

# Comment

## An International Farce: The Sad Case of the PLO Mission

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At the end of one of his great farces, Shakespeare's *King of France* assures us that "[a]ll is well ended, if this suit be won."<sup>1</sup> But lawyers know that the ways in which outcomes are achieved may themselves have precedential effects on future procedures. Even a tolerable outcome in a particular case may yield long-term consequences that bedevil efforts at public order. This possibility is the detritus of the PLO Mission affair. All may have ended well. Before we congratulate ourselves on the operation of justice, however, we should reflect on all the lamentable behavior that precipitated the crisis and on all the ill-considered actions that helped to resolve it.

To understand the facts, we must begin over forty years ago. In 1947, the United States and the United Nations, newly established in New York City, concluded what has come to be known as the Headquarters Agreement.<sup>2</sup> The Agreement sets out the basic rights and obligations of each of the parties and constitutes an indispensable part of the environment necessary for an organization which, although international, must maintain and operate its headquarters within the territory of a single state. The Agreement was quite comprehensive and included a dispute settlement procedure.<sup>3</sup> By a joint resolution of August 4, 1947, Congress authorized the President to bring the Agreement into effect.<sup>4</sup> Congress anticipated that the Agreement would be interpreted in the course of its implementation, and that this might involve some changes. Hence its

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1. W. SHAKESPEARE, *ALL'S WELL THAT ENDS WELL*, epilogue, line 2.

2. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 756, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (1947) [hereinafter *Headquarters Agreement*].

3. *Id.* § 21. See *infra* text accompanying notes 49-54.

4. Joint Resolution of Aug. 4, 1947, Pub. L. No. 80-357, 61 Stat. 756 (codified at 22 U.S.C. § 287 app. at 101 (1982)).

authorization included an empowerment to conclude “such changes therein not contrary to the general tenor thereof and not imposing any additional obligations on the United States as the President may deem necessary and appropriate . . . .”<sup>5</sup>

Section 11 of the Headquarters Agreement obliged the various levels of authority within the United States not to impose impediments to transit from or to the Headquarters District upon representatives of members, officials of the United Nations, experts performing missions, representatives of the press, representatives of non-governmental organizations recognized by the Organization and “other persons invited to the Headquarters District by the United Nations . . . .”<sup>6</sup>

Early in its history, the General Assembly began to invite observers to its meetings—some for brief terms, some for longer terms.<sup>7</sup> These observers have become important and sometimes indispensable participants in the work of the United Nations.<sup>8</sup> In a relatively short period of time, the status of “Permanent Observer” was established and recognized. The U.S. Government has routinely provided the benefits of the Headquarters Agreement to these Permanent Observers, on the common understanding that they fell within Section 11’s category of “other persons invited to the Headquarters District.”

In 1974, the Palestine Liberation Organization (PLO) was invited by the General Assembly to “participate in the sessions and the work of the

5. *Id.*

6. Headquarters Agreement, *supra* note 2, § 11. Section 11 provides in full:

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) in its discretion 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.

7. See, e.g., *Observer status for the South West Africa People’s Organization*, G.A. Res. 31/152, 31 U.N. GAOR Supp. (No. 39) at 136, U.N. Doc. A/31/39 (1976); *Observer status for the Islamic Conference at the United Nations*, G.A. Res. 3369, 30 U.N. GAOR Supp. (No. 34) at 3, U.N. Doc. A/10034 (1975); *Status of the Council for Mutual Economic Assistance in the General Assembly*, G.A. Res. 3209, 29 U.N. GAOR Supp. (No. 31) at 2-3, U.N. Doc. A/9631 (1974); *Co-operation between the United Nations and the Organization of African Unity*, G.A. Res. 2011, 20 U.N. GAOR Supp. (No. 14) at 2, U.N. Doc. A/6014 (1965).

8. For a good history of observer status, see Suy, *The Status of Observers in International Organizations*, in 160 RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL 75 (1978).

General Assembly in the capacity of observer."<sup>9</sup> The PLO established an Observer Mission, and since that time has maintained a permanent office in New York City. The PLO is listed in U.N. publications as a member of a category of "'organizations which have received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as observers.'"<sup>10</sup>

Shortly after the invitation was extended, the B'nai B'rith Anti-Defamation League, a private organization in the United States,<sup>11</sup> sought to enjoin the U.S. Government from granting visas to members of the PLO. A District Court rejected the request on the ground that the United States was obliged to issue visas on the basis of its obligations in the Headquarters Agreement.<sup>12</sup>

There the matter rested until public opinion in the United States was aroused by the *Achille Lauro* incident in 1987, in which Palestinian "irregulars" seized an Italian cruise ship with the intention of using it for an operation against Israel. The mission went awry; in the course of its conclusion, the Palestinians murdered a passenger, an elderly American confined to a wheel chair.<sup>13</sup> In December, 1987, in the face of resistance from the Reagan Administration, Congress passed the Anti-Terrorism Act of 1987.<sup>14</sup> Section 1003 of the Act provided:

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

. . . . .  
(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

9. *Observer status for the Palestine Liberation Organization*, G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974).

10. This is how the ICJ characterized the PLO in its recent case, *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June, 1947*, 1988 I.C.J. 12, 15 (Advisory Opinion of Apr. 26, 1988) (quoting U.N. publications) [hereinafter ICJ Advisory Opinion].

11. The Anti-Defamation League (ADL) of B'nai B'rith is a civil rights association founded in 1913. The ADL was established "[t]o stop the defamation of Jewish people and to secure justice and fair treatment to all citizens alike." 1 ENCYCLOPEDIA OF ASSOCIATIONS 1334 (1988).

12. *Anti-Defamation League v. Kissinger*, No. 74 Civ. 1545 (E.D.N.Y. Oct. 31, 1974), reprinted in part in 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 27.

13. For descriptions of the *Achille Lauro* incident, see Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158, 164-68 (1987); McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985).

