon the nature of that violation. If a rule of customary international law had been violated and the political branches of the State had induced the violation the courts could not grant a remedy. The position as regards *jus cogens* was not so unequivocal but the Court did not resolve this confusion, because the rules which the Committee alleged were peremptory norms of international law were not recognized as such by the community of nations (pp. 255-256).

(*b*) The claims of the Committee with regard to treaty violations were dismissed on the basis of the principle that subsequent municipal legislation superseded conflicting provisions of preceding treaties. Therefore, the enactment by Congress providing for continued funding for the rebel movement overrode the international obligations of the United States owed under the United Nations Charter. Nevertheless, it was noted that the courts would do their utmost to construe subsequent statutes in a manner intended to minimize conflict with existing treaty obligations. The Committee lacked *locus standi* to enforce the provisions of the United Nations Charter in any event. Article 94 of the Charter did not confer enforceable rights upon individuals. The vesting of rights by treaty required provisions which were self-executing In order to determine whether a treaty was self-executing, the courts would look to the intention of the parties to that treaty as represented by the language adopted in the treaty. The courts would also look to see whether the onus was placed upon the government or judiciary for the implementation of the treaty within the domestic sphere. Article 94 placed the burden upon governments of the Member States of the United Nations (pp. 256-258).

(*c*) In accordance with the dualist approach adopted with regard to treaties, it followed that the application of the rules of customary international law as applied by the municipal courts was modified by later statutes adopted by Congress. Therefore, the claim upon this ground failed on the basis that a statute could not be found to violate a rule of customary international law (pp. 258-259).

(*d*) The claim that *jus cogens* operated within the municipal legal system on the same level as the Constitution of the United States failed. There was no evidence that *jus cogens* had the same binding force in a domestic legal system as it had on the international plane. Furthermore, neither the obligation to abide

by the decision of the International Court of Justice, nor the judgment of the Court itself, were peremptory norms of international law as alleged by the Committee. For a practice to develop into a rule of customary international law it had to enjoy consistent and general acceptance amongst a number of States. When State practice had reached a certain level, a rule of customary international law came into being. The Vienna Convention on the Law of Treaties, 1969, provided that a rule of customary international law had to be accepted and recognized by the whole of the international community to become part of the body of *jus cogens*.[86] That recognition had to include cognizance of the fact that the rule was non-derogable. The decision of the International Court in the *Nicaragua* case was not a peremptory norm of international law and could not be enforced by the municipal courts (pp. 259-262).

(4) The claims under the Administrative Procedure Act and the United States Constitution were dismissed (pp. 262-263).

NOTES

[1]Despite General Assembly Resolution 2372 (XXII) (1968) by which the United Nations changed the name of the territory of South West Africa to "Namibia", the Law Report containing this case describes the Court as being of "South West Africa" and, for convenience, this name has been retained.

[2]*International Law Reports*, vol. 82 (1990), pp. 464-99.

[3]49 *ILR* 2.

[4]17 *ILR* 47.

[5]7 *Ann Dig* 53.

[6]9 *Ann Dig* 44.

[7]2 *Ann Dig* 27.

[8]8 *Ann Dig* 128.

[9]52 *ILR* 29.

[10]Ibid. at 35-6.

[11]Ibid. at 39.

[12]49 *ILR* 2 at 39.

[13]Ibid.

[14]37 *ILR* 3 at 12.

[15]52 *ILR* 29.

[16]17 *ILR* 46 at 60.

[17]39 *ILR* 61 at 208 *et seq*.

[18]69 *ILR* 145 at 149-50.

[19]52 *ILR* 422 at 426.

[20]53 *ILR* 50 at 58.

[21]2 *Ann Dig* 27.

[22]52 *ILR* 29.

[23]43 *ILR* 114.

[24]55 *ILR* 89 at 93-4.

[25]52 *ILR* 29.

[26]52 *ILR* 29 at 36.

[27]Ibid. at 36.

[28]Ibid. at 39.

[29]52 *ILR* 422 at 426.

[30]52 *ILR* 29.

[31]2 Ann Dig 27.

[32]8 Ann Dig 128.

[33]9 Ann Dig 44.

[34]61 *ILR* 260 at 265.

[35]41 *ILR* 1 at 6-7.

[36]3 *Ann Dig* 46.

[37]See *International Law Reports*, vol. 80 (1989), pp. 47-227.

[38]77 ILR. 55.

[39]See p. 39.

