summary of the law under the rules of contract interpretation, which puts the lawyer right back into arguing over what law to use.

A speaker from the floor, who said that he was an attorney in Brazil, asked for the specific definition of money laundering, in view of the following situation. In most of the countries in South America, though not all, the currency was not freely convertible. If a Brazilian attorney, for example, had to engage a U.S. law firm for one of his clients, to pay the fees of this law firm, he would have to go through the normal red tape of getting approval from the Central Bank for the remittance of those fees. This was an extraordinarily long process that eventually became bogged down in one of the various departments of the Central Bank. The attorney therefore might arrange for the U.S. law firm to be paid with funds purchased in the “parallel market.”

In Brazil there was an official market for the conversion of currency, on which there were certain limitations, including the requirement that the Central Bank approve the transaction. There was also a free market or parallel market. Through this parallel market one could buy dollars by shipping cruzados, the currency of Brazil, to Uruguay, where the conversion actually would take place. Now strictly speaking, from a legal standpoint, the purchase of dollars by converting the cruzados outside the jurisdiction of the Brazilian central bank was illegal. But this illegality was only on paper, because the Uruguay exchange rates were quoted openly in the newspapers and on television. The conversions were made openly and the practice was tolerated. Would this constitute an illegal act under the reporting requirements, such that the U.S. firm receiving these fees, knowing that the conversion of cruzados to dollars had been illegal, would become subject to U.S. sanctions?

Mr. Zagaris: Under the 1986 act, that should not constitute an offense, unless there is some underlying U.S. federal or state law that has been violated. Simply not following a requirement of a foreign country would not constitute a violation of the 1986 act. Assuming the payment of cruzados through the parallel market was made to a U.S. financial institution, a Form 4789 would have to be filed by the financial institution. If the U.S. law firm had a role in circumventing that reporting requirement, the U.S. firm would be subject under recent case law to a violation, but otherwise there would be no violation.

Gabrielle G. Gallegos*

Reporter

THE PALESTINE LIBERATION ORGANIZATION MISSION
CONTROVERSY

The panel was convened at 8:30 a.m., April 23, 1988, by its Chair, John F. Murphy**

Remarks by Professor Murphy

Among the many issues that will come out in this discussion is one I regard as having the most transcendent importance. That is the relationship between U.S. law and international law, more particularly, the U.N. Charter and the Headquarters Agreement. Assuming that the Anti-Terrorism Act of 1987¹ mandates the closing of

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the mission of the Palestine Liberation Organization (PLO) and thus conflicts with the Charter and the Headquarters Agreement, does the last-in-time rule set out in U.S. Supreme Court cases apply, or should the rule be reconsidered and the Charter be regarded as having a superior status so as to override any conflicting domestic legislation?

I would like to bring out two points, the first of which was raised by Louis Sohn at the 1969 Annual Meeting. First, in terms of the alleged equal status between the U.N. Charter and federal legislation, article 103 of the Charter explicitly provides that in case of conflict, the U.N. Charter is to prevail over any other conflicting international obligations. The second point deals with the supranational aspects of the U.N. Charter and the relationship to decisions with respect to the Rome Treaty establishing the European Economic Community. Both the European Court of Justice and national courts of the member states have held that the Rome Treaty prevails over any conflicting national law. There are analogies there that might be explored usefully, although that might have to wait for another day.

REMARKS BY CHARLES J. COOPER*

I am pleased to be with you this morning to discuss this very important and timely issue. I will use the few moments that I have to set out the salient features of our legal position. I am not going to attempt to defend the Anti-Terrorism Act; in fact, the administration opposed it quite vigorously. Since the act was passed, however, we take the view that it is to be enforced.

Briefly stated, our legal position is as follows. First, the Anti-Terrorism Act clearly applies to the PLO U.N. Observer Mission; indeed, closing the mission was the Act’s exclusive purpose. It is impossible to escape that fact from the language of the statute and its legislative history. Second, this Act of Congress takes precedence or supersedes any prior existing treaty obligation. It has been alleged that the U.N. Headquarters Agreement requires the United States to permit the continued residence of the observer mission. Whether or not that is true really does not matter, because this statute overrides the obligations under the Headquarters Agreement. Finally, the act does not violate the President’s prerogatives in the area of foreign affairs unconstitutionally, including the Executive’s exclusive prerogative to receive ambassadors.

The act prohibits anyone, if the purpose is to further the interests of the PLO, from establishing or maintaining an office, headquarters, premises or any other facility within the jurisdiction of the United States at the behest or direction of, or with funds provided by, the PLO. It also outlaws virtually all economic transactions in which the PLO or agents of the PLO might want to engage—both the expenditure of funds and the receipt of PLO money by others. Significantly, the act directs the Attorney General to “take the necessary steps and institute the necessary legal action to effectuate the policy and provisions of this title.” It is in obedience to that directive that the Justice Department filed the lawsuit requiring the PLO to show reason why its mission should not be closed.

The plain terms of the Anti-Terrorism Act encompass the U.N. Observer Mission of the PLO. Obviously, the Mission is an office established, maintained, and funded by the PLO, and it is therefore within the plain terms of the statute. If there is any doubt on this issue, the legislative history of the statute removes it. The U.N. Ob-

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server Mission of the PLO was the precise and exclusive target of Congress. As you may know, the PLO also had an information office in Washington that was closed prior to the time the statute was passed. The U.N. Observer Mission, therefore, was the only existing PLO office in the United States at the time this statute was passed.

The second issue that arises in the context of this statute is the effect of the act on any prior treaty obligation. This point first assumes that the U.N. Headquarters Agreement requires the United States to extend permanent residency privileges to observer missions, or at least to the PLO’s Observer Mission. The State Department examined the issue and concluded that the U.N. Headquarters Agreement does indeed place that requirement upon the United States. Since the act would place the United States in violation of its international obligations, the State Department argued to the Congress that the statute should not be enacted.