14. Pub. L. No. 100-204, §§ 1001-1005, 101 Stat. 1406 (codified at 22 U.S.C.A. §§ 5201-5203 (West Supp. 1988)) [hereinafter Anti-Terrorism Act].

of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor thereto, or any agents thereof.<sup>15</sup>

The original targets of this legislation were the PLO Observer Mission in New York and the PLO information office in Washington, D.C. This was clear from the final text of the bill as well as from statements made on the floor of each house when revisions of the bill were introduced in late April and May 1987.<sup>16</sup> In September, 1987, the Executive Branch ordered the PLO to close its information office in Washington, D.C. in the hope of placating Congress and arresting the progress of the Anti-Terrorism Act.<sup>17</sup> Congress was not dissuaded, however, and when the Act was incorporated into a larger omnibus appropriations bill in October, 1987,<sup>18</sup> now exclusively targeting the PLO Mission, the President signed it, despite continuing misgivings about the Act's legality.<sup>19</sup>

Even though the U.N. Secretariat believed that the implementation of the Anti-Terrorism Act would violate the Headquarters Agreement, it was unable to secure from the United States a commitment to refrain from implementing the Act.<sup>20</sup> Nor could the United Nations persuade the United States to cooperate in initiating arbitration in accordance with the Agreement's dispute resolution mechanism.<sup>21</sup> When negotiations deadlocked, the General Assembly entered the picture. At the conclusion of a special session convened to deal with the impending application of the U.S. statute, the General Assembly resolved that the Anti-Terrorism Act was inconsistent with the United States' obligations to the United Nations under the Headquarters Agreement.<sup>22</sup> The General Assembly asked the International Court of Justice to issue an Advisory Opinion on whether the United States was obliged to participate in arbi-

15. *Id.* § 1003 (codified at 22 U.S.C.A. § 5202 (West Supp. 1988)).

16. For the legislative history of the Anti-Terrorism Act, see 133 CONG. REC. E1635-36 (daily ed. Apr. 29, 1987); 133 CONG. REC. S6448-51 (daily ed. May 14, 1987); 133 CONG. REC. H4047-48 (daily ed. May 28, 1987); 133 CONG. REC. H4198 (daily ed. June 3, 1987).

17. See *P.L.O. Backers Ordered to Close Capital Office*, N.Y. Times, Sept. 16, 1987, at A1, col. 1; *Washington Talk: State Department; Ousting the P.L.O.*, N.Y. Times, Sept. 24, 1988, at A24, col. 4; *P.L.O. Given 6 More Weeks to Close Washington Office*, N.Y. Times, Oct. 15, 1987, at A8, col. 1.

18. The Anti-Terrorism Act was added without hearings as a rider to the Foreign Relations Authorization Act for Fiscal Years 1988-89. See 133 CONG. REC. S13,851 (daily ed. Oct. 8, 1987). The Anti-Terrorism Act was briefly discussed during a joint conference on the Foreign Relations Authorization Act, during which the House conferees acceded to the Senate's version. See 133 CONG. REC. S18,193 (daily ed. Dec. 16, 1987).

19. See the articles cited at *supra* note 17.

20. ICJ Advisory Opinion, *supra* note 10, at 17-20.

21. *Id.* at 19-22.

22. G.A. Res. 229A, *Resolutions and Decisions Adopted by General Assembly at its Forty-Second Session (29 February - 2 March 1988)*, U.N. Doc. GA/7612/Add.1 (9 March 1988) at 1, reprinted in part in ICJ Advisory Opinion, *supra* note 10, at 21.

tration as requested by the United Nations pursuant to the Headquarters Agreement's dispute resolution clause.<sup>23</sup>

On March 11, 1988, ten days before the Act's effective date and while the ICJ opinion was pending, the Department of Justice informed the PLO Observer Mission that it would have to close.<sup>24</sup> The PLO refused to comply and indicated that it would resist the demand for closure. The Justice Department then initiated an action to secure the closure of the Mission, as the statute prescribed, in the Federal District Court of the Southern District of New York. While that case was pending, the International Court issued a unanimous opinion, confirming the General Assembly's conclusion that the Act violated the Headquarters Agreement, and that the United States was obliged to commence arbitration.<sup>25</sup>

Shortly afterwards, the Federal District Court in which the Department of Justice had filed suit ruled, *per* Judge Edmund L. Palmieri, that congressionally-mandated closure of the PLO Mission would indeed constitute a violation of the Headquarters Agreement, and that, as Congress had not explicitly indicated an intention to violate the Agreement, courts were to assume that it had not intended to do so. Thus, the Court found against the Department of Justice.<sup>26</sup>

On August 29, 1988, the Reagan Administration decided not to appeal the decision,<sup>27</sup> effectively terminating the United States' effort to close the PLO Mission and avoiding what apparently all had conceded would have been a violation by the United States of its obligations to the United Nations. The curtain rang down on the PLO Mission case.

## I

The principal villain of this farce was the U.S. Congress. Congress enacted the Anti-Terrorism Act of 1987 with scant concern either for the international political consequences of its actions or, at least for many of its members, for the Act's incompatibility with an international obligation previously undertaken by the United States. It is difficult to escape

23. G.A. Res. 229B, *Resolutions and Decisions Adopted by General Assembly at its Forty-Second Session (29 February - 2 March 1988)*, U.N. Doc. GA/7612/Add.1 (9 March 1988) at 3, reprinted in part in ICJ Advisory Opinion, *supra* note 10, at 13.

24. Letter from U.S. Attorney General Meese to Chief of the PLO Observer Mission to the U.N. (Mar. 11, 1988), cited in *United States v. Palestine Liberation Org.*, No. 88 Civ. 1962, slip op. at 9 (S.D.N.Y. June 29, 1988).

