

SEPARATE OPINION OF JUDGE ODA

TABLE OF CONTENTS

	<i>Pages</i>
OPENING REMARKS	472
PART I. NICARAGUA'S STANDING AS APPLICANT	473
Chapter 1. Nicaragua's Declaration of 1929 for acceptance of the Optional Clause	473
Chapter 2. Article 36, paragraph 5, of the Statute	478
Chapter 3. Nicaragua's position in respect of the Optional Clause	483
PART II. EFFECT OF THE SHULTZ LETTER	489
Chapter 1. New types of reservation	489
Chapter 2. Termination and modification of the United States Declara- tion	494
Chapter 3. Effect vis-à-vis Nicaragua of the United States termination of its obligation under the Optional Clause	510
CONCLUSIONS	513

OPENING REMARKS

While dissenting on many vital points from the Judgment, I nevertheless concur in the conclusion the Court has reached in paragraph 113 (1)(c) that it has jurisdiction to entertain the case solely because I cannot, with confidence, hold in respect of the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States any view different from the interpretation given by the Judgment.

Yet this Treaty was not mentioned at all in Nicaragua's Application and was scarcely discussed during the oral proceedings, except for a single reference by the Agent to the Treaty as "a subsidiary basis for the Court's jurisdiction"; neither am I confident that the Court has sufficiently satisfied itself that a dispute concerning the interpretation or application of this Treaty – which is of a commercial nature – exists or that, if any dispute does exist, diplomatic negotiations have been tried and have failed to adjust it (see Treaty, Art. XXIV, para. 2). I am afraid that the Court might seem in danger of inviting a case "through the back door". So it should be understood that a case brought under the 1956 Treaty must be more strictly limited in scope than that brought by Nicaragua's original Application. In other words, the present case could be sustained only as far as any violations of specific provisions of that Treaty are proved.

Furthermore, in depending on this Treaty as one of the bases for jurisdiction, the Court seems implicitly to concede that Article 36, paragraph 2, read with paragraph 5, of its Statute does not provide a solid foundation. It is true that in the case concerning *United States Diplomatic and Consular Staff in Tehran* the Court based its jurisdiction on two different sources, but it did so for reasons which have no parallel in the present case, so that the Judgment's reference to this alleged precedent constitutes a highly misleading application of the Court's jurisprudence.

In view of the unduly short time allowed to Judges in the present case for expounding their separate or dissenting opinions, I cannot, to my great regret, cover all the issues over which I am in disagreement with the Judgment. I confine myself therefore, in the main, to expressing my views, which are quite contrary to those of the Judgment, with regard to Article 36, paragraph 2, read with paragraph 5, of the Statute of the Court, since these provisions, which are the basis of the so-called system of the Optional Clause or of compulsory jurisdiction, raise issues of interpretation and application that are so important that the future of the Court might well depend upon them.

PART I. NICARAGUA'S STANDING AS APPLICANT

*Chapter 1. Nicaragua's Declaration of 1929 for
Acceptance of the Optional Clause*

I

Nicaragua became a Member of the League of Nations on 3 November 1920¹. On 13 December of that year it joined the other Members in a unanimous resolution approving, as amended, the draft Statute of the Permanent Court of International Justice and providing for a Protocol of Signature whereby States would declare their "recognition of this Statute". The Protocol was so worded as to render this recognition meaningful and effective by, first, bringing the Statute into force through ratification by the majority of League Members and, second, securing from League Members declarations "that they accept[ed] the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute". The Protocol continued in the following terms :

"The present Protocol . . . is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations ; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations." (*P.C.I.J., Series D, No. 1, 4th ed., p. 7.*)

Ratification of the Protocol was thus essential both for the creation of the Permanent Court and for conferring upon it jurisdiction *ratione personae*. It can accordingly be concluded that a State, even if it had participated in the resolution of 13 December 1920 and even if it remained a Member of the League of Nations, could not be held to have accepted the jurisdiction of the Court in the minimal sense indicated above unless or until it had both signed and ratified the Protocol, which became open for signature only three days after the adoption of the resolution.

Nicaragua did sign the Protocol of Signature, but not until 14 September 1929, when it also signed the Protocol relating to the revision of the Statute of the Court. There is, however, as the Judgment makes abundantly clear, no evidence that it ever provided an instrument of ratification for deposit in the archives of the League Secretariat. On the other hand, various documents submitted to the Court indicate that between 1934 and 1939 Nicaragua internally carried out domestic formalities for the ratification of the Protocol of the Statute. Externally, on 29 November 1939, the Ministry

¹ Nicaragua later announced on 26 June 1936 that it would withdraw from the League, and this withdrawal became effective as of 26 June 1938 (League of Nations, *Official Journal*, 17th Year, Nos. 8-9 (1936), p. 923).

of Foreign Affairs of Nicaragua sent the following telegram to the Secretary-General of the League of Nations :

[English translation]

“Statute and Protocol Permanent Court International Justice The Hague have already been ratified. Will send you in due course instrument ratification – Relations.”

The Acting Legal Adviser to the League of Nations acknowledged receipt of the telegram on 30 November 1939, and stated :

“En réponse, je m’empresse de vous informer que le service compétent du Secrétariat se tient à la disposition de votre Gouvernement pour lui faciliter les formalités relatives au dépôt dudit instrument de ratification.” (Ann. No. 23 to United States Counter-Memorial.)

The Secretariat of the League of Nations did not, however, receive the instrument of ratification thereafter. In his letter of 15 September 1942 to Judge Manley O. Hudson, the Acting Legal Adviser stated :

“We have not received the ratification necessary to complete the signature of the Court Protocol and at the same time to bring into force the obligations concerning Article 36. But on November 29th, 1939, the Secretary-General was informed by a telegram that the Court Protocol was ratified by the President of the Republic of Nicaragua. We have however never received the instrument of ratification itself, which should have been sent to us. Nicaragua is therefore not bound either by the Protocol or by the optional clause.” (Ann. No. 25 to United States Counter-Memorial.)

Nicaragua’s Memorial (para. 86) concedes that : “The instrument of ratification of the Protocol of Signature appears not to have been deposited.” Annex I to the Memorial states :

“In connection with this proceeding, the Government of Nicaragua has undertaken investigations in the official archives of Nicaragua. To date, no evidence has been uncovered that the instrument of ratification of the Protocol of Signature to the Statute of the Permanent Court of International Justice was forwarded to Geneva.”

The Agent of Nicaragua stated :

“World War II, which was then in full progress, and the attacks on commercial shipping may explain why the instruments appear never to have arrived at the Registry of the Permanent Court.” (Hearing of 8 October 1984.)

Thus Nicaragua itself seems to recognize that the instrument of ratification of the Protocol was not deposited, as it should have been, with the Secretariat of the League of Nations.

Nicaragua has suggested that this defect in the process of recognizing the Statute and accepting the jurisdiction of the Permanent Court of International Justice can be attributed to the outbreak of war in Europe in 1939. However, what is of concern in the present case is not whether the necessary ratification could have been deposited by any fixed date in 1939. Even if one acknowledges the serious situation in Europe as from 1939, it is difficult to suppose that Nicaragua would not, at some time up to 1945, have been able to cure the defect if it persisted in the intention of becoming a party to the Statute of the Permanent Court of International Justice.

II

Nicaragua had thus gone only half way towards "recognition of the Statute" (in the language of the 1920 resolution) or "acceptance of the jurisdiction" (in that of the Protocol) when, on 24 September 1929, the following declaration was made in accordance with the so-called Optional Clause :

"On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice."

Article 36 of the Permanent Court's Statute provided that such declarations might be made "either when signing or ratifying the Protocol" of Signature "or at a later moment". In Nicaragua's case the moment chosen was ten days after signature of the Protocol, which strongly suggests that it fully intended, at that period, to complete all the processes whereby it would have recognized the Statute and accepted the jurisdiction of the Permanent Court – accepted it, what is more, as compulsory without condition. Failing ratification, however, none of this occurred, and the fulfilment of that intention remained, as we have seen, indefinitely in suspense. From the viewpoint of legal effectivity, the half-way stage reached by Nicaragua remained of no account. What effect can after all be attributed to its recognition as compulsory of a jurisdiction it had not formally accepted : the jurisdiction of a Court whose Statute it had not formally recognized ?

In this connection, and even supposing that Nicaragua's intention was constant and demonstrable beyond all doubt, I cannot accept the proposition that that intention outweighed the defect because of the formal character of the latter. As I have indicated at the outset, ratification of the Protocol was a stringent requirement without whose fulfilment the Permanent Court could have no jurisdiction over Nicaragua. This conclusion

is reinforced by the very language of the resolution of 13 December 1920, which had stated in terms that the Permanent Court was to deal solely with "disputes between the Members [of the League] or States which have ratified [the Protocol]" or other States which had been given access to the Court under the second paragraph of Article 35 of its Statute (*P.C.I.J., Series D, No. 1*, 4th ed., p. 7). Nicaragua never fell into either category. Ratification was thus no matter of pure form, and neither was the requirement of "sending" the ratification to the Secretary-General, considering that the possibility of his notifying "other signatory powers" depended entirely upon its accomplishment. To my knowledge, he has never been held remiss for not proceeding to the notification upon the strength of the 1939 telegram.

Certainly, at the time of the Permanent Court, there was no doubt at The Hague that Nicaragua, until it ratified the Protocol, could not be held bound by its declaration. The *Collection of Texts Governing the Jurisdiction of the Court* issued by the Registrar (*P.C.I.J., Series D, No. 6*, 4th ed., 1932) made this perfectly clear with a list of mere "*Signataires*" of the Optional Clause (on p. 32) followed immediately by one of "*Etats liés*" (p. 33). Several States were placed in the first list, but not in the second; in most cases because of a self-imposed requirement of ratification of the *declaration* that had yet to be fulfilled, but in Nicaragua's case because it had not ratified the *Protocol* (*ibid.*, p. 58, n. 5, and table on p. 61). That situation never changed throughout the life of the Permanent Court, and so there was never any moment at which Nicaragua's declaration could be relied upon.

Nicaragua, be it noted, was not alone in having made its declaration in advance of the necessary ratification of the Protocol of Signature of the Statute. Particularly in the early days of the Permanent Court of International Justice, several States, doubtless encouraged by the very wording of Article 36 of the Statute, made declarations of acceptance of compulsory jurisdiction "when signing" the Protocol of Signature, far in advance of its ratification. Thus *Annual Report* No. 15 of the Permanent Court of International Justice, the last number available prior to 1945, indicates that as of 15 June 1939 the 1920 Protocol of Signature had been signed by 58 nations, of which nine (United States of America, *Argentina, Costa Rica, Egypt, Guatemala, Iraq, Liberia, Nicaragua* and *Turkey*) had not ratified it; though the eight here italicized had declared their acceptance of the compulsory jurisdiction of the Court in one way or another.