Be that as it may, what the U.N. Headquarters Agreement requires is irrelevant because the Headquarters Agreement is superseded by the act. This is not a controversial proposition. It is black-letter law, more than a century old. This holding was first announced by the Supreme Court in the *Head Money* cases. The holding springs from the self-evident legal proposition that a statute first in time may be repealed, modified, or amended by a statute later in time. If an earlier statute is irreconcilable with the later statute, the later statute controls. Obviously, this is a proposition that applies to statutory enactments, which enactments are the law of the land. A treaty, by the same token, is also the law of the land.

The Supreme Court, more than 100 years ago, rejected the proposition that a treaty has some lexical superiority to a statute, finding instead that a treaty, to the extent that it constitutes the domestic law of the land, could be repealed by a subsequently enacted statute of the Congress. The Supreme Court first stated this holding in the *Head Money* cases in the following relevant language:

> The constitution gives [a treaty] no superiority over an act of congress in this respect, which may be repealed or modified by an Act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it superior sanctity.¹

The Court went on to suggest that, if anything, a treaty, by virtue of the method by which it becomes the law of the land, may well be inferior to a subsequently enacted statute that invokes the operation of both houses of Congress, rather than just one.

In any event, the last-in-time rule is black-letter law. Section 145 of the *Restatement (Second) of Foreign Relations* sets out the principle in these terms:

1. An Act of Congress, enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed.

2. The superseding of the agreement as domestic law of the United States by subsequent act of congress does not affect the international obligations of the United States under the Agreement.

It is important to remember that when Congress repeals or supersedes a treaty, the international obligations of the United States under the terms of the treaty nevertheless continue in effect. Congress simply makes the decision to accept whatever consequences might flow from the violation of that international obligation. Some of the commentators that have criticized this rule, such as Louis Henkin, have recognized

nonetheless that it is the rule. The President, in light of the relevant Supreme Court jurisprudence, must yield to the authoritative ruling of that body.

Finally, I would like to turn briefly to the constitutionality of the act's provisions requiring the closing the PLO Observer Mission, addressing this issue from a separation-of-power standpoint. We believe that the act does not infringe upon the President's power to receive ambassadors or his general power over foreign affairs. As the sole organ to represent the interests of the American people to foreign sovereigns, the scope of the President's power to receive ambassadors is quite broad. It is far more than just a ceremonial power extending, as Professor Cohen puts it, "to all possible diplomatic agents which any power may accredit to the United States." The power clearly embraces questions as to whether the United States should recognize, or refuse to recognize, a foreign government and whether to maintain or eliminate relations with them. This presidential power is also exclusive. Congress may not act in this area vis-à-vis foreign states even in the absence of the President's invocation of his constitutional authority. For example, Congress could not choose to recognize the PLO even if the President had not established an official policy of nonrecognition.

It does not follow from this broad and exclusive power, however, that the Anti-Terrorism Act unconstitutionally infringes on the President's exclusive prerogatives. Congress' legislative power clearly extends to measures necessary to implement, through domestic legislation, the undertakings of the United States in treaties. Pursuant to that responsibility, Congress may make laws affecting the foreign relations of the United States and its international commitments insofar as those commitments have domestic effects, as the international commitments at issue here clearly do vis-à-vis the PLO. Congress has the authority, moreover, to govern aliens who are within the United States and to establish the conditions upon which they may be denied access to, or excluded from, this country. Although their presence in the United States is for the purpose of conducting diplomatic relations at the United Nations, the PLO's representatives to the United Nations fall within the legislative power of Congress over aliens.

The President has not chosen, in this matter, to invoke his constitutional authority either to receive ambassadors or to conduct foreign relations. PLO observers to the United Nations are neither ambassadors to the United States nor do they have the status of representatives from foreign states with which the United States has diplomatic relations. In this sense, the United Nations is not a state, and ambassadors to the United Nations are not ambassadors to the United States. They have no official relationship to the United States; they do not present their credentials to the United States; their presence here does not imply in any way that the President recognizes either them or their sending state. The President, however, can change all this. He can accept the current members of the PLO Mission as Ambassadors to the United States, either at large or for some limited special purpose. He can establish an official relationship with the PLO and with its representatives. He can accept their credentials, and he can choose to recognize the PLO formally. If he did so, the Anti-Terrorism Act could not apply constitutionally to the PLO or its diplomatic offices. The President, however, has not done so, and it is my understanding that he has no intention of doing so. Until such time as he does, the act is a legitimate and authoritative enactment of the Congress and is due to be enforced.
Remarks by Paul C. Szasz*

It is my task to present, briefly, the U.N. position as to the controversy that we are assembled here to discuss. I would like to have it understood, however, that I am not speaking in my capacity as a U.N. official, but as a deeply distressed American lawyer and as a member of this learned Society dedicated to the furtherance of international law.

I will address quickly the two principal aspects of the controversy, only one of which was discussed by Mr. Cooper. This is the substantive one, which might be summarized as follows: Does international law permit the United States, on the basis of its Anti-Terrorism Act of 1987 or otherwise, to make any substantive unilateral change in the current arrangements concerning the PLO Observer Mission to the United Nations in New York? Second comes a procedural issue, which Mr. Cooper did not mention, but which is the one that is currently before the World Court.¹ Is the United States obligated by the Headquarters Agreement to arbitrate with the United Nations concerning the resolution of the just-mentioned substantive dispute?

Because of the very brief time available, I will address only the international legal issues and leave the domestic constitutional ones to later speakers.

First, I will discuss the substantive issue revolving around the Headquarters Agreement. As Mr. Cooper has conceded, the Headquarters Agreement covers the PLO Observer Mission. Alternatively, according to Mr. Cooper, it does not matter whether or not the agreement covers the Mission. I will not belabor the issue, except to say that even though the Headquarters Agreement does not refer to the PLO Observer Mission specifically or, indeed, to any missions, there are two bases for saying that the mission is covered by the Headquarters Agreement. One basis is the principle of necessary implication that the World Court established in the Reparation for Injuries case. If the PLO is to be invited, as it is, to be represented at almost all U.N. meetings in New York, then it has to have a base from which it can do so. Such a base is called simply a mission. The second basis is the established practice of the parties, which is a well-established means for interpreting any treaty. The United States and the United Nations have agreed to the establishment of missions ever since the Headquarters Agreement was concluded, including missions from states that are both nonmembers of the United Nations and not recognized by the United States, such as North Korea. As to the PLO Mission the United States has tolerated its establishment since 1975, shortly after the PLO was invited by the General Assembly. But there is no reason to belabor this point since the Secretary of State has admitted to Congress, and U.S. representatives to the United Nations have, in statements in U.N. organs, conceded that the PLO Observer Mission is covered by the Headquarters Agreement.

