SEPARATE OPINION OF JUDGE ODA

I

1. I voted in favour — albeit reluctantly — of the Order which was very nearly unanimously adopted.

However, I find it incorrect that the Court has decided, at this stage and in the form of a Court Order, that "the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings" (Order, p. 206, para. 46 (A)).

I feel that the Court's decision in this Order sets a rather unfortunate precedent in its jurisprudence relating to counter-claims.

II

2. In the current case concerning *Oil Platforms*, which was presented unilaterally by Iran against the United States on 2 November 1992, Iran submitted its Memorial on 8 June 1993. While the United States, on 16 December 1993, presented its preliminary objection to the jurisdiction of the Court (within the time-limit fixed by the Court for the submission of the Counter-Memorial), the Court in its Judgment of 12 December 1996 rejected that objection and found that "it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by [Iran] under Article X, paragraph 1, of that Treaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, I.C.J. Reports 1996,* p. 821, para. 55 (2)).

Within the time-limit fixed by the President of the Court for the submission of the Counter-Memorial, the United States, on 23 June 1997, filed its Counter-Memorial entitled "Counter-Memorial and Counter-Claim". In its submission, the United States requests, on the one hand, that the Court adjudge and declare "[t]hat the United States did not breach its obligations to [Iran] under Article X (1) of the Treaty" and that "the claims of [Iran] are accordingly dismissed". On the other hand, Part VI of the United States Counter-Memorial sets forth its counter-claim and in its submissions the United States requests, with respect to its counter-claim, that the Court adjudge and declare:

"1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and

detrimental to maritime commerce, [Iran] breached its obligations to the United States under Article X of the 1955 Treaty, and

2. That [Iran] is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court . . ."

3. Several months passed and the Court has not taken any action so far. The Court did not order a second round of written pleadings (in other words, the submission of a Reply by Iran and a Rejoinder by the United States) since the counter-claim was presented in the Counter-Memorial of the Respondent party on 23 June 1997.

In fact, in a letter dated 2 October 1997 addressed to the Registrar of the Court, which was, in part, a response to the contention contained in the letter dated 23 June 1997 from the Agent of the United States filed at the same time as its Counter-Memorial, the Agent of Iran stated:

"I should . . . observe that Iran has serious objections to the admissibility of the United States' counter-claim. It is Iran's position that the counter-claim as formulated by the United States does not meet the requirements of Article 80 (1) of the Rules. Iran requests a hearing on this question, as provided for in Article 80 (3) of the Rules."

On 17 October 1997, after the exchange of the above-mentioned letters of the Agents of both Parties through the Registrar of the Court, the Acting President in the present case held a meeting with the Agents of the Parties in order to ascertain their views as to the further proceedings in the case. According to the United States letter of 20 October 1997 "it was discussed [at that meeting] that the two Parties may be ordered by the Court to file *submissions* regarding the United States Counter-Claim" (emphasis added). It is also known from the text of the present Order, however, that at that meeting "the two Agents agreed that their respective Governments would submit *written observations* on the question of the admissibility of the United States counter-claim" (emphasis added) and that "the Agent of Iran envisaged that his Government would then present oral observations on the question".

In that letter dated 20 October 1997 addressed to the Registrar, the Agent of the United States stated that

"the United States understands that any order by the Court will limit the filing of these submissions to the issue set forth in Rule 80 (3) of the Rules of the Court, in other words, to the connection of the counter-claim to Iran's claim".

In his letter of 27 October 1997 to the Registrar, prepared in response to the Registrar's request of 21 October 1997, the Agent of Iran made it

clear that he did not share the views of the United States that Iran's submissions should have been limited to the issue set forth in Article 80, paragraph 3, of the Rules. Iran was of the view that "a counter-claim may only be presented provided that it is directly connected with the subject-matter of the claim of the [other] party and that it comes under the jurisdiction of the Court".