Whatever the legal significance of official yearbooks, the fact is that the Registrar of the Court, in prefacing the addenda to the above-mentioned *Collection of Texts* which were incorporated into the *Annual Reports*, took care to describe that collection as mentioning "instruments already in force or merely signed" (e.g., *P.C.I.J., Series E, No. 15*, p. 211), so that no

conclusion of effectivity is to be drawn from the inclusion of the above eight States in the *List of States having signed the Optional Clause*.

The situation of Nicaragua in this respect had not changed by 31 December 1945. In *Report No. 16* of the Permanent Court of International Justice (the latest volume of the series, covering the years 1939-1945 and therefore not called Annual Report), published after 1946, Nicaragua was referred to in exactly the same way as in the preceding volumes, except for the addition of the following footnote in a section entitled *Protocol of Signature of the Statute of the Court* :

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol, and the instrument of ratification was to follow. The latter however has not been deposited.” (*P.C.I.J., Series E, No. 16, p. 331.*)

In No. 16, as in the preceding volumes, Nicaragua was listed as a State which had *signed* [the Optional Clause] *without condition as to ratification* (*ibid.*, p. 49), and as a State which had *signed without condition as to ratification but had not ratified the Protocol of Signature of the Statute* (*ibid.*, p. 50). Even in this volume Nicaragua was not among the 29 States which were listed as *States bound by the Clause* (*ibid.*). Despite the 1939 telegram, there was no change in Nicaragua's treatment in the *List of States having signed the Optional Clause* (*ibid.*, p. 345).

III

It stands to reason that the declaration of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice as such did not have effect if it emanated from a State which had not become a Party to the Statute of the Permanent Court of International Justice, and that the declaration of acceptance of the compulsory jurisdiction of the Court could not have been in force separately from the recognition of the Statute itself, to which alone such a declaration could have been attached.

It is not easy to count the exact number of those States whose declarations of acceptance of the compulsory jurisdiction of the Court were still valid in 1945, because of the somewhat vague status of the declaration in the case of some countries. Quite a number of declarations had already expired by that time because of the expiration of the term fixed by the declarations themselves, and still-valid declarations had been made by States which were not the original Members of the United Nations. In 1945 it was possible to say, on the basis of Volume 15 of the *Annual Report* (the latest available), that about 20 declarations made by original Member States of the United Nations were still valid and effective. This brings me to the question of the transition to the International Court of Justice.

Chapter 2. Article 36, paragraph 5, of the Statute

I

The origin of Article 36, paragraph 5, of the present Court's Statute may be traced to a question raised by the United Kingdom at the Washington Committee of Jurists in the preparations for the San Francisco Conference in the spring of 1945 to draft the United Nations Charter. In a document dated 10 April 1945 the United Kingdom drew attention to the matter as follows :

“One question which will arise in connection with Article 36, is what action should be taken concerning the existing acceptances of the ‘optional clause’, by which a number of countries have, subject to certain reservations, bound themselves to accept the jurisdiction of the Court as obligatory. Should these acceptances be regarded as having automatically come to an end or should some provision be made for *continuing them in force* with perhaps a provision by which those concerned could revise or denounce them [?]” (*UNCIO*, Vol. XIV, p. 318, emphasis added.)

The documents of the Committee of Jurists do not reveal any significant discussions on this subject, but in a report of 14 April 1945 the Sub-Committee dealing with the drafting of Article 36 expressed its belief that provision should be made for a “special agreement for continuing these acceptances in force” (in French, “un accord spécial pour maintenir ces acceptations en vigueur”) (*ibid.*, p. 289). Thus *continuance in force* was the theme from the outset.

II

In Committee IV/1 of the San Francisco Conference, the United Kingdom representative made the following statement on 28 May 1945 :

“If the Committee decides to retain the optional clause, it could provide for the continuing validity of existing adherences to it. Since forty Members of the United Nations are bound by it, compulsory jurisdiction would to this extent be a reality.” (*UNCIO*, Vol. XIII, p. 227.)

A Sub-Committee was set up on that day and its report submitted to Committee IV/1 on 31 May 1945 read as follows :

“The text proposed by the Sub-Committee to the Committee is attached. This text is the same as that of the first alternative proposed for Article 36 by the Committee of Jurists of Washington, with the exception of the two following modifications :

.

- (2) the new paragraph which follows (new paragraph 4) has been inserted after paragraph 3 :

‘Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and *which are still in force* shall be deemed as between the parties to the present Statute to have been made under this Article and shall continue to apply, in accordance with their terms.’” (*UNCIO*, Vol. XIII, p. 558, emphasis added.)

The French text of this new paragraph reads :

“Les déclarations *encore en vigueur*, faites en application de l’article 36 du Statut de la Cour permanente de Justice internationale seront considérées, en ce qui concerne les rapports réciproques des parties au présent Statut, comme ayant été faites en application du présent article, et continueront à s’appliquer conformément aux conditions qu’elles stipulent.” (*Ibid.*, p. 564, emphasis added.)

In other words, the English and French texts were drafted in exactly the same manner.

During the debate on this report in Committee IV/1 on 1 June 1945, several delegates expressed their views on this particular provision.

Canada :

“In view of the new paragraph quoted above, as soon as states sign the Charter, the great majority of them would be automatically under the compulsory jurisdiction of the Court because of existing declarations.” (*Ibid.*, p. 248.)

United Kingdom :

“After referring to the fact that his country had accepted the jurisdiction of the Court for the past sixteen years, he stated that, for the reasons given in the report, he favoured the compromise suggested therein. He thought that some forty states would thereby become automatically subject to the compulsory jurisdiction of the Court.” (*Ibid.*, p. 249.)

Australia :

“[H]e desired to call attention to the fact that not forty but about twenty states would be automatically bound as a result of the compromise. In this connection he pointed out that of the fifty-one states that have adhered to the optional clause, three had ceased to be independent states, seventeen were not represented at the Conference and about ten of the declarations of other states had expired. The difference between the two systems was therefore much greater than had been suggested.” (*Ibid.*, p. 266.)

On 5 June 1945 France made a new proposal, suggesting that the paragraph should read as follows :

“Les déclarations faites en application de l’article 36 du Statut de la Cour permanente de Justice internationale *pour une durée qui n’est pas encore expirée* seront considérées, dans les rapports entre parties au présent Statut, *comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée et dans les conditions exprimées par ces déclarations.*” (UNCIO, Vol. XIII, p. 486, emphasis added.)

The English text of this suggested amendment reads as follows :

“Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, *as including acceptance of compulsory jurisdiction of the International Court of Justice for the time and under the conditions expressed in these declarations.*” (*Ibid.*, p. 485, emphasis added.)

It is to be noted, however, that the French amendment was suggested so as to replace the latter part of the new paragraph as proposed by the Sub-Committee D, in both the English and French texts, but to change the wording of the first part only in the French text by replacing “encore en vigueur” with “pour une durée qui n’est pas encore expirée”. The French representative stated that “the changes suggested by him in paragraph (4) were not substantive ones, but were intended to improve the phraseology” (*ibid.*, p. 284). According to the French version of the report :

“Le représentant de la France déclare que les changements dont il a proposé l’introduction au paragraphe 4 ne visaient pas le fond mais tendaient à améliorer la rédaction.” (*Ibid.*, p. 290.)

This statement is crucial to the interpretation of what is now paragraph 5 of Article 36, for it precludes one from arguing, on the basis of the preparatory work, that the meaning of the English text may be strained to cover every subtlety encompassed by its French counterpart.

On 6 June Committee IV/1 unanimously approved paragraph 4, which was finally drafted as follows :

“Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period during which they still have to run and in accordance with their terms.” (*Ibid.*, p. 284.)

In the report of this Committee it was stated as follows :

“A new paragraph 4 was inserted to preserve declarations made

under Article 36 of the old Statute for periods of time which have not expired, and to make these declarations applicable to the jurisdiction of the new Court.” (*UNCIO*, Vol. XIII, p. 391.)

This English text was identical with that of the draft report (p. 314), but its French equivalent had been recast so as, *inter alia*, to replace “les déclarations formulées . . . pour des périodes qui n’ont pas encore expirées” (p. 348) with “les déclarations non expirées” (p. 426), which, one may point out in passing, appears closer to “still in force” than either the French text of the Statute or the English of the report. The only other mention of this provision in the document is, curiously enough, found in the part devoted to the Charter, where it is indicated that the new paragraph (and Art. 37 of the Statute) would safeguard “the progressive development of the judicial process” (p. 384).

On 9 June this paragraph had been renumbered paragraph 5 (owing to the insertion of a new paragraph 4 which is irrelevant to this discussion), and it thus finally became Article 36, paragraph 5, of the Statute.

III

There is no denying that the founders of the International Court of Justice in 1945 wanted to carry over to it declarations accepting the jurisdiction of the Permanent Court of International Justice as compulsory. This is no licence, however, for interpreting Article 36, paragraph 5, as attempting to refer to any declaration which, without being effective, was simply on record at that time as a historical statement. As shown in the explanation given by the United Kingdom, which took the initiative on this particular provision, Article 36, paragraph 5, was drafted to meet problems such as : should “the acceptances of the ‘Optional Clause’, by which a number of countries have . . . *bound themselves* to accept the jurisdiction of the Court as obligatory” “be regarded as having automatically come to an end” ? Or “Should some provision be made for continuing them *in force*” ? (*UNCIO*, Vol. XIV, p. 318, emphasis added.)

To my mind, this, and the clear limits on interpretation which are imposed by the English text of Article 36, paragraph 5, and should be evident from the foregoing section, quite rule out the possibility that the provision may be held to contemplate any declaration not in force or by which the declarant State was not or – in Nicaragua’s case – never had been bound. The French delegate at the San Francisco Conference who suggested the expression “pour une durée qui n’est pas encore expirée” for Article 36, paragraph 5, may or may not have been thinking of his own Government’s case, because the French Declaration of 1936 had already expired in 1941. On the other hand, there is not the slightest ground for believing that the French delegate had in mind the case of Nicaragua in suggesting the rephrasing of the French version.

It may indeed be asked whether there was any reason for the San Francisco Conference in 1945 to concern itself with any States that had never been parties to the Statute of the Permanent Court of International Justice. The new Article 36, paragraph 2, was certainly available to all such States, and there was therefore no necessity to make any additional provision to enable expression to be given to their consent to be bound by the Court’s compulsory jurisdiction. *A contrario*, had any attempt been made to “capture” them unawares through a statutory formula, that would have been an extremely dubious device which tended to violate the principle of consent and was *ex hypothesi* vitiated. The straightforward solution offered by the new Article 36, paragraph 2, sufficed to enable *any* State joining the new judicial institution, including one having made a declaration that had never come into force, to express its readiness to accept the compulsory jurisdiction.

The present Judgment states :

“[T]hose who framed the new text were aware . . . that a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua’s declaration.” (Para. 28.)