The previous speaker has argued that the Anti-Terrorism Act of 1987 supersedes the Headquarters Agreement. While it is a very old and perhaps outmoded principle of statutory interpretation, the Supreme Court has held that the supremacy clause of the U.S. Constitution, article VI, section 2, places laws and treaties on the same level, and thus allows the later in time to prevail, I cannot agree with my learned predecessor that this constitutes black-letter law. The later-in-time rule depends on a series of court decisions which, as the President of this Society has suggested, are decisions that bear reexamination, particularly as to their applicability to multilateral treaties such as the U.N. Charter and to agreements made pursuant to the Charter. In any event,

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as Mr. Cooper also has conceded, whatever supersession is provided for by domestic law is only for domestic purposes.

As a matter of entirely undisputed international law, articles 27 of the 1969 and 1986 Vienna Conventions on the Law of Treaties provide that a state party to a treaty may not invoke the provisions of its internal law as a justification for its failure to perform the treaty. Whatever U.S. domestic law may allow or require, the international obligation therefore remains in full force. Thus, the United States remains fully bound by all provisions of the Headquarters Agreement.

It should be pointed out, moreover, that to help avoid unnecessary discrepancies or conflicts between America’s domestic and international obligations, a well-established principle of statutory construction has evolved to the effect that laws are not to be construed as superseding treaties unless the congressional intent to do so was clear. While the congressional intent to close the PLO Observer Mission was evident, it is by no means clear that Congress thought that this would violate the Headquarters Agreement. A number of Congressmen said during the debate that in spite of the fact that the State Department and the U.N. Legal Office asserted such a violation, they did not believe it to be so. It would seem, therefore, that the congressional intent was to close the PLO Observer Mission if this could be done consistent with the Headquarters Agreement.

To summarize this point: the establishment and maintenance of the PLO Observer Mission must be allowed under the Headquarters Agreement, taking into account the necessary implications of its provisions and the well-established practice as to its implementation. The forced closure of the Mission would, therefore, violate the U.S. international legal obligation to observe treaties in good faith. This conclusion cannot be avoided by relying on the supposed supersession of the agreement by the Anti-Terrorism Act.

I come now to the procedural issue: whether the United States is under an obligation at this time to settle any dispute it may have with the United Nations about the application of the Headquarters Agreement by arbitration pursuant to that agreement. Section 21(a) of the Headquarters Agreement reads in part: “Any dispute between the United Nations and the United States concerning the interpretation or application of this 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 . . .” The United States has taken the position that it is premature to consider dispute settlement, first because the act had not been adopted yet, then because it had not been signed yet, then because it had not entered into force yet and the Attorney General had not decided yet whether he would implement it. Now, when this too has been decided, the government is asserting that until the federal courts have ruled on the Attorney General’s request for an injunction that the PLO Mission be closed, the Headquarters Agreement dispute-settlement procedure is still premature and inapplicable.

At the same time, the U.S. Government has said repeatedly, in formal statements to the Secretary-General, the World Court and the federal district court, that as the implementation of the Anti-Terrorism Act is purely a matter of domestic law, any international litigation is entirely irrelevant to the action that would be taken and “would not serve any useful purpose.” It is these amazing and profoundly disturbing positions that I now wish to address.

We must begin with the proposition that the Headquarters Agreement is a treaty whose obligations must be performed in good faith, especially obligations to settle disputes. The question that arises is whether the Anti-Terrorism Act offers the United
States any excuse for not agreeing to arbitrate under section 21(a) of the Headquarters Agreement. It is quite clear that Congress never considered this issue and gave no sign whatsoever that it wished the act to supersede the dispute-settlement clause of the agreement. If the vigor of section 21(a) of the Headquarters Agreement thus has not been sapped, the question is whether its terms require the United States to respond positively at this stage to the U.N. desire to engage these provisions. Can the United States assert any grounds for resisting such a demand, as it has done in its correspondence to the Secretary-General, the General Assembly and the World Court? The United States has not expressed any indication as to why it believes it can avoid the dispute-settlement procedure. All we know is what the U.S. Ambassador to the Netherlands wrote to the World Court. There, in effect, the United States said that as long as the matter is pending in U.S. courts it is inopportune to raise the matter in the International Court of Justice.

Whether or not a dispute exists within the meaning of the Headquarters Agreement is an objective rather than subjective question. That much was established by the Permanent Court of International Justice in the Mavrommatis case and was strongly restated by the present Court in the Peace Treaties advisory opinion. In the latter, incidentally, it was the United States that expressed the greatest outrage at the refusal of three Eastern European countries to live up to their obligations to arbitrate. Now, the United States seems to argue that until it actually has closed down the PLO Mission, there is no dispute, for until then the matter is purely hypothetical. Surely the legal threat in the form of a law that is adopted and supplied with a 90-day implementation deadline and later emphasized in a formal determination to enforce announced by the chief legal officer of the government, and the initiation of a domestic court action requiring the PLO to show cause why its Mission should not be closed, constitute sufficient grounds for asserting that there is enough of a dispute to require settlement.

Still another ground appears to be that there is no room for international litigation until the domestic courts have finished their consideration of the matter. This might require the PLO, with U.N. assistance, to litigate all the way to the U.S. Supreme Court, whether as applicants or respondents. The United Nations, however, is an international entity asserting an international obligation under an international agreement that provides for international arbitration. Surely the United Nations cannot be held to the requirement that it first exhaust domestic remedies that are in no way applicable to it. Indeed, in an international arbitration, the United States would have every opportunity to present its arguments and case to an international panel. Therefore, there is no reason why the United States should avoid such an international proceeding.

