

American Bar Association Section of International Law and Practice Standing Committee on World Order under Law Report to the House of Delegates

II. PALESTINE LIBERATION ORGANIZATION

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association

1. condemns the terrorist activities of the Palestine Liberation Organization (PLO) often directed against innocent civilians in Israel and other countries, including citizens of the United States;
2. notes that a dispute is asserted to have arisen between the United States and the United Nations with respect to the proposed closure of the PLO's Observer Mission to the United Nations;
3. considers that the respective obligations of the United States and the United Nations under the Headquarters Agreement may need to be clarified by an arbitral decision, as provided in Section 21 of that Agreement;
4. urges the United States Government to participate in any arbitration proceedings pursued by the United Nations in accordance with that Agreement.

REPORT

I. Introduction

The purpose of the proposed Recommendations and the Report that accompanies it is to express the support of the American Bar Association for the settlement by international arbitration of the dispute that arose recently between the United States Government and the United Nations. The American Bar Association committed itself in its Goal VIII to "the development of the rule of law in dispute avoidance and resolution of conflict between nations." This goal should be interpreted as applying as well to any dispute between the United Nations and one of its member states, especially where there is extant a special agreement obliging a state to submit a particular category of disputes to a tribunal of three arbitrators to be chosen in accordance with a procedure clearly delineated in the Headquarters Agreement.

As this dispute involves the Palestine Liberation Organization (PLO), it may be useful to recall that the American Bar Association has adopted several

resolutions condemning international terrorism and recommending that the Government of the United States ratify various anti-terrorist conventions, assist in their implementation, and encourage the development of new measures to combat terrorism. Resolutions to that effect were adopted, for instance, in February of 1981 and 1982, and another has been submitted for approval in August 1988. In accordance with this firm policy of the American Bar Association, the resolution here proposed would expressly condemn the terrorist activities of the PLO which have resulted in the death of many innocent civilians both in Israel and other countries.

II. Obligation to Arbitrate

The dispute which is the subject of this report, while relating to the Observer Mission of the PLO to the United Nations, involves primarily the interpretation of an agreement between the United States and the United Nations, the validity of which is not contested by either party.

It has to be pointed out that there are in this situation two related but separate disputes. The substantive dispute between the United States and the PLO relates to the consistency with the United Nations-United States Agreement Regarding the Headquarters of the United Nations* of an action brought by the Attorney-General of the United States pursuant to the provisions of the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001-1005, 22 U.S.C. §§ 5201-5203 (1987),** seeking from a United States District Court an injunction directing the closure of the PLO Observer Mission to the United Nations. But the issue which arose between the United States and the United Nations relates to a different problem—the obligation of the United States to accept the settlement by arbitration of a dispute relating to the interpretation of the Headquarters Agreement's provisions relating to Observer Missions. The American Bar Association believes that it would further the rule of law in the world if the United States would agree to submit this separate dispute to arbitration in accordance with the specific clause inserted in the Headquarters Agreement for this very purpose.

If the United States considers that for some reason this particular dispute is not subject to arbitration, and the United Nations disagrees with the contention, this preliminary dispute can also be submitted to arbitration under the agreed arbitration provision. It is a generally recognized principle of international law that an arbitral tribunal is judge of its competence, and determines it on the basis of a strict interpretation of the relevant arbitration clause. In particular, the tribunal may be asked to decide: (a) whether there was actually a "dispute" between the parties; (b) whether there was a sufficient attempt to settle the dispute by negotiations; and, (c) whether it was premature to resort to arbitration

*See Appendix A

**See Appendix B

if the controversial legislation has not been implemented and as long as the matter was still pending before a United States court, which may decide that the contested legislation is not enforceable against the PLO.

III. The Advisory Opinion of the International Court of Justice

On March 2, 1988, the General Assembly submitted to the International Court of Justice a request for an advisory opinion on the following question:

In the light of facts reflected in the reports of the Secretary-General [A/42/915 and Add.1], is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?

The Court replied unanimously on April 26, 1988, that

the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.

It is not the purpose of this report to discuss the content of the Court's opinion. Suffice it to say that, according to the three judges who presented separate opinions, the Court opinion answered only the narrow question referred to it by the General Assembly, and left a number of other questions unanswered. Consequently, should the matter be presented to an arbitral tribunal, the arbitrators, who are not bound by the Court's opinion, may consider the matter *de novo*, on the basis of full briefs and oral arguments presented by the parties (which were presented only in an abbreviated form in the expedited proceedings before the Court), and may arrive at a different decision than the Court. It must be remembered also that the Court scrupulously refrained from dealing with the merits of the dispute, as it considered that the issue "whether the enactment, or the enforcement, of the United States Anti-Terrorism Act would or would not constitute a breach of the provisions of the Headquarters Agreement" was "reserved for the arbitral tribunal." (Paragraph 45 of the Advisory Opinion).

IV. Action to Be Taken

The situation may be slightly clarified by the decision to be rendered by the United States District Court for the Southern District of New York, *United States v. Palestine Liberation Organization*, to which the United Nations is not a party, though it presented an *amicus curiae* brief. It is likely, however, that there will be appeals from this court's decision, and the matter may remain in suspense for a long time. The Gordian knot may be cut more quickly by submitting the matter to an international arbitral tribunal. The decision of such a tribunal would be considered more impartial than a decision of a United States court which, in case

of conflict between national and international law, is likely to give precedence to later domestic legislation over a prior international agreement. Only submission to an international decision is going to be considered by the public opinion of the world as consonant with United States' dedication to the rule of law. It is the duty of the American Bar Association to exhort the United States to take a courageous step in that direction.

Respectfully submitted,

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Standing Committee on World
Order Under Law

Joseph P. Griffin, Chairman
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and Practice

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APPENDIX A

Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 22 U.S.C. § 287, 61 Stat. 3416, T.I.A.S. 1676, 12 Bevans 956, 11 U.N.T.S. 11.

...

Section 11

The federal, state, or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of:

1. Representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials;
2. Experts performing missions for the United Nations or for such specialized agencies;
3. Representatives of the Press, or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) after consultation with the United States;
4. Representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter; or
5. Other persons invited to the headquarters district by the United Nations or by such specialized agency on official business.

The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district. This section does not apply to general interruptions of transportation which are to be dealt

with as provided in section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation.

...

Section 12

The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.

...

Section 21

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

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

...

Section 27

This agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfill its purposes.

APPENDIX B

Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204. §§ 1001-1005, 22 U.S.C. §§ 5201-5205, enacted December 22, 1987.

TITLE X—ANTI-TERRORISM ACT OF 1987

SEC. 1001. SHORT TITLE

This title may be cited as the "Anti-Terrorism Act of 1987."

SEC. 1002. 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 Achille 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 specifically 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.

SEC. 1003. 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 the effective date of this title—

- (1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;
- (2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or
- (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdictions 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.

SEC. 1004. ENFORCEMENT

- (a) **ATTORNEY GENERAL.**—The Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this title.
- (b) **RELIEF.**—Any district court of the United States for a district in which a violation of this title occurs shall have authority, upon petition of relief by the Attorney General, to grant injunctive and such other equitable relief as it shall deem necessary to enforce the provisions of this title.

SEC. 1005. EFFECTIVE DATE

- (a) **EFFECTIVE DATE.**—Provisions of this title shall take effect 90 days after the date of enactment of this Act.
- (b) **TERMINATION.** —The provisions of this title shall cease to have effect if the President certifies in writing to the President pro tempore of the Senate and the Speaker of the House that the Palestine Liberation Organization, its agents, or constituent groups thereof no longer practice or support terrorist actions anywhere in the world.