DISSENTING OPINION OF JUDGE SCHWEBEL

TABLE OF CONTENTS

	Paragraphs
SUMMARY	
I. INTRODUCTION	1-2
II. QUESTIONS OF JURISDICTION	
A. The jurisdictional issues	3
B. The question of whether Nicaragua has standing to maintain claims under the Optional Clause	
1. The essence of Nicaragua's claims of standing	4
2. The essence of United States denial of Nicaragua's standing	5
3. A State could not become party to the Optional Clause of the Statute of the Permanent Court of International Justice without being party to its Statute	6-7
4. Nicaragua never became party to the Protocol of Signature of the Permanent Court or to its Statute and hence never was party to the Optional Clause	8-13
5. The effect of Article 36, paragraph 5, of this Court's Statute on a declaration which was not binding under the Statute of the Permanent Court	14-17
6. The intentions of the drafters of Article 36, paragraph 5	18-24
7. The United States understanding of Article 36, paragraph 5, on ratifying the Statute and adopting its declaration under Article 36, paragraph 2	25
8. The Court's interpretation of Article 36, paragraph 5	26-40
9. The listings in the *Yearbooks* of the Court	41-47
10. Listings in *Reports* of the Court	48-52
11. The conduct of the Parties	53-61
12. Conclusion	62
C. The question of whether the Court has jurisdiction over the United States	
1. Jurisdiction under the Optional Clause	63
(i) The Connally Reservation	64-66
(ii) The Vandenberg (Multilateral Treaty) Reservation	67-90
(iii) The "1984 notification" of the United States	91-116
2. Jurisdiction under the Treaty of Friendship, Commerce and Navigation	117-129

SUMMARY

Standing of Nicaragua

Nicaragua lacks standing to invoke the Optional Clause not only because it never has deposited a declaration under Article 36, paragraph 2, of this Court's Statute, but because it never became party to the Statute of the Permanent Court of International Justice within the meaning of Article 36, paragraph 5, of this Court's Statute. The Protocol of Signature of the Statute of the Permanent Court of International Justice required that it be ratified and that an instrument of ratification be deposited with the Secretary-General of the League of Nations. No such deposit was made. Thus Nicaragua was held by the League Secretariat and Permanent Court of International Justice Registry never to have become party to the Protocol, the Optional Clause which was an integral part of that Protocol, or to the Statute. (Paras. 3-13.)

The intention of the drafters of the Statute of the International Court of Justice, in respect of Article 36, paragraph 5, was to ensure that declarations made under Article 36 of the Permanent Court of International Justice Statute "and which are still in force" shall be deemed to be acceptances of the compulsory jurisdiction of this Court. The *travaux préparatoires* demonstrate that by the term, "still in force" was meant declarations which bound declarants to the compulsory jurisdiction of the Permanent Court of International Justice and which remain in force. The intention was to maintain in effect declarations which were in effect, but it was not to give effect for the first time to a declaration which, like Nicaragua's, had never come into force. That meaning is expressed as precisely by the French text as by the English of Article 36, paragraph 5. In proposing a drafting amendment to the original text, the French delegation at San Francisco apparently had not Nicaraguan but French interests in view, namely, to make it perfectly clear that declarations which, like the French, had expired, were not embraced by the terms of Article 36, paragraph 5. Nicaragua's Declaration was not of a duration which had not expired, because it was never "inspired". (Paras. 14-24.)

The four cases of this Court interpreting Article 36, paragraph 5, show that the Court has always interpreted that Article only to embrace declarations which had been binding under the Permanent Court of International Justice Statute. (Paras. 26-40.) The fact that Nicaragua was listed in the *Yearbooks* of this Court as bound by the Optional Clause is not dispositive, particularly because the listings were accompanied by foot-

notes which indicated that Nicaragua had not deposited its instrument of ratification with the League, i.e., that it had not fulfilled a condition precedent to being covered by Article 36, paragraph 5. Listings in reports of this Court to the General Assembly and in other publications lead to no other conclusion. (Paras. 41-52.)

The conduct of Nicaragua, of other States, and of the Court, of its Registry and the Secretary-General of the United Nations neither establishes nor confirms that Nicaragua is bound by the Optional Clause. Before these proceedings, Nicaragua never expressly stated that it believed itself to be bound. It evaded the clear occasion to do so when Honduras so maintained during the *Arbitral Award Made by the King of Spain on 23 December 1906* case. It rather gave the impression to the United States and Honduras that it did not believe itself to be bound. Nicaragua never queried or otherwise reacted to the footnotes in the *Yearbook* listings. In all, its conduct, and that of other actors, is neither consistent with nor clearly supportive of Nicaragua's position. (Paras. 53-61.)

Jurisdiction over the United States

There is ground for questioning whether the United States 1946 adherence to the Court's compulsory jurisdiction under the Optional Clause is valid, in view of its self-judging proviso, the "Connally Reservation". But that ground is not now pursued since the United States does not invoke it. (Paras. 64-66.)

The Vandenberg "multilateral treaty" Reservation bars the Court from assuming jurisdiction over the United States in a case in which multilateral treaties are pleaded and in which all parties to the treaties affected by the decision are not also parties to the case. It is plain from Nicaragua's pleadings that Honduras, Costa Rica and El Salvador will necessarily be affected by the decision in the case. They are not parties. The Court evades applying the reservation by holdings which conflict with any reasonable interpretation of its terms and object. However, it is not clear that all of Nicaragua's claims should be barred, since it invokes customary international law, which may not be pre-empted on all relevant counts by the terms of the treaties on which Nicaragua relies. (Paras. 67-90.)

While failing to apply the Vandenberg Reservation, the Court does apply another provision of the United States Declaration, that requiring it to give six months' notice of its termination. The Court might be able to justify so doing if it equally applied the Vandenberg Reservation and other elements of the United States Declaration.

A considerable case can be made out for the contention that, in view of

State practice concerning the Optional Clause, all declarants are entitled to terminate or modify their declarations at any time with immediate effect. But even if that case is not accepted, and if the United States rather is held to its six months' notice proviso, it does not follow that its notification of April 1984 purporting to modify its declaration is ineffective vis-à-vis Nicaragua. It may be ineffective *erga omnes*. But since Nicaragua, by the intendment of its unconditional declaration of 1929, at any time could terminate (or modify) that declaration with immediate effect, reciprocally the United States could terminate (or modify) its declaration with immediate effect. The jurisprudence of the Court in respect of reciprocity furnishes support for this approach, as do precedents of termination of acceptances of the Court's jurisdiction. Moreover, the Indonesian case demonstrates that the United Nations and the Court accepted Indonesian withdrawal from the Organization and from the Statute on 24 hours' notice, which indicates that such withdrawal from declarations made under the Statute is permissible. (Paras. 91-116.)

Finally, the Court does not have jurisdiction over the United States in respect of the claims contained in Nicaragua's Application – which alleges acts of aggression and intervention by the United States – on the basis of the Parties' bilateral Treaty of Friendship, Commerce and Navigation. That Treaty is a purely commercial agreement, whose terms do not relate to the use or misuse of force in international relations. Moreover, Nicaragua failed to comply with the procedural prerequisites of invocation of the Court's jurisdiction under the Treaty. (Paras. 117-134.)

I. Introduction

1. The Application in this case is without precedent in the history of the International Court of Justice and the Permanent Court of International Justice. It is unprecedented in its substance, because never before has a State come to the Court requesting it to adjudge and declare that another State has the duty to cease and desist immediately from the use of force against it. It is procedurally unprecedented as well, and not, of course, because the defendant, the United States, challenges the jurisdiction of the Court, for that is the characteristic response of States summoned to this Court as Defendants. It is procedurally without precedent because the standing of the Applicant, of Nicaragua itself to maintain suit in reliance upon the Court's compulsory jurisdiction under the Optional Clause is at issue ; because the United States purports to have modified the scope of its adherence to the Court's compulsory jurisdiction under the Optional Clause on which Nicaragua relies before the filing of Nicaragua's Application, so as to exclude the very class of case brought ; and because the United States further pleads a reservation to the terms of its adherence to

the Court's compulsory jurisdiction of a kind which the Court earlier has not had cause to adjudge. Thus the Court has been faced with multiple preliminary objections to its jurisdiction and to the admissibility of the case which it has never passed upon before in the course of its long and complex history of jurisdictional controversy. The response of the Court to these objections necessarily is of exceptional importance, not only because of the significance of the case but because the issues of jurisdiction and admissibility which it raises have profound implications for the nature and extent of the Court's jurisdiction and for the character of the Court as the principal judicial organ of the United Nations.

2. I regret to be obliged to dissent from the Judgment of the Court, which I find to be in error on the principal questions of jurisdiction which the case poses. In view of my conclusion that the Court lacks jurisdiction to adjudicate upon the merits of the case, I have not found it necessary to set out my views on questions of admissibility, one or more of which, not possessing, in the words of Article 79, paragraph 7, of the Rules of Court, "in the circumstances of the case, an exclusively preliminary character", may in any event arise at the stage of the merits. Nevertheless, the Court's Judgment required a separate vote on the admissibility of the Application. While I do not agree with all of the Court's holdings on admissibility, at the present stage I do not find the contentions of the United States concerning the inadmissibility of the case to be convincing. Accordingly, I have joined the Court in voting that the Application is admissible, by which I mean that, if the Court had jurisdiction – as in my view it does not – the case currently would appear to be admissible. I so conclude without prejudice to any consideration of questions of admissibility which may arise at the stage of the merits of the case.

II. Questions of Jurisdiction

A. The Jurisdictional Issues

3. The jurisdictional issues in the case turn, first, on whether Nicaragua has standing to file an Application relying, as it does, on its alleged acceptance of the compulsory jurisdiction of the Court under Article 36 of the Statute, by which, Nicaragua has made clear, it means by operation of Article 36, paragraph 5, of the Statute ; second, if it has such standing, on whether the terms of United States adherence to the Court's compulsory jurisdiction under the Optional Clause in force on the day on which Nicaragua filed its Application afford the Court jurisdiction over the parties and the claims made ; and third, on whether, in any event, the Court has jurisdiction over some or all of Nicaragua's claims by reason of the fact that Nicaragua and the United States are party to a bilateral Treaty of Friendship, Commerce and Navigation of 1956, which provides for submission of disputes as to the interpretation or application of the Treaty,

not satisfactorily adjusted by diplomacy, to the Court. Each of these three large issues in turn subsumes a number of questions, which will be stated and dealt with in their turn.

B. The Question of Whether Nicaragua Has Standing to Maintain Claims under the Optional Clause

1. The essence of Nicaragua's claims of standing

4. Nicaragua in its Application refers to the declarations made by Nicaragua and by the United States "accepting the jurisdiction of the Court as provided for in Article 36 of the Statute of the International Court of Justice . . ." (introduction) and says no more than : "Both the United States and Nicaragua have accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the Court" (para. 13). While the United States filed a declaration under Article 36, paragraph 2, on 14 August 1946, which the United States (and Nicaragua) treat as valid and generally in force, Nicaragua has never filed a declaration under Article 36, paragraph 2, of the Statute. It relies on a declaration filed with the Secretary-General of the League of Nations on 24 September 1929, unconditionally accepting the jurisdiction of the Permanent Court of International Justice without limit of time, and on the effect of Article 36, paragraph 5, of the Statute, which 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, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The rationale of that reliance is summarized by Nicaragua in its Memorial as follows :

> "11. Nicaragua meets the conditions of the Article. It ratified the United Nations Charter on 6 September 1945 and became an Original Member of the United Nations on 24 October 1945, when the Charter came into force. Under Article 93 (1) of the Charter, it automatically became a party to the Statute of the Court on the same date. On that date, its declaration of 24 September 1929, accepting the compulsory jurisdiction of the Permanent Court without condition, was in effect. Being of unlimited duration, it had not expired. Thus, when the Charter and Statute entered into force, that declaration was, by the terms of Article 36 (5), 'deemed, as between the parties to the present

> Statute, to be [an] acceptance[] of the compulsory jurisdiction' of this Court.
>
> 12. The result follows from the language of Article 36 (5) and from its purpose to maintain to the maximum extent the actual and potential jurisdiction of the Permanent Court for the newly established International Court of Justice. The construction is confirmed by the jurisprudence of the Court and by its practice, as well as by the unbroken practice of the parties to this proceeding and other States over a period of more than 30 years, and by the substantially uniform opinion of the most highly qualified publicists."

2. The essence of the United States denial of Nicaragua's standing

5. The United States maintains that Nicaragua lacks standing to maintain its claims, because it has not adhered to the jurisdiction of the Court under the Optional Clause. Not only has it not done so under Article 36, paragraph 2 ; it has not done so by operation of Article 36, paragraph 5, because the declaration which Nicaragua made on 24 September 1929 accepting the jurisdiction of the Permanent Court of International Justice never came into force by reason of Nicaragua's failure to deposit its instrument of ratification of the Protocol of Signature of the Statute of that Court. That deposit was a necessary condition of bringing its declaration into force. Since the declaration – as officially attested by the Registry of the Permanent Court of International Justice and the Secretariat of the League of Nations – never came into force, it was never (contrary to the Nicaraguan Memorial, para. 11) "in effect" ; "it had not expired" only because it had never been inspired. A declaration never in force could not "be deemed" to be an acceptance of the compulsory jurisdiction of this Court "for the period which" it "still" has "to run", because, since the Nicaraguan Declaration never began to run at all, it has no period in which still to run. The United States maintains that Nicaragua never accepted "nor intended to accept" any obligation under the Protocol of Signature of the Permanent Court. "Nicaragua's adherence to the Charter and subsequent conduct cannot constitute compliance with the requirements of the present Court's Statute for acceptance of compulsory jurisdiction" (Counter-Memorial, para. 31).

3. A State could not become party to the Optional Clause of the Statute of the Permanent Court of International Justice without being party to its Statute

6. On 13 December 1920, the Assembly of the League of Nations by resolution unanimously declared its approval of the draft Statute of the Permanent Court of International Justice "for adoption in the form of a

Protocol duly ratified . . ." (*P.C.I.J., Series D, No. 1,* p. 4). On 16 December 1920, Members of the League signed a Protocol of Signature by which they declared "their acceptance of the adjoined Statute" of the Court. The Protocol provided :

> "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 Secretary of the League of Nations." (*Ibid.,* p. 5, emphasis supplied.)

The Protocol of Signature had two parts. Section "A" contained the text of the Protocol itself, part of which has just been quoted. Section "B" of the Protocol of Signature read as follows :

> "B. OPTIONAL CLAUSE
>
> The undersigned, being duly authorized thereto, further declare, on behalf of their Government that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions :" (*Ibid.,* p. 6.)

Thereafter, the text of the Statute followed (*ibid.,* pp. 7 ff.).

7. Thus it will be observed that the Protocol of Signature, in a single instrument, comprised both the Protocol itself and the form of declarations by which States could adhere to the Optional Clause. When a State signed a declaration under the Optional Clause, it signed one section of the Protocol of Signature, but that declaration did not take effect – it did not bind the State making it to the Court's compulsory jurisdiction under the Optional Clause – unless or until that State had ratified the Protocol of Signature of which the declaration was a part. Article 36, paragraph 2, of the Statute itself provided that a State could make a declaration accepting the Optional Clause "either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment . . .". But it was recognized throughout the life of the Permanent Court that a State could not become a party to the Statute unless it became a party to the Protocol ; and it could not become a party to the Optional Clause which was a part of the Protocol unless it became party to the Protocol. Those conclusions were officially affirmed more than once by the Legal Adviser of the League of Nations in communications to various States – and with specific reference to Nicaragua (see the Counter-Memorial of the United States, Anns. 4, 6, 12, 23). As Manley O. Hudson put it in *The Permanent Court of International Justice* (1934), page 388 :

> "Clearly, the 'optional clause' does not stand on any independent basis ; it is only a suggested form of the declaration which Article 36 permits to be made at the time of signing or ratifying the Protocol of

Signature or at a later moment. It is entirely subsidiary to the Protocol of Signature ; a State cannot become a party to the optional clause unless it has become or becomes a party also to the Protocol of Signature, and a State which is not effectively a party to the latter does not make a binding declaration by merely signing the 'optional clause' even without conditions."

4. Nicaragua never became party to the Protocol of Signature of the Permanent Court or to its Statute and hence never was party to the Optional Clause

8. On 24 September 1929, Nicaragua's authorized representative made a declaration under the Optional Clause in the following terms :

"On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice." (*I.C.J. Yearbook 1982-1983,* p. 79 ; Registry's translation from the French.)

It had not by that date ratified and deposited its instrument of ratification of the Protocol of Signature of the Court's Statute and so was not, on making a declaration under the Optional Clause, a party either to the Statute or to the Optional Clause. On 29 November 1939, Nicaragua, by telegram, notified the Secretariat of the League of Nations that it had ratified the Protocol of Signature and that the instrument of ratification was to follow. In fact, the instrument appears never to have been sent and certainly never was received by the League of Nations.

9. At the hearings on provisional measures in this case, Nicaragua endeavoured to give the impression that it had ratified the Protocol and had sent, or might have sent, the instrument of ratification, maintaining that, as the Order of the Court of 10 May 1984, at paragraph 19, recounts, "There are quite obvious reasons why this ratification may not have reached Geneva at the time". At the hearings at the current stage of the proceedings, the Agent of Nicaragua indicated that the instrument of ratification, if sent, may have been lost at sea during the Second World War (Hearing of 8 October 1984). In its Memorial, Nicaragua acknowledges that it never deposited the instrument of ratification to the Protocol of Signature (e.g., at para. 44, – "The footnote shows that Nicaragua's failure to deposit its instrument of ratification of the Protocol of Signature of the Permanent Court was well known" – as well as Annex 1, which declares that "no evidence" has been uncovered indicating that the instrument of ratification "was forwarded to Geneva"). Moreover, Nicaragua was officially and specifically informed by the Acting Legal Adviser of the League of Nations, by letter of 16 September 1942, that the League had never received the instrument of ratification of the Protocol of Signature, "the deposit of which is necessary to bring the obligation effectively into

being. Perhaps that instrument was lost on the way" (League of Nations Archives, File No. 3C/17664/1589, published in the United States Counter-Memorial, Ann. 26 ; translation by this Court's Registry).

10. Thus the last Yearbook of the Court published before the Second World War, the *Fifteenth Annual Report (June 15th 1938-June 15th 1939)*, in recording the facts respecting "the Optional Clause annexed to the Statute of the Court" (at p. 37), provides a list of 53 "States which had signed the Optional Clause" (at p. 39). Nicaragua is among them. It further provides a list entitled : "The following had signed . . . but had not ratified the Protocol of Signature of the Statute" (*ibid.*, p. 40). Nicaragua is among three States so listed. It finally provides a list of 39 "States bound by the Clause" on 15 June 1939 *(ibid.)*. Nicaragua is *not* on that list. It was this Yearbook to which the delegates at the San Francisco Conference on International Organization could have had recourse when they amended and adopted what was the Statute of the Permanent Court to transform it into the Statute of the International Court of Justice. The *Sixteenth Report (June 15th 1939-December 31st 1945)*, published after the San Francisco Conference, records, with respect to "The special protocol, annexed to the 'Protocol of Signature of the Statute' . . . known as the 'Optional Clause' " similar data. There is a list of States which had signed the Optional Clause "but had not ratified the Protocol of Signature of the Statute" and Nicaragua is on that list (p. 50). There is a list of "States bound by the Clause" and Nicaragua is not on that list *(ibid.)*. A footnote to the entry concerning Nicaragua, however, refers to page 331, where the following information is recorded :

> "3. PROTOCOL OF SIGNATURE OF THE STATUTE OF THE COURT
>
> Geneva, December 16th, 1920
>
> 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 yet been deposited."

11. The publication of these entries in the same Yearbook demonstrates the continuing conclusion, which the law of treaties and the provisions of the Protocol dictated and of which Nicaragua had been officially informed, that the sending of a telegram announcing ratification of the Protocol coupled with failure to deposit the instrument of ratification of the Protocol with the Secretary-General of the League, could not constitute Nicaragua a party to the Protocol, to the Statute or to the Optional Clause of the Court. It is incontestable that, in the consistent interpretation of the Registry of the Court as well as the Secretariat of the League which had mandatory depositary functions in respect of the Protocol, Nicaragua never became party to the Protocol ; hence, never party to the Statute ;

hence, never party to the Optional Clause of the Statute, by which Statute and Clause Nicaragua never was – in the definitive term officially employed – "bound".