While this may be literally true, it begs the whole question of the legal force to be attributed to a declaration “made” in such circumstances. Nothing in the proceedings of the San Francisco Conference confirms the implied presumption that on the dissolution of the Permanent Court a declaration of this nature had any life that could be sustained. Furthermore, I suggest that this presumption be tested against the situations of two other countries never parties to the Statute of the Permanent Court of International Justice, Argentina and Iraq, which in 1935 and 1938 respectively made declarations, both subject to ratification, to run for a given number of years (Argentina 10, Iraq 5) from the date of deposit of the ratification of the declaration in question (and, in Iraq’s case, thereafter until notice of

termination). Supposing that either of these two countries were now to deposit a ratification of their pre-war declaration, could it seriously be held that those declarations had remained merely dormant and had been made effective by such ratification ?

*Chapter 3. Nicaragua's Position in Respect of
the Optional Clause*

I

There is no indication as to how Nicaragua understood its own position in 1945 vis-à-vis the provisions of Article 36 of the Statute of the new Court. The only things which are clear are, first, that *Report* No. 16 of the Permanent Court of International Justice, which covered the period from 15 June 1939 to 31 December 1945, had not then been published ; and, second, that the only available report was No. 15, which covered the period 15 June 1938 to 15 June 1939, and which was prepared before the 1939 telegram was sent. Thus in 1945 Nicaragua was not in a position to check its status in the Permanent Court of International Justice from any official publication. It may be noted that Nicaragua was represented at the Washington Committee of Jurists by Ambassador Guillermo Sevilla-Sacasa and at the San Francisco Conference by Mr. Mariano Argüello Vargas, then Minister for Foreign Affairs. At any rate, Nicaragua cannot be deemed to have believed in 1945 that it would be bound by the compulsory jurisdiction of the new Court pursuant to Article 36, paragraph 5, of the new Statute.

II

Nicaragua further states that its own conduct, and the acquiescence of the United States as well as of other States since 1945, provided a basis for the effectiveness of the 1929 Declaration. According to Nicaragua :

“3. Nicaragua has demonstrated by its consistent conduct for 38 years that it has fully consented to the compulsory jurisdiction of the Court.

4. The United States, by accepting the effectiveness of Nicaragua's declaration for 38 years, has waived any objection to the formal defect in ratification of the Protocol of Signature.” (Nicaragua's Memorial, paras. 91, 94.)

In order to prove the allegedly consistent conduct by Nicaragua and the alleged acceptance of the effectiveness of Nicaragua's Declaration by the United States, the present Judgment heavily depends on the way in which Nicaragua is listed in the International Court of Justice *Yearbooks*. The

Judgment points out the fact that Nicaragua is included in the “List of States which have recognized the compulsory jurisdiction of the International Court of Justice, or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice” in the first International Court of Justice *Yearbook 1946-1947*, in contrast to its exclusion from the list in the last *Report* of the Permanent Court of International Justice of “States bound by the [optional] clause”, and it states :

“It is . . . difficult to escape the conclusion that the basis of this innovation was to be found in the possibility that a declaration which, though not of binding character, was still valid, and was so for a period that had not yet expired, permitted the application of Article 36, paragraph 5, so long as the State in question, by ratifying the Statute of the International Court of Justice, provided it with the institutional foundation that it had hitherto lacked. From that moment on, Nicaragua would have become ‘bound’ by its 1929 Declaration, and could, for practical purposes, appropriately be included in the same *Yearbook* list as the States which had been bound even prior to the coming into force of the post-war Statute.” (Para. 37.)

Relying on the inclusion of Nicaragua in the “List of States having recognized the compulsory jurisdiction of the International Court of Justice, or which are still bound by the acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice” in the International Court of Justice *Yearbooks*, the Judgment (para. 37) seems to overlook, or ignore, the disclaimer which started in the 1956-1957 *Yearbook* and which reads :

“The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question.” (P. 207.)

From the *Yearbook 1958-1959* to the *Yearbook 1964-1965*, the beginning of the above reads : “The inclusion or omission of . . .”

Furthermore, the Judgment seems to overlook another fact, namely, that in the *Yearbook 1946-1947* of the International Court of Justice, the declarations made for the purpose of accepting the compulsory jurisdiction of the Permanent Court by States which had not deposited the ratification of the Protocol of Signature, such as Argentina, Costa Rica, Egypt, Guatemala, Iraq, Liberia and Turkey, were certainly not treated as having any potential effect under the Statute of the new Court.

The Registrar of the Court, who is requested by the Court to prepare the *Yearbook*, is admittedly responsible for the accuracy of the facts described therein : however, what kind of legal significance can be drawn from a description in this document is a completely different matter. The Regis-

trar is not responsible for the legal interpretation of or implications to be drawn from this publication. It falls within the judicial functions of the Court to give authoritative meaning to such description and not within the administrative tasks to be discharged by the Registrar.

III

It is, however, pertinent to examine how the position of Nicaragua has been dealt with in the International Court of Justice *Yearbooks*, whose presentation of the facts concerning acceptance under the Optional Clause, after remaining fairly similar from Volume 1 (1946-1947) to Volume 18 (1963-1964), was greatly changed when a complete overhaul of the structure of the *Yearbook* was undertaken with Volume 19 (1964-1965). Since then it has not changed to the present day.

The information which concerns us here has at various times been dealt with in different chapters of the *Yearbook*. It will be appropriate to begin with the mentions in Chapter III, concerning the Court's jurisdiction. In this chapter, there was a table concerning *Declarations accepting compulsory jurisdiction* from 1946-1947 to 1949-1950. The table of States accepting compulsory jurisdiction was set out under the headings "State - Date - Conditions" in the *Yearbook 1946-1947*, but this was changed to "State - Date - Duration" in the 1948-1949 volume, then to "State - Date of Signature - Duration" in that of 1949-1950. In all of the *Yearbooks* Nicaragua was listed as follows: "Nicaragua - 24 IX 29 - Unconditionally", but with a footnote attached in the same manner as to some other countries (for instance, in the volume of 1946-1947, Australia, Canada, Colombia, Dominican Republic, El Salvador, Haiti, India, Iran, Luxembourg, New Zealand, Panama, Paraguay, Siam, Union of South Africa, United Kingdom and Uruguay) (apparently there is an error in that Sweden was omitted in the 1946-1947 volume). This footnote stated:

"Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, paragraph 5, of Statute of the present Court)."

As from the volume of 1950-1951 this table disappeared, and under the title of "Acceptance of compulsory jurisdiction" there was a listing showing:

"The following States have deposited with the Secretary-General of the United Nations the declaration recognizing the Court's jurisdiction as compulsory, or had already accepted the jurisdiction of the Permanent Court of International Justice as compulsory for a period that has not yet expired." (*I.C.J. Yearbook 1951-1952*, p. 43)

This format continued until the *Yearbook 1958-1959*, but since the 1959-1960 volume such reference to the names of States completely disappeared from Chapter III. Nicaragua was included in the list mentioned above

since the volume of 1950-1951. From the 1956-1957 to the 1958-1959 volumes, the following footnote was added to Nicaragua : "See footnote to the declaration of this State, Chapter X, second part."

In the *Yearbook 1946-1947* until that of 1963-1964 there was always a chapter entitled *Texts governing the jurisdiction of the Court* ; this was modelled on the practice of the Registry of the Permanent Court of International Justice, which however had also issued such chapters as offprints constituting addenda to *Series D, No. 6*, bearing the same title. In Chapter X for 1946-1947, the declaration of Nicaragua was listed under the section : *Communications and declarations of States which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court of International Justice* (p. 207), with a footnote which read :

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry."

It should be remembered in passing that the final sentence was rightly designed not to exclude the possibility that the ratification had, unbeknown to the Registrar, been deposited where it belonged – in the archives of the League Secretariat.

From the time of the *Yearbook 1947-1948*, under the section headed *Acceptance of the compulsory jurisdiction of the Court*, only the texts of new declarations were reproduced. Declarations like those of Nicaragua which had been printed in the 1946-1947 volume were not reproduced but simply made the subject of a reference back to that volume. This practice, which in effect preserved the actuality of the footnote, was continued until the *Yearbook 1955-1956*. Since the *Yearbook 1956-1957* all the declarations in force have always been reproduced.

Also in this Chapter X mentioned above, until the *Yearbook 1955-1956* there was always a "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice" (Art. 36 of the Statute of the International Court of Justice) (*I.C.J. Yearbook 1947-1948*, p. 133¹). The headings of each column of the table listing these States have been changed from "States – Date of signature – Conditions – Date of deposit of ratification" in the *Yearbook 1946-1947* to "State – Date of signature – Conditions – Date of deposit of ratification" in 1947-1948 ; "State – Date of signature – Conditions – Date of ratification" in 1948-1949 ; "State – Date of signature – Date of deposit of signature – Conditions" in 1949-1950 ; and "State – Date of signature – Date of deposit of declarations –

¹ The title in the 1946-1947 volume was slightly different.

Conditions” in the 1951-1952 volume. This last type remained until the 1955-1956 volume. During this period Nicaragua was listed as “Nicaragua – 24 IX 29 – (Unconditionally) – blank”. Since the *Yearbook 1949-1950*, because of the change of format, Nicaragua was listed as “Nicaragua – 24 IX 29 – 24 IX 29 – (Unconditionally)”.

In the 1955-1956 volume a footnote was attached to the listing of Nicaragua, which read as follows :

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations.”

The new final sentence shows clearly that by 1956 the Registrar had made thorough enquiries and was reasonably satisfied that the possibility left open by the previous footnote was now unlikely in the extreme. Since the *Yearbook 1956-1957*, as previously mentioned, the texts of all the declarations in force were listed under the title *Acceptance of the compulsory jurisdiction of the Court in pursuance of Article 36 of the Statute*, after which the table was discontinued. A footnote is attached to the declaration itself of Nicaragua, which is identical to that in the 1955-1956 volume. From the *Yearbook 1961-1962* onwards, the title was changed to *Declaration recognizing compulsory jurisdiction*, but there was no change to the substance.

There has been a complete change in the format of the *Yearbook* since that of 1964-1965. The former Chapter X was replaced by a new Chapter IV, *Texts governing the jurisdiction of the Court*, in which Section II, “Declarations recognizing as compulsory the jurisdiction of the Court”, contained the complete texts of the declarations ; the listing of Nicaragua in that volume was the same as in 1956-1957 and this presentation has continued until the latest *Yearbook 1982-1983*.

Thus it can be seen that throughout the *Yearbooks*, from the very beginning, a reservation has always been attached to the Declaration of Nicaragua. In the 1955-1956 volume a footnote was added in respect of Nicaragua in the list in Chapter X, and in the 1956-1957 volume, where the list was discontinued and the full text reproduced, the same footnote was carried over. In addition, in Chapter III of the volumes from 1956-1957 to 1958-1959 which continued the express reference to the names of the States, Nicaragua was mentioned with a footnote which referred back to the footnote included in Chapter X.