4. By invitation of the Registrar in the above-mentioned letter dated 21 October 1997, Iran, on 18 November 1997, forwarded a document entitled "Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court" in which Iran stated:

> "[Iran] hereby requests a hearing pursuant to Article 80, paragraph 3, of the Rules of Court in order to allow the Court to determine whether or not the United States Counter-Claim should be joined to this Case".

On 18 December 1997, the United States, in response to the Registrar's invitation in the above-mentioned letter to set forth its views within a month of receiving Iran's statement, submitted "Views on Iran's 'Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court' ", in which the United States stressed that

> "[t]he thrust of Iran's position is not whether the US counter-claim is connected to the subject matter of Iran's claim, but whether there is a valid US counter-claim at all. The Court cannot make such a determination at this stage of the proceedings. It certainly should not allow Iran to avoid responding to the merits of the US counter-claim"

and that "the Court should now decide to join the questions presented by the US counter-claim to the original proceeding" *(ibid.)*. The United States was of the view that "no oral proceeding is required in connection with such a decision" *(ibid.)* and "[t]here is . . . no need for an oral proceeding under Article 80 (3)" *(ibid.)*.

Since 18 December 1997, there was no further development at the Court until 10 March 1998, the date on which Iran was informed by this Order, without being given the requested opportunity to be heard, "that the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings" (Order, p. 206, para. 46 (A)).

III

5. This procedure strikes me as irregular, if I may say so, in the light of the jurisprudence of this Court, as well as of its predecessor, the Permanent Court of International Justice.

A "counter-claim", as one of the incidental proceedings of the Court, has featured not in the Statute itself but in the Rules of Court since the time of the Permanent Court of International Justice. At its inception in 1946, the International Court of Justice included a "counter-claim" in its 1946 Rules of Court, Article 63 of which read:

> "When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings."

This same text remained in the Rules, as amended in 1972, as Article 68. That text was redrafted, without great modification to the substance, in the new 1978 Rules, as Article 80:

> "1. A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.
>
> 2. A counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party.
>
> 3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings."

6. Throughout the entire history of the present Court, there have been only two other cases (except for the quite recent case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which case an Order on a relevant matter has been issued during the past few months) when counter-claims were presented during the proceedings.

In the *Asylum* case (presented unilaterally by Colombia against Peru on 15 October 1949), which was the first case at the International Court of Justice to deal with the issue of counter-claims, the Respondent, Peru, in replying to Colombia's Memorial of 10 January 1950, filed its Counter-Memorial on 21 March 1950 in which it presented its counter-

claim. In its submissions, Peru requested the Court to set aside the submissions of the Applicant, in which Colombia asks the Court to adjudge and declare:

> "I. That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of 18 July 1911, and the Convention on Asylum of 20 February 1928, and of American international law in general.
>
> II. That the Republic of Peru as the territorial State, is bound, in the case now before the Court, to give the guarantees necessary for the departure of . . . Haya de la Torre from the country, with due regard to the inviolability of his person." (*I.C.J. Pleadings, Asylum*, Vol. I, p. 43.) *[Translation by the Registry.]*

With respect to its counter-claim, Peru requested the Court to adjudge and declare

> "[as a counter-claim under Article 63 of the Rules of Court, and in the same decision,] that the asylum granted by the Colombian Ambassador at Lima to . . . Haya de la Torre was contrary to Article 1, paragraph 1, and Article 2, paragraph 2, item 1 *(inciso primero)*, of the Convention on Asylum signed at Havana in 1928" (*ibid.*, p. 164 *[translation by the Registry]*).

In its Reply of 20 April 1950, Colombia expressed its views on the counter-claim, although Colombia did not address explicitly the question whether there existed a direct connection with the subject-matter of the claim of the other party, and stated

> "To sum up, the Government of Peru has not succeeded in establishing its counter-claim concerning the alleged violation of Articles 1, paragraph 1, and 2, paragraph 2, item 1 *(inciso primero)* of the 1928 Havana Convention on Asylum, by the Colombian Ambassador at Lima as resulting from the 'grant' of asylum to . . . Haya de la Torre." (*Ibid.*, p. 386.) *[Translation by the Registry].*

In its Rejoinder of 15 June 1950 (*ibid.*, p. 425), as in its Counter-Memorial, Peru submitted its request to the Court to reject the Colombian submission and to adjudge in relation to its counter-claim in the same manner as in its Counter-Memorial (*ibid.*, p. 442).