[40]See p. 60.

[41]See p. 181.

[42]See p. 191.

[43]See p. 211.

[44]United Nations document A/42/915/Add.5; see also chaps. VI.2.7 and VII of this *Yearbook*.

[45]Title X of the Foreign Relations Authorization Act for Fiscal Years 1988-89. Pub. L. 100-204, §§1001-1005, 101 Stat. 1331, 1406-07; 22 U.S.C.A. §§5201-5203 (West Supp. 1988). It is attached hereto as Appendix A.

[46]G.A. Res. 169 (II), 11 U.N.T.S. 11, No. 147 (1947). 61 Stat. 756, T.I.A.S. No. 1676, authorized by S.J. Res. 144, 80th Cong., 1st Sess., Pub. L. 80-357, set out in 22 U.S.C. §287 note (1982). We refer to the Headquarters Agreement as a treaty, since we are not concerned here with making a distinction among different forms of international agreement. The applicable law implicates all forms, including the Headquarters Agreement. *Weinberger v. Rossi*, 456 U.S. 25, 29-30 (1982).

[47]H. Con. Res. 75, 79th Cong., 1st Sess., 59 Stat. 848 (1945).

[48]The Democratic People's Republic of Korea, the Holy See, Monaco, the Republic of Korea, San Marino and Switzerland. *Permanent Missions No. 262* at 270-77.

[49]The Asian-African Legal Consultative Committee, the Council for Mutual Assistance, the European Economic Community, the League of Arab States, the Organization of African Unity, and the Islamic Conference. *Permanent Missions No. 262* at 278-84.

[50]The PLO and the South West Africa Peoples' Organization (SWAPO). *Permanent Missions No. 262* at 285-86.

[51]Letter from Secretary of State George P. Shultz to Rep. Jack Kemp (October 16, 1986) ("the PLO Observer Mission … is in no sense accredited to the United States."), *reprinted in* 133 Cong. Rec. E 1, 635-36 (daily ed. April 29, 1987); accord 1 *Restatement (Third) Foreign Relations Law of the United States* §202, Reporters' Note 6 at 84 (1988).

[52]Without accreditation, no diplomatic immunity ensues. Cf. *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1985).

[53]General Assembly resolution 3237 (XXIX), 29 U.N. GAOR Supp. 31 (agenda item 108) 4, United Nations document A/9631 (1974).

[54]Ibid.; see also General Assembly resolution 3236 (XXIX) and 3210 (XXIX), 29 United Nations GAOR Supp. 31 (agenda items General Assembly 108) 3 & 4, United Nations document A/9631 (1974).

[55]E.g., 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987) (letter from Rep. Jack Kemp to Sec. of State George P. Shultz (dated October 16, 1986)).

[56]*Anti-PLO Terrorism Act of 1987*, H.R. 2211, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987). *Antiterrorism Act of 1987*, S. 1203 and H.R. 2548, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. S 6,448 (daily ed. May 14, 1987) and H 4,047 (daily ed. May 28, 1987). *Terrorist Organization Exclusion Act of 1987*, H.R. 2587, 100th Cong., 1st Sess., introduced in 133 Cong. Rec. H 4,198 (daily ed. June 3, 1987).

[57]The ATA, known as the Grassley Amendment after its sponsor Senator Grassley of Iowa, was added to the omnibus foreign relations spending bill on the floor of the Senate on October 8, 1987, despite the objections of several Senators. See 133 Cong. Rec. S 13,855 (daily ed. Oct. 8, 1987) (statement of Sen. Kassebaum) ("We do have hearings scheduled in the Foreign Relations Committee … [and] it is important for us to have a hearing to explore the ramifications of the issues …") *idem*, S 13,852 (statement of Sen. Bingaman) ("We need to further explore the issues raised by this amendment. It is an amendment that has not had any hearings, has not been considered in committee, and one that raises very serious issues of constitutional rights …").

[58]Pub. L. 100-204, Title X, §1002(a), 101 Stat. 1331, 1407, set out in 22 U.S.C.A. §5201 note (West Supp. 1988).

[59]Two of the original six individual defendants were not served, and the action against them has been dismissed on consent without prejudice. Fed. R. Civ. P. 41(a)(i).

[60]Mansour is also a plaintiff in the related case decided today. *Mendelsohn v. Meese*, 88 Civ. 2005 (S.D.N.Y. June 29, 1988) (filed herewith). The court there addresses his claim that the ATA is an unconstitutional Bill of Attainder. See also *Mendelsohn v. Meese* (S.D.N.Y. April 12, 1988) (denying preliminary injunctive relief).