IV

Is it possible, from the facts as mentioned above, to draw the conclusion that the Court has made any authoritative interpretation that Nicaragua would be bound by the compulsory jurisdiction of the Court ? I do not

deny that the Registrar or his staff, at the outset of the International Court of Justice in 1946, might have queried the legal effect of the 1939 telegram from Nicaragua. Yet, as the differences of opinions between Judges in the present case show only too well, it would have been most presumptuous of him to exclude any declaration that might be seen as not having expired. It was natural and indeed proper for him to continue publishing Nicaragua's Declaration with the factual qualification set out in a footnote, rather than categorically ignoring it. The Registrar was certainly not in a position to give any authoritative interpretation to the effect of the 1939 telegram ; and there is no room to interpret the uncertainties in the handling of the case of Nicaragua in the International Court of Justice *Yearbook* as giving any fresh legal significance to the value of Nicaragua's Declaration.

It may be true that such a treatment of Nicaragua's declaration had not been contested by any country, but no one can deny that, unless there is any practical need to scrutinize specific points, little attention is likely to have been paid by other States to items which were repeated year by year. The International Court of Justice *Yearbook*, like other works of reference produced by reputable institutions, exists for the accurate conveying of facts, and where the facts it relates suffice in themselves as the basis of legal conclusions, it is, I repeat, quite inappropriate to attach ultimate legal authority to the manner of its drafting. Even were that not so, given that a footnote is the exception rather than the rule, would it not be reasonable to expect that the Registry's remarks would do more to alert the informed reader *against* the effectiveness of Nicaragua's declaration than its inclusion would do to suggest its being in force ?

V

The case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* between Honduras and Nicaragua has repeatedly been referred to by Nicaragua in support of its contention that its acceptance of the compulsory jurisdiction of the Court was valid. The present Judgment does not have much to say about the case, yet it states :

“The Court notes that Nicaragua, even if its conduct in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* was not unambiguous, did not at any time declare that it was not bound by its 1929 Declaration.” (Para. 39.)

In another place it states :

“[W]hat States believe regarding the legal situation of Nicaragua so far as the compulsory jurisdiction of the Court is concerned may emerge from the conclusions drawn by certain governments as

regards the possibility of obliging Nicaragua to appear before the Court or of escaping any proceedings it may institute. The Court would therefore recall that in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* Honduras founded its application both on a special agreement, the Washington Agreement, and on Nicaragua's Optional-Clause declaration." (Para. 41.)

It may be wondered whether it is the intention of the Judgment to assert that the Respondent's acceptance of the compulsory jurisdiction can be established by the Applicant's assertion.

The Court concludes, again after referring to the above-mentioned case :

"[T]he position of Nicaragua as to its own conduct is, as indicated above, that so far from having represented that it was not bound by the Optional Clause, on the contrary its conduct unequivocally constituted consent to be so bound." (Para. 50.)

The Court thus appears to take Nicaragua's assertion at face value and evades considering whether Nicaragua's conduct in that case would really constitute acquiescence in the compulsory jurisdiction of the Court under any other head than the Washington Agreement. That apart, what is "indicated above", in the quoted phrase, is so scanty that it certainly gives no ground to conclude that Nicaragua believed it would have been bound by the Optional Clause of the Statute in that particular litigation.

PART II. EFFECT OF THE SHULTZ LETTER

Chapter 1. New Types of Reservation

I

If Nicaragua lacks legal standing as an Applicant for the reason that it has not accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2 or 5, of the Statute, the present proceedings, which were initiated by a unilateral application by Nicaragua, cannot be entertained on the basis of those provisions. However, it still appears pertinent to examine whether the United States could be proceeded against in the present case supposing Nicaragua did have *locus standi* to bring the United States to the Court because of the latter's acceptance of the compulsory jurisdiction of the Court.

On 6 April 1984 the United States added in the so-called Shultz letter a further reservation to those already made in its Declaration of 26 August 1946. The Shultz letter purported to exclude from the jurisdiction of the Court :

“[D]isputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.”

In order to see whether or not this reservation was effective, it is pertinent to look at the history of reservations to the Optional Clause since the time of the Permanent Court of International Justice.

II

In drafting the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists in 1920 did not anticipate any reservations being made concerning the compulsory jurisdiction. The Netherlands was the first State accepting the compulsory jurisdiction of the Court (on 6 August 1921) to make a reservation. It was rather a modest one, which attempted to limit the jurisdiction of the Court to “any future dispute in regard to which the parties have not agreed to have recourse to some other means of friendly settlement” (*P.C.I.J., Series D, No. 4*, 2nd ed., p. 20). This type of reservation was used in the 1920s by Estonia (1923), Belgium (1925), Ethiopia (1926), Germany (1927), Spain (1928), Italy (1929), Latvia (1929), France (1929) and Czechoslovakia (1929).

In order to reply to the question of the legality of making a reservation to the Optional Clause and to facilitate the acceptance of the compulsory jurisdiction of the Court by as many countries as possible, the General Assembly of the League of Nations, on 2 October 1924, passed a resolution concerning *Arbitration, Security, and Reduction of Armaments* in which it

“[c]onsider[ed] that the study of the . . . terms [of Article 36, paragraph 2] shows them to be sufficiently wide to permit States to adhere to the Special Protocol opened for signature in virtue of Article 36, paragraph 2, *with the reservations which they regard as indispensable*” (*League of Nations Official Journal, Special Supplement No. 21*, p. 21, emphasis added)

and recommended “States to accede at the earliest possible date” to the Optional Clause. The *Protocol for the Pacific Settlement of International Disputes*, which was attached as an annex to that resolution, reads :

“The Signatory States undertake to recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but *without prejudice to the right of any State*, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, *to make reservations compatible with the said clause.*” (*League of Nations Official Journal, Special Supplement No. 21*, p. 22, emphasis added.)

In 1928 the General Assembly of the League of Nations again passed a resolution along the lines suggested four years previously :

*“Pacific Settlement of International Disputes,
Non-Aggression and Mutual Assistance*

(v) RESOLUTION REGARDING THE OPTIONAL CLAUSE OF ARTICLE 36
OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL
JUSTICE

The Assembly :

Referring to the [1924 resolution] . . . considering that the terms of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice are sufficiently wide to permit States to adhere to the special Protocol opened for signature in virtue of that article, with the reservations which they regard as indispensable, and convinced that it is in the interest of the progress of international justice that the greatest possible number of States should, to the widest possible extent, accept as compulsory the jurisdiction of the Court, recommends States to accede to the said Protocol at the earliest possible date ;

Noting that this recommendation has not so far produced all the effect that is to be desired ;

Being of opinion that, in order to facilitate effectively the acceptance of the clause in question, *it is expedient to diminish the obstacles which prevent States from committing themselves ;*

Being convinced that the efforts now being made through progressive codification to diminish the uncertainties and supply the deficiencies of international law will greatly facilitate the acceptance of the optional clause of Article 36 of the Statute of the Court, and that *meanwhile attention should once more be drawn to the possibility offered by the terms of that clause to States which do not see their way to accede to it without qualification, to do so subject to appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope ;*

Noting, in this latter connection, that *the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and these different kinds of reservation can be legitimately combined ;*

Recommends that States which have not yet acceded to the optional clause of Article 36 of the Statute of the Permanent Court of International Justice should, failing accession pure and simple, consider, with due regard to their interests, whether they can accede on the conditions above indicated ; . . .” (*League of Nations Official Journal, Special Supplement No. 64, p. 183, emphasis added.*)

Thus, within less than ten years of the foundation of the Permanent Court of International Justice, reservations to the jurisdiction of the Court had become permissible in order to make it easier for States to accept the compulsory jurisdiction of the Court.

III

Great Britain, in its Declaration of 19 September 1929, together with other Commonwealth nations, such as the Union of South Africa (19 September 1929), New Zealand (19 September 1929), India (19 September 1929), Australia (20 September 1929), and Canada (20 September 1929) attempted to restrict their acceptance of the jurisdiction of the Court and added, in addition to the type of reservation initiated by the Netherlands, two new types concerning disputes among the members of the British Commonwealth and disputes with regard to questions which, by international law, fell exclusively within the declarant's jurisdiction. Great Britain and other Commonwealth nations also reserved, with some provisos,

“the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations”.

In the 1930s, following the initiative taken by Great Britain, it became common practice for States to make a variety of reservations to the declaration of acceptance of compulsory jurisdiction. Some States followed the reservation of Great Britain in some way or another. The reservation concerning domestic jurisdiction was included by Yugoslavia (16 May 1930), Albania (17 September 1930), Iran (2 October 1930), Romania (8 October 1930), Poland (24 January 1931), Argentina (28 December 1935), Brazil (26 January 1937), Iraq (22 September 1938) and Egypt (30 May 1939). On the other hand the notion of suspension in respect of any dispute before the Council of the League of Nations was adopted by Italy (9 September 1929), Czechoslovakia (19 September 1929), France (19 September 1929), Peru (19 September 1929) and Iraq (22 September 1938). In addition, a new type of reservation for disputes relating to territorial status was made by Greece (12 September 1929), Albania (17 September 1930), Persia (2 October 1930), Romania (8 October 1930) and Iraq (22 September 1938).

On 7 March 1940 Great Britain, making a new declaration, added a further reservation concerning “disputes arising out of events occurring at a time when His Majesty's Government were involved in hostilities”. This type of reservation was immediately followed by the other Commonwealth nations, such as India (7 March 1940), New Zealand (8 April 1940), the Union of South Africa (20 April 1940) and Australia (2 September 1940). (Canada did not make such a reservation.)

IV

During the preparation of the Statute of the International Court of Justice at the San Francisco Conference, no doubt was expressed as to the permissibility of making reservations to acceptance of the compulsory jurisdiction of the Court to be newly founded. The report of Sub-Committee D to Committee I of Commission IV on Article 36 of the Statute of the International Court of Justice, prepared on 31 May 1945, clearly recognizes the permissibility of attaching reservations to the declaration of acceptance of the compulsory jurisdiction of the Court. It reads :

“The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations.” (*UNCIO*, Vol. XIII, p. 559.)

Most declarations referring to the compulsory jurisdiction of the new Court have been accompanied by reservations, the scope of which has been considerably more far-reaching than that of the declarations which had been made under the Permanent Court of International Justice. For example, the famous Vandenberg amendment in the United States Declaration of 26 August 1946 formed one such reservation and was emulated by Pakistan (12 September 1960), Malta (29 November 1966) and India (15 September 1974). The so-called automatic reservation, also in the United States Declaration, was adopted subsequently by Mexico (23 October 1947), Liberia (3 March 1952), France (18 February 1957), Sudan (30 December 1957) and Malawi (29 November 1966).