The issues relating to the counter-claim of Peru were extensively discussed in parallel with the original submission of Colombia in the two rounds of oral proceedings held from 26 September 1950 to 9 October 1950. At those oral proceedings Peru submitted its final submissions, presented by Georges Scelle, which were essentially the same as the previous

submissions in its Counter-Memorial and Rejoinder, but with one addition in the last line, which reads that "in any case the maintenance of the asylum constitutes at the present time a violation of that treaty" (*I.C.J. Pleadings, Asylum*, Vol. II, p. 192 *[translation by the Registry]*).

In the Judgment of 20 November 1950, the Court, regarding Peru's counter-claim, (i) "[r]ejects it in so far as it is founded on a violation of Article 1, paragraph 1, of the [1928 Havana] Convention on Asylum" and (ii) "[f]inds that the grant of asylum by the Colombian Government to . . . Haya de la Torre was not made in conformity with Article 2, paragraph 2 ('First'), of that Convention" (*I.C.J. Reports 1950*, p. 288).

7. In the case concerning *Rights of Nationals of the United States of America in Morocco* presented unilaterally by France against the United States on 27 October 1950, France submitted its Memorial on 1 March 1951 in which it made submissions relating, *inter alia*, to the privileges that were to be enjoyed by United States nationals in Morocco, which privileges arose from the 1836 Treaty, to the existence of the consular jurisdiction over United States nationals and to the extent of that consular jurisdiction, and to the effect of the 1948 Decree relating to consumption taxes upon United States nationals.

The United States raised a preliminary objection on 15 June 1951, in which that country already indicated that it "would wish to consider the inclusion of a counter-claim or counter-claims in its Counter-Memorial, pursuant to Article 63 of the Rules of Court" and continued:

> "Should it be determined, pursuant to that article, that under such circumstances a counter-claim of this character could not be joined to the original proceedings, the Government of the United States would have to consider what other steps it must take to safeguard its rights and interests." (*I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, Vol. I, p. 238.)

The preliminary objection was eventually withdrawn by the United States.

However, in its Counter-Memorial of 20 December 1951, the United States presented, in addition to its objection to the original submission of France, its counter-claim. In support of that counter-claim, the United States Government requested the Court to

> "judge and declare that:
>
> 1. Under Article 95 of the Act of Algeciras, the value of imports from the United States must be determined for the purpose of customs assessments by adding to the purchase value of the imported merchandise in the United States the expenses incidental to its transportation to the custom-house in Morocco . . .
>
> . . . . . .
>
> 2. The treaties exempt American nationals from taxes . . . [T]o

collect taxes from American nationals in violation of the terms of the treaties is a breach of international law.

Such taxes can legally be collected from American nationals only with the previous consent of the United States . . . and from the date upon which such consent is given . . .

. . . . . .

3. Since Moroccan laws do not become applicable to American citizens until they have received the prior assent of the United States Government, the lack of assent of the United States Government to the Dahir of February 28, 1948, rendered illegal the collection of the consumption taxes provided by that Dahir." (*I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco,* Vol. I, p. 407.)

In its Reply of 13 February 1952, France stated in its submission in connection with the counter-claim contained in the United States Counter-Memorial, its request that the Court adjudge:

"That Article 95 of the Act of Algeciras defines valuation for customs purposes as the value of the merchandise at the time and at the place where it is presented for customs clearance;

That no treaty has conferred on the United States fiscal immunity for its nationals in Morocco, either directly or through the effect of the most-favoured-nation clause;

That the laws and regulations on fiscal matters which have been put into force in the Shereefian Empire are applicable to the nationals of the United States without the prior consent of the Government of the United States;

That, consequently, consumption taxes provided by the Dahir of 28 February 1948 have been legally collected from the nationals of the United States, and should not be refunded to them." (*Ibid.,* Vol. II, p. 72.) *[Translation by the Registry.]*

In its Rejoinder of 18 April 1952, the United States maintained, in their entirety, the submissions presented in its Counter-Memorial (*ibid.,* p. 131). The oral proceedings were held from 15 to 26 July 1952. The United States repeated its original submission in respect of its counter-claim (*ibid.*, p. 291).