In summary, there appear to be no good faith grounds on which the United States can assert that, for lack of an immediate dispute, it is not under a current obligation to comply with section 21(a) of the Headquarters Agreement in order to resolve authoritatively on the international plane an international dispute it itself has engendered.

It gives me no pleasure whatsoever to have to assert that my own government is in open disregard of its international obligations. It is even sadder that these obligations include the basic one of settling disputes under previously agreed procedures—which are the very type of arrangements that should constitute, in fact the only ones that can constitute, the basis for a peaceful world.
Remarks by Leonard B. Boudin*

Bearing in mind Keith Highe's instructions that this is not to be a debate on the legal issues, let me indicate the points of agreement there are among the various adversaries. Everyone agrees that the Anti-Terrorism Act, at least insofar as it applies to the PLO Mission at the United Nations, is a violation of the Headquarters Agreement and, presumably, the Charter of the United Nations that the Agreement implements. The question that is posed in the litigation, and here by Mr. Cooper, is whether the statute has priority over the Charter? I must say that I am puzzled by a statement he made that the international obligations of the United States remain in effect. If they remain in effect, it is very difficult to see how the statute can be carried out.

The general principle that Mr. Cooper enunciated, however, is correct. Namely, a statute subsequent in time can overrule a prior treaty. There are two objections to the application of that rule in this instance. First, there is the familiar objection posed by Chief Justice Marshall in The Charming Betsy case that an attempt must be made to read the statute so as not to conflict with the treaty. As later Supreme Court cases pointed out, the honor of the United States is involved in carrying out the obligations under the treaty—which is another reason for the very strict construction. Second is an objection touched on by Mr. Szasz. Assuming that this statute was so clear as to indicate a desire by the U.S. Congress to violate the Headquarters Agreement, does the general rule apply when dealing with so fundamental a document as the Charter of the United Nations and the Headquarters Agreement? It very well may be that a statute can override a treaty, but when dealing with a fundamental institution like the United Nations, can the United States argue that the provision of the Headquarters Agreement relating to the arbitration requirement does not apply, while the United States continues to operate under the other provisions of the agreement? When this matter is ultimately decided by the courts, they will have to address the issue as to whether the Charter of the United Nations and the Headquarters Agreement are just ordinary treaties.

The point made as to the clarity of the act in requiring the closing of the PLO Mission, notwithstanding the Charter, is striking. Passing over the fact that the statute does not refer to a mission at the United Nations, which is rather sui generis, one must consider the language uttered by the chairman of the Senate Foreign Relations Committee, Senator Pell, who said when presenting the conference report, "If this statute closing the mission is consistent with the Headquarters Agreement and international law, then we want to close the mission, but if it is not consistent with the Charter, we do not want to close the mission." Although Supreme Court justices have disregarded the words of Congress before (as with Mr. Cooper's original boss, Chief Justice Rehnquist, who destroyed me in Regan v. Wald when he disregarded authoritative statements made by Congress), nevertheless, we are here dealing with a treaty. The question that arises is, do not Senator Pell's observations constitute an authoritative position, not on whether the mission was intended to be closed, but whether it was intended to be closed if it violated the Charter?

I come to the second point. The President of the United States and the Secretary of State both expressed the view that this statute would be an interference with the prerogatives of the President. While I hate to argue Curtiss-Wright, which was a dreadful decision in so many ways, the general principle is perfectly clear. It is the President's exclusive foreign affairs power that governs the relationships between the United States and foreign entities, whether those entities be formal governments, embassies or

*Of the New York Bar.
missions to the United Nations. Such is the principle whether considered under the question of recognition or of receiving foreign ambassadors. The United Nations, after all, is one of the highest levels of diplomatic relations for the United States. The statements made by Secretary of State Shultz on the prerogatives of the President, which are supported by the specific provisions of the Foreign Missions Act recognizing the President's power in dealing with United Nations and other missions, raises a question. Can the Secretary of State remain silent while the Attorney General proceeds with this litigation? I directed this question to Abraham Sofaer the other night and received the impression that the Secretary of State was indeed going to remain silent, notwithstanding what he had said before.

The last point is one that has intrigued me from the beginning. It is more in the area of constitutional law, but does touch on the problem. The issue is whether or not this statute is a bill of attainder in violation of the constitutional prohibitions against bills of attainder. It fits all of the bill of attainder requirements: It is a legislative determination of guilt; it names a specific organization, entity or group, namely the PLO; and it imposes a punishment, as that term is broadly used in the bill-of-attainder cases from Cummings v. Missouri and Ex Parte Garland to United States v. Brown and United States v. Lovett.

One of the questions that arises is that since we are dealing with a claimed foreign entity, the PLO, does that mean we can do anything we wish to that entity, including attainting it and the people that are associated with it? When one looks at the bill-of-attainder history going back to England, one can see that in many of the cases the people who were attained were people alleged to be the agents of foreign powers. Usually the foreign power was revolutionary France. It is significant that if one traces the repressive litigation of the 1950s, which so many of the people here are acquainted with, one sees that Congress never sought to close a group or organization from operating. Congress required registration or disclosure, but it never went so far as to close down an organization. In the opinions of those cases, the Supreme Court was very clear in saying that the legislation was not a bill of attainder because Congress was not closing the organization, it was only requiring registration.

A last, brief observation deals with the act's prevention of anyone acting in the furtherance of the PLO to receive any funds from the PLO, to expend any money, or, even without receiving money from the PLO, to open an office for the PLO in the United States. It is with respect to this provision that suit was brought by 65 scholars, religious leaders, lawyers and law professors to protect the First Amendment rights of American citizens. Incidentally, one of these 65 individuals is an American citizen member of the U.N. PLO Observer Mission. We are not dealing, therefore, with aliens, as was stated by Mr. Cooper. We are dealing here with American citizens.

