SEPARATE OPINION OF JUDGE LACHS

I wish to make some comments regarding the Judgment and the solution of the outstanding issues between the two States concerned. First I wish to express some preoccupation over the inclusion of the decision recorded in subparagraph 5 of the operative part.

It is not that there can be any doubt as to the principle involved, for that the breach of an undertaking, resulting in injury, entails an obligation to make reparation is a point which international courts have made on several occasions. Indeed, the point is implicit, it can go without saying. "Reparation", said the Permanent Court of International Justice, "is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself" (*P.C.I.J., Series A, No. 9*, p. 21). This dictum did not, as it happens refer to a judicial decision but to a convention. But the Court's Judgment of 9 April 1949 in the *Corfu Channel* case illustrates the point in a decision of the Court, which then, in the operative paragraph, did not make any statement on the obligation to make reparation.

There was thus no necessity for the operative paragraph of the present Judgment to decide the obligation, when the responsibility from which it might be deduced had been clearly spelled out both in the reasoning and in subparagraph 2. I accordingly felt subparagraph 5 to be redundant. In the circumstances of the case it would, to my mind, have been sound judicial economy to confine the *res judicata* to the first four subparagraphs and to conclude with the reservation for further decision, failing agreement between the Parties, of any subsequent procedure necessitated in respect of a claim to reparation.

By so proceeding the Court would in my opinion have left the ground clear for such subsequent procedure, while not depriving the Applicant of a sufficient response to its present claim under that head.

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I wish now to emphasize the value which the present Judgment possesses in my eyes. I consider it to constitute not only a decision of the instant case but an important confirmation of a body of law which is one of the main pillars of the international community. This body of law has been specifically enshrined in the Vienna Conventions of 1961 and 1963, which in my view constitute, together with the rules of general international law, the basis of the present Judgment. The principles and rules of diplomatic

privileges and immunities are not – and this cannot be over-stressed – the invention or device of one group of nations, of one continent or one circle of culture, but have been established for centuries and are shared by nations of all races and all civilizations. Characteristically, the preamble of the 1961 Convention *"Recall[s]* that peoples of all nations from ancient times have recognized the status of diplomatic agents" and concludes with the words : *"Affirming* that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention." Moreover, by 31 December 1978 the Vienna Convention of 1961 on Diplomatic Relations had been ratified or acceded to by 132 States, including 61 from Africa and Asia. In the case of the 1963 Convention on Consular Relations, the figures at the same date were 81, with 45 from those two continents. It is thus clear that these Conventions reflect the law as approved by all regions of the globe, and by peoples belonging to both North and South, East and West alike. The laws in question are the common property of the international community and were confirmed in the interest of all.

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It is a matter of particular concern, however, that the Court has again had to make its pronouncements without the assistance of the Respondent's defence, apart from the general arguments contained in two letters addressed to it. The Court took note of the claims of the Islamic Republic of Iran against the United States of America and kept the door open for their substantiation before it. But, unfortunately, Iran chose to deprive itself of the available means for developing its contentions. While discharging its obligations under Article 53 of its Statute, the Court could not decide on any claim of the Iranian Government, for no such claim was submitted ; thus the responsibility for not doing so cannot be laid at the door of the Court.

In this context I am anxious to recall that the Court was called into being by the Charter of the United Nations as "the principal judicial organ of the United Nations" (Art. 92), and is intended to serve all the international community in order to "decide in accordance with international law such disputes as are submitted to it" (Statute, Art. 38, para. 1). But to be able to perform this task, the Court needs the assistance of the States concerned. Governments remain, of course, free to act as they wish in this matter, but I think that, having called it into existence, they owe it to the Court to appear before it when so notified – to admit, defend or counter-claim – whichever role they wish to assume. On the other hand, the Applicant, having instituted proceedings, is precluded from taking unilateral action, military or otherwise, as if no case is pending.

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The Court having given its ruling on the issues of law placed before it, one should consider whether one can usefully point the way towards the practical solution of the problems between the parties. Here it would not be realistic to ignore the fact that the mandate given by the Secretary-General of the United Nations to his special commission linked the grievances of either side.

The efforts of that commission thus brought the problem into a field of diplomatic negotiation where its solution should have been greatly facilitated. Unfortunately, those efforts failed, while further events contributed to an aggravation of the tension. Nevertheless, now that the Judgment has, with force of law, determined one of the major issues in question, it should in my opinion be possible for negotiations to be resumed with a view to seeking a peaceful solution to the dispute. I can only repeat the deep-rooted conviction I have expressed on other occasions, that, while the Court is not entitled to oblige parties to enter into negotiations, its Judgment should where appropriate encourage them to do so, in consonance with its role as an institution devoted to the cause of peaceful settlement.

Accordingly, both countries, as parties to the Charter and members of the international community, should now engage in negotiations with a view to terminating their disagreement, which with other factors is sustaining the cloud of tension and misunderstanding that now hangs over that part of the world. By taking such account of the grievances of Iran against the United States as it had been enabled to do, the Court gave its attention not only to the immediate question of responsibility for specific acts placed before it, but also to the wider disagreement that has perturbed relations between the two countries. In view of the fact that the Islamic Republic of Iran has radically severed its ties with the recent past under the former ruler, it is necessary to adopt a renewed approach to the solution of these problems, and while both parties are not on speaking terms I believe recourse should be had to a third-party initiative. The States concerned must be encouraged to seek a solution in order to avoid a further deterioration of the situation between them. To close the apparent abyss, to dispel the tension and the mistrust, only patient and wise action – mediation, conciliation or good offices – should be resorted to. The role of the Secretary-General of the United Nations may here be the key.

I append these words to the Judgment because I am hopeful that its pronouncements may mark a step towards the resolution of the grave differences which remain in the relations between the two States concerned. The peaceful means which I have enumerated may still appear difficult of application, but our age has shown that, with their aid, progress can be made towards the solution of even more complex problems, while perilous methods tend to render them even more intractable. Past efforts have failed for a variety of reasons, many of them deriving precisely from the lack of direct communication, and the situation being dominated by

factors unrelated to the specific nature of the dispute. Against this background, the crucial element of timing went awry.

It will be necessary to seize the propitious moment when a procedure acceptable to both sides can be devised. But the uses of diplomacy which are corroborated on the present occasion will, I am confident, be vindicated in the event.

(Signed) Manfred LACHS.