[61]S.J. Res. 144, 61 Stat. 756 (22 U.S.C.§287 note); see also 1 *Foreign Relations of the United States 1947* 42-46 (1973).

[62]The United Nations has explicitly refrained from becoming a party to this litigation. The International Court of Justice makes a persuasive statement that the proceedings before this court "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 [alleged] dispute, concerning the application of the Headquarters Agreement." *U.N. v. U.S.*, *supra*, 1988 I.C.J. No. 77 ¶56, slip op. at 23.

[63]The Federal Arbitration Act itself, 9 U.S.C. §1-14 (1982), is applicable only to "a written agreement evidencing a transaction involving commerce." *Idem*, §2; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-01 (1956).

[64]The same is true of the suggestion of *amicus*, the Association of the Bar of the City of New York, that this court decline to exercise its equity jurisdiction before an arbitral tribunal has been convened. By doing so, the court could thereby place the executive department in an awkward position, leaving the impression that the court, rather than the executive, is making the determination of this issue of foreign policy. The court should not do by indirection what it cannot do directly.

[65]It is important to note that we may not inquire into the executive's reasons for refraining from arbitration, and in fact those reasons are not before us. See Press Conference, Assistant Attorney General Charles Cooper, 16 (March 11, 1988) ("I would not describe any of the deliberations that went into that decision."); see also Letter of Assistant Attorney General John R. Bolton to Judge Edmund L. Palmieri (May 12, 1988) (docketed at the request of government counsel in 88 Civ. 1962 and 88 Civ. 2005) ("arbitration would not be appropriate or timely").

[66]The political question doctrine is inapplicable to the court's duty to interpret the Headquarters Agreement and the ATA. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). We are interpreting the Agreement, but are unwilling to expand the reach of its arbitration clause to a point which would be inconsistent with the limitations placed upon us by the Constitution.

[67]Section 12 requires that the provisions of section 11 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". 61 Stat. at 761 (22 U.S.C. §287 note).

Section 13 limits the applicability of the United States laws and regulations regarding the entry and residence of aliens, when applied to those affiliated with the United Nations by virtue of Section 11. *Idem*, at 761-62 (22 U.S.C. §287 note).

[68]This letter was reproduced as item 33 of the Compendium submitted by the parties

to the court. See also Letter from Sec. of State George P. Shultz to Sens. Robert J. Dole, Charles E. Grassley, Claiborne Pell and Rep. Jack F. Kemp (July 31, 1987) ("this would be seen as a violation of a U.S. treaty obligation"); Letter from Sec. Shultz to Sen. Dole (January 29, 1987), *reprinted in* 133 Cong. Rec. S 6,449 (daily ed. May 14, 1987) ("while we are therefore 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, we retain the right to deny entry to, or expel, any individual PLO representative directly implicated in terrorist acts"); Letter from Sec. Shultz to Rep. Kemp (November 12, 1986), *reprinted in* 133 Cong. Rec. E 1,635, 1,636 (daily ed. April 29, 1987) (same language).

[69]This court has no information concerning the nature or content of these consultations, beyond the fact that the Department of Justice and the Department of State both appear to support current efforts to repeal the ATA. See H.R. 4078, 100th Cong., 2d Sess., *introduced in* 134 Cong. Rec. H 696 (daily ed. March 3, 1988) (statement of Rep. Crockett); Letter from Acting Assist. Atty. Gen. Thomas M. Boyd to Rep. Dante B. Fascell (May 10, 1988) (expressing reservations about H.R. 4078, but supporting it, with modifications); Letter from Assist. Sec. of State J. Edward Fox to Rep. Fascell (April 29, 1988) (same).

[70]See Letter from Vernon A. Walters, United States Ambassador to the United Nations, to United Nations Secretary-General Javier Pérez de Cuéllar (October 27, 1987); Letter from Herbert S. Okun to Secretary-General Pérez de Cuéllar (January 5, 1988).

[71]In addition, the United Nations General Assembly has, on several occasions, reaffirmed its position that the PLO Mission is covered by the provisions of the Headquarters Agreement. General Assembly Resolution 42/230 (agenda item 136) (March 23, 1988); General Assembly resolution 42/229 A (agenda item 136) (March 2, 1988); see also General Assembly resolution 42/232 (agenda item 136) (May 18, 1988).