REMARKS BY KEITH HIGHTET*

Thirty-five years from now, looking back at this episode—and I use the term episode because I do not want to particularize any one of the three cases—what will they mean? What will they represent? Tom Franck wrote a wonderful piece in the American Journal of International Law recently about taking treaties seriously. I think that when you look at the overall problem, the problem of which Mr. Cooper is a very able part, the problem of which we are a part, there is something at a higher level that strikes you. It relates to the United States and international law. In a funny way it is a paradox, it is the old thing about the irresistible force and the immovable object,

*Of the New York Bar.
which, of course, is a contradiction in terms because if one is one, then the other is not the other. It really is like that, however, and to hear Mr. Cooper ably stake out the Justice Department position without mentioning article 21 of the Headquarters Agreement and without even referring to the International Court of Justice is emblematic of the basic element of the problem.

What is going on here? Where are the basic documents of international law? What is the Charter? What are all the efforts that have been made since 1945? People are relying on "black-letter law," but that is a form of global nitpicking. It is as if the members of Congress were totally under anesthesia when they were passing the act. To see international obligations under the best, biggest and only multinational arrangement of this kind that we have had in human history capable of being superseded, repealed, rolled back, or somehow just knocked into a hat by an Act of Congress that did not even receive the pathetic charity of committee hearings is ridiculous. To rely on a century-old tradition going back to The Charming Betsy, which I support valiantly, and to say it is "black-letter law" in this context does not make sense.

Mr. Cooper has his job, and I know he is doing it very well. The problem, however, transcends anybody. It transcends offices. It transcends the Department of Justice, it transcends the Department of State and its Legal Adviser, it transcends me, and it even transcends the United Nations. This is the point that I wish to make: I do not think that the United States is mature in its international relations, and it has been that way for some time. This is another example of what happened in 1986, 1984 and 1982. Now, in 1988, the congressional action and, to a lesser extent, the executive implementation of that action, is a symbol of that lack of maturity. It is two trains passing each other in the night. In talking to the executive department, they are fixed on the domestic problem. In talking to the international lawyers, they are, quite correctly, fixed on the international obligations. There is almost no contact. What it tells me is an ultimate irony. If you have a vote in the General Assembly of 154-0 or 152-1, somebody is trying to send you a message. Whether you are in the executive or legislative branch, or whether you are a historian, academic or practitioner, you had better listen to it because it goes to the viability of the U.N. system. Obviously, the United States is viable, we may be wrong but we do depend on the United Nations, we do depend on international law. We rely on it when it suits our case and, as in the Nicaraguan incident, when it does not we break all the rules.

This demonstrates on a different plane a lack of consciousness in the Congress of the international effects of domestic legislation. It is a form of optical illusion that this poorly drafted statute can be passed; it is short, ambiguous, even grammatically incorrect. To have this statute, which Mr. Cooper has taken an oath to apply, interpreted as "the law of the land" without first having a debate, without the issue being joined, is an immaturity that I wish we did not demonstrate. It sets us apart from many other countries in the world. Would this ever have happened in the other developed countries of the West and major democracies in the world? In fact, would this have happened in 1952? No, you know perfectly well it would not have happened under President Eisenhower. It could not have happened even in the great era of the Connally Reservation. People put too much into the United Nations. They put too much credibility into international law and its instruments at that time. Something has happened between then and now; possibly a few generations have gone by, and people have forgotten what World War II was like.

I have several points on the U.S. attitude toward international law. On the congressional level, Congress should have recognized the international nature of the problem.
It is always the unanticipated side effects that get you, never the thing you are trying to do, but what it causes. The fact that they are unanticipated is sometimes more important, but the fact that the ramifications are anticipated is even more indicative of what was going on in the first place. That Congress did not really take seriously the international debate when it was passing this legislation is the most indicative thing of all, even more than the legislation itself.

The President, to his credit, said he didn’t like the act when he signed it; the Legal Adviser, to his credit, said he didn’t like the act; and, to his credit, Mr. Cooper said that the Department of Justice opposed the act. They could, however, have done more about it than that. They could have interpreted it in accordance with The Charming Betsy which says: “An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” I do not have to make the construction, but I certainly would like to hear it made in court. I do not think that it is proper to have Whitney v. Robertson and all these cases involving the import duty on refined sugar from the Dominican Republican in a bilateral agreement 101 years ago used as black-letter law to defeat something as important as this, especially where you have a vote in the General Assembly of 150–0.

On the Executive level, the Department of Justice could have recognized that the arbitration obligations of article 21 of the Headquarters Agreement were not even touched, mentioned or considered by the Congress. Therefore, they are the law of the land. Therefore, request for arbitration is the law of the land. Therefore, the Executive is bound under the Constitution to enforce the law of the land and go to arbitration. It is very simple, but it has not happened.

My next point is that there is absolutely no way that the United States should have declined to appear before the International Court of Justice on this question. The United States did not appear, and Mr. Szasz referred to the letter Ambassador Shad sent to the Court saying it would serve no useful purpose since such a proceeding is premature. That argument does not even pass the red-face test. It makes a fundamental logical blunder. Although this case can be kicked around on appeal for 10 years, that does not mean that a dispute does not exist today, a dispute fully capable of resolution. Let me remind you of a very interesting word that nobody points to in the Headquarters Agreement in section 21(a). It states, “Any dispute between the United Nations and the United States concerning interpretation or application of this agreement” any dispute “which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators.” (Emphasis added.) That is the law of the land, and that is the law of the United States. That is black-letter law. Not to appear in the International Court of Justice is just as ridiculous as our mistake in not appearing in the merits phase of the Nicaragua case or, indeed, in not appearing in the present phase of the Nicaragua case. It is an insult to the Court and a blunder in long-term legal strategy. Worst of all, it is a mistake in presenting our position toward the rest of the world.

I will conclude now. It is not enough to say that the matter is in U.S. courts. We are presented with a major dilemma and a paradox which, I hope, will be worked out in those courts. It certainly will be interesting to see how the courts look to the results of the International Court of Justice’s advisory opinion. The problem, however, runs far deeper than that. It relates to whether the United States prefers to have a self-judging internal system, which accepts the benefits of the international world when they accrue to the United States, and, when they conflict, we fail to make a substantial enough effort to put our nation in line with the rest.
REMARKS BY RICHARD A. FALK*

I suppose we should have some vocational resistance to being made to look silly. It is one thing to have international law violated; it is another thing to be made to look as though we are part of a ridiculous profession. Unfortunately, the way in which this has evolved will subject us to the prospect of ridicule in the end. I was searching for the proper allusion or metaphor to capture the absurdity of the position in which our government has placed us as advocates of international law. The allusion that I came up with is that since this is the 60th anniversary of Mickey Mouse, this ultimately must be some sort of congressional tribute to that great Disneyland creation. If one wants to capture the full surrealistic depth of the situation that has been created, it is somewhere between Mickey Mouse and Alice in Wonderland.