There were also some instances in which the declarant States attempted to make reservations in respect of disputes which were about to occur. Australia's Declaration to exclude from the Court's jurisdiction :

“disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia

(a) in respect of the continental shelf of Australia and the Territories under the authority of Australia, as that continental shelf is described or delimited in the Australian Proclamations of 10 September 1953 or in or under the Australian Pearl Fisheries Acts . . .” (*I.C.J. Yearbook 1953-1954*, p. 210)

was made on 6 February 1954, a few months after an agreement was reached with Japan to submit jointly to the International Court of Justice a dispute on Japanese pearl fishing on Australia's continental shelf, but subject to successful negotiations on a *modus vivendi*. India issued a new

Declaration on 15 September 1974 to matters of the law of the sea, including "the determination and delimitation of its maritime boundaries", while it was reported that some negotiations with Bangladesh were taking place concerning the maritime boundaries of the Gulf of Bengal. While the law of the sea negotiations were proceeding in the United Nations, the new reservation added to exclude matters of the law of the sea also appeared in several declarations, such as those of Canada (7 April 1970), Philippines (23 December 1971), New Zealand (22 September 1977) and Malta (23 January 1981 and 23 September 1983). These are only a few examples of the types of reservations made.

V

In the light of the practice concerning reservations to the Optional Clause throughout the period of the Permanent Court of International Justice and the International Court of Justice, the reservations made by the United States in 1984 cannot be held so exceptional or extraordinary as to fall outside the purview of permissibility.

Chapter 2. Termination and Modification of the United States Declaration

I

The point at issue with regard to the Shultz letter concerns the legal implications of its purporting to make a new reservation *with immediate effect*. The letter states :

"Notwithstanding the terms of the aforesaid [1946] Declaration, this proviso [i.e., new reservation] shall *take effect immediately* and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America." (Emphasis added.)

The "Notwithstanding" constitutes, of course, an allusion to the following clause in the United States Declaration of 1946 :

"[T]his declaration shall remain in force . . . until the expiration of six months after notice may be given to terminate this declaration."

It should thus be asked whether the addition of this new reservation on 6

April 1984 effectively exempts the United States from its adherence, given in 1946, to the Court's jurisdiction for a dispute unilaterally brought to the Court by Nicaragua on 9 April 1984.

The United States has implied that the Shultz letter did not purport to terminate the 1946 Declaration but only to amend it by making a new reservation. It is pertinent in this respect to examine the problem of the validity of a declaration of acceptance of the Optional Clause. Relevant indications concerning these declarations can be found in the *Annual Report* in the case of the Permanent Court of International Justice, and in the *Yearbook* in the case of the International Court of Justice, but the format of these publications has changed from time to time and is often inconsistent.

II

At the time of the Permanent Court of International Justice in particular, it appears that the Registry did not necessarily have a precise understanding of how to deal with the Optional Clause. The inconsistency in dealing with the date of the Optional Clause in the *Annual Reports* causes great confusion to the reader¹; it is extremely difficult to derive a clear indication of the status of some of the declarations of acceptance of the Optional Clause from the *Annual Reports* of the Permanent Court of International Justice. However, with this reservation, I deem it useful to proceed with some analysis of these declarations.

¹ Ratification was not imposed by the terms of the Optional Clause, but in fact some declarations were made subject to ratification while others (which did not require it) were nevertheless ratified. In No. 1 of the *Annual Reports* of the Permanent Court of International Justice, the table concerning the Optional Clause in Chapter III (p. 138) had three columns headed "Signatory States - Date of ratification (if any) - Conditions of acceptance", while another table in Chapter X (p. 359) was headed simply "Signatory States - Date of ratification when required". In No. 2 of the *Annual Reports*, the table appeared in Chapter III only, under the headings "States - Date of signature - Conditions - Date of deposit of ratification (if any)". In No. 3, the headings of the tables in Chapters III and X were identical in that they indicate "States - Date of signature - Conditions - Date of deposit of ratification (if any)" (pp. 83 and 335). After No. 4 of the *Annual Reports* the list in Chapter III disappeared and the format of the table in Chapter X of No. 3 was retained. However, in *Report* No. 16 a table in Chapter X is headed "States - Date of signature - Conditions - Date of deposit of ratification", thus omitting "(if any)" from the heading concerning ratification. I assume that what must have been significant was the date of the deposit of the declaration, no matter whether ratification was required under the internal procedures of some countries. When the table indicates the "Date of deposit of ratification" it might have meant the date of deposit of the declaration itself, whether it was properly ratified under internal procedures (when required), or was simply deposited, in cases where internal ratification was not required.

Table I shows all the declarations made under the Permanent Court of International Justice, arranged in chronological order of the first declarations of States :

TABLE I. DECLARATIONS UNDER THE PERMANENT COURT OF INTERNATIONAL JUSTICE (IN CHRONOLOGICAL ORDER)

S = date of signature.

R = date of deposit of ratification.

T = date of expiration or termination of the latest declaration.

D = *P.C.I.J., Series D.*

E = *P.C.I.J., Series E.*

* State whose latest declaration has expired or was terminated by 1945.

^a Declaration signed without condition as to ratification.

^b Declaration signed and ratified.

^c Declaration subject to ratification but not ratified.

^d Declaration signed before ratification of Protocol of Signature deposited.

Denmark	I : S before 28.I.21, R 13.VI.21 (D4, E6) ; II : S 11.XII.25, R 28.III.26 (E6) ; III : S 4.VI.36, R ? ^b (D4, E12).
Switzerland	I : S before 28.I.21 (D4, E6), R 25.VII.21 (E1) ; II : S 1.III.26, R 24.VII.26 (E6) ; III : S 23.IX.36, R 17.IV.37 ^b (E13).
Portugal	S before 28.I.21 (D4, E6), R 8.X.21 ^a (E1).
El Salvador	S before 28.I.21, R 29.VIII.30 ^{a d} (D4, E6) (Protocol ratified 29.VIII.30).
Costa Rica	S before 28.I.21 ^{a d} (D4, E6) (Protocol signed before 28.I.21 but never ratified).
Uruguay	S before 28.I.21 (D4, E6), R 27.IX.21 ^a (E1).
Netherlands *	I : S and R 6.VIII.21 ^a (D4, E6) ; II : S 2.IX.26 (E6) ; III : S 5.VIII.36 ^a (E13), T 1943.
Sweden	I : S 16.VIII.21 ^a (D4, E6) ; II : S 18.III.26 (E6) ; III : S 18.IV.36 ^a (E12).
Norway	I : S 6.IX.21, R 3.X.21 (D4, E6) ; II : S 22.IX.26 ^b (E6) ; III : S 19.V.36 ^b (E12).
Lithuania *	I : S 5.X.21, R 16.V.22 (D4, E6) ; II : S 14.I.30 ^a (E6) ; III : S 8.III.35, R 12.III.35 ^a (E11), T 1940.
Panama	S 25.X.21, R 14.VI.29 ^a (D4, E6).
Brazil	I : R 1.XI.21 ^a (E6) ; II : S and R 26.I.37 ^a (E13).

- Luxembourg I : S 1921 (D4, E6) (Protocol ratified 15.IX.30) ;
II : S 15.IX.30^a (E7).
- Finland I : S 1921, R 6.IV.22 (D4, E6) ;
II : S 3.III.27^a (E3, E6) ;
III : S 9.IV.37^a (E13).
- Liberia S 1921^{c d} (D4, E6) (Protocol signed 24.VII.21 but never ratified).
- Bulgaria S 1921^a, R 12.VIII.21 (D4, E6).
- Haiti S 1921^a (D4, E6).
- Austria I : S 14.IV.22 (D4, E6), R 14.III.22 (E1) ;
II : S 12.I.27, R 13.III.27 (E6) ;
III : S 22.III.37, R 30.VI.37^b (E13).
- China S 13.V.22^a (D4, E6).
- Estonia I : R 2.V.23^a (E1, E6) ;
II : S 25.VI.28^a (E4, E6) ;
III : S 6.V.38^a (E14).
- Latvia I : S 11.IX.23 (D4) (Protocol ratified 12.II.24) ;
II : S 10.IX.29, R 26.II.30 (E6) ;
III : S 31.I.35, R 26.II.35^b (E11).
- Dominican Republic S 30.IX.24, R 4.II.33^b (E9).
- France * I : S 2.X.24 (E1) ;
II : S 19.IX.29 (E6), R 25.IV.31 (E7) ;
III : S 7.IV.36^a (E12), T 1941.
- Belgium * S 25.IX.25, R 10.III.26^b (E2), T 1941.
- Ethiopia * I : S 12.VII.26, R 16.VII.26 (E6) ;
II : S 15.IV.32^a (E8) ;
III : S 18.IX.34^a (E11), T 1936.
- Guatemala S 17.XII.26^{c d} (E3, E6) (Protocol signed 17.XII.26 but never ratified).
- Germany * I : S 23.IX.27, R 29.II.28 (E4, E6) ;
II : S 9.III.33, R 5.VII.33^b (E9), T 1938.
- Hungary * I : S 14.IX.28, R 13.VIII.29 (E5, E6) ;
II : S 30.V.34 (E10), R 9.VIII.34 (E13) ;
III : S 12.VII.39, R ?^b (E16), T 1939.
- Spain * S 21.IX.28^a (E5), T 1938.
- Italy * S 9.IX.29 (E6), R 7.IX.31^b (E8), T 1936.
- Greece * I : S 12.IX.29^a (E6) ;
II : S 12.IX.34, R 19.VII.35 (E11) ;
III : S 8.IX.39, R 20.II.40^a (E16), T 1944.
- Irish Free State S 14.IX.29 (E6), R 11.VII.30^b (E7).
- Czechoslovakia S 19.IX.29^c (E6).
- Peru * S 19.IX.29 (E6), R 29.III.32^b (E8), T 1942.

United Kingdom	I : S 19.IX.29, R 5.II.30 (E6) ; II : S 28.II.40 ^a (E16).
New Zealand	I : S 19.IX.29 (E6) ; II : S 1.IV.40 ^a (E16).
Union of South Africa	I : S 19.IX.29, R 7.IV.30 (E6) ; II : S 7.IV.40 ^a (E16).
India	I : S 19.IX.29, R 5.II.30 (E6) ; II : S 28.II.40 ^a (E16).
Australia	I : S 20.IX.29, R 18.VIII.30 (E6) ; II : S 21.VIII.40 ^a (E16).
Canada	S 20.IX.29, R 28.VII.30 ^b (E6).
Siam	I : S 20.IX.29 (E6), R 7.V.30 (E7) ; II : S 3.V.40 ^b (E16).
Nicaragua	S 24.IX.29 ^{a d} (E6) (Protocol signed 14.IX.29 but never ratified).
Yugoslavia *	S 16.V.30 (E6), R 24.XI.30 ^b (E7), T 1935.
Albania *	I : S and R 17.IX.30 (E7) ; II : S 7.XI.35 ^b (E12), T 1946.
Persia	S 2.X.30 (E7), R 19.IX.32 ^b (E9).
Romania *	I : S 8.X.30, R 9.VI.31 (E7) ; II : S 4.VI.36 ^b (E12) (corrected E13), T 1941.
Poland	S 24.I.31 ^c (E6).
Colombia	I : S 6.I.32 ^a (D6) ; II : S and R 30.X.37 ^a (E14).
Paraguay	S and R 11.V.33 ^a (E9).
Argentina	S 28.XII.35 ^{c d} (E12) (Protocol signed 28.XII.35 but never ratified).
Turkey	S 12.IV.36 ^{a d} (E12) (Protocol signed 12.IV.36 but never ratified).
Bolivia	S and R 7.VII.36 ^a (E12, E13).
Monaco *	S and R 22.IV.37 ^a (E13), T 1942.
Iraq	S 22.IX.38 ^{c d} (E15) (Protocol signed 22.IX.38 but never ratified).
Liechtenstein *	S 22.III.39 ^a (E15), T 1944.
Egypt	S 30.V.39 ^{c d} (E15) (Protocol signed 30.V.39 but never ratified).