[72]133 Cong. Rec. S 18, 185-86 (daily ed. December 16, 1987).

[73]See pp. 23-25 and notes 68 and 69 above. See also Transcript of Joint Conference on H.R. 1777, p. 208 (December 3, 1987) (statement of State Department representative Jamie Selby: "it is a legal obligation based on practice in interpreting a treaty"); 133 Cong. Rec. H 11,224 (daily ed. December 10, 1987) (statement of Rep. Crockett) (ATA would place United States "in violation of our treaty obligations").

[74]E.g., Pub. L. 100-204 §215(a), 101 Stat. 1331, 1343 (adding 22 U.S.C. §4315(a)) ("A foreign mission may not allow an unaffiliated alien the use of any premise of that foreign mission which is inviolable under United States law *(including any treaty)* for any purpose which is incompatible with its status as a foreign mission including use as a residence.") (emphasis supplied); see also *idem*, §806(d)(1)(B), 101 Stat. at 1398 (adding 19 U.S.C. §2492(d)(1)(B)) (abrogating "agreements", necessarily international).

[75]Transcript of oral argument, p. 18 (June 8, 1988). This concession disposes of the suggestion that the United States' security reservation to the Headquarters Agreement, annex 2, §6, 61 Stat. at 766, 767-681 (22 U.S.C. §287 note), serves as a justification for the ATA.

[76]E.g., 133 Cong. Rec. H 11, 684-85 (daily ed. December 18, 1987) (statement of Rep. Burton); 133 Cong. Rec. S 15,621 (daily ed. November 3, 1987) (statement of Sen. Grassley); 133 Cong. Rec. S 9,627 (daily ed. July 10, 1987) (statement of Sen. Grassley); 133 Cong. Rec. E 2,249 (daily ed. June 4, 1987) (statement of Rep. Gallegly); 122 Cong. Rec. H 4,047 (daily ed. May 28, 1987) (statement of Rep. Herger); 133 Cong. Rec. S 6,449 (daily ed. May 14, 1987) (statement of Sen. D'Amato); ibid., S 6448 (statement of Senator Dole); 133 Cong. Rec. E 1,635 (daily ed. April 29, 1987) (statement of Rep. Kemp).

[77]133 Cong. Rec. H 12,224 (daily ed. December 10, 1987) (statement of Rep. Crockett); 133 Cong. Rec. S 13,852 (daily ed. October 8, 1987) (statement of Sen. Bingaman); 133 Cong. Rec. E 2,895 (daily ed. July 14, 1987) (statement of Rep. Bonior).

[78]Transcript of Joint Conference on H.R. 1777, pp. 210-11 (December 3, 1987) (statements of Reps. Mica and Kostmayer).

[79]"As far as the closure of the PLO Observer Mission is concerned, this would be

seen as a violation of a United States treaty obligation under the United Nations Headquarters Agreement." Letter from Secretary of State George P. Shultz to unnamed Senators and Congressmen (July 31, 1987), *partially reprinted in* 133 Cong. Rec. S 16,605 (daily ed. November 20, 1987) (statement of Sen. Grassley).

[80]Hon. Abraham Sofaer: "It is our judgement that the Headquarters Agreement as interpreted and applied would be violated." *The New York Times*, January 13, 1988 at A3.

[81]Accord 133 Cong. Rec. H 8,790 (daily ed. October 20, 1987) (statement of Rep. Burton); 133 Cong. Rec. S 9,627-28 (daily ed. July 10, 1987) (statement of Sen. Grassley); 133 Cong. Rec. S 6,449-50 (daily ed. May 14, 1987) (statement of Sen. D'Amato); ibid., S 6,449 (statement of Sen. Dole). Indeed, this misapprehension apparently has continued after the passage of the ATA and even during the pendency of this lawsuit. E.g., 134 Cong. Rec. S 3,113 (daily ed. March 25, 1988) (statement of Sen. D'Amato); 134 Cong. Rec. S 1,997 (daily ed. March 4, 1988) (statement of Sen. Grassley).

[82]International Law Reports, vol. 85 (1991), pp. 248-73.

[83]76 *ILR* 1.

[84]Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 1956.

[85]Article 94 provided that each Member of the United Nations that was a party to proceedings before the ICJ undertook to comply with the decision of the Court. See p. 255.

[86]See article 53 of the Vienna Convention on the Law of Treaties, 1969, on p. 261.