I would like to address the wider implications this situation illustrates about the shortcomings of the governmental response to this kind of contemporary challenge posed by international legal obligations. These wider implications can be divided into two categories: first, the failures of discretion to do what it is possible to do within the structure of our governing process, and second, the conceptual failures of that governmental structure.

As to the first, Congress deserves to be castigated for an extraordinarily untimely opportunism in bringing to bear in an election year an issue of this sort, burying it in legislation and creating this crisis for the United States in its relations to the United Nations and its relation to international diplomacy generally. Surprisingly, for an administration that talks about resolve and making America stand tall, there has been an unexpected wimpiness in the failure of the administration to back up what it itself has described as both an intrusion on the foreign relations process and an interference with the operations of the United Nations. Not to veto this legislation goes to show the seriousness of this issue. To have the Secretary of State remain silent says that while it is true we disagree with what Congress has done, we do not think it is all that important. I regard it as a very serious failure of leadership on an issue where the executive branch has a particular responsibility both toward the United Nations, where we are the host country, and toward the maintenance of the appropriate kind of diplomatic relations between the United States and the United Nations.

This issue presents a challenge to the judiciary to give up a growing tradition of unwarranted deference and passivity, by hiding behind such things as the political question doctrine in a world that is extremely unlike the kind of world in which those doctrines were originally enunciated. At that time, there was no evolved international law. There were no legal criteria by which to assess executive and congressional action. Today, those criteria exist. It is time for judicial activism to reestablish an appropriate relationship regarding the relevance of international law to the actions of Congress and the Executive. The judicial capacities to use their discretion remain to be seen in this litigation. One is not encouraged, however, by the early results.

Let me turn to the structural and conceptual issues that go beyond the failures of discretion that are here presented. In the first Federalist Papers, the basic admonition of the constitutional arrangements that were being discussed and proposed was that they serve the interests of the citizenry. My central argument would be that the way we now deal with international law within our constitutional framework no longer serves the American people in an appropriate manner. We need to deal in a different way with deliberate violations of international law. It is not a discretion that can be tolerated any longer as part of what Congress and the Executive are permitted to do.

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Whether this has to be rectified by legislation or constitutional action, or can be dealt with as a matter of judicial interpretation, I am uncertain. Nonetheless, it must be dealt with. It is absurd to have this so-called lexical priority attach to the last-in-time instrument. We need something that is more sophisticated and acknowledges more clearly the importance of international law and external legal obligations in an interdependent world.

Second, we need a more sophisticated view of the respective spheres of legal competence between Congress and the Executive as they bear on international legal issues. This controversy is the kind of issue, as Leonard Boudin suggested, that raises the whole question of legislative encroachment on an appropriate sphere of Executive action. The whole notion of spheres of legal competence provides the judiciary with a relatively elegant way of invalidating certain forms of congressional action of the sort that are present here. Furthermore, we need either a legislative or constitutional adjustment to take account of the fact that the U.S. Government, the host country to the United Nations, has a special fiduciary obligation to carry out this treaty above all else. It affects not only ourselves, it affects the entire network of international relationships that are embodied in that organization. If we are to be the responsible host country, we cannot allow domestic, election-year politics to intrude on that fundamental relationship. We owe it to ourselves and to the organization to take account of that.

Finally, we need to rethink the whole issue of lexical superiority. This notion of equating treaties and statutes in terms of the supremacy clause of the Constitution is not mandated by the constitutional language. It is a matter of judicial interpretation in a different sort of global setting on very limited facts. It is certainly susceptible to reinterpretation, even beyond the extent of The Charming Betsy notion of interpretation. The whole idea of lexical parity needs to be re-examined under contemporary conditions.

This set of controversies that has exposed our country externally to such an awkward set of contradictory commitments provides us with the challenge and opportunity to rethink the place of international law in our constitutional process and, in the broader sense, of relating it in a more systematic and effective way to the conduct of foreign relations. We have reached a point in human history where it is critical for citizens to have a right to a lawful foreign policy. This is an absolutely indispensable development of constitutionalism, and it is part of the challenge posed in this extreme situation created by the intemperate and ill-advised legislation at issue.

Remarks by Harold Hongju Koh*

Speaking as the sixth and last panelist on an 8:30 a.m. Saturday panel, I am reminded of a remark attributed to Zsa Zsa Gabor's sixth husband on the eve of their honeymoon trip: "After all that has gone before, I know perfectly well what is expected of me, but I am at a total loss as to how to make it interesting." As the only panelist who is not involved as a party or counsel in any of these lawsuits, I have the luxury of not having to decide what strategic moves to make in any of these cases in the next 10 days. Instead, I thought I might be in the best position to step away from some of the tactical discussions and advocacy that you have heard and to suggest what this entire PLO Mission episode will be remembered for in the next 10 years. Let me suggest how I think this controversy will be remembered in 10 years by three bodies of law: the foreign relations law of the United States, public international law, and the

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law of international remedies, which, coincidentally, was the subject that this panel
originally was supposed to address. If we analyze the PLO Mission controversy in
this manner, I think we will see that there is a way to untie the Gordian knot and to
resolve the problems my fellow panelists have described.

First, how will U.S. foreign relations law remember this controversy. Let me quibble
initially with everyone who has gone before me. This controversy did not begin on
December 22, 1987 when President Reagan signed the Anti-Terrorism Act into law.
It began in October 1985, when four Palestinian terrorists claiming to act for the PLO
hijacked the cruiseship Achille Lauro. Abul Abbas, a member of the PLO's Executive
Committee, later admitted during a televised interview that he had "engineered" the
Achille Lauro operation. What has been overlooked recently is that the Anti-Terror-
ism Act is one of four different types of remedies that have been invoked subsequently
against the PLO for its terrorism, as exemplified during that incident by the murder of
Leon Klinghoffer.