25. ICJ Advisory Opinion, *supra* note 10, at 35.

26. *United States v. Palestine Liberation Org.*, slip op. at 35.

27. *U.S. Will Allow P.L.O. to Maintain its Office at U.N.*, N.Y. Times, Aug. 30, 1988, at A1, col. 6.

the conclusion that many of the movers of the legislation were acting from motives of sheer opportunism.<sup>28</sup>

The recent development of a new flexibility on the part of the Palestinians and certain tentative initiatives by close associates of Yassir Arafat, culminating in the PLO's acceptance of Resolution 242,<sup>29</sup> presented unusual opportunities for the Executive. These opportunities were undermined by the Anti-Terrorism Act which, had it been implemented, could well have ended them. Congress' concern for internal security is certainly well-founded, and it is far too late in our constitutional history to bicker about whether action of this sort is an infringement of an exclusive Executive power. Congress increasingly and probably irreversibly participates in foreign affairs. The pertinent question is no longer whether it should be doing so, but whether it is doing so responsibly and with an appropriate level of competence.

There was no evidence that the PLO Mission was either a headquarters or instrument of terror in the United States or elsewhere. Helping neither the Executive nor the fight against terrorism, Congress managed to weaken the credibility of American treaty commitments and to offend the U.N. Secretariat and almost every delegation to the United Nations. Incidents like this one leave a residue of bad feeling, which hardly helps the Executive conduct foreign relations.

It was of little concern to its drafters that the legislation would have violated an international agreement. Despite Judge Palmieri's opinion, there was no question that such was its intention and consequence. This lack of concern is particularly disappointing in a Congress that has, of late, frequently alleged Executive departures from treaties to which the Senate had advised and consented,<sup>30</sup> and has preached, with a thundering righteousness, about the need for faithful implementation of the international commitments this nation undertakes.

28. See, e.g., 133 CONG. REC. S6448 (daily ed. May 14, 1987) ("This organization, and its personnel, have no place in America; they have no place in civilized society. It's time they were banished.") (remarks of Senator Dole); *id.* at S6449 ("[T]he Constitution is not at issue; the United Nations is not at issue; the Middle East peace process is not at issue. Terrorism is the issue.") (remarks of Senator Dole); 133 CONG. REC. H4047 (daily ed. May 28, 1987) ("I urge my colleagues to join me in this effort to rid America of one of the world's most notorious terrorist organizations, a group which has no place in a free country such as ours.") (remarks of Representative Herger).

29. S.C. Res. 242, 22 U.N. SCOR RESOLUTIONS AND DECISIONS at 8, U.N. Doc. S/INF/22/Rev.2 (1967), *reprinted in* 1967 U.N.Y.B. 257 (resolution "guaranteeing the territorial inviolability and political independence of every State in the [Middle East] area," the PLO's acceptance of which has long been considered by both Israel and United States to be a prerequisite for peace negotiations).

30. *Senate Committee Threatens Delay of New Arms Pact*, N.Y. Times, Sept. 21, 1987, at A1, col. 6; *In a Setback to Reagan's Policy, House Votes to Halt Nuclear Tests*, N.Y. Times, May 20, 1987, at A10, col. 3.

## II

The second villain of the farce was the Justice Department. Faced with legislation that violated an important treaty, the Executive initially acquiesced, without much conviction, agreeing that section 11 of the Headquarters Agreement, by its terms, did not require the toleration of permanent observer missions.<sup>31</sup> But even a first-year law student knows that after forty-one years of intensive application of an instrument, the practice that has illuminated the text is as important as the text itself. Indeed, the congressional authorization of the Agreement had contemplated and endorsed such developments, and some three decades of practice had surely established it.

The content of the international obligation was actually of little importance to the Department of Justice. The Department acknowledged the violation which the Anti-Terrorism Act would cause, and then indicated that it would nonetheless enforce the legislation. Attorney General Edwin Meese said:

I am aware of your position that requiring closure of the Palestine Liberation Organization ("PLO") Observer Mission violates our obligations under the United Nations ("UN") Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course available to me is to respect and follow that decision.<sup>32</sup>

The Constitution does not *in haec verba* superordinate subsequent legislation over prior treaties with which it may be incompatible: It states simply that the Constitution, treaties and statutes comprise our law without indicating which might take precedence in case of conflict. The nineteenth-century judicial creation of the so-called "last in time rule,"<sup>33</sup> to which the Attorney General referred and which is actually much more

31. *State Department Adviser Says Shutting P.L.O. Mission Would Break Law*, N.Y. Times, Jan. 13, 1988, at A3, col. 1.

32. Letter of March 21, 1988 from U.S. Attorney General Edwin Meese to the Permanent Observer of the PLO to the United Nations, *reprinted in part in ICJ Advisory Opinion, supra* note 10, at 24.

33. See *Chinese Exclusion Case*, 130 U.S. 581, 600, 602 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 599 (1884). See also Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987) (reviews *Chinese Exclusion Case* and its progeny within context of relationship between international law and congressional, executive and judicial power).

complicated than he suggested, was fashioned long before modern international law and, in particular, before the rise of public international organizations.