12. The conclusion that Nicaragua was never bound was in accordance with the jurisprudence of the Court. Thus, in the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J., Series A, No. 23,* the question arose of the effect of the Barcelona Convention of 20 April 1921 relating to the régime of navigable waterways of international concern. The Court observed that that Convention contained provisions

> "differing in no way from the clauses generally inserted in international conventions of this nature ; such provisions clearly make the coming into force of the Convention as regards each of the Parties depend upon ratification" (at p. 21).

Thus the Court in respect of a convention which, just as the Court's Protocol of Signature provided, specified that it is "subject to ratification", whose instrument of ratification "shall be transmitted to the Secretary-General of the League of Nations, who will notify the receipt" to other signatories, held that a convention which a State had not ratified had not come "into force" for it. Appraising this and other cases, Dr. Hans Blix concluded that,

> "what the courts have established with increasing clarity is merely that in law the procedure of ratification is not a ceremonial formality but an act by which a State becomes bound by a treaty" ("The Requirement of Ratification", *British Year Book of International Law* 1953 (1954), pp. 352, 370).

Dr. Blix observed that

> "there is no doubt that if an international agreement expressly stipulates for entry into force by signature or ratification or some other manner, the prescribed procedure must be complied with" (*ibid.,* p. 352).

The reason is that : "Parties to international compacts must know when they become irrevocably bound by the compacts." (*Ibid.,* p. 356.) That contemporary international law on this question is what the Court in the *Territorial Jurisdiction of the International Commission of the River Oder* case held it to be is demonstrated by the terms of Article 14 of the Vienna Convention on the Law of Treaties, which provides that :

> "1. The consent of a State to be bound by a treaty is expressed by ratification when :
>
> (*a*) the treaty provides for such consent to be expressed by means of ratification ; . . ."

Article 16 of the Vienna Convention further provides that instruments of ratification

> "establish the consent of a State to be bound by a treaty upon :
>
> *(a)* their exchange between the contracting States ;
> *(b)* their deposit with the depositary ; or
> *(c)* their notification to the contracting States or to the depositary, if so agreed".

In the case before the Court, it could not be clearer that it was never agreed that notification by Nicaragua would suffice. On the contrary, deposit of the instrument of ratification was required by the Protocol of Signature and insisted upon by the depositary who, in default of deposit, notified Nicaragua that it was not bound.

13. However, while it cannot be denied – and Nicaragua itself does not deny – that its Declaration of 1929 never bound it to the compulsory jurisdiction of the Permanent Court of International Justice (and this fact is repeatedly recognized by the Court in today's Judgment), Nicaragua maintains that the matter does not rest there. While it did not do so at the stage of provisional measures, it now contends that its ratification of the United Nations Charter and its appended Statute of this Court was sufficient to give life to a declaration which otherwise had been and remained inoperative. The Court, in its Order of 10 May 1984, and I, in my dissent to that Order, were prepared to consider that argument as affording a possible basis for the Court's jurisdiction in this case. But while the Court now accepts that argument as affording a definitive basis of jurisdiction, on analysis which the time afforded at the stage of provisional measures did not admit, I have concluded that that argument is utterly inadequate. Nor do I accept the allied argument that the conduct of this Court and its Registry and of the United Nations, and of Nicaragua and other States, endows Nicaragua with a standing and the Court with a jurisdiction which the operation of the provisions of Article 36, paragraph 5, does not engender.

5. The effect of Article 36, paragraph 5, of this Court's Statute on a declaration which was not binding under the Statute of the Permanent Court

14. Nicaragua concedes that its 1929 Declaration, at the time immediately prior to its ratification of the United Nations Charter, lacked "binding force" (Nicaraguan Memorial, para. 178, E). The Court, in paragraph 26 of today's Judgment, holds that "the declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might

produce". The critical question accordingly is : despite the acknowledged fact that Nicaragua's 1929 Declaration lacked binding force, is it a declaration which, in the terms and meaning of Article 36, paragraph 5, of the Statute, was "made under Article 36 of the Statute of the Permanent Court of International Justice and which" is "still in force" ?

15. Nicaragua maintains that Article 36, paragraph 5 :

> "does not speak of parties to the Statute of the Permanent Court but of declarations accepting its jurisdiction. Such a declaration made by a State not a party to the Statute and that by its terms had not expired was a declaration 'in force' . . . it 'remained in an imperfect but not invalid state' ; . . . The effect of Article 36 (5), in the case of Nicaragua, was to make its ratification of the Statute of this Court . . . the equivalent of ratification of the old Statute – the act that perfected the declaration . . . That is the significance of the use of the language '*deemed* . . . to be acceptances of the compulsory jurisdiction of the International Court of Justice . . .' " (Memorial, paras. 13, 14.)

Does this imaginative construction of Article 36, paragraph 5, withstand analysis ?

16. In the first place, it is beyond dispute that, in the understanding of international law, "in force" means, and equates with, "bound". One need look no further than the provisions of the Vienna Convention on the Law of Treaties, Articles 2 (1) *(b)*, 24, 25 and 84. Article 24 in particular makes it crystal clear that a "treaty enters into force as soon as consent to be bound by the treaty has been established . . .". As the late Sir Humphrey Waldock put it, in his capacity of Special Rapporteur of the International Law Commission on the law of treaties, "the basic rule" is that "the entry into force of the treaty automatically makes it binding upon the parties" (*Yearbook of the International Law Commission,* 1962, Vol. II, p. 71). It is undeniable that an instrument of ratification establishing Nicaragua's consent to be bound by the Statute of the Permanent Court was never received by the depositary ; rather, its failure to become so bound was established by the depositary, the Secretary-General of the League of Nations, and by that Court's Registry ; consequently, the Statute of the Permanent Court never entered into force for it. The question which then arises is : despite that conclusion of fact and law, did its declaration accepting the jurisdiction of the Permanent Court enter into force ?

17. To answer that question requires a review of the drafting history of Article 36, paragraph 5, and of the meaning attached to that article by those who were concerned with its acceptance, and, as well, of the judgments of this Court interpreting Article 36, paragraph 5. It also requires a consideration of the effect of the treatment of Nicaragua's Declaration of

1929 in the Yearbooks of the two Courts, the *Reports* of this Court to the General Assembly, and elsewhere, and of the conduct of the Parties.

6. The intentions of the drafters of Article 36, paragraph 5

18. In the eyes of the drafters of the Statute of the Court, what was Article 36, paragraph 5, designed to achieve ? The Committee of Jurists which, in preparation for the San Francisco Conference, met in Washington on 14 April 1945, had before it the following observation of the United Kingdom :

> "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." (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XIV, p. 318 ; emphasis supplied.)

In response, the subcommittee took a straightforward position :

> "The subcommittee calls attention to the fact that many nations have heretofore *accepted compulsory jurisdiction under the 'optional clause'*. The subcommittee believes that provision should be made at the San Francisco Conference for a special agreement *for continuing these acceptances in force* for the purpose of this Statute." (*Ibid.*, p. 289 ; emphasis supplied.)

Let us apply these seminal statements of the purpose of what came to be Article 36, paragraph 5, to the facts and question at issue. The intention of the drafters of Article 36, paragraph 5, in addressing existing acceptances under the Optional Clause by which States were "bound", was to deal with the fact that "many nations have heretofore accepted compulsory jurisdiction under the 'Optional Clause' ". It was clear that Nicaragua was not among such nations. It was clear by, *inter alia*, the terms of the Yearbook of the Permanent Court, which listed Nicaragua as a State which was not bound by compulsory jurisdiction under the Optional Clause (*supra*, para. 11). Moreover, the Committee of Jurists contemplated that what came to be Article 36, paragraph 5, would be tantamount to a special agreement "continuing these acceptances in force for the purpose of this Statute". That phrase imports that declarations, to be continued in force, were in force. Nicaragua's was not.

19. In pursuance of this purpose of the Committee of Jurists, a Report of 31 May 1945 to Commission IV (Judicial Organization) of the San Francisco Conference proposed to add to Article 36 of the Statute the following provision :

"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." (*Documents of the United Nations Conference on International Organization,* Vol. XIII, p. 558.)

With reference to a text of this substance, the British representative at San Francisco three days earlier had said :

"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." (*Ibid.,* p. 227 ; emphasis supplied.)

Thus it appears that what was sought was the "continuing validity" of adherences by which States were "bound" under the Statute of the Permanent Court. At that juncture, the corresponding French text of what came to be Article 36, paragraph 5, read :

"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. 565.)

Thereafter, on 5 June 1945, the French representative proposed the following alternative wording :

"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." (*Ibid.,* p. 486.)

The "Proposals by the Delegation of France Relating to Article 36 of the Statute of the International Court of Justice" which have just been reproduced in their French version were duplicated in the English text proposed by France 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.)

The French representative, who thus proposed (on the point at issue in the

instant case) to maintain the English text unchanged, on 7 June 1945 understandably explained his proposed recasting of the French text only of Article 36, paragraph 5 – then numbered as Article 36, paragraph 4 – as follows :

> "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.*, pp. 284, 290.)

The Committee at the meeting of 7 June thereupon unanimously adopted the text of Article 36, paragraph 5, in the terms in which they appear in the Statute (*ibid.*, p. 284). The relevant report of 9 June 1945 observes :

> "In a sense . . . the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4, and Article 37. Hence, continuity in the progressive development of the judicial process will be amply safeguarded.
>
> . . . .
>
> A new paragraph 4 [now 5] 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." (*Ibid.*, pp. 307, 314, 328.)

The French text of that latter passage reads :

> "On a inséré un nouveau paragraphe 4 afin de maintenir les déclarations formulées d'après l'article 36 de l'ancien Statut pour des périodes qui n'ont pas encore expiré et pour rendre ces déclarations applicables à la juridiction de la nouvelle Cour." (*Ibid.*, p. 348.)

Thereafter, the text of Article 36, paragraph 5, remained unchanged. Little further light is shed upon its meaning by the San Francisco *travaux préparatoires.*

20. However, the illumination provided by the San Francisco proceedings is bright enough. For it is clear that the new paragraph, as the San Francisco records state, "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" (emphasis supplied). The purpose of Article 36, paragraph 5, was not to invest nugatory declarations which were never in effect with initial force, it was "to preserve" declarations in force under the Permanent Court for the new Court – declarations by which States were, as the Committee of Jurists put it, "bound".

21. Moreover, the French text of Article 36, paragraph 5, was designed, and was clearly stated by its author to be, substantively identical to the

English. Indeed, France itself apparently proposed to maintain the English text as it was, and this was accepted. Article 36, paragraph 5, was initially a British proposal. France proposed a revised text which it indicated was substantively the same as the English. The motivations of the French amendment are not altogether clear. The Court appears to believe that its purpose was, by the operation of Article 36, paragraph 5, to maintain in force not only declarations of the Permanent Court which were in force, but to give effect to declarations which had been made but which never had come into force. It seems likelier that the French amendment may have been stimulated by the perception that the phrase in English, "and which are still in force" – initially translated "encore en vigueur" (a phrase which, as the Nicaraguan Memorial points out at paragraph 17 is characteristic of treaty usage but not declarations which are "unilateral acts") – would be more precisely translated if "still in force" were rendered "pour une durée qui n'est pas encore expirée" because the latter phrase emphasized the continuing validity of declarations which had not yet expired. But that change did not change the meaning of the English text so as to embrace declarations which had never come into force, because a declaration of a duration which has not yet expired must nevertheless be a declaration which initially was "inspired". The French text may well have been meant to make the clearer that declarations in force under the Permanent Court's Statute which have not by their terms expired should be "preserved" (as it was put in the English text of the rapporteur's report) or "maintained" ("afin de maintenir") as it was put in the French, but there is no indication of the French amendment being designed to give life to a declaration which had never come into force. The Nicaraguan Memorial argues, in paragraph 48, that there was in fact only one such declaration, that of Nicaragua. Can it be plausibly maintained that the object of the French amendment was to give force for the first time to Nicaragua's 1929 Declaration ? Or may it be more plausibly argued that France had French, rather than Nicaraguan, interests in view ?

22. The true clue to the object of the French delegation in proposing its amendment to the French text of Article 36, paragraph 5, may be found in the joint dissent of three judges of this Court in the *Aerial Incident* case, the probative passage from which is quoted below at paragraph 34. That passage infers that France moved its amendment in order to make clear beyond a doubt that Article 36, paragraph 5, did not embrace declarations of a duration which *had* expired. France's declaration was precisely of that character. On the day in San Francisco on which France moved its amendment, there was no French Declaration still in force which had been made under Article 36 of the Statute of the Permanent Court. There was no French Declaration "en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée", for the pertinent reason that the last French Declaration under the Permanent Court's Statute had been renewed for five years, from 25

April 1936 (*P.C.I.J., Fifteenth Annual Report,* p. 221). Accordingly it had expired in 1941. Apparently France did not wish the possibility to remain of its being revived by the operation of Article 36, paragraph 5, and to make that point still clearer – it was clear in the English text and the original French but not so precisely and fully expressed in the original French as it was by the terms of the French amendment – France moved its amendment. This explanation, while not certain, surely is far more plausible – and probable – than that advanced by Nicaragua and accepted by the Court.

23. While it is clear that the intention at San Francisco in drafting Article 36, paragraph 5, was to preserve declarations under the Statute of the Permanent Court which were in force, the French text of the Article is, with some strain, capable of the broader interpretation which the Court gives it, namely, that it is meant to give force to declarations which by their own terms had not expired (even if they never had come into force). The French text is also more than capable of supporting the narrower interpretation set out in the preceding paragraphs, which is fully consistent with the English text ; and, since the original English text remained unchanged, since it was indeed apparently accepted by the French delegation itself as the correct English version of its own amendment, and since the French representative declared that his amendment was not substantive, there is every reason to conclude that France itself attached the narrower interpretation to what it described as an amendment designed "to improve the phraseology". But let us assume, *arguendo,* what has not been and cannot be shown, namely, that the broader meaning is the meaning which France meant to attach to Article 36, paragraph 5. Under the law of treaties, where two authoritative texts in two languages differ, which is to be taken as governing ? Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties provides that,

> "when a comparison of the authentic texts discloses a difference of meaning . . ., the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

Now it has been shown that the object and purpose of Article 36, paragraph 5, of the Statute was to "continue" or to "preserve" declarations made under the Optional Clause of the Statute of the Permanent Court by which States party to that Statute were "bound" (*supra,* para. 18). That is, the object and purpose are expressed by the narrower interpretation only. Moreover, if one takes the narrower ground which is held by the English text, it is also quite reasonably understood to be held by the French text ; that is to say, both texts can be "best reconciled" on this narrower ground. But if one ascribes the broader interpretation to the French text, then one must leave the English text – not to speak of the texts in the three other

authentic languages, the Spanish of which was attached to Nicaragua's ratification – out of account. For it is undeniable that the meaning which attaches to the English text, and to the Spanish, Russian and Chinese texts, is that Article 36, paragraph 5, encompasses only declarations which are "still" in force, a term which surely imports that such declarations came into force in the first place. Accordingly, by dint of application of the rules of the law of treaties governing interpretation of different language texts, it is not possible to sustain the contention that Article 36, paragraph 5, was meant to give force to ineffective declarations.

24. In sum, the San Francisco proceedings do not support two key contentions of Nicaragua in respect of Article 36, paragraph 5 : the purpose of that provision was not, as Nicaragua's Memorial contends, "to maintain to the maximum extent the actual and potential jurisdiction of the Permanent Court" but only its actual jurisdiction ; and that purpose is expressed as precisely by the French text, which must on this issue be read consistently with the English to relate only to declarations which were in force under the Statute of the Permanent Court, i.e., declarations which bound the declarant States, of which Nicaragua was not one.

7. The United States understanding of Article 36, paragraph 5, on ratifying the Statute and adopting its declaration under Article 36, paragraph 2

25. The United States, in ratifying the Statute, and in adhering to the Optional Clause, interpreted Article 36, paragraph 5, as embracing only those declarations which were in force under the Statute of the Permanent Court. The United States further appears to have understood that Article 36, paragraph 5, did not embrace Nicaragua's Declaration of 1929. These conclusions are supported by the following passages from the United States Counter-Memorial :

> "79. The United States understanding, both at the San Francisco Conference and in making its own declaration for the new Court under Article 36 (2), was also that Article 36 (5) applied only to declarations in force for the Permanent Court. The United States specifically understood that Nicaragua was *not* one of those States that would be deemed to have accepted this Court's compulsory jurisdiction for purposes of reciprocity under Article 36 (2).
>
> 80. The United States delegation to the San Francisco Conference reported the proceedings to the President on 26 June 1945, and a copy of this report was submitted to the Senate on 9 July 1945. The Report described Article 36 (5) as '*maintaining in force* with respect to the new Court, declarations made under the old Statute whereby many states

accepted the compulsory jurisdiction of the old Court'. *Report to the President,* at p. 124 (italics added).

81. Green H. Hackworth, the principal legal adviser to the U.S. delegation at San Francisco and later a member of this Court, described Article 36 (5) in similar terms. In testimony before the Senate Foreign Relations Committee in 1945 as it considered United States membership in the United Nations, Judge Hackworth explained that Article 36 (5) was intended to address the concern that –

> 'states that had accepted compulsory jurisdiction under the present Court [the Permanent Court] would no longer be bound by their acceptance if a new Court were set up. That was taken care of by a provision in the Statute in article 36, that those *states which had accepted compulsory jurisdiction for the Permanent Court of International Justice would now substitute the proposed International Court under the same terms.*' *Report to the President,* at p. 338 (italics added).

82. In the Senate hearings the following year on whether the United States should accept the Court's compulsory jurisdiction, this understanding was made even more explicit. Charles Fahy, then Legal Adviser to the Department of State, and, as Solicitor General of the United States, formerly a member of the United States delegation to San Francisco, told the Senate Foreign Relations Committee that the proposed United States declaration would be made only on condition of reciprocity :

> 'As to particular states I think the situation as you point out is clear, that this resolution makes our declaration reciprocal ; that is, only with respect to states which accepted similar jurisdiction. Declarations of the following 19 states thus came into force : Australia, Bolivia, Brazil, Canada, Colombia, Denmark, Dominican Republic, Haiti, India, Iran, Luxembourg, Netherlands, New Zealand, Norway, Panama, El Salvador, South Africa, United Kingdom, Uruguay . . .' (*Hearings before a Subcommittee of the Committee on Foreign Relations of the United States Senate on S. Res. 196,* 77th Cong., 2d Sess. July 11, 1946, pp. 141-142.)

83. The second paragraph quoted here, which listed 'the 19 [States] . . . whose declarations continue in force', described the class of States which by virtue of Article 36 (5) could satisfy the requirement of reciprocity in the proposed United States declaration. Nicaragua was not included among these States . . .

84. In its Report approving the proposal for a United States

declaration under article 36 (2), the Senate Foreign Relations Committee also adopted this view of Article 36 (5). The *Report* stated :

'The San Francisco Conference added an additional paragraph to article 36 of the statute, according to which *declarations accepting the jurisdiction of the old Court, and remaining in force, are deemed to remain in force as among the parties to the present statute for such period as they still have to run. Nineteen declarations are currently in force under this provision.*' (*Report of the Senate Committee on Foreign Relations on Compulsory Jurisdiction of the International Court of Justice, S. Rept. No. 1835,* 79th Cong., 2d Sess. at p. 105 (25 July 1946) (italics added).)

85. In sum, the United States delegation to San Francisco, the Department of State, and the Senate all understood *(a)* that Article 36 (5) applied only to declarations that were in force under the Permanent Court's Statute as of the date of adherence to this Court's Statute and (2) that Nicaragua's declaration did not fall within this category."

8. The Court's interpretation of Article 36, paragraph 5

26. Article 36, paragraph 5, has been directly interpreted or incidentally addressed, in four prior judgments of this Court. None of them support Nicaragua's thesis that its ratification of the Statute of this Court – or relevant conduct – operated to perfect and give legal force to its Declaration of 1929. Rather, the terms and tenor of those judgments indicate the contrary.