The first of these four remedies took the form of criminal prosecutions that were
brought in an Italian court against the four Achille Lauro hijackers and the indictment
that was brought against Abul Abbas in absentia in Italy. Should Abbas ever be appre-
rehended and tried, either in Italy or in the United States, those criminal convictions
would set a precedent regarding the extraterritorial application of domestic criminal
laws against terrorism.

The second type of remedy is represented by the two civil suits brought by the
Klinghoffer family in November 1985. The first suit was brought against the PLO in
New York state court and now has been removed to the federal court. That suit
charges that the PLO, inter alia, violated Leon Klinghoffer's rights to be free from
torture and from terrorism, the same charges that were made against the PLO before
the D.C. Circuit in Tel-Oren v. Libyan Arab Republic. The second suit was a wrongful
death action brought against the Achille Lauro Shipping Company in the Southern
District of New York before Judge Louis Stanton. The Achille Lauro Shipping Com-
pany has now impleaded the PLO as a third-party defendant. In each of these cases,
depositions of leading PLO officials already have been taken. If either of these cases
gets past motions to dismiss, it will make new foreign relations law in three areas.
First, the cases implicate the question whether the PLO and its officials enjoy any
form of foreign sovereign immunity or diplomatic immunity against civil suits, a point
on which I think the courts would likely rule in the negative. Second, the issue arises
whether acts of terrorism are crimes of universal jurisdiction that give rise to U.S.
federal court jurisdiction in civil cases. This is an issue that is closely related to those
raised in Argentine Republic v. Amerada Hess Shipping Corp., on which the Supreme
Court granted certiorari on April 18, 1988. Third, the cases ask whether private indi-
viduals have a cause of action against nonstate entities such as the PLO, based on
alleged acts of torture and terrorism. Obviously this is an issue that was before the
D.C. Circuit in the 1984 Tel-Oren case, but never was resolved fully, in the now-
famous debate between Judges Edwards and Bork.

While each of these three issues is fascinating and might be resolved in a way that
would add to the body of foreign relations law, each is by its nature sui generis to the
peculiarly contested nature of the statehood of the PLO and the status of terrorism as
an international crime. The same cannot be said for the third type of remedy that has
been sought against the PLO. This remedy is not a criminal conviction, nor a civil
action. Instead, it is an executive action; namely, Secretary of State Shultz's Septem-
ber 1987 attempt to forestall passage of the Anti-Terrorism Act by designating the

In that case, *Palestine Information Office v. Shultz*, those citizens and the American Civil Liberties Union (ACLU) sought to enjoin Secretary of State Shultz, on First and Fifth Amendment due process grounds, from closing the Palestine Information Office. The plaintiffs were unsuccessful in the district court and argued their appeal to the D.C. Circuit at the end of February. The heart of their argument was that when Congress passed the Foreign Missions Act, it never intended that that act would be used to close information offices operated by U.S. citizens who are acting as duly registered foreign agents seeking to engage in peaceful political advocacy. If that were the case, the State Department theoretically could use the act to shut down law firms that currently are engaged in a political advocacy on behalf of the Delvalle Government in Panama. The *Palestine Information Office* case is very important, but it has received little attention here today. It represents the classic confrontation between the Executive's liberal construction of a broadly worded authorizing statute and First Amendment rights. It is the type of issue that has faced my fellow panelist Leonard Boudin, repeatedly over the years, in *Kent v. Dulles*, *Zemel v. Rusk*, *Haig v. Agee* and *Regan v. Wald*. Simply by citing those cases, which I am sure bring tears to Leonard's eyes, is to suggest that the President's construction likely will prevail again here, even in the face of First Amendment arguments. There is, however, some slight movement to the contrary, as evidenced by the Supreme Court's recent 3–3 affirmance of the D.C. Circuit's opinion in *Abourezk v. Reagan*. It is possible, therefore, that judicial solicitude for First Amendment interests will lead to a narrowing construction of the Foreign Missions Act, based on *Kent v. Dulles*.

This brings me to the Anti-Terrorism Act of 1987, which we now recognize as the fourth type of remedy that has been sought against the PLO. It takes the form not of criminal prosecution, nor a civil action, nor an executive action, but of a duly enacted statute. The two cases that have been brought in the Southern District of New York recently, namely, the *U.S. v. PLO* and *Mendelsohn v. Meese*, the suit by the private litigants against the United States, could make foreign relations law in six different areas: first, standing; second, the political question doctrine; third, the scope of the First Amendment in foreign affairs; fourth, the bill of attainder doctrine; fifth, the scope of the President's exclusive foreign affairs power; and sixth, the last-in-time rule in cases of conflict between statutes and treaties. Let me say quickly that I believe the fifth of these, the President's exclusive foreign affairs power, should be the dispositive issue in these cases. Because of that conclusion, I would suggest that the sixth issue—the conflict between the statute and the treaty—will never be reached. As a result, most of what everyone has been saying here today should become irrelevant.

Although the President's exclusive foreign affairs power should be the dispositive issue, allow me to review the first four areas in which some foreign relations law also might be made. First, I do not expect standing to be a serious issue, because the U.S. Government clearly has standing in *U.S. v. PLO*. It is less clear in *Mendelsohn*, where the plaintiffs, none of whom has an indisputable claim to standing, will have difficulty having their claims heard by the court. Second, I doubt that either case will be dismissed as a political question, because both involve construction of statute. In the 1986 *Japan Whaling Ass'n* case, the Supreme Court suggested that courts should not shirk their responsibility to interpret statutes, even where foreign affairs are at stake. Third, with all due respect to Mr. Boudin, the First Amendment issues likely will not

be dispositive. Recently, this Supreme Court has not been receptive to arguments about the right to hear and, unlike the Palestine Information Office case, the case in the Southern District of New York involves the First Amendment rights of foreign diplomats, not of U.S. citizens. The Supreme Court could not strike down the Anti-Terrorism Act on First Amendment grounds without also effectively limiting the President's power to take similar diplomatic actions to declare as persona non grata diplomats from South Africa, Nicaragua, Libya or Iran. Fourth, although the bill of attainder issue is attractive, I also do not think that it ultimately will carry any weight. The Anti-Terrorism Act is not a criminal statute that legislatively determines guilt or inflicts criminal punishment without a trial. If Congress can deny landing rights to South African Airways, which it did last year in a statute later upheld by the D.C. Circuit in an opinion written by Judge James Buckley, then it also can do this act. Nonetheless, there will be a lot of bill of attainder law made this year by this case, the anti-Toshiba provisions in the new trade bill, and the recent case involving Rupert Murdoch and his cross-ownership of newspapers and radio stations.