Context is important in understanding and construing any communication. It is one thing to authorize Congress to override in simple fashion a bilateral treaty in the international political context of the nineteenth century. It is quite another to authorize Congress to override an agreement with the most inclusive international organization in the international political context of the late twentieth century. Apparently no one in the Justice Department inquired whether an American court had ever been asked to decide if Congress can selectively override treaty-assumed host obligations to an international organization. To cite the old rule without reference to the modern context, and to rest its authority simply on the fact that it is old, is about as relevant as citing *Plessy v. Ferguson*<sup>34</sup> as an adequate support for segregation during the litigation of *Brown v. Board of Education*.<sup>35</sup>

The Département of Justice was not alone. The *New York Times* weighed into the matter by supporting the Justice Department, which it rarely does, and proclaiming that “[t]he Justice Department in fact has no license to disobey domestic law and should not be encouraged to do so.”<sup>36</sup> The Academy also appeared to agree. Professor Glennon, in a letter to the *New York Times*, argued that when Congress violates international law—by adopting legislation which is at odds with an existing international obligation—both the Executive and the Courts must implement that violation.<sup>37</sup>

The conception of law underlying all these views was distorted. The “last in time” rule, according to which inconsistencies between earlier and later legislation are resolved in favor of the later, is little more than a good-housekeeping practice—as long as one is concerned only with legislation. But in a system of separation of powers and checks and balances, particularly in the foreign affairs area, which is characterized by an intricate network of sequential checks and counter-checks, it would indeed be peculiar if a momentous competence such as the overriding of a solemn commitment engaging the faith and credit of the United States with another government could be accomplished by a simple and routine major-

34. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

35. 347 U.S. 483 (1954).

36. *Looking Foolish on the P.L.O.*, N.Y. Times, Mar. 4, 1988, at A38, col. 1 (editorial).

37. Glennon, *White House Can't Disregard Law on P.L.O.*, N.Y. Times, Apr. 6, 1988, at A22, col. 4 (Letter to the editor). See also T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 113 (1987) (discussing the “last in time” principle); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221-22 (1972).



ity vote of a single Branch, a vote which is then embedded in an omnibus legislation which the Executive cannot selectively veto but must take or leave as an indivisible entity.<sup>38</sup>

The so-called "last in time" rule is often described in grossly oversimplified terms. A special judicial hermeneutic has been developed and applied under the rubric of "last in time" when the conflict is between a treaty and subsequent legislation. The basic, although unstated, principle is judicial preeminence: The law in these matters, to paraphrase John Chipman Gray, is what the courts say.<sup>39</sup> The judge endeavors to "accommodate" the apparently divergent texts. Accommodation is often a euphemism for trying to "shoe-horn" the statute into the treaty. The fit can be preposterously tight.<sup>40</sup> There is a very strong presumption, and until the *PLO* case a rebuttable one, that the treaty prevails, i.e., that Congress did not intend to violate the treaty, unless an intention manifest on the face of the legislation indicates that such a violation was the unmistakable congressional purpose. In interpreting a given statute, the courts have assumed a very broad interpretative competence. And some "interpretations" have substantially refashioned the statute in a way alien to its apparent or "plain and natural" intention. In sum, judges have reserved a potentially very broad power to determine if and how the statute is to coexist with the international commitment. In some cases, the violation has been upheld and effected.<sup>41</sup> In other cases, it has not.<sup>42</sup>

38. See Reisman & McDougal, *Who Can Terminate Mutual Defense Treaties?*, NAT'L L.J., May 21, 1979, at 19; Reisman & McDougal, *Can the President Unilaterally End Treaties?*, NAT'L L.J., May 28, 1979, at 17 (Constitution requires balancing of congressional and presidential powers in terminating international agreements such as 1954 U.S.-Taiwan Mutual Defense Treaty).

39. See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 115-16 (1909) ("[W]e have seen that the law is made up of the rules for decision which the courts lay down; . . . the judges are rather the creators than the discoverers of the law.").

40. See *United States v. Palestine Liberation Org.*, No. 88 Civ. 1962, slip op. at 18-21 (S.D.N.Y. June 29, 1988); *Chinese Exclusion Cases*, 130 U.S. 581, 600 (1889) ("It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country.").

41. See, e.g., *Chinese Exclusion Case*, 130 U.S. 581 (1889) (act forbidding petitioner from entering United States which was in conflict with prior treaties between United States and China must be given effect by courts); *Head Money Cases*, 112 U.S. 580 (1884) (statute levying duty on captain for each non-citizen passenger arriving by ship in U.S. port is valid despite numerous treaties permitting immigration); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870) (act imposing tax on liquor and tobacco "produced anywhere within the exterior boundaries of the United States" applies to Cherokee territories notwithstanding prior treaty exempting all products from taxation).

42. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); *United States v. Palestine Liberation Org.*, No. 88 Civ. 1962, slip op. at 18-21 (S.D.N.Y. June 29, 1988). See also Henkin, *supra* note 33, at 872 ("After the notorious instance of the Chinese exclusion acts, Congress has only infrequently

The Executive Branch must also interpret statutes which conflict with international agreements. In cases of irreconcilable discrepancies between international commitments and statutes, some great presidents have responded directly on the basis of their own constitutional authority: Lincoln disregarded Congress' instruction regarding termination of the Rush-Bagot Agreement;<sup>43</sup> Wilson simply refused to implement a statute on the grounds that it was an invalid attempt to usurp his foreign affairs authority.<sup>44</sup>

The potential violation in the *PLO* case was at least as serious as these earlier instances; if effected, the Anti-Terrorism Act would have forced the Executive to violate the Headquarters Agreement, an obligation in which every other Member State of the United Nations had an interest. The near unanimity of condemnation in the General Assembly resolution indicated how wide and deep the international indignation was.<sup>45</sup> Although Attorney General Meese and the *New York Times* implied that the Executive had no choice but to comply, the Executive could have resolved the issue on the domestic level in ways which would have created a sounder precedent for future cases.

Consider the situation from the President's perspective. The Headquarters Agreement required the President to allow the Mission to operate. Congress was requiring the President to close the Mission. The international law of state responsibility was telling the President, because of his status under the Constitution and his status as the designated agent for foreign affairs, that if he closed the Mission, he would have to repair the violation committed by his Government, i.e., allow the Mission to reopen. At such a level of normative dissonance, the President could have informed Congress that, in his view, the statute was unimplementable. He then could have invited Congress, if it disagreed with his judg-

disregarded treaty obligations, and courts have striven to interpret statutes to avoid inconsistency with treaty obligations.") (footnote omitted).