27. The principal judgment in point was given in the case concerning the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria),* Preliminary Objections, *Judgment, I.C.J. Reports 1959,* page 127. Israel relied on Bulgaria's Declaration of 29 July 1921, which had come into force under the Statute of the Permanent Court (*ibid.*, p. 129). Bulgaria objected that Article 36, paragraph 5, was inapplicable to it (*ibid.*, p. 131). The Court found for Bulgaria on the ground that, by the time that it joined the United Nations in 1955 and became party to the Court's Statute, the Permanent Court had ceased to exist and a declaration in force vis-à-vis that Court could not be revived to apply to this Court. In so holding, the Court declared :

"Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation : it transforms *their acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of the International Court of Justice.*" (*Ibid.*, p. 137 ; emphasis supplied.)

It continued :

> "Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations ; in so doing, *it maintained an existing obligation* while modifying its subject-matter." (*I.C.J. Reports 1959,* p. 138 ; emphasis supplied.)

The Court further explained the meaning of Article 36, paragraph 5, in these terms :

> "Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears . . .
>
> . . . .
>
> *The declarations to which Article 36, paragraph 5, refers created for the States which had made them the obligation to recognize the jurisdiction of the Permanent Court of International Justice.* At the time when the new Statute was drawn up, it was anticipated – and events confirmed this – that the Permanent Court would shortly disappear and these undertakings consequently lapse. It was sought to provide for this situation, to avoid, as far as it was possible, such a result *by substituting for the compulsory jurisdiction of the Permanent Court,* which was to come to an end, the compulsory jurisdiction of the International Court of Justice. This was the purpose of Article 36, paragraph 5. This provision effected, as between the States to which it applied, *the transfer to the new Court of the compulsory jurisdiction of the old.* It thereby laid upon the States to which it applied an obligation, the obligation to recognize, *ipso facto* and without special agreement, the jurisdiction of the new Court. This constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation." (*Ibid.*, pp. 142-143 ; emphasis supplied.)

28. These quotations demonstrate that the *Aerial Incident* case strikingly and decisively cuts against Nicaragua's thesis. If, as the Court there said, the purpose of Article 36, paragraph 5, is to transform "acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction" of this Court, then Nicaragua is excluded by the fact that it never accepted the former's compulsory jurisdiction. When this Court speaks of "acceptance of" its compulsory jurisdiction, it means "binding itself to" this Court's jurisdiction. Can it be seriously maintained that what the Court means when it speaks of "acceptance" of its compulsory jurisdiction, or "acceptance" of the Permanent Court's jurisdiction, is something less, such as non-acceptance ? Thus, when the Court says, as it did in the *Aerial Incident* case, that Article 36, paragraph 5, effects a simple

operation : it "transforms . . . acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of" this Court, the Court could only have meant that Article 36, paragraph 5, exclusively referred to declarations made under the Statute of the Permanent Court which accepted, that is, bound the declarant to, that Court's compulsory jurisdiction. If, as the Court in *Aerial Incident* held, Article 36, paragraph 5, "maintained an existing obligation", there must have been an obligation in existence. But Nicaragua had no obligation in existence in respect of the Permanent Court's jurisdiction, and it has acknowledged that fact. If, again, as the Court says, the declarations to which Article 36, paragraph 5, refers created "the obligation to recognize the jurisdiction of the Permanent Court . . ." then Nicaragua is outside the reach of that provision since it never undertook an obligation to recognize the jurisdiction of that Court. If the purpose of Article 36, paragraph 5, was, as the Court says, "to substitute" for the compulsory jurisdiction of the Permanent Court the compulsory jurisdiction of this Court, Nicaragua is excluded by reason of not having effectively adhered to the compulsory jurisdiction of the Permanent Court. If its purpose, as the Court says, was to "transfer to the new Court . . . the compulsory jurisdiction of the old", then Nicaragua fails by reason of its failure to adhere to that older jurisdiction.

29. The Court added :

> "the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved ; it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired : it is one thing to preserve an existing undertaking by changing its subject-matter ; it is quite another to revive an undertaking which has already been extinguished" (*I.C.J. Reports 1959,* p. 145).

Thus the Court emphasized preservation, continuity. It excluded reviving an undertaking which has already been extinguished. How then can Article 36, paragraph 5, be interpreted to give life to an undertaking which never came into force at all ?

30. In view of these holdings of the Court in the *Aerial Incident* case, it is remarkable to find that the Court's Order of 10 May 1984 relies on this case and some of these very passages (it cites p. 142 of the Judgment) to conclude that the absence of Nicaragua's "effective ratification" of the Permanent Court's Protocol of Signature may not have excluded the operation of Article 36, paragraph 5, that it may not have prevented the transfer to the present Court of its 1929 Declaration "as a result of the

consent" thereto of Nicaragua by its acceptance of this Court's Statute including Article 36, paragraph 5 (Order of 10 May 1984, *I.C.J. Reports 1984*, p. 179, para. 25). Since the Court's holdings in the *Aerial Incident* case run counter to the thrust of the Court's Order of 10 May 1984, one is entitled to ask : on what basis does the Court there rely upon and specifically cite the *Aerial Incident* Judgment ? Moreover, today's Judgment, while endeavouring to distinguish the facts at bar in the *Aerial Incident* case from the instant case, renews (with a suggestive lack of vigour) its reliance upon the Judgment in the *Aerial Incident* case and so gives fresh point to this question. The most one can do in Nicaragua's support is to take out of context a few passages, notably, as the Court does, a single sentence found on page 142 of the Judgment :

> "Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears."

But it is absolutely clear that, by this, the Court meant a declaration accepting the jurisdiction of the Permanent Court which was in force under the Statute of that Court. Why ? Not only because Article 36, paragraph 5, says so in those terms, but because the Court says so, and on the very same page :

> "The declarations to which Article 36, paragraph 5, refers, created for the States which had made them the obligation to recognize the jurisdiction of the Permanent Court of International Justice." (*I.C.J. Reports 1959*, pp. 142-143.)

Now it is admitted on all sides, including that of Nicaragua, that its Declaration of 1929 never imposed on Nicaragua "the obligation to recognize the jurisdiction of the Permanent Court of International Justice".

31. In this regard, it is instructive to observe that counsel for Nicaragua have conceded that the Court's Judgment in the *Aerial Incident* case does not support Nicaragua's thesis. That is to say, Nicaragua's own counsel have in effect concluded that any reliance by this Court in this case on the Judgment in that case would be misplaced. Thus Professor Chayes declared that :

> "the majority opinion in *Aerial Incident* really has no significance at all for the present dispute . . . Nothing in the opinion, either in holding or in considered *obiter dictum*, excludes or is even faintly inconsistent with the position taken by Nicaragua : namely, that its declaration was 'in force' within the meaning of Article 36 (5) when Nica-

ragua became an original Member of the United Nations in 1945." (Hearing of 8 October 1984.)

Now Professor Chayes is plainly wrong in arguing that nothing in the majority opinion "is even faintly inconsistent" with the position taken by Nicaragua : that has been shown by the foregoing quotations from the Court's Judgment. But that is beside the immediate point, which is : was and is the Court justified in relying on or citing the Court's Judgment in the *Aerial Incident* case as support for the Article 36, paragraph 5, thesis that is made out in Nicaragua's favour ? Nicaragua's distinguished counsel recognizes that it was and is not justified when he affirms that that opinion has "no significance at all for the present dispute . . .".

32. Professor Chayes continues that, "The matter is different with the dissenters" *(ibid.)*. He points out that the joint dissenting opinion in the *Aerial Incident* case of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender maintained that the purpose of Article 36, paragraph 5, was "to ensure continuity between the old Court and the new" and "to preserve to the greatest extent possible . . . the state of affairs with respect to compulsory jurisdiction that existed under the Permanent Court . . ." *(ibid.)*. In this, he is quite right. But for the reasons set out above, this does not advance his case.

33. The joint dissenting opinion held :

> "The formal and, in effect, insignificant changes in the Statute of the new Court were not to be permitted to stand in the way of the then existing compulsory jurisdiction of the Permanent Court being taken over by the International Court. It was specifically contemplated that the continuity of the two Courts should be given expression by recognizing the continuity of the compulsory jurisdiction at that time existing." (*I.C.J. Reports 1959*, p. 159.)

Thus the dissenters affirmed that the intention of Article 36, paragraph 5, was to do no more than transfer "the then existing compulsory jurisdiction of the Permanent Court" (by which Nicaragua had never accepted to be bound). They further recalled that Article 36, paragraph 5, stemmed from a British proposal to "provide for the continuing validity of existing adherences" to the compulsory jurisdiction of the Permanent Court (*ibid.*, p. 160). Nicaragua had no such adherence. The object of Article 36, paragraph 5, as the dissenters saw it, was that none of the "existing declarations of acceptance" should disappear with the dissolution of the Permanent Court ; what was sought was "the maintenance of the entire group of declarations of acceptances which were still in force . . ." *(ibid.)*. That object, however, would exclude Nicaragua, whose declaration was not and never had been in force.

34. The joint dissenters proceeded to interpret the phrase of Article 36, paragraph 5, "which are still in force" as only meaning the exclusion of

some 14 declarations of acceptance which "had already expired" and the inclusion, irrespective of the dissolution of the Permanent Court, of "all the declarations the duration of which has not expired" (*I.C.J. Reports 1959*, p. 161). They cited the French text in support of that conclusion (*ibid.*, pp. 161-162), stating :

> "At the Conference of San Francisco there were present a number of States that had in the past made Declarations of Acceptance which, not having been renewed, had lapsed and were therefore no longer in force. *This applied,* for instance, to *the Declarations of* China, Egypt, Ethiopia, *France,* Greece, Peru, Turkey and Yugoslavia. It was clearly necessary, by inserting the expression 'which are still in force', to exclude those States from the operation of paragraph 5. That interpretation is supported by the French text which is as authoritative as the English text and which is even more clear and indisputable than the latter. The words '*pour une durée qui n'est pas encore expirée*' (for a duration which has not yet expired) must be regarded as determining the true meaning of the English text in question. The fact that the Chinese, Russian and Spanish texts of that paragraph approximate to the English text does not invalidate or weaken the obvious meaning of the French text. Those three texts were translated from the English version, whereas the French text was that of one of the two official working languages adopted at the San Francisco Conference. However, while the French text removes any doubt whatsoever as to the meaning of these words, there is in effect no reasonable doubt about them also so far as the English text is concerned. There is no question here of giving preference to the French text. Both texts have the same meaning. The French text is no more than an accurate translation of the English text as generally understood. Or, rather, in so far as it appears that the final version was first formulated in the French language, the English text is no more than an accurate translation from the French." (*Ibid.,* pp. 161-162 ; emphasis supplied.)

They observed that the phrase "in force" as found elsewhere in the Statute, refers to the element of time (*ibid.,* p. 163). They also pointed out that, "Retroactive operation of a provision ought not to be assumed without good cause . . ." (*ibid.,* p. 164). Article 36, paragraph 5, did not lapse on the dissolution of the Permanent Court ; it was rather designed to render that dissolution irrelevant in the matter of the transfer of declarations. They then concluded, in the passage on which counsel for Nicaragua place great emphasis, that the words, "which are still in force" refer "to the declarations themselves . . ." (*ibid.*).

> "So long as the period of time of declarations made under Article 36 of the Statute of the Permanent Court still has to run at the time when the declarant State concerned becomes a party to the Statute of the International Court of Justice, those declarations fall within the purview of Article 36, paragraph 5, of the new Statute and 'shall be

> deemed to be acceptances of the compulsory jurisdiction of the International Court for the period which they still have to run and in accordance with their terms'." (*Ibid.,* pp. 164-165.)

But – and this is critical to and destructive of Nicaragua's construction – there is no indication whatsoever in this passage (or elsewhere in their opinion) that, in saying this, the dissenters viewed a declaration which had, unlike Bulgaria's, never come into force at all to have a period of time in which still to run.

35. It should be added that, at a much later point in the joint dissenting opinion, the three distinguished dissenters took up the contention of a few of their colleagues that Article 36, paragraph 5, refers only to declarations which contain a time-limit of their validity, and thus does not embrace declarations, such as that of Bulgaria, whose duration was unlimited. In rebutting that contention, they said :

> "Moreover, if the interpretation contended for had been adopted by the Court in the present case, its result would be to invalidate, as from the date of the Judgment of the Court, the existing declarations of a number of States – such as Colombia, Haiti, Nicaragua and Uruguay." (*Ibid.,* p. 193.)

Nicaragua can derive comfort from that quotation. But there is no reason to conclude that, in including it, the dissenters had investigated whether Nicaragua's 1929 Declaration, listed in the Court's *Yearbook,* actually had ever come into force.

36. In sum, while Nicaragua arguably may find a measure of support in selected passages of the joint dissent in the *Aerial Incident* case, that support is very limited. Moreover, the dissenters were speaking for themselves as dissenters, not for the Court. Counsel for Nicaragua appreciate that, but maintain that the *Temple of Preah Vihear* case and *Barcelona Traction* "wholeheartedly" adopt the principles espoused by the dissenters in *Aerial Incident* (Hearing of 8 October 1984). Let us turn to those cases, but first consider whether, as Nicaraguan counsel contend, United States arguments in a companion *Aerial Incident* case lend support to Nicaragua's thesis.

37. Counsel for Nicaragua argued that, in the proceedings which the United States brought against Bulgaria in connection with the latter's shooting down of an Israeli civil aircraft on which there were passengers of United States nationality, the United States espoused the very interpretation of Article 36, paragraph 5, for which Nicaragua now argues (Hearing of 8 October 1984). It is true that the United States argument in that case parallels the argument of the joint dissenters in *Aerial Incident.* However, the United States expressly affirmed that the declaration of Bulgaria there at issue came into force in 1921 (as did the United Kingdom

in another companion case) [1]. (*I.C.J. Pleadings, Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria ; United States of America* v. *Bulgaria ; United Kingdom* v. *Bulgaria*), p. 312.) The United States construction of Article 36, paragraph 5, was based, *inter alia,* on "acceptance of the jurisdiction of the Permanent Court" (*ibid.,* pp. 317-318). That was one obligation ; Article 36, paragraph 5, entailed "a new and additional obligation . . ." (*ibid.,* p. 318). The United States relied on the San Francisco negotiating history to establish that the purpose of Article 36, paragraph 5, was "to preserve" declarations (*ibid.,* pp. 319-320). Article 36, paragraph 5, was included "to prevent retrogression with respect to international judicial jurisdiction . . ." (*ibid.,* p. 320) – but the United States gave no hint of construing Article 36, paragraph 5, so as to expand that jurisdiction by giving life to a declaration which had never come into force. Article 36, paragraph 5, was meant, the United States argued, "not to lose the effectiveness of declarations made under the optional clause of the old Statute" *(ibid.)*, but it does not follow that it was intended to validate declarations which had not come into effect. Thus, it is clear that these United States arguments give no nourishment to the Nicaraguan thesis, because they all addressed the situation – which is not Nicaragua's but was Bulgaria's – in which the declarant State had ratified the Protocol of Signature and therefore had brought its declaration under the Optional Clause into force.

38. The next significant reference to Article 36, paragraph 5, in the Court's jurisprudence was that of Judge Philip C. Jessup, in his separate opinion in the *South West Africa (Ethiopia* v. *South Africa, Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962,* pages 319, 415 :

> "It was clearly the intention in the drafting of the Statute of the International Court of Justice to preserve for the new Court just as much as possible of the jurisdiction which appertained to the old Court. For this purpose, Article 36 (5) provided for the transfer of the obligations assumed by States which made declarations under Article 36 of the old Statute, and Article 37 provided for a similar transfer where a 'treaty or convention' had contained a provision for the jurisdiction of the Permanent Court."

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[1] The British Memorial puts the matter precisely :

> "Bulgaria's acceptance of the compulsory jurisdiction of the Court is unconditional, and was made on July 29, 1921, when the instrument of Bulgaria's ratification of the Protocol of Signature of the Permanent Court of International Justice was deposited, and became effective as to the jurisdiction of the International Court of Justice by virtue of . . . Article 36 (5) of the Statute of the Court, on the date of Bulgaria's admission to membership of the United Nations." (*I.C.J. Pleadings* referred to above, p. 331.)

Again, there is the emphasis on preservation of the jurisdiction which "appertained to the old Court". Judge Jessup clearly was speaking of, as he specifies, "the obligations assumed by States which made declarations under Article 36 of the old Statute", of a jurisdiction which was effective and in force, not a jurisdiction to be brought initially into effect by operation of Article 36, paragraph 5.

39. Nicaraguan counsel suggested that the three major opinions to be considered by the Court in reaching the current Judgment are those of *(a)* the Court in *Aerial Incident* ; *(b)* the joint dissent in that case ; and *(c)* *Barcelona Traction.* Nicaraguan counsel views *Barcelona Traction* as in effect, though not in terms, overturning the Court's judgment in *Aerial Incident* and as accepting the dissenters' rationale in that case (Hearing of 8 October 1984). However, in *Barcelona Traction,* the Court, in interpreting Article 37, decidedly did not overrule *Aerial Incident* ; and, even if it had, it would have thereby lent no support to Nicaragua's thesis, not only because the joint dissenting opinion in *Aerial Incident* lends it so little, but because both the Court and Judge Tanaka in his separate opinion in *Barcelona Traction* emphasized that the purpose of Article 37, like Article 36, paragraph 5, was to maintain continuity between the jurisdiction given to the Permanent Court and that given to the new Court. Thus the Court stressed that Article 37 was "not intended to create any new obligatory jurisdiction that had not existed before . . .". Rather the point was "preserving the existing conventional jurisdiction . . ." (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964,* pp. 6, 34). In *Barcelona Traction,* the treaty at issue affording jurisdiction to the Permanent Court had come into force. Thus the analogy is with Bulgaria's initially effective adherence to the Permanent Court's compulsory jurisdiction in *Aerial Incident,* it is not with Nicaragua's initially ineffective adherence in the current case. And why, by the way, does Nicaragua try to make so much of *Barcelona Traction* when on analysis it offers it so little ? Essentially because Nicaragua contends that it overrules the Court's Judgment in *Aerial Incident.* Nicaragua's exposition of *Barcelona Traction,* while lending scant support to its position, thus underscores how dubious is such reliance of the Court as there is upon the *Aerial Incident* case. If the *Aerial Incident* Judgment lends support to Nicaragua's theory, why should Nicaragua argue that *Barcelona Traction* overruled the Court's Judgment in *Aerial Incident* ?

40. Let us finally advert to the case concerning the *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961,* page 17. In its Order of 10 May 1984, the Court relied on this case as well (without specifying any page or passage) to support its conclusion that the absence

of Nicaragua's effective ratification of the Protocol of Signature might not have excluded the operation of Article 36, paragraph 5. In today's Judgment, the Court cites the *Temple* case anew, apparently with regard to the alleged reality of Nicaragua's consent to be bound by the Court's compulsory jurisdiction. In the *Temple* case, the Court held that the intention of Article 36, paragraph 5, was to provide a means whereby,

> "within certain limits, existing declarations *in acceptance* of the compulsory jurisdiction of the Permanent Court of International Justice would become *ipso jure* transformed *into acceptances* of the compulsory jurisdiction of the present Court . . ." (at p. 25 ; see also, p. 28 ; emphasis supplied).