With respect to the United States counter-claim, the Court's Judgment of 27 August 1952 partly rejected the submission of the United States relating to exemption from taxes and to the consumption taxes imposed by the Shereefian Dahir in 1948, but found that

"in applying Article 95 of the General Act of Algeciras, the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its cash wholesale value delivered at the custom-house" (*I.C.J. Reports 1952,* p. 213).

IV

8. The institution of counter-claims, in parallel with that of third-party intervention which appears immediately after counter-claims in the section on incidental proceedings in the Rules of Court, had been introduced at the time of the Permanent Court of International Justice. Its purpose was the proper administration of justice with a view to judicial economy to enable it to rule on any or all connected claims in a single proceeding, in other words, to avoid any inconvenience which might be caused by the other party or by a third party filing a fresh application on issues that are directly connected. Any new application would, of course, necessitate another confirmation of the Court's jurisdiction and an examination of the complete documentation, and it would be a situation best avoided.

However, an applicant State will be severely prejudiced if the scope of the issues, in the respondent State's counter-claim, is broadened beyond the original contention in the claim of the applicant State. While an applicant State is not itself allowed to bring additional claims, why then may a respondent State be permitted to bring a new claim if this (counter-)claim is not directly connected with the subject-matter of the Applicant's claim? We should not simply put what may have originally been somewhat distinct matters into one melting-pot without making a careful examination of the essential character of that claim.

9. In the present case, I wonder if it is quite proper to confirm the admissibility of the United States counter-claim and make it part of the whole proceedings without (i) affording the Parties, and in particular the Applicant, the opportunity to express their views on this matter in the written pleadings and (ii) without having oral hearings on the basis of the complete exhaustion of the exchange of views indicated in the written proceedings. In the light of past jurisprudence, except as already mentioned for the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in which an Order was made just a few months ago, I wonder if the quick rendering of an Order by the Court is quite reasonable.

Past precedent (as mentioned above) seems to indicate, in general, that the question presented by way of a counter-claim by the Respondent and the subject-matter of the Applicant were so interlinked that their direct connection could not be determined without careful study of the substance of the issues contained in their respective counter-claims. In those two past cases, *Asylum* and *Rights of Nationals of the United States of America in Morocco*, some of the respective counter-claims submitted by the Respondents were rejected by the Court but only after it was proved by a thorough examination through the written and oral pleadings that

the counter-claims were directly connected with the subject-matter of the claim of the other party.

10. I certainly agree that, at this stage, the Court should fix the time-limit for the submission of a Reply and of a Rejoinder, as has been done in paragraph 46 (B) of the present Order. The matter, including whether or not there is a "connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party", should have been open to analysis by Iran in the Reply which it is to prepare and, further, by the United States in its Rejoinder.

There remains, as a matter of principle, the question of whether it is fair for the Respondent to be given the opportunity to present the subject-matter twice, once in its Counter-Memorial and once in its Rejoinder, while the Applicant is confined to a single written pleading in its Reply, although the Applicant will be afforded a further opportunity to argue this point during the oral pleadings.

11. I find it difficult to understand why the admissibility of the counter-claim should be determined *at this stage* before the Court has, at least, received Iran's Reply. I also fail to understand why this needs to be done so hastily in this case especially when one considers the careful manner in which the Court has proceeded in earlier years.

In addition, I believe that this matter, namely whether the (counter-) claim is admissible or not, should not be determined by the Court in the form of an Order but should rather be decided by the Judgment in the merits phase.

(Signed) Shigeru ODA.