43. See SEN. EXEC. DOC. NO. 9, 52d Cong., 2d Sess. 24-32 (1892), cited in M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 598 n.131 (1960) (President Lincoln withdrew notification of termination of Rush-Bagot Convention of 1817, which limited naval armament on the Great Lakes, despite congressional resolution ratifying original decision to terminate treaty).

44. See W. McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 24 (1941) (President Wilson refused to terminate treaties restricting U.S. ability to impose discriminating customs duties on imports as Congress had required in § 34 of Merchant Marine Act of 1920).

45. The General Assembly resolution declaring that the United States violated the Headquarters Agreement by passing the ATA was adopted by 143 votes to 1, with no abstentions. Israel voted against the resolution, and the United States announced that it was not participating in the vote. See United Nations Press Release, U.N. Doc. GA/7612/Add.1 (9 March 1988) at 5; ICJ Advisory Opinion, *supra* note 10, at 21.

ment, to take the matter to court.<sup>46</sup> Such a presidential response would have suspended the operation of the Anti-Terrorism Act, removed the matter from the international agenda, and obviated debate in the General Assembly or adjudication in The Hague, all of which could only increase the political costs to the United States. The Supreme Court, in all likelihood, would have found that the case raised "political questions" and was therefore non-justiciable. The Anti-Terrorism Act would have been unimplementable, and the affair would have ended domestically, with minimal international costs.

I do not mean to minimize the legal and political difficulties facing Executive officials charged with applying ill-conceived domestic legislation that patently contravenes international law. Many considerations must go into the officials' decisions and strategies. Each case must be taken on its merits. The quandary is exacerbated because it is far from certain that international law should always prevail. Some international law is bad; in a system lacking a legislature to abrogate law, contrary national legislation can be viewed as its belated termination. On the other hand, some national law is bad and should be overruled by international law. Choices must always be made.

In terms of the morals of personal choice, the decision of officials asked to implement statutes violating international law, like the personal decision of a citizen facing unjust laws, is difficult and sometimes perilous.<sup>47</sup> The implications for organizational efficacy are hardly negligible. Superiors usually prefer an ethic of obedience. But legal systems built on unquestioning obedience and defenses of superior orders are as dangerous as they are dehumanizing. It is precisely for this reason that democracies are notoriously more difficult to manage, for they are comprised of a community of morally autonomous and responsible citizens. The difficulty goes with the turf. An escape from this dilemma is ultimately an escape from freedom.

Thanks in no small part to the United States, contrary national legislation is no longer a defense for a violation of international law. In the *Justice* case at Nuremberg, the indicted German judges proved that "[u]nder the Nazi system, and even prior thereto, German judges were also bound to apply German law even when in violation of the principles

46. See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 432-36 (D.C. Cir. 1974) (Senators have standing to sue President to vindicate effectiveness of their vote).

47. See generally H.L.A. HART, *THE CONCEPT OF LAW* 206 (1961) ("the certification of something as legally valid is not conclusive of the question of obedience . . ."); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958) ("the problem posed by morally evil laws"); Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499 (1983).

of international law.”<sup>48</sup> If that practice had been a valid defense, there would have been precious few convictions and scant humanitarian development since that time. If the Justice Department, the *New York Times*, and the professors are right and contrary national law is now a valid defense to violations of international law, the international human rights program is doomed.

Indeed, the most melancholy aspect in this part of the Mission affair was the militantly parochial attitude that many of the American players adopted toward international law and morality. For a moment, it was difficult to believe this controversy was taking place at the end of the twentieth century. Did not any of these players realize that as the international political system has become more interdependent, parts of international law have increasingly prescribed and sought to override incompatible national law? Most of them know and, at one time or another, some have even said that our democracy must find a way to accommodate the need for governmental autonomy with the need for restraint imposed by an increasingly urgent international law. Surely it is now clear that in an interdependent planet, a notion of legality based entirely on domestic institutions and requiring automatic compliance with domestic directives, even when they violate common and accepted international norms, involves a gravely pathological legal and moral autism. Imagine foreign officials violating our international rights on the ground that they are simply complying with their own subsequent legislation. We reject such claims when invoked by officials of other governments. Do the Justice Department, the *New York Times*, and the professors want a different standard for the United States?

### III

There was yet a third villain. The International Court of Justice's performance in this case is no less depressing than that of Congress and the Executive. The essential question posed by the General Assembly to the Court was not whether there was a dispute. The very fact that negotiations between the United Nations and the United States were ongoing presupposed the dispute's existence. The question posed to the Court by the General Assembly here, as indeed in every case involving an arbitration clause, was whether, under the circumstances, the United States was obliged to go to arbitration under section 21(a) of the Headquarters Agreement.

48. *Justice Case* (U.S. v. Altstoetter), 3 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS 954, 1011 (1951).

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 . . . .<sup>49</sup>

This is an unusual clause for a number of reasons. First, instead of permitting either party to initiate arbitration once a dispute erupts, as is the usual practice, the clause appears to require that *both* parties agree to refer the dispute to arbitration. This unusual provision appears to have been designed to prevent a particular dispute from going to arbitration unless both parties specifically agree to it. Consistent with this intention, the Appointing Authority is not permitted to designate an arbitrator if one of the parties refuses to appoint its own. Arbitral commitments that do not provide for or permit the establishment of a tribunal when one of the parties refuses to cooperate are sometimes referred to as "pathological arbitral clauses."<sup>50</sup> It would be a mistake to apply that term to this case, for the parties plainly wished to require that both sides negotiate in order to reach consent to a particular arbitration.

