SEPARATE OPINION OF JUDGE ODA

1. I voted in favour of the Advisory Opinion, but only after some hesitation, which I consider it my judicial duty to explain. The reason lies in my conviction that one important aspect of the issues outstanding between the United Nations and the United States should, in my view, have been more clearly highlighted both in the request submitted by the General Assembly and in the reasoning of the Court.

2. The important point to note at the outset is that, so far as the relevant substantive provisions of the 1947 Headquarters Agreement are concerned, that is to say, sections 11-13, there does not exist much difference of views between the United Nations and the United States. Although, in the present controversy, express reference to sections 11, 12 and 13 was first made, at least to the Court's certain knowledge, in the statement made by the Spokesman for the Secretary-General on 22 October 1987 (United Nations daily press briefing), it may reasonably be assumed that not only the United Nations but also the United States have always had those provisions in mind when considering the implications for the interests of the United Nations of the legislation introduced in order to make unlawful the establishment or maintenance within United States jurisdiction of any office of the Palestine Liberation Organization.

3. As early as January 1987, Secretary of State Shultz indicated his interpretation of the Headquarters Agreement in his letter of 29 January 1987 to Senator Dole (and in a letter of the same date to Representative Kemp) that:

> "The US has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as 'invitees' of the United Nations within the meaning of the Headquarters Agreement ... [W]e therefore are under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters ..." (*Congressional Record,* Vol. 133, No. 78, p. S6449.)

In a letter to the Permanent Representative of the United States on 13 October 1987, the United Nations Secretary-General, referring to the position of the Secretary of State (as quoted above) expressed the strong view that "the legislation [contemplated] runs counter to obligations arising from the Headquarters Agreement". In his response, the United States Permanent Representative to the United Nations wrote a letter to the United Nations Secretary-General on 27 October 1987 stating that:

> "[T]he Administration has vigorously opposed closure of the Palestine Liberation Organization Observer Mission to the United Nations. I want to assure you that the Administration remains opposed to the proposed legislation."

In a letter of 7 December 1987 to the United States Permanent Representative, the United Nations Secretary-General reiterated the Organization's position and took note that it "coincided" with that taken by the United States Administration in the letter of the Secretary of State on 29 January 1987.

4. When the PLO Observer on 14 October 1987 brought the matter to the attention of the United Nations Committee on Relations with the Host Country, the representative of the United States immediately responded by stating

> "that in the opinion of the Executive Branch, closing of the PLO Mission would not be consistent with the host country's obligations under the Headquarters Agreement" (A/42/26: *Report of the Committee on Relations with the Host Country,* p. 12).

So far as the report of the Committee shows, no mention was made of any specific provisions of the Headquarters Agreement which might have been at stake. Yet one can reasonably assume that the representative of the United States in his response implicated sections 11, 12 and 13 of the Agreement.

5. When, in resolution 42/210B of 17 December 1987, the General Assembly expressed its view that

> "the action being considered in . . . the United States of America . . . might impede the maintenance of the facilities of the [PLO] Observer Mission . . . which enables it to discharge its official functions",

it also voiced the opinion that the PLO Observer Mission was covered by the provisions of the Headquarters Agreement and requested the United States

> "to abide by its treaty obligations under the Headquarters Agreement and . . . to refrain from taking any action that would prevent the discharge of the official functions of the [PLO] Observer Mission".

When the draft of that resolution was under consideration in the Sixth Committee, the United States representative said, on 25 November 1987, that:

> "the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligations under the Headquarters Agreement" (A/C.6/42/SR.58, p. 2).

As recently as January 1988, the Acting Permanent Representative of the

United States, in his letter of 5 January to the United Nations Secretary-General, did not hesitate to state that the provisions concerning the PLO Observer Mission "if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement".

6. Thus it was quite clear that, regarding "the interpretation or application" of sections 11-13 of the Agreement, there was no difference of opinion, in that both sides understood that the *forced closure* of the PLO office would conflict with international obligations undertaken by the United States under the Agreement. What brought about a differentiation between the position of the United States and that of the United Nations was that the two Houses of Congress finally adopted the Anti-Terrorism Act, as Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, on 15 and 16 December 1987, and that the President of the United States signed it into law, along with other Titles of the latter Act, on 22 December 1987. I must repeat that the difference between the United Nations and the United States was thus not the issue whether the *forced closure* of the office would or would not violate the Headquarters Agreement, but rather the issue as to what course of action within the United States domestic legal structure would be tantamount to the *forced closure* of the PLO's New York office, in which both parties would see a violation of the Agreement. This difference seems to have emerged towards the end of 1987 or in early 1988.