That is not a holding which helps Nicaragua, since its declaration did not accept the compulsory jurisdiction of the Permanent Court. Once again it may be observed that when the Court speaks of "acceptances" of this Court's compulsory jurisdiction, and, in the same sentence, speaks of declarations "in acceptance" of the compulsory jurisdiction of the Permanent Court, it incontestably interprets Article 36, paragraph 5, to refer only to declarations which bound the declarants – in both Courts. The Court does not assign one meaning to the term "accept" in this Court, and another meaning to that term in the Permanent Court, and in the same sentence. Furthermore, in the *Temple* case, the Court reaffirmed the rationale of its Judgment in the *Aerial Incident* case. It observed that Thailand in the *Temple* case endeavoured to apply that rationale in its favour, maintaining that its Declaration of 1940 had lapsed with the dissolution of the Permanent Court and could not have been renewed by a later declaration of 1950 which purported to renew it. It held that Thailand's 1950 Declaration, which was meant to be an effective acceptance of this Court's compulsory jurisdiction under the Optional Clause, was a new and independent instrument not made under Article 36, paragraph 5, not only because that provision did not contemplate the making of new declarations but because it was concerned with the preservation of declarations for the period which they still had to run. Thus the Court treated Thailand's 1950 Declaration as intended to be made under Article 36, paragraph 2, and effective as such. The Court expressly put aside questions of revival of lapsed or spent instruments and questions of error, for in the *Temple* case the Court concluded that there was no factor which impaired the reality of the consent which Thailand intended to give in 1950. The Court observed that, in the case of declarations under the Optional Clause of this Court, the "only formality required" is the deposit of the acceptance with the Secretary-General of the United Nations. The Court accordingly concluded that Thailand's acceptance could not be defeated by some defect which did not involve "a mandatory legal requirement" (*ibid.*, p. 34). Thus the Court, in the *Temple* case, interpreted as a "mandatory legal requirement" that act which is most closely analogous to the act which Nicaragua failed to perform in this case, deposit of its instrument of

ratification of the Protocol of Signature of the Permanent Court with the League Secretary-General.

9. The listings in the Yearbooks *of the Court*

41. While it is not disputed that the responsible officials of the League of Nations and the Registry of the Permanent Court did not regard Nicaragua as party to the Court's compulsory jurisdiction by reason of its 1929 Declaration, the *Yearbooks* of this Court are not so clear, as was amply expounded in the pleadings of the Parties.

42. Those pleadings and the facts which they interpret need not be fully recapitulated. The essential points that may be derived from them appear to be the following :

– The *Yearbooks* of this Court, from the outset of the life of this Court to the present day, have listed Nicaragua as party to the Court's compulsory jurisdiction. For example, the first *Yearbook* so lists Nicaragua, with a footnote stating :

> "Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, paragraph 5, of the Statute of the present Court)." (*Yearbook 1946-1947,* p. 111.)

– However, those *Yearbooks* have always contained, in terms or referentially, a footnote. In the first *Yearbook,* that footnote to the text of Nicaragua's 1929 Declaration refers to the telegram of 20 November 1939 informing the League that Nicaragua's instrument of ratification of the Protocol of Signature of the Court's Statute was to follow, concluding : "Notification concerning the deposit of the said instrument has not, however, been received in the Registry." (*Ibid.,* p. 210.) Beginning with the *Yearbook 1955-1956,* the footnote has concluded : "It does not appear, however, that the instrument of ratification was ever received by the League of Nations." (At p. 218.)

– The footnote's inclusion is incompatible with the thesis that Nicaragua's ratification of the United Nations Charter and Statute of this Court and the consequent operation of Article 36, paragraph 5, were sufficient to bring into effect a declaration which otherwise was ineffective to bind Nicaragua to the compulsory jurisdiction of the Permanent Court. Why ? Nicaragua claims that the operation of Article 36, paragraph 5, combined with the existence of its 1929 Declaration which was not binding on it, and its ratification of the Charter and the Court's Statute which is binding on it, was and is sufficient to give life to its 1929 Declaration. Let us assume that that is so. What then is the point of the footnote ? According to Nicaragua,

it makes no difference at all whether its instrument of ratification of the Permanent Court's Protocol was or was not received, because, even if not received, Nicaragua became party to this Court's compulsory jurisdiction by operation of Article 36, paragraph 5, upon its ratification of the Charter. It maintains that its being so listed in the *Yearbook* so shows. But why then should the Registry have said anything at all about non-receipt of the instrument of ratification since it was absolutely irrelevant, on Nicaragua's argument, to the operation of Article 36, paragraph 5 ? Clearly only because the Registry did *not* think that it was irrelevant. Rather, it thought that possible non-receipt was wholly relevant ; and it thought that it warned States about the uncertainty in Nicaragua's position by including the footnote. When the first *Yearbook* (and immediately succeeding *Yearbooks*) were composed, it was not definitively established whether or not the Secretariat of the League had received the instrument of ratification which Nicaragua in 1939 affirmed it would send ; it was only later that it was established not only that this Court's Registry had not been notified of such deposit, but that in fact deposit never had been made.

43. Now let us turn to the second *Yearbook*. That *Yearbook* omits the footnote, but, on page 127, it refers to the prior *Yearbook* in which Nicaragua's declaration – and the footnote – are found. But it contains more of interest and probative value, namely, the text of the Pact of Bogotá. By the terms of Article XXXI of that Pact, "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice", the Parties accept compulsory jurisdiction unconditionally under that Article in relation to any other American State, in the precise terms of the Optional Clause. Under Article XXXII of the Pact of Bogotá, moreover, whenever the conciliation or arbitration procedures prescribed by the Pact do not lead to a solution, either party to a dispute shall be entitled to have recourse to the International Court of Justice and, "The Court shall have general compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute". A reservation to the Pact of Bogotá by Nicaragua is found at page 143 of that *Yearbook,* which states that Nicaragua's acceptance of the foregoing may not prejudice its position in respect of any arbitral decision which it has attacked. Thus Nicaragua generally accepted the Court's compulsory jurisdiction under Article 36, paragraph 2, vis-à-vis any other American State, and under Article 36, paragraph 1, as well, subject to this reservation, which obviously related to the King of Spain's contested arbitral award of 1906. This may suggest that Nicaragua did not regard itself otherwise as being bound to the Court's compulsory jurisdiction by reason of the operation of Article 36, paragraph 5. Why ? Because otherwise Nicaragua's reservation to the Pact of Bogotá makes little sense. Why should Nicaragua make this reservation to the Court's compulsory jurisdiction under Article 36, paragraph 2, and Article 36, paragraph 1 (and to

the other means of pacific settlement provided for in the Pact of Bogotá), if otherwise Nicaragua was bound, and believed itself to be bound, by the Court's compulsory jurisdiction under Article 36, paragraph 5, in terms which omitted the reservation ? Nothing in the 1929 Declaration hints at that reservation. It should be noted, moreover, that, in the *King of Spain* case which is discussed below, Nicaragua invoked its reservation to the Pact of Bogotá (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua),* Vol. I, pp. 132-133). Thus the content of the *Yearbook 1947-1948* itself gives ground for questioning whether Nicaragua regarded itself as bound by the force of operation of Article 36, paragraph 5.

44. The footnote of the *Yearbook* of 1946-1947, which was incorporated by reference in subsequent editions, was revived and revised with the *Yearbook* for 1955-1956, and maintained in all subsequent *Yearbooks,* in the following terms :

> "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." (P. 195.)

The reintroduction of a footnote apparently stemmed from correspondence among the then Registrar, Julio López-Oliván, Judge Hudson, and the Director of the European Headquarters of the United Nations, Adriaan Pelt, which was not brought to the attention of the Court at the time it deliberated upon provisional measures and issued its Order of 10 May 1984. This correspondence is in the Court's archives ; some of it was found by the United States and by Nicaragua in Judge Hudson's papers at Harvard Law School. That correspondence is enlightening. The published elements of it demonstrate that:

(a) Judge Hudson believed that Nicaragua's ratification of the Charter did not subject it to the Court's compulsory jurisdiction in the event of the League's not having received the instrument of ratification ;
(b) Nicaragua's instrument of ratification was never received by the Secretariat of the League of Nations ;
(c) the Registrar concluded that Nicaragua was not bound by this Court's compulsory jurisdiction by reason of the operation of Article 36, paragraph 5.

Thus his letter to Judge Hudson of 2 September 1955 concludes :

> "I do not think one could disagree with the view you express when

> you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of the compulsory jurisdiction. If the Declaration of September 24th, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court."

45. The opinion of the then Registrar, Sr. López-Oliván, is of particular interest. López-Oliván was the last Registrar of the Permanent Court, and obviously was familiar with its workings and the processes of adherence to its compulsory jurisdiction. He was a member of the delegation (together with the Court's President and Judge Hudson) which represented the Permanent Court of International Justice at the San Francisco Conference (see *P.C.I.J., Sixteenth Report,* p. 12). And he later served as this Court's second Registrar. Thus there is every reason to presume that he was fully familiar with the intentions of the drafters of Article 36, paragraph 5, and that he was in a unique position to interpret the result of the failure of Nicaragua to transmit to the League its instrument of ratification of the Protocol of Signature. Moreover, his interpretation – manifested cautiously but still manifested in the revised footnote inserted in the *Yearbook 1955-1956* and thereafter – is entitled to the greater weight in the light of the fact that, when the Court itself subsequently came to interpret Article 36, paragraph 5, it interpreted it in ways wholly consistent with the interpretation of López-Oliván. The Registrar understandably did not take it upon himself in 1955 to delete Nicaragua's declaration from the *Yearbook,* an act which would have been particularly delicate at a time when litigation between Nicaragua and Honduras over the arbitral award of the King of Spain loomed and when it was uncertain what the jurisdictional basis of such litigation might be. He contented himself with reintroducing and revising the footnote which was sufficient to place on guard any reader interested in the question of whether Nicaragua was effectively a party to the Court's compulsory jurisdiction. He left it to the Court to draw legal conclusions from the facts so presented.

46. But the Registrar did take one further step. With the *Yearbook 1956-1957,* Sr. López-Oliván introduced the following caveat in presenting the *Yearbook's* recital of declarations made under Article 36 (including Nicaragua's) :

> "The texts of declarations set out in this Chapter are reproduced for convience of reference only. 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." (At p. 207.)

It cannot be shown that the inclusion of this new proviso was stimulated by the uncertain status of Nicaragua's declaration, but it is a sensible speculation. Whatever the origins of the provision, which appears in subsequent *Yearbooks,* it serves to place the listing of Nicaragua in the *Yearbook* in its appropriate context.

47. The Court's *Yearbooks* are instructive in a further aspect as well. At page 188 of the *Yearbook 1955-1956* one finds the following in bold letters : "List of States which recognize 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." (Emphasis supplied.) Nicaragua is listed thereunder, together with the reintroduced footnote. The meaning to be attached to this heading, Nicaragua and the Court appear to maintain, is that "still bound" means – in Nicaragua's unique case – "never bound" by the Permanent Court's jurisdiction but bound by this Court's jurisdiction. Does Nicaragua – or the Court – treat the French text of the *Yearbook* more seriously ? The French *Yearbook* for 1955-1956, at page 182, provides a "Liste analytique des Etats qui reconnaissent comme obligatoire la juridiction de la Cour internationale de Justice ou qui sont *encore liés* par leur acceptation de la juridiction de la Cour permanente de Justice internationale." (Emphasis supplied.) How can the meaning which this phrase of the *Yearbook* – "encore liés" – imports to Article 36, paragraph 5, be reconciled with the meaning which the Court attributes to the French text of Article 36, paragraph 5 ? The Court at paragraph 30 of its Judgment in the instant case finds it significant that the English text of Article 36, paragraph 5, does not specify that declarations must be "binding". Then what explanation can the Court offer for the terms of this heading of the *Yearbook* which specifies "still bound" as the meaning of Article 36, paragraph 5 ? As noted, these questions are not posed by the terminology of this issue of the *Yearbook* only. For example, the *Yearbook 1946-1947* containing the first version of the footnote similarly contains, at page 221, a "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 . . .".

10. Listings in Reports *of the Court to the General Assembly*

48. Since 1968, the Court has submitted a brief annual report to the General Assembly of the United Nations. That report has included a list of States bound by the Court's compulsory jurisdiction. Nicaragua always has been included in that list. Does that fact establish as a matter of law that Nicaragua is party to the Court's compulsory jurisdiction, and does it estop the Court from holding that it is not ?

49. In adopting the Court's *Reports* to the General Assembly, the judges of the Court do not investigate the facts that lie behind a list of States which are presented as having accepted the Court's compulsory jurisdiction. That list is submitted by the Registry and is routinely accepted by the Court. How routinely is demonstrated by the *Report of the International Court of Justice, 1 August 1982-31 July 1983* (A/38/4), which, at page 1, contains the following entry :

> "8. There are now 47 States which recognize (a number of them with reservations) the jurisdiction of the Court as compulsory in accordance with declarations filed under Article 36, paragraph 2, of the Statute. They are : Australia, Austria, Barbados, Belgium, Botswana, Canada, Colombia, Costa Rica, Democratic Kampuchea, Denmark, Dominican Republic, Egypt, El Salvador, Finland, Gambia, Haiti, Honduras, India, Israel, Japan, Kenya, Liberia, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Philippines, Portugal, Somalia, Sudan, Swaziland, Sweden, Switzerland, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay. The texts of the declarations filed by these States appear in Chapter IV, Section II, of *I.C.J. Yearbook 1982-1983.*"

It will be observed that Nicaragua is thus listed as a State which has filed a declaration "under Article 36, paragraph 2, of the Statute". When this Court speaks of "the Statute", it speaks of its Statute. But the fact is that Nicaragua has never filed a declaration under Article 36, paragraph 2, of the Court's Statute. It does not claim that it has. Rather, it claims that it is bound to the Court's compulsory jurisdiction by reason of a declaration filed under the Statute of the Permanent Court and by the operation of Article 36, paragraph 5, of this Court's Statute. But that is not what the aforesaid *Report* says. Can it be maintained that, although what the *Report* says is inaccurate, it nevertheless has become the law because it is contained in a Report to the General Assembly ?

50. In the *Report of the International Court of Justice, 1 August 1983-31 July 1984* (A/39/4), the following entry is found :

> "7. There are now 47 States which recognize (a number of them with reservations) the jurisdiction of the Court as compulsory in accordance with declarations filed under Article 36, paragraphs 2 and 5, of the Statute. They are : Australia, Austria, Barbados, Belgium, Botswana, Canada, Colombia, Costa Rica, Democratic Kampuchea, Denmark, Dominican Republic, Egypt, El Salvador, Finland, Gambia, Haiti, Honduras, India, Israel, Japan, Kenya, Liberia, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Netherlands,

New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Philippines, Portugal, Somalia, Sudan, Swaziland, Sweden, Switzerland, Togo, Uganda, United Kingdom of Great Britian and Northern Ireland, United States of America and Uruguay. The texts of the declarations filed by these States appear in Chapter IV, Section II, of *I.C.J. Yearbook 1983-1984*."

Thus the error which was published in last year's *Report* has been dealt with in this year's *Report*, as is understandable in view of the fact that that *Report* was written and adopted well after the commencement of proceedings in the current case. However, the error of stating that Nicaragua has recognized the compulsory jurisdiction of this Court under Article 36, paragraph 2, is found in the *Reports* of the Court to the General Assembly in all reports from 1 August 1973 through that of 1983, that is, in 9 reports out of the 16 rendered to the General Assembly to date.

51. Thus, it is demonstrable – and demonstrated – that when the Court provides information in an administrative capacity, not only may it err and repeatedly err, but that it cannot be thought to be making a judgment in law or of legal effect. There is an obvious difference between the administrative acts and the judicial acts of the Court. The administrative acts of the Court – and particularly inconsistent acts of this character – cannot reasonably be taken as either establishing the law or estopping the Court from holding what the law is. Indeed, if the current *Report* of the Court were to be treated as dispositive, what would be the point of the Court's receiving extensive memorials, having substantial hearings and writing a judgment on the very issue ? It could rather treat what otherwise is a question of considerable complexity as perfectly simple, as one resolved not by last year's *Report* but by this year's.

52. In sum, while the reader on the run may have gained the impression from the Court's *Yearbooks* and *Reports* that Nicaragua is bound to the Court's compulsory jurisdiction, if not under Article 36, paragraph 2, then by operation of Article 36, paragraph 5, that is not a lawyerlike conclusion which follows from a careful analysis of the relevant documentation, and still less of the relevant law. Nor is it a conclusion which follows from the annually published collection of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral-Conventions, and Agreements in respect of which the Secretary-General acts as Depositary,* to which the Court, in paragraph 36 of its Judgment, also ascribes "particular weight". Those reports state that, "All data and footnotes concerning these declarations" of acceptance of the Court's jurisdiction are reprinted from the Court's *Yearbook*, and, when that *Yearbook* runs the footnote to Nicaragua's declaration, so does the derivative volume of the Secretary-General. See, e.g., *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1982*, pages 24 and 27, note 54.

11. The conduct of the Parties

53. Nicaragua argues that, in any event, its Declaration of 1929 is effective to confer jurisdiction on the Court in the present proceeding "for an entirely separate and independent reason", namely :

> "(i) Nicaragua's conduct over the past 38 years unequivocally manifests its consent to be bound by the Court's compulsory jurisdiction. Such an expression of consent overcomes any formal defect in Nicaragua's ratification of the Protocol of Signature.
>
> (ii) The conduct of the United States during the past 38 years, like the conduct of the other States that have declared their acceptance of the Court's compulsory jurisdiction, constitutes an acceptance of and acquiescence in the effectiveness of Nicaragua's 1929 declaration and a waiver of any formal defect in Nicaragua's ratification of the Protocol of Signature." (Nicaraguan Memorial, para. 85.)

54. That contention is unpersuasive for two reasons. First, the conduct in question actually is ambiguous not unequivocal, and it cannot on the part of the United States reasonably be interpreted to constitute acquiescence in the effectiveness of Nicaragua's 1929 Declaration. Second, even if the course of the Parties' conduct were more consistent and more favourable to Nicaragua's position than it is, it is implausible to argue that a State may become party to the Optional Clause of the Statute not by the deposit of a declaration with the Secretary-General of the United Nations pursuant to Article 36, paragraphs 2 and 4, not by the operation of Article 36, paragraph 5, but by conduct extraneous to those provisions. The ambiguities of Nicaragua's behaviour by no means establish the reality of its consent ; if Nicaragua had wished to ensure that its consent were real, it needed merely to file a declaration under Article 36, paragraphs 2 and 4. But in any event, the deposit of an instrument of ratification is no mere optional formality ; as pointed out in paragraph 12 of this opinion, where a treaty exclusively provides for that means of ratification (as did the Protocol of Signature) no other is permitted ; in the words of the *Temple of Preah Vihear* case, it was, like deposit of a declaration is under this Court's Article 36, paragraph 4, "a mandatory legal requirement".

55. Since, despite the foregoing considerations, the Court nevertheless gives weight to what it appears to find as a sufficiently consistent course of conduct of those concerned, comment on that conduct is in order.

56. It is of course true that the Court's *Yearbooks* and *Reports* (and those of the Secretary-General and national authorities) listed Nicaragua as party to the Court's compulsory jurisdiction. Much is made of the fact that such listings were never protested. But what does the lack of protest

indicate ? Arguably, on Nicaragua's part, an intent to be bound ; and arguably, on Nicaragua's part – by reason of its failure to challenge or otherwise react to the footnote – an intent not to be bound. As for the United States, and third States generally, since they did not have litigation with Nicaragua actively in view, they had no reason to protest what, on analysis, might have been seen as a questionable listing.

57. Moreover, Nicaragua's conduct in and in connection with the *King of Spain* case strongly suggests that Nicaragua was not seen to be bound by the Court's compulsory jurisdiction, by itself, by Honduras or by the United States. Honduras was anxious to bring Nicaragua before the Court in the hope that the Court would uphold the King of Spain's arbitral award of 1906 which awarded to Honduras territory of which Nicaragua had remained in occupation. Honduras engaged Manley O. Hudson as its leading counsel. That was what prompted him to make the inquiry of the Registrar which led to the re-introduction of the footnote in the *Yearbook 1955-1956*. In the light of his correspondence with the Registrar, Hudson was confirmed in his view that, if Honduras invoked its own submission to the Court's compulsory jurisdiction and Nicaragua's declaration of 1929, it was unlikely that the Court would find that it had jurisdiction over Nicaragua. Thus Honduras sought the good offices of the United States in order to persuade Nicaragua to conclude a special agreement submitting the case to the Court. In that connection, Honduras sent to the United States a memorandum of 15 June 1955 which declared :

> "Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance of and resolve the case which Honduras has considered filing against Nicaragua. Nicaragua has suggested that the two countries sign a kind of special protocol to submit the problem to the Court so that it could declare whether or not the award is valid." (United States Counter-Memorial, Ann. 34, p. 2.)