Both the United Nations and the United States appear to have ignored these unusual features in the compromissory clause. The United Nations claimed that, given an arbitration clause, once a dispute existed and one party called for arbitration, the other party was obliged to arbitrate.<sup>51</sup> The United States did not really contest that point but claimed instead that, notwithstanding the existence of a dispute, the critical question was whether arbitration was appropriate at the particular moment at which the United Nations requested it. The United States contended that "[t]he United States will take no action to close the Mission pending a decision in [the District Court] litigation. Since the matter is still pending in our courts, we do not believe arbitration would be *appropriate or timely*."<sup>52</sup>

Thus, the central legal question of the ICJ case was whether arbitration had to be compelled at the moment a dispute crystallized, or

49. Headquarters Agreement, *supra* note 2, § 21(a).

50. See generally Scalbert & Marville, *Les Clauses Compromissaires Pathologiques*, 1988 REVUE DE L'ARBITRAGE 117; Eisemann, *La Clause d'Arbitrage Pathologique*, in COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129, 130 (1974) (arbitral clause is "pathological" if it fails to fulfill its four essential functions: (1) to provide that decisions will be binding on parties; (2) to make participation by state tribunals in settling disagreements unnecessary; (3) to give power to arbitrators to settle all legal disputes which might set one party against other; and (4) to put in place most efficient procedure for reaching enforceable judgment).

51. ICJ Advisory Opinion, *supra* note 10, at 21.

52. *Id.* at 25 (emphasis added).

whether an international tribunal had some prudential discretion to decide if arbitration was appropriate or timely. Only if it were found that the tribunal could exercise prudential discretion would the Court reach the factual question of whether the circumstances of the particular case warranted its exercise.

The Court rejected the United States' legal contention:

The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as "the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decisions on considerations of pure expediency."<sup>53</sup>

The ICJ quotes from and relies on *Free Zones*, a 1930 case concerning a dispute between France and Switzerland over the free zones of Haute-Savoie and the District of Gex. When the French Government decided to suppress the free zones, Switzerland protested, proposing that the matter be referred to the PCIJ or to some other arbitral tribunal. The case came before the PCIJ in three phases. The orders from both the first and the second phases required the parties to negotiate between themselves.

The quotation which the ICJ took from the second phase of the *Free Zones* case creates the impression that a jurisprudence of more than fifty years holds that, in determining whether to compel arbitration, the Court is precluded from considering prudential factors such as the appropriateness and timeliness of arbitration in the particular dispute. This is the exact opposite, however, of what the Permanent Court in *Free Zones* actually said; by the use of selective quotation, the ICJ misstated its own precedent. Consider the precise words of the Permanent Court in *Free Zones*:

*[A]nd although the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency, nevertheless there is nothing to prevent it, having regard to the advantages which a [negotiated] solution of this kind might present, to offer the Parties, who alone can bring it about, a further opportunity for achieving this end.*<sup>54</sup>

The Permanent Court had actually said that a court *does* have the discretion to determine, even after a dispute has crystallized, whether the appropriate moment has arrived to proceed to a third-party decision or whether further inter-party negotiations are in order.

53. *Id.* at 29 (quoting *Free Zones of Upper Savoy and the District of Gex (Second Phase) (Fr. v. Switz.)*, 1930 P.C.I.J. (ser. A) No. 24, at 15 (Dec. 6)).

54. *Free Zones of Upper Savoy and the District of Gex (Second Phase) (Fr. v. Switz.)*, 1930 P.C.I.J. (ser. A) No. 24, at 15 (Dec. 6) (emphasis added).

If the ICJ had presented its own case law correctly, it would have proceeded to explore whether national legislation which is inconsistent with some international obligation represents a *per se* violation of that obligation. In a separate opinion that garnered no other support from his brethren on the Court, Judge Elias said that such legislation *does* violate the international obligation,<sup>55</sup> but his position raises both factual and legal difficulties.

What we might call "self-executing legislation"—legislation which does not incorporate or allow for national judicial participation and, hence, review—may be viewed, all things being equal, as an accomplished violation of international law at the moment it contravenes it. Thus, were Congress to legislate that no officer of the PLO is to be given a visa to enter the United States, notwithstanding any other law or international commitment to which the United States is a party, that law would be, effectively, self-executing. Were Chairman Arafat to present himself at the U.S. Embassy's Consular Division in Berne, Switzerland and request a visa to attend the General Assembly as titular head of a Permanent Observer, the visa would not be issued and *ipso facto* section 11 of the Headquarters Agreement would be violated.<sup>56</sup>

But under the terms of the Anti-Terrorism Act of 1987, the closure of the Permanent Mission of the PLO was not self-executing. Section 1004 contemplated taking "necessary legal action to effectuate the policies and provisions" of the Act and instructed the Attorney General to take that action.<sup>57</sup> The Act specifically designated the Federal District Courts as the appropriate fora for the legal action. In this respect, the Anti-Terrorism Act presented a distinctly different international legal problem than did Secretary of State Shultz's lamentable decision to refuse a visa to Yasir Arafat, an invitee of the General Assembly, in December, 1988.<sup>58</sup> Shultz's act was a self-executing violation of the Headquarters Agreement in that it was, effectively, the final U.S. decision. The Anti-Terrorism Act was not.

In international law, non-self-executing national legislation which is inconsistent with the international obligations of the state enacting the

55. ICJ Advisory Opinion, *supra* note 10, at 36 (declaration by Judge Elias).

56. This, of course, is no mere hypothetical situation. *See infra* note 58.

57. Anti-Terrorism Act, *supra* note 14, § 1004(a) (codified at 22 U.S.C.A. § 5203(a) (West Supp. 1988)).

58. For discussion of the denial of a visa to Arafat and the State Department's reasons for the denial, see *Statement Denying Visa for Arafat*, N.Y. Times, Nov. 27, 1988, at A5, col. 1; United States Representative to the Committee of Relations with the Host Country, Press Release No. USUN 154-(88) (Nov. 28, 1988) (Statement by Patricia M. Byrne); *see also* Reisman, *The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion*, 83 AM. J. INT'L L. (forthcoming July, 1989).