Table II shows various types of declaration made for acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, classified from the viewpoint of ostensible duration :

TABLE II. DURATION OF DECLARATIONS UNDER THE
PERMANENT COURT OF INTERNATIONAL JUSTICE

^x Declarations still valid pursuant to Article 36, paragraph 5, of the Statute of the International Court of Justice.

1. Declarations Valid for a Fixed Period

(1) Five-year period

Denmark I (1921), Switzerland I (1921), Netherlands I (1921), Sweden I (1921), Norway I (1921), Lithuania I (1921), Brazil I (1921), Luxembourg I (1921), Finland I (1921), Austria I (1922), China (1922), Estonia I (1923), Latvia I (1923), Ethiopia I (1926), Germany I (1927), Hungary I (1928), Italy (1929), Latvia II (1929), France II (1929), Greece I (1929), Lithuania II (1930), Yugoslavia (1930), Albania I (1930), Romania I (1930), Poland (1931), Germany II (1933), Greece II (1934), Hungary II (1934), Lithuania III (1935), Albania II (1935), France III (1936), Turkey (1936), Romania II (1936), Austria III (1937), Monaco (1937), Egypt (1939), Liechtenstein (1939), Greece III (1939).

(2) Ten-year period

Denmark II (1925), Switzerland II (1926), Netherlands II (1926), Sweden II (1926), Norway II (1926), Finland II (1927), Austria II (1927), Estonia II (1928), Spain (1928), Czechoslovakia (1929), Peru (1929), Siam I (1929), Argentina (1935), Bolivia (1936), Denmark III (1936), Switzerland III (1936), Netherlands III (1936), Sweden III (1936), Norway III (1936), Brazil II (1937), Estonia III (1938), Siam II (1940).

(3) Fifteen-year period

France I (1924), Belgium (1925).

(4) Twenty-year period

Irish Free State (1929).

(5) Two-year period

Ethiopia II (1932), Ethiopia III (1934).

(6) With a specified date of termination

Hungary III (1939).

(7) With a fixed period automatically renewed unless an advance notice of six months is given

Luxembourg II (1930) ^x.

*2. Declarations for an Initial Fixed Period then
Valid until Notice of Termination Is Given*

(1) Initial ten-year period

United Kingdom I (1929), II (1940), New Zealand I (1929), II (1940), Union of South Africa I (1929), II (1940), Australia I (1929), II (1940), India I (1929), II (1940), Canada (1929).

(2) Initial five-year period

Latvia III (1935), Iraq (1938).

(3) Initial six-year period

Persia (1930).

3. *Declarations which Did not Contain any Reference to Duration*

Portugal (1921), Salvador (1921), Costa Rica (1921), Uruguay (1921) *, Liberia (1921), Bulgaria (1921), Haiti (1921) *, Panama (1921) *, Dominican Republic (1924) *, Guatemala (1926), Nicaragua (1929), Colombia I (1932), Paraguay (1933), Colombia II (1937) *.

*

The following observations may be made from the analysis of Table II. First, in the early period of the Permanent Court of International Justice – in other words in the 1920s – most of the States signatory to the Statute of the Permanent Court of International Justice (some of which did not deposit the required ratification of the Protocol of Signature) accepted the Optional Clause. Many of them did so for a fixed period, mostly five years ; in addition, many renewed the period after the expiration of the initial period. On the other hand – in particular at the very beginning of the Permanent Court of International Justice – some declarations did not specify any period at all for the duration of the declaration.

Secondly, the most remarkable development was in 1929, when Great Britain introduced a new concept of the immediate terminability of a declaration. Great Britain accepted compulsory jurisdiction in a declaration which was stated to remain valid after the first ten-year period until notice of termination was given. The declaration read in part as follows :

“I accept as compulsory . . . the jurisdiction of the Court . . . for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance.” (*P.C.I.J., Series E, No. 6, p. 479.*)

This example was followed by the then Commonwealth countries, such as the Union of South Africa (19 September 1929), India (19 September 1929), New Zealand (19 September 1929), Australia (20 September 1929) and Canada (20 September 1929). In the period of the Permanent Court of International Justice this precedent was followed by Persia (2 October 1930), Latvia (31 January 1935), and Iraq (22 September 1938).

Thirdly, another new development was seen in 1930 with the action of Luxembourg in making a declaration for a five-year period which would automatically be renewed unless a six months' advance notice was given. The Declaration of Luxembourg read as follows :

“The present declaration is made for a period of five years. Unless it is denounced six months before the expiration of that period, it shall

be considered as renewed for a specific period of five years and similarly thereafter ¹.”

*

Some declarations were terminated or amended while they were still valid. Colombia, which on 6 January 1932 made a declaration without any reference to duration, made a fresh declaration on 30 October 1937 which was to continue for a ten-year period, in order to include a new reservation.

Paraguay, by a decree of 26 April 1938, withdrew the acceptance of compulsory jurisdiction which had been expressed by its Declaration of 1933 (*P.C.I.J., Series E, No. 14*, p. 57). On being notified of Paraguay's withdrawal by the Secretary-General of the League of Nations, some countries made express reservations as to the effectiveness of such denunciation, which are contained in the publication of the Permanent Court (*P.C.I.J., Series E, No. 15*, p. 227).

Bolivia “makes the most formal reservations as to the legal value of the decree and requests the Secretary-General to communicate these reservations to the States signatories of the Statute and to the Members of the League of Nations”.

Belgium “in taking note of this denunciation, feels bound to make all reservations”.

Brazil “cannot accept such declaration without express reservation”.

Sweden “finds itself obliged to formulate every reservation ; in its view it will be for the Court itself, should occasion arise, to pronounce on the legal effects of that declaration”.

Czechoslovakia “is of opinion that, in the absence of any provision in the Statute regarding the denunciation of declarations, the matter is one in which reference should be made to the general rules of international law concerning the termination of international undertakings”.

Netherlands “while not opposed to the denunciation, finds itself obliged to formulate every reservation as regards the right of States to denounce treaties which do not contain a clause to that effect”.

On 7 September 1939, the United Kingdom, which had, as noted above, made a declaration on 19 September 1929 for an initial period of ten years and then until notice of termination would be given, stated in its letter :

“[T]he position to-day shows clearly that the Covenant has, in the

¹ This English translation was made by the International Court of Justice (see *I.C.J. Yearbook 1982-1983*, p. 73). It is different from the translation that appeared in the *Seventh Annual Report of the Permanent Court of International Justice (P.C.I.J., Series E, No. 7*, p. 464).

present instance, completely broken down in practice, that the whole machinery for the preservation of peace has collapsed, and that the conditions in which His Majesty's Government accepted the Optional Clause no longer exist . . .

I am, therefore, directed to notify you that His Majesty's Government, believing themselves to be firmly defending the principles on which the Covenant was made, will not regard their acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities." (*P.C.I.J., Series E, No. 16, p. 339.*)

Other Commonwealth nations, such as New Zealand, the Union of South Africa, Australia, India and Canada, followed this example. Similarly, France, which on 7 April 1936 had made a declaration for a five-year period, sent the Secretary-General of the League of Nations on 10 September 1939, a letter which read in part :

"Les conditions dans lesquelles le Gouvernement français avait adhéré à cette clause se trouvent aujourd'hui profondément modifiées. En particulier, depuis que le système de règlement des conflits internationaux établi par le Pacte de la Société des Nations n'est plus regardé comme liant uniformément et obligatoirement tous les Membres de la Société des Nations, la question de la belligérance et des droits des neutres apparaît sous un aspect entièrement nouveau.

Le Gouvernement français considère donc, comme le Gouvernement britannique, dont le point de vue vous a été exposé d'autre part, que son acceptation de la clause de l'article 36 du Statut de la Cour permanente de Justice internationale ne peut plus désormais avoir d'effet à l'égard des différends relatifs à des événements qui viendraient à se produire durant le cours de la présente guerre." (*Ibid., p. 337.*)

These letters were received in the Secretariat of the League of Nations and transmitted to States parties to the Protocol of Signature and others. The publication of the Permanent Court of International Justice shows that some reservations were made (*ibid., p. 333*). In its reply of 25 September 1939, the Swiss Government made "reservations . . . regarding the principle which a denunciation effected in such circumstances involves". In their letters, Belgium (20 November 1939), Netherlands (30 November 1939), Peru (12 December 1939), Estonia (5 January 1940) and Siam (6 May 1940) reserved their points of view. The Danish Government, on 29 January 1940, also made reservations concerning declarations of the Commonwealth nations and France "more particularly as regards their effect in relation to disputes not immediately connected with the war". The Norwegian and Swedish Governments, on 15 and 20 December 1939 respectively, made "reservations as to the legal effect of the above acts of denunciation, more particularly as regards disputes not connected with the war". They also drew attention to the

“fact that, in virtue of Article 36 of the Statute and the declarations relating thereto, it rests with the Court itself to decide questions as to its own jurisdiction and, should the case arise, to pronounce upon the validity and, if necessary, the scope of the acts of denunciation referred to.”

The Brazilian Government, on 7 May 1940 also made reservations as regards this “unilateral action . . . in so far as concerns all matters relating to its rights as a neutral in the present war and coming within the jurisdiction of the Court”.

It is interesting to note in this connection that Sweden suggested that, should the case arise, the Court should pronounce on the legal effect or the scope of the denunciation of the existing declarations relating to the withdrawal of the Declaration of Paraguay, and that Sweden and Norway jointly made a similar suggestion concerning the amendments of the Commonwealth nations and France.

It is also to be noted that a number of States added various reservations at the time when they renewed their previous declarations upon expiration of the period stipulated.

III

I will now try to analyse the period of validity of the declarations of acceptance of the Optional Clause made under Article 36, paragraph 2, of the Statute of the International Court of Justice. The States which have made these declarations amount to 47 in number. Table III may be useful for appreciating any further analysis of this problem¹ :

TABLE III. DECLARATIONS UNDER THE INTERNATIONAL COURT OF JUSTICE (IN CHRONOLOGICAL ORDER)

The figures in brackets indicate the year of the *I.C.J. Yearbook*.