Thereafter, in a conversation of 21 December 1955 between Nicaragua's Ambassador to the United States, Guillermo Sevilla-Sacasa, and officials of the Department of State, it was said, according to a memorandum of conversation then drawn up which the United States has submitted in evidence, that :

> "Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.
>
> Ambassador Sevilla-Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty." (*Ibid.*, p. 4 and App. K thereto at p. 2.)

The problem was finally taken to the Organization of American States, which succeeded in persuading Nicaragua and Honduras to conclude a special agreement submitting the case to the Court. Nevertheless, there are indications that Honduras remained uncertain whether Nicaragua would in fact appear. (See, for example, the repeated statements in the Honduran Application seeking a judgment "whether the Government of Nicaragua appears or not" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906,* Vol. I (e.g., at p. 10).) Perhaps this explains why Honduras did not exclusively rely on the terms of the special agreement ; it also made the claim that Nicaragua's telegram to the League was tantamount to ratification and that Nicaragua thus was bound under the Optional Clause by operation of Article 36, paragraph 5 (*ibid.,* pp. 8-9). More than that, it was in Honduras' interest to seek to establish jurisdiction in this way, since it could then make a claim for damages for unlawful occupation of its territory which the terms of the special agreement did not admit.

58. Conversely, it was not in Nicaragua's interest in the *King of Spain* case to accept Honduras' argument that it was bound by operation of Article 36, paragraph 5, since then it might have been held liable for damages. That may be why it carefully refrained from doing what it could so easily and plausibly have done : squarely stated to the Court that it agreed with Honduras that it was bound to the Court's compulsory jurisdiction by reason of its 1929 Declaration and the operation of Article 36, paragraph 5. In fact, what Nicaragua said was the following :

> "It goes without saying that the competence of the International Court of Justice to settle this dispute meets with no contradiction from Nicaragua. It was, moreover, expressly admitted by both Parties in the Agreement of June 21st and 22nd, 1957, . . . reproduced in the Resolution of the Organization of American States, . . . Nicaragua agrees with Honduras . . . in ascribing to that instrument the character of a special agreement.
>
> 2. The Court will also note that, with the agreement of the Parties, the present dispute is defined in the said Resolution and in the various documents as a dispute 'existing between them with respect to the *Arbitral Award* handed down by His Majesty the King of Spain on December 23rd, 1906' and not as concerning a claim for the *execution* of the decision or for denunciation of its breach.
>
> It is true that the Honduran Foreign Minister, in a Declaration annexed to the Agreement of July 21st, 1957 . . . expressed his explicit wish that the Arbitral Award . . . be carried out and its view that 'Nicaragua's failure to comply with that arbitral decision constitutes, under Article 36 of the Statute of the International Court of Justice (?) and, in accordance with the principles of international law, a breach of an international obligation'.
>
> But Nicaragua at the same time expressed the equally clear intention of answering the claim of Honduras, not only 'opposing the

exceptions that it considers appropriate in order to impugn the validity of the Arbitral Award of December 23rd, 1906, and its compulsory force', but also 'invoking all those rights that may be in its interest', maintaining in particular 'that its boundaries with Honduras continue in the same legal status as before the issuance of the above-mentioned Arbitral Award' . . .

It was expressly understood in the Agreement of July 21st, 1957, that each Government 'in the exercise of its sovereignty and in accordance with the procedures underlined in this instrument, shall present the matter in this Agreement as it deems pertinent'.

. . . .

3. We should add that it may be only by inadvertence that Honduras presented the first claim set forth in its submissions as coming within the category of disputes covered by Article 36, 2 *(c)*, of the Statute of the International Court of Justice. The present dispute in no way concerns the *existence* of any fact which, if established, would constitute a breach of an international obligation. There is in this case no dispute as to the existence of the exercise of Nicaraguan sovereignty over part of the disputed territory ; on the other hand, there is a disagreement over the existence of an obligation upon Nicaragua to agree to execute an alleged Arbitral Award against which it has for years formulated much serious and detailed criticism, expressing readiness from the outset to acquiesce in the opinion of arbiters in this matter.

4. Similarly, Nicaragua can only express surprise that Honduras should have invoked Article VI of the Pact of Bogotá, ratified by the two Parties to the present dispute and according to which the procedures provided in that Pact '*may not be applied* to matters already settled by arrangement between the Parties or by arbitral award'.

For it is well known that Nicaragua, when signing the said Treaty, made an explicit reservation reading as follows :

> 'The Nicaraguan Delegation, on giving its approval to the American Treaty on Pacific Settlement (Pact of Bogotá), wishes to record expressly that no provisions contained in the said Treaty may prejudice any position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law, which clearly permit arbitral decisions to be attacked when they are adjudged to be null or invalidated. Consequently, the signature of the Nicaraguan Delegation to the Treaty in question cannot be alleged as an acceptance of any arbitral decisions that Nicaragua has contested and the validity of which is not certain.'

It is true that, according to the Resolution of the Organization of American States of July 5th, 1957, mentioned above, Nicaragua's agreement to the method of settlement proposed implied its abandonment of the reservation attached to the Bogotá Pact, but obviously that abandonment was motivated solely by the assured conviction that the whole of the dispute was going to be submitted to the International Court of Justice and that it would be at variance with the undoubted intention of the Parties to interpret it as a recognition of the validity of the Award of December 23rd, 1906, or as waiving the assertion of Nicaragua's complaints before the Court.

In these circumstances and subject to what may be said on this matter in the Reply, Nicaragua will say no more on this question of jurisdiction." (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906,* Vol. I, pp. 131-133. The translation from the French is the Registry's.)

59. It follows that, in the one case before the instant case in which the question of whether Nicaragua was bound under the Optional Clause was explicitly raised, Nicaragua remained significantly silent. It did not answer that question positively ; it did not answer it directly ; rather it contented itself with answers which channelled the case away from the Optional Clause and towards exclusive reliance on the special agreement. That is hardly the conduct of a State which harbours and manifests the belief that it is bound under the Optional Clause.

60. There are other events as well which weaken Nicaragua's claim of consistent conduct showing that it was, and believed itself to have been, bound under the Optional Clause. Notably, after San Francisco, the Nicaraguan Foreign Minister made a substantial report to Nicaragua's Congress on the Conference, the Charter and the Statute of the Court. He spoke about the attachment of Latin American States to the compulsory jurisdiction of the Court. But he said not a word which even hinted that he regarded Nicaragua as bound by that compulsory jurisdiction.

61. It is suggested by the Court that, if Nicaragua were a defendant in this Court, and sought to deny its recognition of the Court's compulsory jurisdiction in reliance on Article 36, paragraph 5, the Court would probably reject that argument ; and that, accordingly, since it would hold Nicaragua to what it sees as the appearance of its being bound under the Optional Clause, it should hold the United States to that appearance in this case. In my view, that does not follow. As the Court indicated in the *Anglo-Iranian Oil Co.* case (*Judgment, I.C.J. Reports 1952,* pp. 93, 105-107), the declarant State in making a declaration under the Optional Clause has a special knowledge of its own situation and intentions. Nicaragua is chargeable with knowing not only the equivocations referred to in preceding paragraphs, but, above all, of the footnotes and what they implied. There is ample indication that, all along, Nicaragua might have known of the possibility of its maintaining that it was not bound, despite

the *Yearbook* and other publications apparently holding it out as bound. Thus the Court should not countenance Nicaragua having it both ways : being able to plead that it is bound under the Optional Clause, as in this case, but avoiding such a plea, as in the *King of Spain* case. However, were the United States bringing an application against Nicaragua, these considerations might well not impair the reliance of the United States on the appearance of Nicaragua being bound because, in view of Nicaragua's having taken no public, clear and unambiguous step to correct an appearance of being bound, Nicaragua cannot be heard to deny the truth of an appearance in which it so long acquiesced. In short, Nicaragua may well be in no position to deny, after almost 40 years, what it has tolerated despite the ambiguities of which it had special knowledge. But the United States and other States were and are not in the same knowledgeable position (even if the United States may be said in the 1950s to have had some knowledge of the situation) ; they were not charged with a like duty of sensitivity to Nicaragua's position ; and thus they could rely on appearances which Nicaragua peculiarly knew, or should have known, to be questionable.

12. Conclusion

62. In light of the foregoing facts and analysis, it is concluded that Nicaragua manifestly is without standing to maintain suit before this Court on the basis of the contention that it is party to the Court's compulsory jurisdiction by operation of Article 36, paragraph 5, of the Statute, or on the basis of conduct. In view of that conclusion, Nicaragua's Application, in so far as it relies – and it largely and essentially relies – on Article 36, paragraph 2, and Article 36, paragraph 5, should have been dismissed.

C. The Question of Whether the Court Has Jurisdiction over the United States

1. Jurisdiction under the Optional Clause

63. Nevertheless let us assume, contrary to what I believe to be manifest, that Nicaragua is party to the compulsory jurisdiction of the Court. Is the United States subject in this case to the Court's compulsory jurisdiction under its declaration of 26 August 1946 ? That question gives rise to the following subsidiary questions :

– Is the United States declaration of 26 August 1946 valid ?
– If it is valid, does its Vandenberg multilateral treaty reservation to the Court's compulsory jurisdiction operate so as to exclude all or some of Nicaragua's claims ?

– If it is valid, does the United States Note of 6 April 1984 – the "1984 notification" – operate to exclude Nicaragua's claims ?

(i) *The Connally Reservation*

64. It is well known that Judge Lauterpacht, in his dissenting opinion in the *Interhandel* case (*Judgment, I.C.J. Reports 1959*, pp. 6, 95), concluded that the United States Declaration of 26 August 1946 is invalid by reason of its incorporation of the automatic, self-judging proviso known as the "Connally Reservation". The United States thereby reserved from the Court's jurisdiction :

> "*(b)* disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America".

He reached a similar conclusion earlier in respect of a French self-judging reservation in the case of *Certain Norwegian Loans* (*Judgment, I.C.J. Reports 1957*, p. 34). Judge Lauterpacht in the *Interhandel* case summarized his position in these terms :

> "*(a)* the reservation in question, while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court ; it cannot, accordingly, be acted upon by the Court ; which means that it is invalid ;
>
> *(b)* that, irrespective of its inconsistency with the Statute, that reservation by effectively conferring upon the Government of the United States the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal, expressing legal rights and obligations ;
>
> *(c)* that reservation, being an essential part of the Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the purported Declaration of Acceptance, to the system of the Optional Clause of Article 36 (2) of the Statute, cannot invoke it as an applicant ; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance." (*I.C.J. Reports 1959*, pp. 101-102.)

65. In testimony before the Senate Committee on Foreign Relations in 1960, I agreed with Judge Lauterpacht's position (*Compulsory Jurisdiction, International Court of Justice, Hearings before the Committee on Foreign Relations, United States Senate, Eighty-Sixth Congress, Second Session, on S. Res. 94*, 1960, pp. 191, 202-203). I continue to see great force in it, while appreciating the argument that, since declarations incorporating self-

judging provisions apparently have been treated as valid, certainly by the declarants, for many years, the passage of time may have rendered Judge Lauterpacht's analysis less compelling today than it was when made. Were his position to be applied to the instant case, the result would be that there is no valid adherence by the United States to the Optional Clause in existence and that, accordingly, in so far as Nicaragua relies on that adherence, its Application must be dismissed.

66. However, I do not rest my conclusions in this case on that basis, essentially but not exclusively for the reason that the United States itself has treated its adherence to the Court's jurisdiction by means of its Declaration of 26 August 1946 as valid in this case and otherwise. I say this without prejudice to my position in such subsequent pleadings in this case as there may be which are relevant, taking note, in that connection, of the following statement which is found as note 1 to page 9 of the United States Counter-Memorial :

> "On the basis of Nicaragua's pleadings to date, the United States has determined not to invoke proviso '*b*' to the United States 1946 declaration (the so-called 'Connally Reservation'). This determination is without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court."

Moreover, for other reasons, in any event I conclude that Nicaragua cannot maintain its claims against the United States in reliance upon its Declaration of 26 August 1946.

(ii) *The Vandenberg (Multilateral Treaty) Reservation*

67. The Vandenberg Reservation—or multilateral treaty reservation—to the United States adherence to the Court's compulsory jurisdiction of 14 August 1946 withholds from the jurisdiction of the Court :

> "*(c)* disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

The United States maintains that, since Nicaragua essentially bases its Application on alleged violation by the United States of its treaty obligations under the United Nations Charter, the Charter of the Organization of American States and two other inter-American treaties, the Court is bound to give effect to this exception from its jurisdiction. It contends that, in view of Nicaraguan claims that El Salvador, Honduras and Costa Rica are acting in concert with the United States, and in view of the factual situation obtaining in Central America which is rooted in Nicaraguan acts of sub-

version and aggression against its neighbours, those States will necessarily be "affected" by any judgment which the Court renders on the merits of Nicaragua's claims. While acknowledging that Nicaragua requests judgment for alleged violations of customary international law as well as treaty law, the United States argues that Nicaragua's claims are so integrally and essentially governed by the specific treaty provisions which it invokes that the Court cannot decide upon the merits of those claims while excluding those treaty provisions ; Nicaragua's claims of violation of customary international law are no more than paraphrases of these preclusive treaty standards. Nicaragua maintains that the multilateral treaties reservation is mere surplusage ; that the records of Senate debate indicate that it was addressed to a non-existent problem ; and that in any event, even if the reservation were to be applied, it could not debar its claims under customary international law, which it contends, exists on the points at issue quite apart from the treaty provisions on which it has relied. (A much fuller summary of the Parties' contentions in this regard is found in paras. 68-71 of the Court's Judgment.)

68. In disposing of the multilateral treaty reservation, the Court arrives at the following conclusions :

(a) El Salvador, Honduras and Costa Rica, being bound by the Court's compulsory jurisdiction, are free to institute proceedings against Nicaragua if they should find that they might be affected by the future decision of the Court. Moreover, they are free to resort to the incidental procedure of intervention. Thus there is no question of their needing the protection of the multilateral treaties reservation.

(b) It is for the Court to determine which are the States "affected" within the meaning of the reservation. But it is "only when the general lines of the judgment to be given have come clear that the States 'affected' could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third States that could claim to be affected."

(c) The question of which States are affected is a matter of substance relating to the merits of the case, "obviously" not a jurisdictional problem. The Court must therefore avail itself of Article 79, paragraph 7, of the Rules of Court and declare that the objection based on the reservation "does not possess, in the circumstances of the case, an exclusively preliminary character" and that consequently it does not constitute an obstacle for the Court to consider the merits of Nicaragua's Application. At the same time, the Court holds, the Rules of Court as revised have done away with the procedural technique formerly available of joinder of preliminary objections to the merits.

(d) Moreover, the reservation could not bar adjudication by the Court of

all Nicaragua's claims, since those claims embrace principles of customary international law. The fact that such principles have been codified or embodied in multilateral conventions does not mean that they have ceased to exist as customary international law.

69. In my view, conclusions *(a), (b)* and *(c)* are misconceived. Conclusion *(d)* raises substantial and difficult questions which are discussed below. My reasons for so maintaining are the following :

70. With respect to *(a),* it may be observed that the multilateral treaties reservation excludes from the scope of United States submission to the Court's compulsory jurisdiction disputes arising under a multilateral treaty unless "all parties to the treaty affected by the decision *are* also parties to the case before the Court" (emphasis supplied). The only Parties now before the Court are Nicaragua and the United States. The fact that third States affected by the decision might, if they choose, institute proceedings in separate cases against Nicaragua, or might seek to intervene in the current case, is beside the point of the reservation. It may be that those States, or some of them, will choose not to institute proceedings against Nicaragua – none have to date – and that is their perfect right. Equally, it is unknown whether they will seek to intervene (a process which, as Orders of the Court rendered in recent times in respect of attempted interventions of Malta, Italy and El Salvador demonstrate, is in any event problematical). But what is determinative, in application – rather than evasion – of the multilateral treaty reservation is the answer to a simple question of fact : are all parties to the multilateral treaties at issue affected by the decision also parties to the case before the Court ? Obviously, now, they are not. The United States has not specially agreed to jurisdiction. Thus the reservation, which by its nature was meant to take effect at the jurisdictional phase of the proceedings, applies, and must be applied. But what is less obvious is which are the parties "affected".

71. In respect to *(b),* the Court rightly holds that it is for the Court to determine which are the States "affected" within the meaning of the reservation. But the Court concludes that it is only "when the general lines of the judgment to be given have become clear" that the States "affected" could be identified. It goes without saying that, if that identification can be made only at that late stage, after the parties have been required fully to brief and argue the merits, the reservation could not fully serve the purposes of a jurisdictional bar which it was designed to serve. The Court's inference accordingly is that the reservation is incapable of application at a jurisdictional stage of the proceedings. In my view, such an interpretation of the multilateral treaty reservation is unacceptable. It is not the function of the Court to interpret the reservations of States to their adherences to the Court's compulsory jurisdiction so as to lead, if not "to a result which is manifestly absurd or unreasonable" (Vienna Convention on the Law of

Treaties, Art. 32), then to a result which denies a reservation its obvious object. Rather, the Court is obliged, in accordance with its consistent jurisprudence, to give effect to "the close and necessary link that always exists between a jurisdictional clause and reservations to it" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978,* p. 33). It is not free to sever that link by an interpretation of a reservation which deprives it of its point. Moreover, the Court's interpretation is inconsonant with the terms of the Court's Statute and inconsistent with the pleadings of the Parties in this case.

72. The Court's interpretation of the multilateral treaty reservation is inconsonant with the terms of Article 62 of its Statute, which provides :

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
> 2. It shall be for the Court to decide upon this request."

It will be observed that Article 62, like the multilateral treaty reservation, employs the verb "to affect" in its past participle, "affected". In one sense, Article 62 is more narrowly cast than the reservation, because it is confined to "an interest of a legal nature which may be affected", whereas the reservation speaks of parties to the treaty "affected by the decision" – which admits of being affected not only legally but politically, economically, militarily, and otherwise. In another sense, Article 62 is more broadly cast, because it covers cases in which a State's legal interest "may be" affected, whereas the reservation simply states : "affected". But what is instructive in answering the immediate question are two facts relating to Article 62 : first, it provides Statutory demonstration of the use of the very term "affected" to which the Court in this case finds itself unable to give operative significance at this stage of the proceedings. And second, in the history of the interpretation of Article 62 by the Permanent Court and this Court, it has never before been suggested, still less held by the Court, that Article 62 could not be applied because it was only after the general lines of the judgment to be given have become clear that the Court could determine whether a State actually has an interest that may be or is affected by the judgment.

73. The Court's interpretation of the multilateral treaties reservation is inconsistent with the pleadings of the Parties in the case; which themselves quite clearly demonstrate which are the States whose interests are to be affected by the Court's judgment on the merits. The pleadings of Nicaragua are particularly probative, for it is Nicaragua's Application and its precise claims in which it sets out what the Court is requested to adjudge and declare which frame the issues of the case. Nicaragua, while making its claims against the United States alone, has made it clear that other Central American States in addition to itself are involved in the dispute. The very

first numbered paragraph of its Application claims that the United States has installed more than "10,000 mercenaries . . . in more than ten base camps in Honduras along the border with Nicaragua . . .". This accusation is elaborated in Annex A to the Nicaraguan Application, in its introductory paragraphs and in numbered paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, 17, 20, 22 and 23. Nicaragua has also alleged that there are 2,000 United States-supported "mercenaries" operating against it from Costa Rica (affidavit of Nicaraguan Foreign Minister d'Escoto Brockmann, Exhibit II, para. 5, submitted during the oral proceedings on provisional measures) and that the Government of Costa Rica is acting in concert with the United States (affidavit of Luis Carrión, Exhibit I, para. 4, also submitted at the stage of provisional measures). Moreover, in the recent oral argument in this phase of the proceedings, the Agent of Nicaragua alleged that, in this dispute, the United States has bases, radar stations, spy planes, spy ships – the armies of El Salvador and Honduras at its service . . ." (Hearing of 8 October 1984) ; that is to say, Nicaragua has alleged that the United States acts in concert with Honduras and El Salvador. It is accordingly plain that, if the pleadings of Nicaragua are to be accepted for these purposes as accurate, and if Nicaragua were in a decision of the Court to be accorded the remedies which it seeks, Honduras, Costa Rica and El Salvador necessarily would be "affected" by the Court's decision. Point *(g)* of what Nicaragua in its Application (at para. 26) requests the Court to adjudge and declare makes this particularly clear. Nicaragua requests that the Court hold that the United States

> "is under a particular duty to cease and desist immediately . . . from all support of any kind – including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support – to any nation . . . engaged or planning to engage in military or paramilitary actions in or against Nicaragua . . ."