legislation is not deemed to be a violation until the law is implemented. International case law on this point is remarkably consistent. In the *Mariposa Development Company* case before the United States and Panamanian General Claims Commission of 1926, the Commission said:

Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.<sup>59</sup>

The same point was adopted by the Permanent Court in the case concerning *Certain German Interests in Polish Upper Silesia*: “[T]he Court is certainly not called upon to interpret the Polish law as such: but there is nothing to prevent the Court’s giving judgment on the question whether or not, in *applying that law*, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”<sup>60</sup>

In 1962, the European Court of Human Rights in the *De Becker* case said:

[T]he Court is not called upon, under Articles 19 and 25 of the [Geneva] Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention . . . .<sup>61</sup>

In Application Number 290/57 against Ireland and 867/60 against Norway, the European Commission on Human Rights held:

[T]he Commission is competent to examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organization or group of individuals and only insofar as its application is alleged to constitute a violation of the Convention in regard to the applicant person, organization or group in question . . . .<sup>62</sup>

59. *Mariposa Development Company (U.S. v. Pan.)*, United States and Panamanian General Claims Arbitration 573, 6 R. INT’L ARB. AWARDS 338, 341 (1933).

60. *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) (emphasis added).

61. *De Becker Case*, 1962 Y.B. EUR. CONV. ON HUM. RTS. 320, 334-36 (Eur. Ct. Hum. Rts.).

62. *X v. Ireland*, 1960 Y.B. EUR. CONV. ON HUM. RTS. 214, 220 (Eur. Comm’n on Hum. Rts.); *X v. Norway*, 1961 Y.B. EUR. CONV. ON HUM. RTS. 270, 276 (Eur. Comm’n on Hum. Rts.).



After a comprehensive review of state practice, international judicial decisions and the writings of scholars, the International Law Commission concluded in 1977:

[I]n the case of international obligations requiring the State to achieve a result *in concreto* but leaving it free to do so by means of its own choice, the fact that a State bound by such an obligation has adopted a measure or, in particular, enacted a law constituting *in abstracto* an obstacle to the achievement of the required result, is not yet a breach or even the beginning of a breach of the obligation in question. There will be a breach only if the State is found to have failed *in concreto* to achieve the result required by the obligation.<sup>63</sup>

Thus, the legal conclusion of the ICJ is quite inconsistent with international law and its own jurisprudence.

As a legal matter, the Court had the discretion to determine whether the opportune moment to compel arbitration had arrived. As a factual matter, there were good reasons for finding arbitration premature. First, the Anti-Terrorism Act required the collaboration of American courts for its implementation. The matter was in court, and no action could be taken against the Mission until the adjudication was concluded. Moreover, the ICJ was familiar with the independence of the U.S. judiciary. Indeed, in the *Interhandel* case in 1959,<sup>64</sup> the Court deferred the Swiss claim against the United States although the matter had been in U.S. legal processes since 1942 and in U.S. courts since 1948! To the Swiss claim that U.S. courts would ignore international law and, instead, follow the domestic Trading with the Enemy Act, the International Court replied: "[T]he decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary."<sup>65</sup> And indeed in the *PLO* case, the U.S. judiciary, through the beneficent actions of Judge Palmieri, did resolve the matter at the national level, making arbitration unnecessary.

I believe that there were compelling reasons of law and fact for the International Court to find that the matter was not ripe and to suspend the process until the domestic court action had concluded. Such a decision would not have been politically popular with the General Assembly, but that is hardly a criterion of justice. In my view, not only did the Court do the improper thing; it did it in the wrong way, impairing its own discretion in future cases which may present comparable problems, and injuring its reputation for reliability.

63. Report of the Commission to the General Assembly on the Work of its Twenty-Ninth Session, [1977] 2 Y.B. INT'L L. COMM'N 1, 26.

64. *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6 (Preliminary Objections) (March 21).

65. *Id.* at 28.

## IV

The only character to emerge honorably out of this otherwise dismaying farce was Judge Palmieri. He concluded that the Anti-Terrorism Act was valid but that it did not override the Headquarters Agreement either by its terms or intention.<sup>66</sup> While the opinion seems consistent with the treaty corollary of the “last in time” rule, it should be seen, if read in context, to be a bid to increase significantly the discretion of the courts to refuse to implement subsequent legislation which, in their view, is inconsistent with a prior treaty commitment.

Judge Palmieri reaffirmed the old doctrine that it was permissible for Congress to have intended to violate the Headquarters Agreement. Had this intention only been clear, reasoned Palmieri, other branches of the Government would have been obliged to implement it. The *formal* reasoning of Judge Palmieri’s opinion posits that there was a legitimate question about the precise intention of the Anti-Terrorism Act. It is presumed that the legislators would not have intended to violate the treaty; the treaty prevailed because, according to Palmieri, the intention to the contrary was not absolutely manifest.

Judge Palmieri refashioned the “last in time” rule in a way which pushed the threshold of incompatibility extremely high.<sup>67</sup> He referred to the discussion of the “last in time” rule in the *Restatement (Third) of the Foreign Relations Law of the United States*<sup>68</sup> as reflecting an “unbroken line of authority.”<sup>69</sup> He quoted section 115(1)(a) of the *Restatement* as follows:

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.<sup>70</sup>

The judge actually misquotes the *Restatement*. The American Law Institute’s text actually reads: “if the purpose of the act to supersede the earlier rule or provision is clear *or* if the act and the earlier rule or provision cannot be fairly reconciled.”<sup>71</sup> The *Restatement* set the threshold of

66. *United States v. Palestine Liberation Org.*, No. 88 Civ. 1962, slip op. at 35 (S.D.N.Y. June 29, 1988).

67. I am indebted to Steven Hartmann, Yale J.D. ‘90, for permitting me to read his (as yet unpublished) paper entitled *Reconsidering the Last in Time Rule*, in which he explores the discrepancy between the text of the *Restatement (Third) of the Foreign Relations Law of the United States* and Judge Palmieri’s opinion.

68. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987) [hereinafter RESTATEMENT].

69. *United States v. Palestine Liberation Org.*, slip op. at 21.

70. *Id.* (emphasis is Judge Palmieri’s).

71. RESTATEMENT, *supra* note 68, § 115 (emphasis added).

incompatibility relatively low, giving courts two options: They could derive a possible inconsistency from either the text *or* the intention. By insisting on the conjunction of text *and* intention before concluding that a statute is inconsistent with a previous treaty, Judge Palmieri has made it even harder to establish an inconsistency.

The requirement that congressional intention to override prior treaties be manifest has always been a part of the "last in time" cases; until the *PLO* case, it has been possible to satisfy the requirement. Congress, it will be recalled, had cast its net widely, neither using ambiguous language nor concealing its intentions in enacting the Anti-Terrorism Act: It would henceforth be unlawful "notwithstanding any provision of law to the contrary" for the PLO to maintain "an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States . . . ." <sup>72</sup> If this language did not convey an intention with sufficient clarity, then it is difficult to imagine what language could.

Consider one example, for purposes of contrast. In 1971, Congress, at the initiative of Senator Robert Byrd, set out to stop the U.S. embargo on trade with Southern Rhodesia,<sup>73</sup> imposed in order to comply with Security Council Resolution 232.<sup>74</sup> Section 10 of the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act<sup>75</sup> stated in part:

Notwithstanding any other provision of law . . . the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this subchapter, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area . . . for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.<sup>76</sup>

In *Diggs v. Shultz*, Judge McGowan said:

We think that there can be no blinking the purpose and effect of the Byrd Amendment. It was to detach this country from the U.N. boycott of Southern Rhodesia in blatant disregard of our treaty undertakings. The legislative record shows that no member of Congress voting on the measure

72. Anti-Terrorism Act, *supra* note 14, § 1003(3) (codified at 22 U.S.C.A. § 5202(3) (West Supp. 1988)).

73. See Exec. Order No. 11,322, 3 C.F.R. 243 (1967), *reprinted in* 22 U.S.C.A. § 287c app. at 254-56 (1979); Exec. Order No. 11,419, 3 C.F.R. 125 (1968), *reprinted in* 22 U.S.C.A. § 287c app. at 256-57 (1979). Both of these Executive Orders were later revoked by Exec. Order No. 12,183, 3 C.F.R. 472 (1979), *reprinted in* 22 U.S.C. § 287c app. at 110 (1982).

74. S.C. Res. 232, 21 U.N. SCOR RESOLUTIONS AND DECISIONS at 7, U.N. Doc. No. S/INF/21/Rev.1 (1966).

75. 50 U.S.C. §§ 98 to 98h-4 (1982).

76. *Id.* § 98h-4.

was under any doubt about what was involved then; and no amount of statutory interpretation now can make the Byrd Amendment other than what it was as presented to the Congress, namely, a measure which would make—and was intended to make—the United States a certain treaty violator.<sup>77</sup>

Judge McGowan found that the “notwithstanding” clause demonstrated congressional intention to violate the international obligation. Judge Palmieri’s threshold of intention, in contrast, allows a court to find, in virtually any case, that there is some doubt about intention.

Like Zeno’s paradox, in which the distance between points A and B is infinitely divisible such that one can “theoretically” never reach B from A, the theory underlying this part of the *PLO* case is that there is always a higher level of potential specificity. If the legislature does not adopt that higher level, its formulation of intent is ambiguous and the presumption against an intention to violate international law prevails. Henceforth, the game is played in a new way. If a future act should say instead: “notwithstanding any other *international agreement . . .*,” a court may note that the Headquarters Agreement is not strictly an international agreement, for the United Nations is not a nation. If an act should say: “notwithstanding the *Headquarters Agreement . . .*,” a court could still respond that the practice in question is grounded in custom and not exclusively on the text of the agreement. And so on. The game stops only in the unlikely case that a legislative considerandum says *expressis verbis*: “It is our firm and unequivocal intention to violate international law.” Even the most brazen law-breakers avoid such self-incriminations.

I submit that the *PLO* case imports an innovative judicial approach. Even when congressional intention is manifest, federal courts, as an independent Branch, will decide whether or not to give effect to congressional interventions in foreign affairs accomplished through unilateral terminations of treaties. The situation does not mean that *every* treaty will be sustained against subsequent legislation; rather, it means that in case of a conflict between international law and subsequent national legislation, the Judiciary will conduct an independent review of the issues, policies, and consequences. If this jurisprudence endures, we may anticipate that some treaties will survive subsequent contrary legislation, and

77. 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied* 411 U.S. 931. In *Diggs v. Shultz*, the circuit court recognized that a conflict existed between the 1971 statute authorizing importation by the United States of metallurgical chromite from Southern Rhodesia and an earlier U.N. resolution imposing an embargo on trade with South Rhodesia. The court viewed congressional power to set aside treaty obligations as settled constitutional doctrine: “Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.” *Id.*

that others will not. Unfortunately, the *PLO* case did not make explicit the methodology and criteria necessary for deciding these types of issues. We must now look to higher courts for doctrinal illumination.

Insofar as other courts accept and use the *PLO* decision, we will witness a belated assertion and application of the constitutionally-accorded competence of the courts to play an active role in this aspect of the foreign affairs power. Until now, courts have been reticent in this regard, but given the increased power which Congress has assumed in foreign affairs, a more determined mediating role by the courts may be a necessary counter-balance. Because the Executive may sometimes exercise its independent powers and refuse to defer to the congressional will, a more active judiciary will not only contribute to order but may lead to a more constitutionally-healthy political process.

#### V

The best that may be said is that the *PLO* Mission affair ended without an effective violation of international law. In this limited sense, it ended well. But all is not well that ends well.