*The latest declarations which have expired or were terminated.

T = year of termination.

E = year of expiration.

Netherlands	I : 5.VIII.46 (46/47) ; II : 1.VIII.56 (55/56).
United States	I : 14.VIII.46 (46/47) ; II : 6.IV.84.
China *	26.X.46 (46/47), T 1972.
Norway	I : 16.XI.46 (46/47) ; II : 17.XII.56 (56/57) ; III : 2.IV.76 (75/76).
Denmark	I : 10.XII.46 (46/47) ; II : 10.XII.56 (56/57).

¹ The date indicated in the table is the date of the signature of the declaration, which is sometimes the same as the date of the deposit of the declaration with the Secretariat of the United Nations. Although it is questionable whether a declaration becomes effective from the date of the signature of the declaration or from the date of the deposit of the declaration with the United Nations, for the sake of convenience I refer only to the date of the signature of the declaration in the table.

Guatemala *	27.I.47 (46/47), E 1952.
France *	I : undated : 1947 ? (46/47) ; II : 10.VII.59 (58/59) ; III : 16.V.66 (65/66), T 1974.
Sweden	I : 5.IV.47 (46/47) ; II : 6.IV.57 (56/57).
Turkey *	I : 22.V.47 (47/48) ; II : 19.IV.54 (53/54), E 1972.
Philippines	I : 12.VII.47 (47/48) ; II : 23.XII.71 (71/72).
Mexico	23.X.47 (47/48).
Honduras	I : 2.II.48 (47/48) ; II : 20.II.60 (59/60).
Brazil *	12.II.48 (47/48), E 1953.
Belgium	I : 10.VI.48 (47/48) ; II : 3.IV.58 (57/58).
Bolivia *	5.VII.48 (47/48), E 1953.
Pakistan	I : 22.VI.48 (47/48) ; II : 23.V.57 (56/57) ; III : 12.IX.60 (60/61).
Switzerland	6.VII.48 (47/48).
Liechtenstein	10.III.48 (47/48).
Israel	I : 4.IX.50 (50/51) ; II : 3.X.56 (56/57).
Liberia	3.III.52 (51/52).
Australia	I : 6.II.54 (53/54) ; II : 13.III.75 (74/75).
United Kingdom	I : 1.VI.55 (54/55) ; II : 31.X.55 (55/56) ; III : 18.IV.57 (56/57) ; IV : 26.XI.58 (58/59) ; V : 27.XI.63 (63/64) ; VI : 1.I.69 (68/69).
South Africa *	12.IX.55 (55/56), T 1969.
Portugal	19.XII.55 (55/56).
India	I : 7.I.56 (55/56) ; II : 14.IX.59 (59/60) ; III : 15.IX.74 (74/75).
Egypt	18.VII.57 (56/57).
Cambodia (now Democratic Kampuchea)	9.IX.57 (57/58).
Sudan	30.XII.57 (57/58).
Finland	25.VI.58 (57/58).
Japan	15.IX.58 (58/59).
Somalia	25.III.63 (62/63).
Uganda	3.X.63 (63/64).
Kenya	12.IV.65 (64/65).
Nigeria	14.VIII.65 (65/66).
Gambia	14.VI.66 (65/66).
Malawi	22.XI.66 (66/67).
Malta	I : 29.XI.66 (66/67) ; II : 2.I.81 (80/81) ; III : 2.IX.83 (83/84).
Mauritius	4.IX.68 (68/69).
Swaziland	9.V.69 (68/69).

Botswana	14.I.70 (69/70).
Canada	7.IV.70 (69/70).
Austria	28.IV.71 (70/71).
Costa Rica	5.II.73 (72/73).
El Salvador	26.XI.73 (73/74).
New Zealand	22.IX.77 (77/78).
Togo	24.X.79 (79/80).
Barbados	24.VII.80 (80/81).

Table IV has been prepared in order to indicate various types of declarations for acceptance of compulsory jurisdiction under the Statute of the International Court of Justice, classified from the viewpoint of ostensible duration :

TABLE IV. DURATION OF DECLARATIONS UNDER
THE INTERNATIONAL COURT OF JUSTICE

- + Declarations which were terminated and replaced by new declarations.
* Declarations which have expired or were terminated.

1. Declarations Valid for a Fixed Period

(1) Period of either five or ten years

Norway I (1946) +, Denmark I (1946) +, Guatemala (1947) *, France I (1947 ?) +, Sweden I (1947) +, Turkey I (1947) +, Honduras I (1948) +, Brazil (1948) *, Belgium I (1948) +, Bolivia (1948) *, Israel I (1950) +, Turkey II (1954) *, El Salvador (1973).

(2) With a fixed period automatically renewed

Costa Rica (1973).

(3) With a fixed period which may be automatically renewed unless a notice of termination is given in advance (six months)

Netherlands II (1956), Norway II (1956) +, Denmark II (1956), Sweden II (1957), Finland (1958), New Zealand (1973), Norway III (1976).

(4) Valid until a notice of termination is given in advance (six months or one year)

United States (1946), Mexico (1947), Switzerland (1948), Liechtenstein (1950).

2. Declarations Valid until Notice of Termination Is Given

(1) With initial fixed period

Netherlands I (1946) +, Philippines I (1947) +, Pakistan I (1948) +, Liberia (1952), Portugal (1955), Cambodia (1957), Belgium II (1958), Japan (1958), France II (1959) +, Austria (1971).

(2) Without initial fixed period

Australia I (1954) +, United Kingdom I (1955) +, United Kingdom II (1955) +,

South Africa (1955) *, India I (1955) +, Israel II (1956), Sudan (1957), Pakistan II (1957) +, United Kingdom III (1957) +, United Kingdom IV (1958) +, India II (1959) +, Pakistan III (1960), Somalia (1963), United Kingdom V (1963) +, Kenya (1965), France III (1966) *, Gambia (1966), Malta I (1966) +, Mauritius (1968), United Kingdom VI (1969), Canada (1970), Philippines II (1971), India III (1974), Australia II (1975), Barbados (1980), Malta II (1981) *.

3. *Declarations which Do not Contain any Reference to Duration or Are Made for an Indefinite or Unlimited Period*¹

Honduras II (1960), Uganda (1963), Nigeria (1965), Malawi (1966), Swaziland (1969), Botswana (1970), Togo (1979), Malta III (1983).

—

*

On the basis of examination of these declarations, I would make the following observations.

First, of the declarations made for a fixed period (see Table IV, 1 (1) and (2)), those of Guatemala, Brazil, Bolivia and Turkey II have expired ; and those of Norway I, Denmark I, France I, Sweden I, Honduras I, Belgium I and Israel I were replaced by differently formulated declarations. The only Declaration which is still valid for a fixed period is that of El Salvador, which renewed its Declaration for a further ten-year period in 1978. The Declaration of Costa Rica has been renewed twice and is still valid.

Secondly, regarding declarations with an initial fixed period and remaining valid until notice of termination is given (see Table IV, 2 (1)) (i.e., declarations of the type initiated by the United Kingdom's Declaration in 1929), the initial fixed period of all of these declarations has already expired. The declarations of Netherlands I, Philippines I, Pakistan I and France II were replaced by differently formulated declarations ; and those of Liberia, Portugal, Cambodia, Belgium II, Japan and Austria are now to remain valid until notice of termination is given. In this respect, these declarations at present have the same effect as those which simply remain valid until notice of termination is given (Table IV, 2 (2)), such as those of Israel II, Sudan, Pakistan III, Somalia, Kenya, Gambia, United Kingdom VI, Mauritius, Canada, Philippines II, India III, Australia II and Barbados. (South Africa, France III and Malta I² in Table IV, 2 (2), were terminated in 1967, 1974 and 1983 respectively.)

¹ Honduras II was for an indefinite period, and that of Togo for an unlimited period.

² Malta II was to replace Malta I but was withdrawn in 1982 in order to return to Malta I.

Thirdly, those declarations without any fixed period, or those which were made for an indefinite or unlimited period (Table IV, 3), have been very limited in number ; Honduras II, Uganda, Nigeria, Malawi, Swaziland, Botswana, Togo and Malta II. In addition, the following five declarations, which were made in the period of the Permanent Court of International Justice, still remain in force pursuant to Article 36, paragraph 5, of the Statute of the International Court of Justice : Uruguay (1921), Panama (1921), Haiti (1921), Dominican Republic (1924) and Colombia II (1937).

Fourthly, those declarations which may be terminated only when advance notice of termination (six months or one year) is given (Table IV, 1 (4)) (i.e., declarations of the type initiated by the Luxembourg Declaration in 1930) were made by the United States, Mexico, Switzerland and Liechtenstein ; and the Declarations of Netherlands II, Denmark II, Sweden II, Finland, New Zealand and Norway III are still valid for a renewed fixed period of time unless the renewal is denounced by advance notice of six months (Table IV, 1 (3)). The Declaration of Luxembourg made in 1930, which has been carried over in pursuance of Article 36, paragraph 5, of the Statute of the International Court of Justice, is also added hereto.

*

I now turn to the practice of the termination of declarations during the period of the International Court of Justice. The declarations made under the Permanent Court of International Justice by Iran (formerly Persia), Australia, the United Kingdom, South Africa, India, Canada and New Zealand – to remain valid until notice of termination would be given, which was carried over to the International Court of Justice pursuant to Article 36, paragraph 5, of the Statute – were in fact terminated in 1951, 1954, 1955, 1955, 1956, 1970 and 1977 respectively ; and the Declaration of El Salvador made in 1921, which did not have any reference to period and was carried over to the International Court of Justice, was also terminated in 1973. Except for the case of Iran, which simply denounced the Declaration on 9 July 1951, these former declarations from the period of the Permanent Court of International Justice were all replaced by the respective new declarations which contained new reservations or amended conditions.

Many cases are also reported in which valid declarations made under the Statute of the International Court of Justice were terminated and replaced by new declarations. The sign “+” in Table IV indicated these examples, and it is important to note that these replacements always took place in order to change the conditions of acceptance of the compulsory jurisdiction or to add new reservations to the former declarations. In this respect it is noted that Israel informed the Secretary-General of the United Nations on 28 February 1984 that it was amending its 1956 Declaration. In two cases (South Africa and France) a declaration which was supposed to

remain valid until notice of termination would be given was simply terminated without being replaced by a new declaration. South Africa gave notice of the immediate withdrawal and termination on 12 April 1967 ; France terminated its declaration by a letter of 2 January 1974.

IV

An attempt to amend the terms of reservations would seem to amount in effect to the same as the termination of the declarations containing the reservations in question, in so far as an existing obligation under the Optional Clause is terminated. In this respect, another significant trend concerning declarations accepting the Optional Clause cannot be overlooked : today there is quite a number in which the declarant States have reserved the right to exclude from submission to the Court's jurisdiction any given category of dispute.