It is a fact that the United States is heavily engaged in supporting Honduras and El Salvador with training, arms, finances, etc. Nicaragua itself in its Application and pleadings alleges that Honduras and El Salvador are engaged in military or paramilitary actions in or against Nicaragua, in concert with the United States. Honduras and El Salvador, in their communications to the Court, maintain that actually it is Nicaragua which has engaged and is engaging in a variety of acts of direct and indirect aggression against them, including armed attacks. (See the letter of 18 April 1984 from the Government of Honduras to the Secretary-General of the United Nations containing observations on the then pending request for provisional measures, as well as the Court's Order of 10 May 1984, my dissenting opinion, p. 199 ; and see El Salvador's Declaration of Intervention of 15 August 1984, in which it alleges, *inter alia*, that it "considers itself under the pressure of an effective armed attack on the part of Nicaragua . . .". It there protested "the aggression of which it is a victim

through subversion directed by Nicaragua . . .". It claimed that, "Nicaragua has been converted into a base from which the terrorists seek the overthrow of the popularly elected Government of our nation. They are directed, armed, supplied and trained by Nicaragua . . ." (at paras. I and III).) In short, Nicaragua seeks a judgment from the Court requiring the United States to cease and desist from actions which Nicaragua claims are unlawfully directed against Nicaragua, with the assistance of Honduras, Costa Rica and El Salvador, whereas the United States, Honduras and El Salvador claim that these very actions are conducted in collective self-defence against Nicaraguan acts of aggression. The judgment which the Court reaches on this critical point accordingly must "affect" not only the United States but Honduras and El Salvador, and – in view of Nicaragua's allegations – Costa Rica as well. If the Court takes the facts as alleged in Nicaragua's pleadings as true – which the Court is entitled to do for purposes of deciding whether Nicaragua presents a cause of action over which the Court has jurisdiction or which is admissible – then it necessarily follows that Honduras, Costa Rica and El Salvador *must* be affected by a decision of the Court in this case, whatever that decision turns out to be. Nicaragua's Agent indeed maintained that Nicaragua has no objection "to a participation of El Salvador" in this case, indeed, "no objection to a participation of other States" (Hearing of 8 October 1984). This suggests that Nicaragua itself has recognized that, at least within the compass of Article 63, El Salvador, Honduras and Costa Rica will be "affected" by any decision of the Court in this case. El Salvador itself has sought to intervene under Article 63 of the Statute ; the Court has inferred in its Order of 4 October 1984 the propriety of such intervention on the merrits ; and Honduras and Costa Rica, while not seeking to intervene, have also sent communications to the Court or to the Secretary-General which demonstrate their concern about how adjudication of this case would affect them.

74. The conclusion to which the particulars of the pleadings of the Parties lead is supported by the principles of international law. If Nicaragua's charges are true – if the acts against it which it alleges the United States is taking or supporting are in fact taking place, if they are unlawful, and if Honduras and Costa Rica are knowingly lending their territory and El Salvador is lending its resources to the commission of these acts – then Honduras, Costa Rica and El Salvador also stand in violation of their international obligations. Indeed, even if the acts of Honduras, Costa Rica and El Salvador themselves do not give rise to international responsibility, then aid or assistance by Honduras, Costa Rica and El Salvador to the United States for the commission of the acts of the United States constitutes an internationally wrongful act on the part of those three States. These elemental aspects of accepted international law are illustrated in the draft articles on State Responsibility which my eminent colleague, Judge Ago, prepared and which the International Law Commission has adopted. Article 27 of that draft provides :

> *"Aid or Assistance by a State to Another State for the Commission of an Internationally Wrongful Act*
>
> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation." (*Yearbook of the International Law Commission* 1978, Vol. II, Part Two, p. 99.)

The commentary to that article demonstrates how established are these principles of international law in doctrine and practice (pp. 99-105). It follows from these principles, and from the pleadings of Nicaragua, that, if the Court should sustain Nicaragua's claims, Honduras, Costa Rica and El Salvador necessarily will be affected by the Court's judgment in the case.

75. Nor is it persuasive to argue, as the Court does, that if it should reject Nicaragua's Application, there would be no third States that could claim to be affected by the judgment in the case. That is like saying that, if in a national court, citizen "A" is indicted on charges of terrorism involving the smuggling of narcotics and arms, and foreigners "B", "C" and "D", who are situated abroad, are named in the charges as unindicted co-conspirators, and if the court finds citizen "A" not guilty, then foreigners "B", "C" and "D" are not affected by the judgment – not affected legally, economically, morally or otherwise. Indeed, the case before this Court is an *a fortiori* case, because, while in the hypothetical case, the foreigners, not being within the territorial jurisdiction of the forum, are not, or probably are not, subject to its law, in the case before this Court the situation is fundamentally otherwise. While, by the terms of Article 59 of the Court's Statute, the decision of the Court has no binding force except between the Parties and in respect of that particular case, and while, in point of fact, the only Parties before the Court are Nicaragua and the United States, nevertheless all States are subject to the same law to which they are subject, international law. Thus the certainty of States which are deeply implicated in the pleadings of the Applicant being affected by the judgment of the Court in this case is the clearer.

76. Let us assume, however, contrary to the foregoing considerations, that the Court is correct in a holding which had the effect of rendering the multilateral treaty reservation of the United States inoperative, at any rate in the jurisdictional phase of the proceedings in which it was designed to operate. Let us assume that it is right in concluding that "it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified". What follows from that portentous conclusion ? In the Court's view, apparently it follows, for this and other reasons, that the multilateral treaty reservation "does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua . . .". My conclusion is the opposite.

77. In his notable dissent in the *Interhandel* case, Judge Sir Hersch Lauterpacht observed that:

> "Invalidity, in the contemplation of the law, is nothing else than inherent incapacity to produce legal results . . .
>
> . . . .
>
> The United States of America has accepted the obligations of Article 36 (2) of the Statute on condition that in any particular case it is for the Government of the United States of America, and not for the International Court of Justice, to determine whether a matter is essentially within the domestic jurisdiction of the United States of America. That condition, covering as it does a potentially all-comprehensive category of disputes relating to matters essentially within domestic jurisdiction, has replaced – in addition to another wide reservation in the American Declaration of Acceptance relating to the interpretation of multilateral treaties – the traditional formula requiring the consent of the Senate, or of the Government of the United States of America, to the submission of any particular dispute to the international tribunal. This Court, whose jurisdiction is grounded solely and exclusively in the consent of the defendant State, must respect that essential condition of the Declaration of Acceptance.
>
> . . . .
>
> Any decision of the Court which arrogates to it a competence denied to it by the express terms of the jurisdictional instrument relied upon by the parties disturbs the continuity of the established jurisprudence of the Court. That jurisprudence has been based on the accepted principle of international law that the jurisdiction of the Court is based invariably on the consent of the parties, given in advance or in relation to a particular dispute . . . But the Court has not assumed jurisdiction – and cannot properly do so – if jurisdiction is expressly denied to it." (*Interhandel, Judgment, I.C.J. Reports 1959*, pp. 104, 107, 114-115.)

Judge Lauterpacht then considered the question whether, although the Connally Reservation

> "is invalid – the Declaration of Acceptance may, apart from that reservation, be treated as otherwise subsistent and given effect by the Court. In the case concerning *Certain Norwegian Loans* I gave reasons in my separate opinion – which must be read as forming part of the present Opinion – why that question must be answered in the negative. These reasons included the general principle of law governing the subject, namely, the principle that a condition which, having regard to the intention of the party making it, is essential to and goes to the roots of the main obligation, cannot be separated from it. This is not a mere

refinement of private law, or of any municipal system thereof, but – as all general principles of law – a maxim based on common sense and equity. A party cannot be held to be bound by an obligation divested of a condition without which that obligation would never have been undertaken." (*Ibid.*, pp. 116-117.)

In his separate opinion in the *Certain Norwegian Loans* case, Judge Lauterpacht, in discussing whether it was possible to sever a French self-judging proviso from the French declaration accepting the compulsory jurisdiction of the Court, concluded :

> "The Court cannot properly uphold the validity of the Acceptance as a whole and at the same time treat as non-existent any such far-reaching, articulate and deliberate limitation of its jurisdiction. To do so would run counter to the established practice of the Court – which, in turn, is in accordance with a fundamental principle of international judicial settlement – that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt. The Court certainly cannot assume jurisdiction if there is a clearly expressed intention to deny it in specified circumstances. This means that it would not be possible for the Court to disregard that part of the reservation in question which claims for the State concerned the right to determine its application. It is not possible for the Court to do otherwise than to regard this particular part of the reservation, so specifically formulated, as constituting an essential and not severable part of the instrument of acceptance." (Case of *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 58-59.)

78. It cannot be maintained that the Senate of the United States attached the same importance to the Vandenberg multilateral treaties Reservation as it attached to the Connally Reservation. Indeed, the Senate debate in the course of which the Vandenberg Reservation was added suggests that the Senators concerned were under the impression that the objective which the Vandenberg Reservation was meant to ensure was already written into the Statute by the doctrine and practice of reciprocity. (See the *Congressional Record, Proceedings and Debates of the 79th Congress, Second Session*, 1 August 1946, p. 10618.) They nevertheless added the Vandenberg Reservation with a view to being "doubly assured" *(ibid.)* that the Court could not entertain a dispute involving the United States arising under a multilateral convention unless all parties to the treaty affected by the decision were also parties to the case before the Court. That was the Senate's intention. That intention is clearly reflected in the words of the reservation which were incorporated into the text of the declaration. That is what proviso *(c)* of the United States reservations to the Court's compulsory jurisdiction says. While there may be room for questioning

whether the United States was of the view that this proviso was essential to its declaration, nevertheless I do not believe that the Court is free to disregard or sever it on the ground of its relative unimportance. It is a safeguard which, after deliberation, and in the absence of a recommendation supporting its inclusion from the Department of State, the Senate of the United States nevertheless decided to require. In my view, it accordingly follows that it would not be appropriate for the Court to find that that reservation is inherently inoperative at the stage at which it was designed to operate, i.e., in a limited sense, invalid, by finding, as Judge Lauterpacht put it, that is has "an inherent incapacity to produce legal results" ; however, once the Court so finds – as it in effect does for present purposes in today's judgment – it also follows that it must treat the whole of the United States Declaration of 14 August 1946 as invalid. If for that reason the United States declaration as a whole is invalid, then it cannot be invoked by Nicaragua to sustain the jurisdiction of the Court.

79. As for *(c),* the Court's third reason for not giving effect to the multilateral treaty reservation, it is difficult to express a definitive view because of the compressed character of the Court's reasoning. After holding – in my view, wrongly – that "obviously" the question of what States may be "affected" is not a jurisdictional problem, the Court states, first, that "the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with . . ." and second, that "the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court", and

> "declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984" (Judgment, para. 76).

80. This holding of the Court may be understood in more than one way. It can be interpreted as meaning that, since the United States objection based on the reservation does not possess an exclusively preliminary character, it does not constitute – at this stage of the proceedings – an obstacle for the Court to entertain the case instituted by Nicaragua. From this it follows that this United States objection, not possessing an "exclusively" preliminary character, necessarily possesses some preliminary character, and that that character will be addressed, as a preliminary and jurisdictional question, at the stage of the merits, at which time the Parties can plead further, *inter alia,* to the question of which States, if any, are to be affected by any judgment which the Court may render on the merits of the case. If this is what the Court means, while it would hardly constitute an application of the multilateral treaty reservation as it must have been intended that it would be applied – at the jurisdictional stage – otherwise this would be a tenable holding.

81. However, the Court confounds this interpretation by holding that "the procedural technique formerly available of joinder of the preliminary objections to the merits has been done away with since the 1972 revision of the Rules . . .". By this, the Court appears to hold that, at the stage of the merits, the United States preliminary objection based on the multilateral treaty reservation may *not* be argued and may *not* be found to bar the claims, or some of the claims, of Nicaragua. If this is indeed what the Court means to say – and whatever it means, its words are subject to this construction – then the Court will have sunk the multilateral treaty reservation without a trace by use of a watertight device : on the one hand, by holding that, since it is not of an exclusively preliminary character, it cannot be given effect at the jurisdictional stage of the proceedings ; on the other hand, by holding that that preliminary objection cannot be taken up at the stage of the merits, since the joinder of preliminary objections to the merits "has been done away with". That would be an extraordinary procedure, which could be used not only to vitiate this reservation but all sorts of reservations, on the ground that they may not be applied by way of preliminary objection since they are not of an exclusively preliminary character, and may not be addressed at the stage of the merits, on the ground that the revised rules exclude joining preliminary objections to the merits.

82. The pertinent passages of Article 79 of the Rules of Court on "Preliminary Objections" read as follows :

> "6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.
>
> 7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.
>
> 8. Any agreement between the parties that an objection submitted under paragraph 1 of this Article be heard and determined within the framework of the merits shall be given effect by the Court."

83. It is plain the Court may treat a preliminary objection in three ways : *(a)* uphold it ; *(b)* reject it ; *(c)* "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". In that latter event, the Court shall fix time-limits for the further proceedings, a provision which imports that, at those proceedings, an objection which does not possess an exclusively preliminary character, but therefore some preliminary character, will be taken up. I am unable to see that paragraph 8 prejudices this interpretation ; rather, it supplies an

alternative route to the same terminus. I am confirmed in these conclusions by an article which a former distinguished President of the Court, Judge Eduardo Jiménez de Aréchaga, wrote on "The Amendments to the Rules of Procedure of the International Court of Justice" which was published in the *American Journal of International Law* for January 1973, Volume 67, page 1. Judge Jiménez de Aréchaga observed that, in revising its rules, there was majority recognition of the need to :

> "(3) regulate preliminary objections so as to settle them as soon as feasible and avoid the delay and expense involved in a double discussion of the same question at both the preliminary stage and the stage of the merits" *(ibid.)*.

Accordingly, what is now paragraph 6 of Article 79 was introduced, with a view towards inducing the Court to determine all preliminary objections at the preliminary stage of the proceedings, if possible. Where, however, a preliminary objection so relates to the merits that its argument at the preliminary stage would entail arguing the whole of the case at that stage, or where the Court does not find it necessary – or desirable – to require the Parties at the preliminary stage to argue all questions of law and fact, and to adduce all evidence, which bear upon the issue : "It would then be for the Respondent to raise such a defense at the stage of the merits, if it so wished." (*Ibid.*, p. 17.)

84. Now in the instant case the Court has not invoked or applied paragraph 6 of Article 79 of its Rules. It has not requested the Parties to argue all questions of law and fact, and to adduce all evidence, which bear upon the issue of whether Honduras, Costa Rica and El Salvador are to be affected by the Court's judgment in the case. If it had done so, it would have required, if not the argument of the whole of the case, then the argument of the essence of the defence to the case. That being so – and having failed to sustain the objection of the United States invoking the multilateral treaties reservation on the pleadings, as, in my view, the Court should have – it follows that, at the stage of the merits, the United States is free to raise its defence based on that reservation in bar to the Court's proceeding with the case. That, at any rate, is in my understanding of the Rules and of what the Court's pertinent holding in this case should mean, but I am not able to say that that is what the Court does mean.

85. Let us finally, in respect of the multilateral treaty reservation, address point *(d)*, the Court's holding that Nicaragua's claims embrace customary as well as treaty law and to that extent are not debarred by the reservation even if that reservation were to be applied.

86. Assuming application of the reservation, there are two possibilities. The first would be to dismiss the case (except in so far as it may have a bilateral treaty basis), on the ground that Nicaragua's claims are so inte-

grally and essentially bound up with the treaty provisions on which they rely that, if those provisions cannot be pleaded, there is no case which the Court can consider. The second would be to retain the case in so far as Nicaragua can make out a case divorced from the terms of those treaties, a case which is based on customary international law. In its Application, Nicaragua claims violation not only of the four treaties but of "fundamental rules of general and customary international law . . ." (para. 14).

87. Nicaragua attempts to meet the United States reliance on the reservation by arguing that, even if that proviso can be and is applied, it leaves its claims under customary international law intact. It observes that there is nothing to prevent a State from pleading simultaneously in conventional and customary law. Some of its claims are exclusively cast in terms of customary law. But in any event, Nicaragua argues, even if one were to accept the United States contention that all of the Nicaraguan claims are variations of the obligations encompassed by the provisions of Article 2, paragraph 4, of the United Nations Charter, those provisions are declaratory of international law ; the obligations of Article 2, paragraph 4 – and corresponding and complementary obligations of the Charter of the Oganization of American States – exist in customary international law even if those treaty provisions cannot be relied upon as such. In reply, the United States argues that, on analysis, all of Nicaragua's claims – customary and treaty-based – are in substance the same ; the one set merely paraphrases the other ; and no relevant customary international law exists apart from the treaties invoked by Nicaragua. Moreover, the United States maintains, the Court cannot properly adjudicate the customary international law claims which Nicaragua makes when the limitations contained in the United States declaration preclude the Court from applying the specific, governing legal standards to which the Parties have agreed in the treaties in force between them.

88. In my view, there is a broad but not necessarily complete substantive equivalence between the claims which Nicaragua makes under conventional and under customary international law (as appears from a comparison of those claims). Furthermore, contemporary international law governing the use of force in international relations is essentially composed of Article 2, paragraph 4, and Article 51 of the United Nations Charter. Are those provisions also part of contemporary customary international law ? Article 2, paragraph 6, of the United Nations Charter provides :

"The Organization shall ensure that States which are not members

of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

While there is little agreement on the scope of *jus cogens,* it is important to recall that in the International Law Commission and at the Vienna Conference on the Law of Treaties there was general agreement that, if *jus cogens* has any agreed core, it is Article 2, paragraph 4. Moreover, Article 52 of the Vienna Convention on the Law of Treaties provides :

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

That is not to say that Article 2, paragraph 4, and Article 51 of the Charter occupy the whole field of the use of force in international relations. It is not to say, for example, that necessarily there is no scope to self-defence or to protection of nationals apart from Article 51 and Article 2, paragraph 4. But it is to say that Article 2, paragraph 4, is the supreme and pre-emptive statement of the law in the field which it does occupy. Moreover, while Article 2, paragraph 4, had its antecedents in the Covenant of the League of Nations, the Kellogg-Briand Pact, and the Nuremberg principles and judgments, it is difficult to conclude that it was merely a codification of customary international law ; on the contrary, the Charter was viewed at the time of its adoption as a revolutionary advance in respect of the legality of the use of force and of resort to war in international relations, and, if one speaks not of doctrine but of reality, Article 2, paragraph 4, still represents more preachment than practice in the affairs of States. Thus, I am inclined to think that it cannot simply be said that customary international law, as it had evolved by 1945, equated with the content of Article 2, paragraph 4 ; and it can even less be said that, if Article 51 is removed, the bounds of self-defence in customary international law equate with its terms. May it nevertheless be argued that, as a result of the ratification of the United Nations Charter (including Art. 2, para. 6) by virtually every State in the world, and by virtue of general agreement that Article 2, paragraph 4, of that Charter is *jus cogens,* the provisions of Article 2, paragraph 4, have been subsequently imported into customary international law ? Surely Switzerland, which has not yet joined the United Nations, or Indonesia, which for a time withdrew from the United Nations, were and are as bound by the prescriptions of Article 2, paragraph 4, as are the States Members of the United Nations. That is a powerful and probably correct argument, but it runs into the profound difficulty that the practice of States does not demonstrate that Article 2, paragraph 4, in fact reflects customary international law. Finally, since Article 2, paragraph 4, and Article 51 (and variations upon their themes as they appear in the OAS Charter) are the specific and governing legal standards to which the Parties in this case have

agreed, I have some difficulty in seeing how the Court can proceed to adjudicate Nicaragua's claims if, by application of the multilateral treaty reservation, reliance on those standards is excluded. Such adjudication would be an unreal, artificial, highly constricted – and yet unduly unconstrained – process, in which the Court could be confronted with profoundly sensitive questions, such as : what is the scope of self-defence in international law if the provisions of Article 51 are left entirely out of consideration ?