7. When a draft resolution (which later became General Assembly resolution 42/210B) was put to the vote in the Sixth Committee on 11 December, the United States representative expressed his reasons for not participating in the voting, namely, that the resolution "was unnecessary and inappropriate since it addressed a matter still under consideration within the United States Government" (A/C.6/42/SR.62, p. 3). When the draft proposed by the Sixth Committee was adopted in the plenary meetings on 17 December 1987 as resolution 42/210B, the United States representative, who again did not participate in the voting, reiterated the United States' position (A/42/PV.98, p. 8). On the other hand, in a letter on 7 December 1987 to the United States Permanent Representative, referred to above, the United Nations Secretary-General requested confirmation

> "that even if this proposed legislation becomes law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected".

In the view of the Secretary-General:

> "Without such assurance, a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist."

He warned that, in the absence of that assurance, he "would be obliged to

enter into the dispute settlement procedure foreseen under section 21 [of the Agreement]". This position was reiterated by the United Nations Secretary-General in a letter of 14 January 1988 to the Permanent Representative of the United States.

8. The United Nations has stated that negotiations, which are a prerequisite for bringing a dispute to compulsory arbitration under section 21 of the Headquarters Agreement, were initially held on 7 January 1988, but their content remains unclear. What is apparent is that a meeting on 12 January 1988 did not provide, in the view of the Secretary-General, the necessary assurance that the existing arrangements for the PLO Observer Mission would be maintained. This may doubly justify the inference that, rather than there being any negotiations on *"the interpretation or application"* of sections 11, 12 and 13, there were simply consultations in which the United Nations, or so it appears, repeatedly sought the assurance of the United States that, given the parties' common ground in relation to those sections, the PLO office would not be closed notwithstanding the enactment of the Anti-Terrorism Act. On the other hand, the United States' position in these consultations was that

> "the legislation in question had not yet been implemented and the Executive Branch was still evaluating the situation with a view to the possible non-application or non-enforcement of the law" (written statement of the United Nations Secretary-General).

In a series of consultations, the United States thus interpreted the situation then existing as not being one falling under section 21 of the Agreement; while the United Nations maintained that the dispute settlement procedure provided for in section 21 should be implemented. The discussions centred on the applicability, hence the application of section 21; in other words the compromissory clause itself.

9. There was accordingly never any apparent dispute between the United Nations and the United States as to *how* sections 11-13 of the Agreement *should* be "interpreted or applied". Though the possibility may not be excluded that the United States might in future argue that *forced closure* would not be in conflict with those sections, there was virtual agreement between them in understanding that the *forced closure* of the PLO Observer Mission office would constitute a breach of these provisions of the Agreement. Yet "the Attorney General of the United States has determined that he is required by the Anti-Terrorism Act of 1987 to close the office" of the PLO Observer Mission (letter dated 11 March 1988 from the Acting Permanent Representative of the United States to the United Nations Secretary-General). The actual issue the United Nations faced concerned the constitutional structure of the United States, which ostensibly enabled domestic legislation to be carried into effect in breach of the rights of another party to a treaty which the United States had concluded; and for this to happen "irrespective of any obligations the

United States may have under the Agreement" (letter as stated above), or "irrespective of any international legal obligation that the United States might have under the Headquarters Agreement" (written statement of the United States); or irrespective of "the interpretation or application of the Agreement"; allegedly on the ground that "Congress has the authority to abrogate treaties and international law for the purpose of domestic law" or that, in this particular case, "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 UN" (Justice Department briefing on 11 March 1988).

10. I am not suggesting that the Court was asked in the present case to address that issue, which constitutes a cardinal problem of maintaining the supremacy of international law in the context of its internal application. However, it should be realized that, by asking the question now before us, based on the belief that "section 21 of the [Headquarters] Agreement ... constitutes the *only* legal remedy to solve the dispute" (General Assembly resolution 42/230 of 23 March 1988; emphasis added), the General Assembly has deferred the real issues with which the United Nations has been faced and, I am sure, will not in the outcome be satisfied by the mere submission of a dispute — limited to the interpretation or application of sections 11-13 of the Headquarters Agreement — to arbitration. This is because the real issues of the dispute turn not on the interpretation or application of the Headquarters Agreement, but on whether, in operative effect, precedence will be given to the uncontested interpretation or application of that Agreement or to the Anti-Terrorism Act as interpreted by the Attorney General of the United States. My problem is that the question the Court has had to tackle is not the one which it would have been the most useful for the Court to answer if the underlying concern of the General Assembly was to be met. As it happens, the Court has asserted the priority, in the circumstances, of international law, but has neither heard nor had to consider any thorough argument on that crucial point.

(Signed) Shigeru ODA.