This precedent was initiated by Portugal in 1956. The Declaration of Portugal of 19 December 1955 read, in part, as follows :

“The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.” (*I.C.J. Yearbook 1955-1956*, p. 186.)

When the Declaration of Portugal was transmitted to the States parties to the Statute of the International Court of Justice, the Government of Sweden responded on 23 February 1956 by making a reservation on its position concerning Portugal's reservation :

“The Swedish Government is compelled to state that in its opinion the cited condition in reality signifies that Portugal has not bound itself to accept the jurisdiction of the Court with regard to any dispute or any category of disputes. The condition nullifies the obligation intended by the wording of Article 36, paragraph 2, of the Statute where it is said that the recognition of the jurisdiction of the Court shall be ‘compulsory *ipso facto*’.

For the stated reason, the Swedish Government must consider the cited condition as incompatible with a recognition of the ‘Optional Clause’ of the Statute of the International Court of Justice.” (*I.C.J. Pleadings, Right of Passage over Indian Territory*, Vol. I, p. 217.)

In fact, however, the precedent of the reservation made by Portugal has been followed by a number of States, as shown in the following table.

TABLE V. RESERVATIONS OF THE RIGHT OF IMMEDIATE AMENDMENT

Portugal (1955), Somalia (1963), Kenya (1965), France III (1966), Malta I (1966), Malawi (1966), Mauritius (1968), United Kingdom VI (1969), Swaziland (1969), Botswana (1970), Canada (1970), El Salvador (1973), Norway III (1976), New Zealand (1977), Togo (1979) and Malta III (1983) (in a limited area in the case of Norway III and New Zealand).

It is particularly to be noted that El Salvador made this reservation to be effective at any time during the period which it fixed in its declaration.

V

To sum up, the present situation with respect to the duration of declarations is as follows :

Declarations not to be terminated before the fixed period expires or without advance notice of a fixed period to terminate

Costa Rica, *El Salvador* (Table IV, 1 (1) (2)).

Denmark, Finland, Liechtenstein, Mexico, Netherlands, *New Zealand*, *Norway*, Sweden, Switzerland, United States (Table IV, 1 (3) (4))¹.

Luxembourg (pursuant to Art. 36, para. 5, of the Statute).

Declarations terminable at any time by notice

Australia, Austria, Barbados, Belgium, Canada, Democratic Kampuchea (formerly Cambodia), Gambia, India, Japan, *Kenya*, Liberia, *Mauritius*, Pakistan, Philippines, *Portugal*, *Somalia*, Sudan, *United Kingdom* (Table IV, 2 (1) (2)).

Declarations which do not contain any reference to duration or are made for an indefinite or unlimited period

Botswana, Honduras, *Malawi*, *Malta*, Nigeria, *Swaziland*, *Togo*, Uganda (Table IV, 3).

Colombia, Dominican Republic, Haiti, Panama, Uruguay (pursuant to Art. 36, para. 5, of the Statute).

¹ New Zealand and Norway reserved the right to amend their declarations but only in the special case arising in the light of the results of the Third United Nations Conference on the Law of the Sea in respect of the settlement of disputes.

The declarations of the States here italicized are those in which the right is reserved to exclude *at any time* from submission to the Court's jurisdiction any given category of disputes (Table V)¹.

The above list clearly demonstrates the fact that a great number of States have made their declarations with an express statement that their declarations may be terminated or amended *at any time and with immediate effect*. I have also indicated a number of cases where declarations have been terminated. Thus to my mind it is quite untenable to argue that those declarations without any reference to duration (the number of which, as mentioned above, is very limited) can never be terminated or amended because of the lack of a clause concerning the period of validity of the declarations.

The Judgment of the Court states :

“[T]he right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.” (Para. 63.)

I am astonished to find such an argument put forward by the Court. It seems that the Court is quite unaware of the development of the Optional Clause during the past decades : is it the conclusion of the Court that, since in its view treaty law should be applicable to acceptance of the Optional Clause, declarations which have been made on condition that they may be amended or terminated by a notice of the declarant States *at any time* should be invalid or unacceptable as contrary to treaty law ? For a treaty containing such a clause conferring a unilateral right entirely to alter or terminate terms of the treaty with immediate effect would surely be impossible ; it would not be a treaty. Yet this is now almost normal practice in declarations of acceptance of the Optional Clause.

Chapter 3. Effect vis-à-vis Nicaragua of the United States Termination of its Obligation under the Optional Clause

If Nicaragua were, contrary to my own view, subject to the compulsory jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 5, of the Statute, the declaration which Nicaragua made in 1929 without any fixed period of duration should be interpreted, in view of the past practice as mentioned above, as being terminable at any time. On the other hand, the United States, whose declaration in 1946 was expressed to remain in force until the expiration of six months after notice of termi-

¹ See note 1 on p. 509.

nation was given, amended its declaration just a few days before the seisin of the Court with this case.

Thus the question of reciprocity arises, in a case where for one party the adherence to the Optional Clause is terminable at any time and the other party is bound by its own declaration not to terminate for a certain fixed period. The Optional Clause in effect plays a double role : one, positive in that it may on occasion enable a unilateral application to succeed, and the other one negative in that it may sometimes result in a Respondent being brought to the Court against its actual will. Thus a State, by declaring its acceptance of the compulsory jurisdiction of the Court, may seek to acquire *locus standi* in a case in which the odds are in its favour, but on the other hand it may, where it feels placed at a disadvantage, try to release itself from the compulsory jurisdiction of the Court by the termination or amendment of its declaration.

In view of the fact that the Optional Clause was so drafted to cause each declarant State to "recognize as compulsory . . . the jurisdiction of the Court . . . [only] in relation to any other State accepting the same obligation" (Art. 36, para. 2, of the Statute), is it reasonable or equitable to allow a party which, as a Respondent, is free to escape at any time from the compulsory jurisdiction of the Court to take advantage, as an Applicant, by imposing upon the other party the burden of inescapability, which it does not itself bear¹? The reciprocity of the obligation must exist at the date of the seisin of the case, and acceptance of the Court's jurisdiction by the Applicant and the Respondent must be current at that date. I am of the view that Nicaragua is not in a position to invoke the obligation which it does not bear and which the United States, as Respondent, has borne because of its previous declaration. Thus the United States is fully exempted from the Court's jurisdiction in relation to Nicaragua on the date of Nicaragua's Application.

The interpretation of the declaration of acceptance of the compulsory jurisdiction of the Court as I have presented it above may be criticized as an attempt to nullify the original intention of the Optional Clause. Such criticism I would answer as follows : this clause was first proposed at the beginning of the Permanent Court of International Justice shortly after the termination of the First World War, following failure to actualize the idealistic view that, as in a national domestic society, a court should be

¹ Interesting in this respect is a new type of reservation initiated in 1959 by India, which had been an adherent to the Optional Clause, to prevent a non-declarant State from suddenly taking advantage as an Applicant of the immediate acceptance of the Optional Clause. This declaration of 14 September 1959 excluded a case in which "the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court" (*I.C.J. Yearbook 1959-1960*, p. 242). This formula was followed by Somalia (25 March 1963), Malta (29 November 1966), Mauritius (4 September 1968) and the United Kingdom (1 January 1969).

provided with full jurisdiction over any dispute in the international community. The drafters of the Statute of the Permanent Court of International Justice might have thought that this Optional Clause would be a first step towards the final goal that the International Court should be given full jurisdiction over disputes. This same idea concerning the Optional Clause was also prevalent when the new Statute of the International Court of Justice was being prepared at the San Francisco Conference in 1945 against the background of regret for the “untold sorrow to mankind” brought by the “scourge of war” (see the Preamble to the United Nations Charter).

The rule of law should prevail in the international community as in modern domestic society, while the supremacy of the courts is always to be maintained. Yet the reality of the international community – where a lack of confidence in international law still prevails and the law-enforcement machinery is still non-existent – had not reached a stage that could satisfy the dreams of the idealists in either the early 1920s or the mid-1940s.

I note that, in contrast to the period of the Permanent Court of International Justice, when a great majority of the States parties were subject to the compulsory jurisdiction of the Court under the Optional Clause, the present situation in the 1980s is that adherence to the compulsory jurisdiction of the Court has been declared by less than one-third of the parties to the Statute of the International Court of Justice. In spite of the appeal made by the United Nations in 1974 in General Assembly resolution 3232 (XXIX) concerning the review of the role of the International Court of Justice, which read in part :

“[The General Assembly] [r]ecognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute”,

only two States, Togo and Barbados, have adhered to the Optional Clause in the past decade.

It is a striking fact that those States which at present in their declarations impose upon themselves the obligation not to escape from the compulsory jurisdiction of the Court in the face of the possibility of being brought before the Court, are extremely limited in number – three countries in the western hemisphere, Costa Rica, Mexico and the United States, and seven Western European countries, Denmark, Finland, Liechtenstein, Luxembourg, Netherlands, New Zealand, Norway, Sweden and Switzerland. In addition, the Optional Clause, which was drawn up in 1920 without foreseeing any reservations, is now encumbered by the great variety of reservations attached to it.

The Court should not close its eyes to the practice and experience over the last 40 years in the international community, which has given a new meaning to the Optional Clause. The basic principle that the jurisdiction of

any judicial institution in the international community is based upon the consent of sovereign States has never been changed, and the role of the Optional Clause can never override that principle. In spite of this, the Optional Clause would certainly remain useful in the event that any *bona fide* parties to a dispute, though not willing to initiate proceedings by concluding a special agreement, may not object to coming before the Court if the other party is willing to do so. On the other hand, I am sure that the interpretation of the Optional Clause given by the present Judgment will inevitably induce declarant States to terminate their declarations or at least drop from them any advance notice clause, so as to avoid having to answer any case unilaterally brought by other States, which themselves can take advantage of withdrawing at any time from their obligations under the Court's jurisdiction. This would thus vastly diminish the importance of the Optional Clause.

CONCLUSIONS

Thus the conclusions I have reached are as follows : first, there is no ground for assuming that Nicaragua, to which Article 36, paragraph 5, of the Statute cannot apply, can be held to have *locus standi* in the present proceedings on the basis of acceptance of the Optional Clause ; secondly, assuming *arguendo* that Nicaragua has *locus standi* in the present proceedings, the Application cannot be entertained under the Optional Clause, because the United States excluded, before the seisin of the case, the type of dispute at issue from its obligation under that clause in its relation to Nicaragua ; hence Nicaragua cannot invoke the fixed duration of the United States obligation to the Court's jurisdiction.

I regret that I have had no time to discuss the so-called Vandenberg reservation, but even without invoking it the United States, for the reasons I have stated above, cannot, in my view, be subjected to the Court's jurisdiction under the Optional Clause for this particular case.

(Signed) Shigeru ODA.