89. Nevertheless, there are aspects of the instant case – such as freedom of navigation on the high seas – on which customary international law indisputably existed before the treaties on which Nicaragua relies came into force. It is by no means clear that those treaties establish preclusive legal standards governing that freedom, though they may do so with respect to the use of force which impairs that freedom.

90. More than this, the question of to what extent the claims of Nicaragua embody claims under customary international law which subsists or exists, even if the treaties on which Nicaragua relies are left out of account, is a delicate and complex question, which has not been fully argued by the Parties. Aspects of it may relate to the merits of the case. In view of these considerations, and of the fact that the haste with which the Court has dealt with aspects of the current case, from the moment of its filing through the issuance of today's Judgment, has not afforded me the time sufficiently to consider this difficult question, I feel bound to reserve my position upon it.

(iii) *The "1984 notification" of the United States*

91. It is clear that, if the Court were to give effect to the United States Note of 6 April 1984 – the "1984 notification" – purporting to modify the terms of its 1946 Declaration with immediate effect so as to exclude, for a period of two years, "disputes with any Central American State or arising out of or related to events in Central America", the claims of Nicaragua would be debarred in so far as they rely on the United States declaration accepting the Court's compulsory jurisdiction. The Court declines to give such effect to the 1984 notification, on the following grounds :

(a) Whether the 1984 notification is classified as a termination or modification of the 1946 Declaration does not matter, for it is intended to secure a partial and temporary termination of the United States obligation to subject itself to the Court's jurisdiction in the specified respects.
(b) Declarations accepting the Court's compulsory jurisdiction, while unilateral, do not leave the declarant free to amend the scope and content

of its commitments as it pleases. The principle of good faith governs. Since the United States Declaration of 1946 formally and solemnly provides that any change should take effect only after six months have elapsed from the date of notice, the United States must be held to this undertaking.

(c) The notion of reciprocity is concerned with the scope and substance of commitments entered into under the Optional Clause, and not with the formal conditions of their duration.

(d) Reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration ; it can only take advantage of an express restriction in the declaration of the other Party to the case. Thus the United States cannot rely upon the claimed right of Nicaragua to revoke its declaration at any time.

(e) Nicaragua in any event has not reserved such a right but, if it has that right, it could only be exercised on reasonable notice. Thus, if the United States may reciprocally invoke such a right, it also can do so only on reasonable notice, which is absent in this case.

(f) Nor is it clear that a State can invoke considerations of reciprocity before the Court is seised of a case.

92. I am essentially in agreement with point *(a)*. I do not believe that it can be persuasively argued that, since the United States Declaration of 1946 excludes termination on less than six months' notice, but not modification, the United States may freely modify its declaration, at any rate in the manner in which the 1984 notification purports to do. The Court is right to hold that that notification is tantamount to a limited, suspensive termination.

93. Point *(b)* of the Court's conclusions is not altogether self-evident, as distinguished colleagues' opinions in this case show. Nevertheless, for my part, and for the purposes of this case, I am prepared to accept it, subject to one critical caveat which the Court's judgment does not meet : that the principle of good faith interpretation be applied equally to all elements of the United States declaration. The United States may quite reasonably be held to the provision of no termination on less than six months' notice, provided that the Court is held to respect for the multilateral treaty reservation which that declaration embodies. The relevant report of the Senate Committee on Foreign Relations tellingly provides – as counsel for Nicaragua stressed – that the six months' termination proviso "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding" (79th Congress, 2nd Session, United States Senate, *Report No. 1835*, p. 5). But that report also contains other conditions respecting the United States declaration, which are set out below. If all those conditions are respected, then it would be right to hold the United States to that renunciation. But if those other conditions are not respected – and the Court's Judgment does not respect them – on what

ground may the Court selectively choose the elements of the United States declaration to which the United States is to be held ?

94. I do not find myself in agreement with the holdings of the Court summarized in points *(c), (d), (e)* and *(f)*, though I recognize that those holdings are not unfounded. Before setting out my conclusions on these points, it will be convenient to place the United States Declaration of 1946 in its context, to show what were the intentions of the Government of the United States in adopting it, and to contrast the situation as it obtained in respect of the Optional Clause in 1946 with present reality.

95. When the declaration was under consideration in the United States Senate, the Committee on Foreign Relations took care to describe the scope of the jurisdiction to be conferred under the declaration as "carefully defined and limited". In the first place, it said, there is "a general limitation of jurisdiction to legal disputes". Then a "second major limitation on the jurisdiction conferred arises from the condition of reciprocity . . . specified in the resolution . . ." and in the language of the Statute and by practice in pursuance of it. A third limitation is to disputes arising in the future. Of this limitation and the effect of reciprocity, the Senate Report declared that :

> "any limitation imposed by a state in its grant of jurisdiction thereby also becomes available to any other state with which it might become involved in proceedings, even though the second state had not specifically imposed the limitation. Thus, for example, if the United States limited its grant of jurisdiction to cases 'hereafter arising' this country would be unable to institute proceedings regarding earlier disputes, even though the defendant state might not have interposed this reservation." (*Report No. 1835*, p. 5.)

Thus it will be observed that, when the United States filed its declaration embracing "all legal disputes hereafter arising", subject to specified limitations, it understood that reciprocity embraces temporal limitations. A fourth limitation concerns freedom to entrust disputes to other tribunals. A fifth limitation excludes matters essentially within the domestic jurisdiction of the United States. The Report then declares :

> "The resolution provides that the declaration should remain in force for a period of 5 years and thereafter until 6 months following notice of termination. The declaration might, therefore, remain in force indefinitely. The provision for 6 months' notice of termination after the 5-year period has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding." *(Ibid.)*

Consideration of the Report on the floor of the Senate emphasized that, by adhering to the Court's compulsory jurisdiction in these terms, the United States would vitally contribute to the general acceptance of the Court's effective compulsory jurisdiction. A discordant and contentious note was struck by Senator Connally's proposal on the floor to add his famous reservation, which carried, over energetic opposition. But another crippling reservation, which would have endeavoured to confine the sources of law to be applied in cases to which the United States is party to treaties, in the absence of prior agreement as to what are the applicable sources of international law, was defeated. The Vandenberg Reservation was easily accepted. The provision for six months' notice attracted no criticism in floor debate.

96. In introducing the proposed declaration, the Senate Committee on Foreign Relations recalled to the Senate that the Optional Clause in the days of the Permanent Court had achieved at one time the acceptance of the very great majority of the States then independent :

> "Under this provision some 44 states, including 3 of the 5 states now permanent members of the Security Council (Great Britain, France, and China), at one time or another deposited declarations accepting this jurisdiction." (*Report No. 1835,* p. 8.)

In 1946, declarations by which States reserved the right to terminate their declarations on notice were few and to modify them at any time were unknown. A term of years, together with a notice period, was the pattern which the 1928 General Act for the Pacific Settlement of International Disputes had adopted, which a large number of States had followed, and which the United States embraced. The unconditional declaration which was indefinite in duration because it specified no term of years or notice period, of which Nicaragua's 1929 Declaration is an example, was uncommon in 1946 and is almost extinct today. The seven such declarations that still exist were made in the optimistic if transient days of the League when it was believed that universal and effective compulsory jurisdiction of the Court was burgeoning.

97. However, the contemporary situation is unlike that which prevailed in 1929 or 1946. Today, only 47 of the 162 States party to the Statute are bound under the Optional Clause. Of the 47 declarations now in effect, only 19 are not expressly subject either to unilateral termination or to modification on notice. The Soviet Union has never adhered to the Court's compulsory jurisdiction under the Optional Clause ; neither China nor France currently adhere. The only Permanent Member of the Security Council party to the Optional Clause other that the United States is the United Kingdom, which has reserved "the right at any time . . . and with effect from the moment of . . . notification, either to add to, amend or withdraw" any of its extensive reservations, and this in a declaration which has been made "until such time as notice may be given to terminate" it.

Many other leading States, including Algeria, Argentina, Brazil, the Federal Republic of Germany, Italy, Poland and the other States of Eastern Europe, Senegal, and Syria do not adhere to the Optional Clause. Thus it is clear that the expectations in the light of which the Senate gave its consent and the President filed the declaration of the United States have not been fulfilled.

98. Does it follow, in part because of the failure of these expectations, that the United States is entitled to exercise what subsequent practice may be said to have recognized to be an inherent right to terminate a declaration on notice, despite the presence of a termination clause providing for a period of notice ? In my view, a considerable case can be made out for that conclusion, as distinguished colleagues show in their opinions. But in order to pass upon the 1984 notification of the United States, it is not necessary, in my view, for the Court to take a position on that question.

99. Nor is the Court required to take a position on the allied question of whether declarations under the Optional Clause are subject to the provisions of the law of treaties regulating the termination of treaties or, rather, to a *sui generis* régime. The Court appears nevertheless to incline towards the view that the law of treaties governs declarations, if only by analogy. My own view is that the argument for a *sui generis* régime is much stronger. That is because of the nature of declarations under the Optional Clause – unilateral as they are, not subject to negotiation, reservations to which are not subject to agreement. Their nature differs substantially from that of treaties. The Court's treatment of such declarations is suggestive, notably in the *Anglo-Iranian Oil Co.* case (jurisdiction), *Judgment, I.C.J. Reports 1952*, pages 93, 105, where the Court held :

> "the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran . . ."

The Court thus held that a rule of the interpretation of treaties for which the United Kingdom argued did not govern the interpretation of the Iranian Declaration (*ibid.*, pp. 102-107). The Court has more than once described declarations under the Optional Clause as "unilateral" (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 9, 23 ; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 6, 29). But even if, contrary to this view, rules for the termination or suspension of treaties were to be directly applied, or by analogy were to be applied, to the legal effectiveness of the United States suspension of elements of its 1946 Declaration, the United States still would be able to argue, and with much reason, that a "fundamental change of circumstances . . . has occurred with regard to those existing at the time of the conclusion" of the declaration within the

meaning of Article 62 of the Vienna Convention on the Law of Treaties. An essential basis of the United States consent to be bound by its declaration, it may be maintained, was its perception that that declaration would be one of a near universal number of effective declarations. But the impact of non-adherence to the Optional Clause by the large majority of States, including so many of the more influential States, and the effect of the widespread making of reservations permitting declarants to modify or terminate their declarations at will, has been radically to transform the extent of the obligations still to be performed by the United States under its declaration, should it not be seen as retaining the unfettered right to modify or suspend it.

100. This is a substantial argument. Moreover, even if one does not resort to *rebus sic stantibus,* there is another substantial argument for treating declarations made under the Optional Clause as inherently terminable, even if they are regarded as subject to the law of treaties on termination. It was expressed by Sir Humphrey Waldock in his capacity as Special Rapporteur of the International Law Commission on the Law of Treaties in the following terms :

> "It is only necessary to look at the texts of the large number of such treaties collected in the United Nations publication 'Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-48' to see how almost invariably they are concluded either for a fixed term or for renewable terms subject to a right of denunciation, or are made terminable upon notice . . . If the proportion of instruments containing no provision regarding their duration or termination is somewhat greater among declarations under the 'optional clause' of the Statute of the International Court of Justice (or of the Permanent Court), the general picture is the same. Out of the thirty-seven declarations listed in the Court's Yearbook for 1961-2, eight contain no statement as to their duration or termination, and all the others are made for a limited period or made terminable upon notice. It is true that in 1938, when Paraguay, which then had a declaration of this kind, denounced it in a letter to the Secretary-General, six States made reservations with regard to the denunciation ; and that the Paraguayan declaration was retained in the list of optional clause acceptances in the Yearbook of the Court until the year 1959-60, though with an explanatory footnote mentioning the reservations. But the declaration has now been removed from the list, . . . Moreover, even before the Paraguayan denunciation, Colombia had 'corrected' in 1937 an unlimited and unconditional declaration of 1932 by restricting it to disputes arising out of facts subsequent to 6 January 1932. Taken as a whole, State practice under the optional clause, and especially the modern trend towards Declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that

these treaties are regarded as essentially of a terminable character." *Yearbook of the International Law Commission,* 1963, Vol. II, p. 68.)

In oral argument, the distinguished counsel of the United States, Professor McDougal, further recalled that Waldock in the foregoing report had also concluded that the constituent instruments of international organizations are impliedly terminable upon notice (*ibid.,* p. 69). A primary example which Sir Humphrey cited as confirming the existence of a general presumption in favour of a right of withdrawal in this class of treaty is the United Nations Charter. Professor McDougal then submitted :

> "It is familiar knowledge that the Statute of the Court, including its component obligations, are now a part of the comprehensive United Nations system. If the authors of the Charter in 1945 and the Special Rapporteur of the International Law Commission in 1963 thought there was inherent power to withdraw from the Charter itself, surely they thought that a modification or termination of participation in the Optional Clause system was authorized." (Hearing of 16 October 1984, morning.)

101. In view of the foregoing considerations, a considerable case can be made out for viewing declarations under the Optional Clause as not governed by the law of treaties, and as inherently terminable ; or, in the alternative, if governed by the law of treaties, then terminable as a special class of treaty which by its nature is terminable ; or, in any event, terminable where a fundamental change of circumstances has occurred. Nevertheless, in the present proceedings, I believe that the preferred position is that every proviso of the United States 1946 Declaration is to be given effect. The Court should have given effect to the multilateral treaty reservation and to the intention that gave rise to it. If it had, it would be right to give effect to the termination clause of the declaration and to the intention that gave rise to it. However, where the Court finds that it is unclear whether any States are affected, or could be affected, under the multilateral treaty reservation, the Court, to be consistent, could equally hold that it is unclear that the six months' termination provision debars modification. Moreover, if the Court is to give effect to these provisions of the United States Declaration of 1946, then it equally must give effect to the reciprocity provision – a provision, it should be recalled, which was under-

stood by the United States Senate to embrace temporal elements of the declaration under the Optional Clause.

102. The Declaration of 1929 by which Nicaragua now maintains that it is bound provides : "On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice." That declaration thus contains no limit of time ; its duration is indefinite. Does the declaration accordingly mean that Nicaragua is bound to the Court's compulsory jurisdiction in perpetuity ? Or does "unconditionally" rather mean that Nicaragua has set no condition of time, that the duration of its declaration is indefinite until such time as it may set whatever limit it chooses to it ?

103. To argue, in the abstract, that a State in accepting the Court's compulsory jurisdiction unconditionally has accepted it in perpetuity, is implausible. To argue, concretely, that a State which unconditionally accepted the Court's jurisdiction in 1929 is bound in perpetuity – even vis-à-vis States that have made declarations in which they have reserved the right to modify or terminate at notice, or, indeed vis-à-vis that large majority of States which have never adhered to the Optional Clause but could at any time adhere with the profoundest restrictions simply with the purpose of bringing suit against a State which has unconditionally adhered, and thereafter terminate acceptance – is less plausible still. That obvious conclusion is reinforced by the practice of States. The practice is not large in the nature of the question. Nor is it unambiguous. But on balance it establishes that a small number of States, such as Colombia and Paraguay, have succeeded in freeing themselves of unconditional submissions to the Court's compulsory jurisdiction. There are no cases in which States in that position have been effectively held to their unconditional adherences. In sum, as Shabtai Rosenne, writing in 1965, put it in *The Law and Practice of the International Court* :

> "it is sometimes argued that the essential objection to the unilateral denunciation of a declaration accepting the compulsory jurisdiction, is that these declarations are governed by the law of treaties which in principle does not permit unilateral denunciation, with the possible exception supplied by the doctrine of *rebus sic stantibus*. But . . . that view cannot easily be reconciled with the picture which emerges from close analysis of the jurisprudence on the compulsory jurisdiction . . .
>
> The question whether declarations of the type here being discussed can be withdrawn or denounced must, . . . largely be relegated to the realm of theory. Moreover, with the exception of a few – not more than seven – of the pre-War declarations accepting the compulsory jurisdiction of the Permanent Court which are now applicable to the

present Court by virtue of Article 36 (5) of the present Statute, States have developed the practice of protecting themselves by inserting a reservation of the right to withdraw, and the practical problem is now limited. As far as those seven declarations are concerned, it is submitted that it would be singularly unreal to apply to them an inflexible rule said to derive from the general law of treaties and disallowing the right of unilateral denunciation. The dissolution of the League of Nations and the Permanent Court and the far-reaching changes in the international community and its organization which that dissolution mirrors, are sufficient to allow those States to withdraw their declarations made in those far off days when the compulsory jurisdiction was [in] its infancy, and which are today applicable by virtue of Article 36 (5) of the Statute." (Vol. I, pp. 416-417 ; footnotes omitted.)

104. It follows that Nicaragua, if its 1929 Declaration binds it at all, is free to terminate its acceptance. Is it free to do so at any time, or only on "reasonable notice" ? In the light of the practice in making declarations adhering to the Optional Clause, so many of which permit termination or modification not on "reasonable notice" or after a prescribed period but immediately, the reasonable response to this reasonable question is that Nicaragua has the right to terminate its declaration on immediate notice. That conclusion is reinforced by the experience of withdrawal from indefinite adherences to the Court's compulsory jurisdiction by States such as Colombia and Paraguay, withdrawals which did not entail a period of reasonable notice. (It strains the facts to suggest that, since some States protested Paraguay's action, and its declaration was retained in the Court's *Yearbooks* for some years, with a footnote, that is tantamount to imposition of a period of reasonable notice on Paraguay's termination.)

105. The case of Indonesia is particularly instructive. On 31 December 1964, Indonesia announced that it would withdraw from the United Nations as of 1 January 1965. It confirmed that decision in a communication of 20 January 1965 (doc. A/5857). The United Nations acquiesced in that decision. Indonesian withdrawal, on 24 hours' notice, was given effect, legally and practically. Indonesia ceased to be listed as a member of the Organization. Indonesia was not assessed for any financial contributions for the whole of 1965 (see the *Report of the Committee on Contributions, General Assembly, Official Records: Twentieth Session, supplement No. 10* (A/6010), pp. 1, 2, 3). Subsequently, from September 1966, Indonesia resumed participation in the United Nations, and it was agreed by all concerned that what had been treated as Indonesia's legally effective withdrawal from the United Nations would be regarded retroactively not as a withdrawal but "a cessation of co-operation" (General Assembly, Twenty-First Session, *Official Records,* 1420th Plenary Meeting, pp. 1-2).

A payment of 10 per cent of the amount for which Indonesia would have been assessed for its contributions to the regular budget for the period of Indonesian withdrawal was agreed upon. (*Contributions of Indonesia for the years 1965 and 1966, Report of the Secretary-General,* doc. A/C.5/1097, pp. 1, 2 ; and doc. A/6630, p. 3.)

106. Upon its withdrawal on 24 hours' notice from the United Nations, Indonesian withdrawal from the Statute of the Court, an integral part of the Charter, likewise had the same legal and temporal effect. This was reflected in the *Yearbooks* of the Court. Thus the *Yearbook 1964-1965,* in listing the States Members of the United Nations which *ipso facto* are parties to the Statute, has a footnote after the entry respecting Indonesia (which embraced 1964) observing that Indonesia notified withdrawal as of 1 January 1965 (at p. 27). The *Yearbook 1965-1966,* in listing the States Members of the United Nations, and hence parties to the Statute, simply omits Indonesia (p. 26). However, the *Yearbook 1966-1967* states that, among the States Members of the United Nations on 31 July 1967, was Indonesia (p. 29). There is no indication that the Court, any more than the United Nations, imposed a period of reasonable time upon the effectiveness of Indonesia's notice of withdrawal. Now, if a State can withdraw from the Statute of the Court on 24 hours' notice, may not a State withdraw from a declaration accepting the Court's compulsory jurisdiction under that Statute on 24 hours' notice ?

