

## SEPARATE OPINION OF JUDGE SCHWEBEL

While I have voted in favour of the Court's Order, I voted against one paragraph of it and feel bound to state my reasons for objecting to it.

After observing that it would not be appropriate, in the circumstances of the case, for the Court to consider whether or not provisional measures may be indicated in proceedings on a request for an advisory opinion, the Order continues:

“Whereas the Court takes note that the General Assembly, at the meeting at which it adopted resolution 42/229 B requesting an advisory opinion of the Court also adopted resolution 42/229 A, by which it

‘Calls upon the host country to abide by its treaty obligations under the Agreement and to provide assurance that no action will be taken that would infringe on the current arrangements for the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York.’”

In my view, the inclusion of the foregoing paragraph in the Order is objectionable for the following reasons.

The Statute of the Court provides that a question upon which the advisory opinion of the Court is asked shall be laid before the Court “by means of a written request containing an exact statement of the question upon which an opinion is required . . .” (Art. 65, para. 2). The jurisdiction of the Court in an advisory proceeding is limited by the bounds of that question.

“A particularly significant application of this principle is seen in those cases where the advisory opinion is requested on a preliminary question of procedure. In such cases, the Court has been careful in its opinion not to prejudice the problem of the merits.” (Shabtai Rosenne, *The Law and Practice of the International Court*, Vol. 2 (1965), p. 699, citing *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne case*, P.C.I.J., Series B, No. 12, at p. 18, and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, I.C.J. Reports 1950, p. 70.)

In this case, the exact question put to the Court is confined to whether the United States is under an obligation to enter into arbitration in accordance with section 21 of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations. The question is thus confined to a preliminary question of procedure. The

General Assembly deliberately refrained from asking the Court any question treating the underlying question of substance, namely, whether, by reason of the provisions of the Headquarters Agreement, the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations shall be enabled to maintain premises and adequate functional facilities within the jurisdiction of the United States. That question was withheld from the Court, with the clear intention that it should be dealt with exclusively pursuant to section 21 of the Headquarters Agreement, namely, by an arbitral tribunal empowered to render a final decision. It should be observed in this connection that section 21 further provides that the Secretary-General of the United Nations or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion "on any legal question arising in the course of such [arbitral] proceedings . . . Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court." But no such question has been put to the Court, at any rate as yet. Rather, the question which is before the Court solely concerns the obligation to enter into arbitration under section 21 of the Headquarters Agreement.

Nevertheless, the Court has adopted an Order which takes note of and quotes a paragraph of a General Assembly resolution which is not addressed to it, which paragraph engages the underlying question of substance described above. That paragraph, and more explicitly the resolution which contains it, adopts a position on that question of substance.

In so doing, the Court, in my view, has at once surpassed the bounds of its jurisdiction and trenched upon the question of substance which has been withheld from it. Worse still, in the event that arbitration were to take place between the United Nations and the United States, pursuant to section 21, and a question arising in the course of such proceedings were to be put to the Court, the Court, by quoting the paragraph in question, may have laid itself open to the charge of prejudging that question.

In defence of the Court, it may be said that the Court, being unable to indicate provisional measures in this advisory proceeding, took note of the paragraph at issue in lieu of them. That may be an accurate explanation of the intention of the Court but it cannot be an adequate defence of its action. The Court's quotation of the paragraph at issue can have no injunctive effect; it is in no measure an effective substitute for an indication of provisional measures. It rather seems to be an expression of the Court's concern, an expression which is not juridical in character. For that reason as well, its inclusion in the Court's Order is to be regretted.

(Signed) Stephen M. SCHWEBEL.

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