If either of these cases reaches the Supreme Court, I think the Anti-Terrorism Act should be struck down on the fifth possible ground, as an invasion of the President's exclusive recognition authority under article II, section 3 of the Constitution and his Curtiss-Wright inherent "sole organ" power to conduct diplomatic relations. As a result, I agree with Leonard Boudin and Richard Falk that Charles Cooper's argument to the contrary is surprising, puzzling, and self-defeating. It is surprising because the United States currently maintains no formal diplomatic relations with a nation like Taiwan. Nevertheless, no one would ever say that the President's ability to deal with Taiwan does not fall within the scope of his recognition authority or his power to conduct diplomatic relations. Mr. Cooper's argument is puzzling because when President Reagan signed the Anti-Terrorism Act, he objected to this provision on precisely this ground: that it invaded the President's power to conduct foreign affairs. Finally, his argument is self-defeating, because I count as many as seven votes on the Supreme Court to strike the statute on the grounds that the statute violates the President's foreign affairs power. Justice Brennan likely would vote to strike it down on recognition grounds, as he did in Goldwater v. Carter. Justice Stevens likely would strike it down, given his votes in Regan v. Wald and Dames & Moore v. Regan. Finally, the proexecutive types, Rehnquist, Scalia, O'Connor, White and Kennedy, also all probably would vote to strike down the statute. Given this likely opposition, I think that Mr. Cooper should turn around and make the argument in support of Mr. Boudin on this issue, thus allowing the President to extricate himself from this conundrum.

Finally, as for the last-in-time rule, if the statute is struck down in fact, as unconstitutional, then there never will be a conflict between the statute and the treaty. If that conflict is avoided, the Court never will have to make a ruling regarding the validity of the last-in-time rule.

What does all of this mean for the ICJ case? I think that the World Court should decline to adjudicate the advisory case while domestic remedies are being exhausted. That is what the court essentially did in the Interhandel case. If the ICJ declines to adjudicate the advisory case and the U.S. Supreme Court votes to strike the statute, then the case will go away. Any ruling by the ICJ that the statute violates the Headquarters Agreement would be premature. But if the court should find that the Agreement has been violated, I expect that its ruling would create two types of political pressure. First, it would create political pressure on Congress to repeal the Anti-Terrorism Act, as has begun already with the recently introduced H.R. 4078. Second, I
fear that it would create political pressure on the Supreme Court to issue a dishonest ruling; namely, a ruling that there is no real conflict between the statute and the treaty. I say that such a ruling would be dishonest because, regardless of what the legislative history may say, the plain language of the Anti-Terrorism Act seems very clear. On its face the statute is intended to violate the treaty, and it does not create any exception even in those cases in which implementation of the statute would result in a clear violation of international law.

This brings me to my final point. For what point will the PLO cases ultimately be remembered? In the end, I do not think they will be remembered as cases about foreign affairs law or public international law, but as an illustration of a new form of international legal process—what I have called elsewhere "transnational public law litigation." Transnational public law litigation melds two modes of litigation that were previously thought to be separate. In traditional domestic litigation, private individuals sue one another on private claims based on national law seeking retrospective relief for damages. In traditional international adjudication, states sue one another on claims of public law before international tribunals seeking prospective relief in the form of a negotiated political settlement. In transnational public law litigation, these two modes of litigation merge. Now private individuals, government officials and states often sue each other in domestic courts relying on transnational or foreign relations law. The focus is retrospective, namely, getting redress for the individual victim, as well as prospective, inasmuch as the suit usually seeks a declaration of a norm of international law that can be the basis for a negotiated settlement. Recent examples of this phenomenon abound: Nicaragua's suits filed in U.S. courts based on its successful ICJ judgment, the Bhopal case, and the entire range of litigation under the Alien Tort Statute that started with Filartiga v. Pena-Irala.

My point is that transnational public law litigation is an expanding effort to fuse international legal rights with domestic judicial remedies. Domestic public law litigation, of the type that began with Bivens v. Six Unknown Named Regents, constitutional efforts to desegregate schools, and to create constitutional conditions in prisons and hospitals now has migrated into the international area. At the same time, transnational commercial litigation, which started in the foreign sovereign immunities area, has migrated into the public law area. As yet another example of this emerging phenomenon, the PLO Mission controversy ultimately will be remembered, surprisingly enough, for what it adds to this new branch of the law of international remedies. In the final analysis, what the PLO case confirms for me is that the international law remedy of choice in the 1990s will be domestic remedies, namely, transnational public law suits in U.S. domestic courts. At 10:00 a.m. on a Saturday morning in April 1988, that proposition might not be the one you expect from me, but I hope, at a minimum, that you will find it interesting.

Discussion

Mr. Cooper: I would like to make a couple of points, keying off Harold Koh's remarks, which were quite excellent. He only made one error and otherwise did the Office of Legal Counsel, where he used to be employed, quite proud. First, I would like to address the comments urging that the act be interpreted in a way that is consistent with the Headquarters Agreement. Any such interpretation, I believe, would be dishonest. We have heard from Mr. Hight that The Charming Betsy is the answer, and we have heard from others, such as Mr. Boudin, who are attracted to the idea. The argument runs into some difficulties, not the least of which is the language of the statute, which states that the act is to apply "notwithstanding any provision of law to