107. If Nicaragua could have so acted with immediate effect, may the United States reciprocally do so ? The Court concludes that it may not, on two grounds : first, that reciprocity does not apply to temporal reservations or conditions but only to substantive reservations ; and second, that, in any event, the United States cannot invoke and have the benefit of a right which Nicaragua has but which Nicaragua itself did not invoke before filing its Application.

108. The second point may be summarily addressed. Clearly, if Nicaragua itself – assuming it to have the right of unilateral termination of a declaration which is assumed to be in force – exercised that right before it filed its Application, then it could not file an application based on the Optional Clause with any colourable basis of jurisdiction. It would have itself terminated the jurisdiction it proposed to invoke before invoking it.

109. The question of whether reciprocity applies to temporal conditions is a more substantial question, on which authorities are divided. In my view, there is no persuasive reason, *a priori* or having regard to the practice of the Court, to exclude temporal conditions from the reach of reciprocity. I so conclude for four reasons.

110. First, temporal conditions may be no less important than other conditions. They may exclude jurisdiction just as surely as may substantive reservations to the Court's compulsory jurisdiction. Since reciprocity is so closely tied to considerations of mutuality and of the sovereign equality of

States before the law and before the Court, I see no reason in principle to exclude temporal conditions from the scope of application of reciprocity.

111. Second, the Court has more than once entertained argument about the application of reciprocity *ratione temporis.* It has never held that reciprocity does not apply to temporal conditions. On the contrary, both opposing States in these cases and the Court appear to have assumed that it did or might. See, *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* page 22 ; *Electricity Company of Sofia and Bulgaria, P.C.I.J., Judgment, 1939, Series A/B, No. 77,* page 81 ; and the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952,* pages 93, 103, and the analysis of those cases by Waldock to this effect in "Decline of the Optional Clause", *British Year Book of International Law* 1955-1956 (1957), Vol. XXXII, pages 258-261. See also, case concerning *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957,* pages 125, 143-144. As Helmut Steinberger concluded in "The International Court of Justice", which is found in the volume on *Judicial Settlement of International Disputes* (1974) edited by Hermann Mosler and Rudolf Bernhardt :

> "The Court in several cases has confirmed the wide operational scope of the condition of reciprocity and stated that jurisdiction under the optional clause is conferred on the Court 'only to the extent to which the two declarations coincide in conferring it'. That goes for the jurisdiction *ratione temporis* as well as for the jurisdiction *ratione materiae.*" (At pp. 216-217 ; footnotes omitted.)

112. Third, the United States, in drafting its Declaration of 14 August 1946, made it clear that it did regard the safeguard of reciprocity as applying to temporal conditions (*supra,* para. 95).

113. Fourth, the contrary result may produce inequality and inequity. As Waldock so emphatically put it in his article on the "Decline of the Optional Clause" :

> "There is, . . . another aspect of reciprocity in regard to time-limits which seems to deserve attention, since it may well assume importance in view of the increasing number of declarations which are immediately terminable on notice to the Secretary-General. Reciprocity would seem to demand that in any given pair of States each should have the same right as the other to terminate the juridical bond existing between them under the Optional Clause. This is so even in the ordinary case where State A's declaration is without time-limit while State B's is for a period of five or ten years. State B at the end of the period may choose whether to renew or to terminate its obligations towards State A under the Optional Clause. State A may reasonably contend that, while not retracting its general acceptance of the Optional Clause, it also is entitled at the end of the period to choose whether or not to continue its particular obligations towards State B. It is one thing to hold that a unilateral declaration made without

> time-limit binds the State concerned indefinitely toward other States which have made similar declarations. It is quite another thing to hold that such a unilateral declaration is binding indefinitely towards other States which have not undertaken the same commitment. The inequality in the positions of the two States under the Optional Clause, if the principle of reciprocity is not applied to time-limits, becomes absolutely inadmissible when State A's declaration is without time-limit while that of State B is immediately terminable on notice to the Secretary-General. It would be intolerable that State B should always be able, merely by giving notice, to terminate at any moment its liability to compulsory jurisdiction *vis-à-vis* State A, whilst the latter remained perpetually bound to submit to the Court's jurisdiction at the suit of State B. The Court has not yet had occasion to examine this aspect of the operation of reciprocity in relation to time-limits. In the light, however, of its interpretation of the condition of reciprocity in regard to reservations, the Court, it is believed, must hold that under the Optional Clause each State, with respect to any other State, has the same right to terminate its acceptance of compulsory jurisdiction as is possessed by that other State." (*Loc. cit.*, pp. 278-279.)

114. It is no less clear that what is critical in the application of the Optional Clause is that jurisdiction must subsist as of the date of seisin of the Court. That is axiomatic, and is made the clearer by the Court's Judgments in the *Nottebohm* case, *Preliminary Objection, Judgment, I.C.J. Reports 1953,* pages 111, 122-123 ; and in the *Right of Passage over Indian Territory* case, *I.C.J. Reports 1957,* pages 142-144.

115. Since the United States exercised its reciprocal right to modify or partially suspend elements of its Declaration of 14 August 1946 by a Note deposited with the Secretary-General of the United Nations on 6 April 1984, since Nicaragua filed its Application in this case on 9 April 1984, and since it is clear and is not disputed that the Application of Nicaragua falls within the terms of the exclusions effected by the United States Note of 6 April, it follows that the Court is without jurisdiction to entertain the claims which Nicaragua makes, in so far as they are based on the declarations of the Parties under Article 36, paragraph 2, and Article 36, paragraph 5, of the Court's Statute.

116. It must be acknowledged that to take this broad view of reciprocity, which would not give effect to the 1984 notification of the United States *erga omnes,* but would regard the United States as having been empowered reciprocally and immediately to terminate its declaration vis-à-vis Nicaragua, involves a construction of reciprocity which, being applied before a case is filed in the Court, gives rise to complications. Once the Court is seised of a case, the scope of the declarations of the parties can be compared, but, before seisin, the situation is much more complex. In my view, that is a drawback of my analysis but not a fatal drawback. After all,

prior to this Court's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the law governing the making of reservations to treaties was relatively clear and simple. But in the interests of wider adherence to treaties, the Court took a flexible approach to the making of reservations which, in return for that ease of adherence, produces a most complicated pattern of treaty relationships, which the Vienna Convention on the Law of Treaties has adopted in the train of the Court's reasoning. I believe that, in the interests of maintaining and widening the extent of adherences to the Court's compulsory jurisdiction, the Court in this case should have taken a similarly flexible approach towards the application of reciprocity to declarations made under the Optional Clause.

2. Jurisdiction under the Treaty of Friendship, Commerce and Navigation

117. In its Application, the sole jurisdictional basis alleged by Nicaragua is "the Declarations made by the Republic of Nicaragua and by the United States of America accepting the jurisdiction of the Court as provided for in Article 36 of the Statute . . ." (introduction). Nevertheless, the Nicaraguan Memorial, in paragraph 177, invokes "a complementary ground" of the Court's jurisdiction, namely, the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, signed on 21 January 1956, which came into force in 1958 and remains in force. This poses the threshold question : may a State which has failed to cite a possible basis of jurisdiction in its Application rely upon that basis thereafter ?

118. Such answer as the Court's sparse jurisprudence on the question contains suggests that it may not. The Court held, in the case of *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pages 24-25, that, where an Applicant, France, sought to introduce two treaties as bases for jurisdiction which were not relied upon by it in its Application but only invoked in the proceedings on preliminary objections, it could not do so. The Court held that :

> "If the French Government has intended to proceed upon that basis it would expressly have so stated.
>
> As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court." (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 24-25.)

Equally, the Application of Nicaragua is based "clearly" if not so precisely upon the United States and Nicaraguan Declarations under Article 36,

paragraphs 2 and 5, of the Statute. If Nicaragua "had intended to proceed" upon the basis of the Treaty with the United States, "it would expressly have so stated". Accordingly, in "these circumstances" – which are not unlike those in *Certain Norwegian Loans* – "the Court would not be justified in seeking a basis for its jurisdiction different from that which" the Nicaraguan Government "itself set out in its Application and by reference to which the case has been presented by both Parties to the Court". Therefore, in so far as Nicaragua relies upon the Treaty to establish jurisdiction in this case, there is ground for holding that its Application should be dismissed.

119. However, the Court, for reasons that are not altogether clear, seems in this case to have another understanding of the import of its holding in *Certain Norwegian Loans*. It accordingly turns to a second preliminary consideration which also presents a considerable jurisdictional barrier to Nicaraguan invocation of the Treaty.

Article XXIV of the Treaty provides :

> "1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.
>
> 2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

Paragraph 2 of this Article permits either Party unilaterally to seise the Court of a dispute over "the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy . . .". In its Application in *United States Diplomatic and Consular Staff in Tehran*, the United States invoked an identical provision of its Treaty of Amity, Economic Relations and Consular Rights with Iran, and the Court in its Judgment held that such a clause provides for "a right of unilateral recourse to the Court" which "establishes the jurisdiction of the Court as compulsory for such disputes" unless the Parties agree to settlement by some other means (*I.C.J. Reports 1980*, p. 27). In that case, however, there was no question of initially determining whether the dispute could or could not be satisfactorily adjusted by diplomacy, since, as the Court observed, Iran refused to negotiate. But, in the current case, not only have Nicaragua and the United States engaged in direct negotiations between them, which are actively continuing over their larger disputes, but Nicaragua does not allege that it has ever claimed, before or during those negotiations or otherwise, that there is any dispute between it and the United States over the interpretation or application of the Treaty. Such claims for the first time appear in the Nicaraguan Memorial. For its part, the United States denies that there has been any effort to adjust by diplomacy any dispute with Nicaragua

over the interpretation or application of the Treaty, particularly because Nicaragua has not even made representations under the Treaty that could give rise to a dispute. Nicaragua has not challenged these United States allegations. There is no reason to suppose that Nicaragua failed to invoke the Treaty because of an unwillingness to charge the United States with violation of its international obligations. It rather appears that it did not occur to Nicaragua – despite its allegations about the conduct of the United States to which the Court alludes – that the actions of which it was complaining were violations of this Treaty. In these circumstances, it appears to follow that Nicaragua has not discharged the procedural prerequisites for invocation of Article XXIV (2) of the Treaty. For this reason as well, the Court should have held that the Treaty does not furnish a basis of jurisdiction which sustains the Application of Nicaragua.

120. If, however, with the Court, we lightly vault these barriers rather than demolish them, let us examine whether Nicaragua's invocation of the Treaty is sufficient to establish any measure of the Court's jurisdiction over the claims which Nicaragua's Application sets out. To what extent, if at all, is the substance or are the provisions of the Treaty relevant to Nicaragua's claims ?

121. In its Application, Nicaragua claims that the United States has breached

> "express obligations under the Charter of the United Nations, the Charter of the Organization of American States and other multilateral treaties, and has violated fundamental rules of general and customary international law . . ." (para. 14).

Not a word is said, in terms or in substance, about violation of a bilateral commercial treaty. Rather, the gravamen of Nicaragua's Application is that the United States is "using military force against Nicaragua and intervening in Nicaragua's internal affairs . . ." (para. 1). However, in the precise claims on which Nicaragua requests the Court to adjudge and declare, there are two points that arguably may be said to bear upon the Treaty of Friendship, Commerce and Navigation, though this is nowhere alleged in the Application. Paragraph *(e)* reads :

> "That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce."

(It will be observed that this claim does not relate to the Treaty, or any treaty, but to customary international law.) And paragraph *(g)* concludes :

> "That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately :
>
> . . . .
>
> from all efforts to restrict, block or endanger access to or from Nicaraguan ports."

122. The Treaty is one of a large number of similar treaties which the United States has concluded. The purpose and scope of these "FCN" treaties was summarized by a commentator who had a leading role in their negotiation as follows :

> "[FCN] treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though 'commerce' and 'navigation' complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are 'commercial' in the broadest sense of that term ; and they are above-all treaties of 'establishment', concerned with the protection of persons, natural and juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other ; their rights to engage in business and other activities within the boundaries of the former ; and the respect due them, their property and their enterprises." (Herman Walker, "Modern Treaties of Friendship, Commerce and Navigation", *Minnesota Law Review,* Vol. 42 (1958), p. 806.)

123. How does Nicaragua purport to link the grave and sweeping charges of its Application with the commercial particularities of the Treaty ? Nicaragua proceeds in its Memorial not by establishing, demonstrating or even indicating in any detail that its claims under its Application entail violation by the United States of provisions of the Treaty. It rather contents itself with "simply" identifying those provisions of the Treaty which it claims are contravened. It concentrates such argument as it offers on one clause of the Treaty. It submits that, "for example", Article XIX, paragraph 1, provides : "1. Between the territories of the two Parties, there shall be freedom of commerce and navigation." Nicaragua maintains that, "The activities of the United States clearly violate this provision" (Nicaraguan Memorial, para. 167). It contends :

> "172. It is obvious that the military and paramilitary operations

directed and maintained in and against Nicaragua by the United States – including the mining of Nicaraguan ports and territorial waters, as well as attacks on Nicaragua's airports, and military operations that endanger and limit trade and traffic on land – are designed to paralyze the freedom of commerce and navigation, thus defined and guaranteed in Article XIX (1) of the Treaty."

124. Is this argument consistent with the purpose of Article XIX, paragraph 1, of the Treaty, as indeed of the Treaty as a whole ? The Treaty as a whole has nothing to do with the use of force in international relations, or rights to be free of such use – and correspondingly, *prima facie,* little or nothing to do with Nicaragua's claims in this case. It is a purely commercial treaty "based in general upon the principles of national and most-favoured-nation treatment" (preamble). Article XIX, paragraph 1, mirrors that commercial concern, as is clear when it is considered in the context of the whole article of which it is part, which reads :

"1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party ; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other Party ; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other Party, with respect to : *(a)* duties and charges of all kinds, *(b)* the administration of the customs, and *(c)* bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance.

6. The term 'vessels', as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated ; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war."

It is difficult to see the relevance of such provisions to the claims of unlawful use of force made by Nicaragua in its Application. The obligations created for the United States by this article essentially relate to treatment of Nicaraguan vessels in United States waters. It is only by taking paragraph 1 of Article XIX out of the context of that article and of the Treaty as a whole that one can argue that it is relevant to the claim of mining of Nicaraguan ports. Is the Court justified in reaching out to make that argument ? The jurisprudence of the Court suggests that it is not. The Court rather in the past has held that : "It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" upon whose compromissory clause it relies (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953,* p. 18).

125. The other articles which Nicaragua cites as contravened by activities of the United States are Articles XIV, paragraph 2 ; XVII, paragraph 3 ; XIX, paragraph 3 ; XX ; and I of the Treaty. These clauses provide :

Article XIV, paragraph 2 :

"Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited."

Article XVII, paragraph 3 :

"Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party."

Article XIX, paragraph 3 :

"Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third

country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . ."

Article XX :

"There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit :

(a) for nationals of the other Party, together with their baggage ;
(b) for other persons, together with their baggage, en route to or from the territories of such other Party ; and
(c) for products of any origin en route to or from the territories of such other Party . . ."

Nicaragua maintains – with respect to the foregoing articles – that the military and paramilitary activities which it alleges are carried on by the United States cannot be seen as "equitable treatment to the persons, property and enterprises and other interests" of Nicaraguan nationals and companies (Memorial, para. 174).

126. But the foregoing Treaty provisions on which Nicaragua relies – without pleading the facts that relate such reliance to the claims set out in its Application – concern the treatment of the nationals of one Party, or goods or property of those nationals, or the vessels of one Party, in the territory of the other Party. They concern marine insurance, free transit of nationals, etc. It is obvious on their face that these provisions have no relationship to the claims of direct and indirect aggression made out in Nicaragua's Application. Article I of the Treaty, on which Nicaragua also relies, and which provides that,

"Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party",

sets out the broad principle of equitable treatment in the light of which the Treaty's detailed operative provisions are to be read, but it does not deal with problems of the use or misuse of force in international relations.

127. In addition to the foregoing articles of the Treaty, the Court also takes account of "the references in the Preamble to peace and friendship". The Preamble to the Treaty provides :

"The United States of America and the Republic of Nicaragua, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made towards these ends by arrangements encouraging mutually beneficial investments, promoting

> mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, . . ."

Thus the preamble, if it were to be thought to have any legal effect, emphasizes the commercial purposes of the Treaty. In any event, the provisions of a preamble are not generally regarded as giving rise to legal obligations as the terms of the body of a treaty do or may. The Vienna Convention on the Law of Treaties provides that the preamble is part of the context of a treaty and that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty "in their context and in the light of its object and purpose" (Art. 32). Having regard to the context of this treaty among a score of commercial FCN treaties, and in the light of its commercial objects and purpose, the Treaty's preambular reference to strengthening the bonds of peace and friendship does not appear to provide an additional basis for relating the claims set out in the Application of Nicaragua to the terms of the Treaty.

128. There is another provision of the Treaty which merits comment, because it indicates that the Application of Nicaragua does not fall within the scope of the Treaty. Article XXI (1) of the Treaty provides :

> "1. The present Treaty shall not preclude the application of measures :
>
> . . . .
>
> *(c)* regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment ;
>
> *(d)* necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests ; . . ."

Now it cannot be argued – and Nicaragua did not argue, nor does the Court hold – that, since the Treaty "shall not preclude the application of measures" regulating the production of or traffic in arms, or measures which are necessary to fulfil the obligations of a Party for the maintenance of international peace and security or to protect its essential security interests, these very exclusions entitle the Court to assume jurisdiction over claims based on the Treaty that relate to traffic in arms or to the maintenance of international peace and security or essential security interests. It is clear that, where a treaty excludes from its regulated reach certain areas, those areas do not fall within the jurisdictional scope of the treaty.

That this preclusion clause is indeed an exclusion clause is demonstrated not only by its terms but by its *travaux préparatoires,* which were appended to the United States pleadings in the case of *United States Diplomatic and Consular Staff in Tehran.* A list of a score of Treaties of Friendship, Commerce and Navigation, including that with Nicaragua, is found at page 233, which is followed by a "Memorandum on Dispute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China" which contains the following paragraph :

> "The compromissory clause . . . is limited to questions of the interpretation or application of this treaty ; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject-matter – and in some cases almost identical language – has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, *certain important subjects, notably* immigration, *traffic in military supplies, and the 'essential interests of the country in time of national emergency', are specifically excepted from the purview of the treaty.* In view of the above, it is difficult to conceive how Article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed." (At p. 235 ; emphasis supplied.)

A second memorandum, entitled "Department of State Memorandum on Provisions in Commercial Treaties relating to the International Court of Justice", similarly concludes, first with respect to the scope of the jurisdiction accorded to the Court under FCN treaties, and second with respect to national security clauses :

> "This paper [of the Department of State] . . . points out a number of the features which in its view make the provision satisfactory . . . These include the fact that the provision is limited to differences arising immediately from the specific treaty concerned, that such treaties deal with familiar subject-matter and are thoroughly documented in the records of the negotiation, that an established body of interpretation already exists for much of the subject-matter of such

> treaties, and that *such* purely domestic *matters* as immigration policy and *military security are placed outside the scope of such treaties by specific exceptions.*" (*Ibid.*, p. 237 ; emphasis supplied.)

Article XXI of the Treaty thus serves to indicate that the parties to the Treaty acted to exclude from its scope the kind of claim ("restoration of international peace and security" and protection of "essential security interests") which Nicaragua seeks to base upon it.

129. Nevertheless, the Court concludes that :

> ". . . it is quite clear for the Court that, on the basis alone of the Treaty of Friendship, Commerce and Navigation of 1956, Nicaragua and the United States of America are bound to accept the compulsory jurisdiction of this Court over claims presented by the Application of Nicaragua in so far as they imply violations of provisions of this treaty" (Judgment, para. 111).

The difficulty with that conclusion is that, on analysis, the claims presented by *this* Application of Nicaragua imply no violations of *that* Treaty. Not only does the Application fail to refer to the Treaty ; it is plain that the Treaty itself cannot plausibly be interpreted to afford the Court jurisdiction "to entertain the Application filed by Nicaragua on 9 April 1984". It might furnish basis for another Application, but not for the one before the Court.

(Signed) Stephen M. SCHWEBEL.