SEPARATE OPINION OF JUDGE SETTE-CAMARA

Since I have voted against subparagraph (1) of paragraph 292 of the Judgment, I feel myself obliged to append this separate opinion stating my reasons.

During the previous proceedings relating to the jurisdiction and admissibility of the Nicaraguan Application of 9 April 1984, the multilateral treaty reservation attached to the 26 August 1946 United States Declaration of Acceptance of the Court's jurisdiction under Article 36, paragraph 2, of the Statute was subjected to thorough and detailed discussion, leading to the decision of the Court in the Judgment of 26 November 1984. The two Parties in their arguments examined the reservation in all its aspects, and weighed all possible interpretations of its rather nebulous wording and the consequences of its application.

It should be recalled that the reservation is contained in proviso *(c)* to the Declaration, which excludes from the operation of the clause

> "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" (*I.C.J. Yearbook 1984-1985,* p. 100).

Five member States have appended a similar reservation to their Declarations of Acceptance, namely, El Salvador, India, Malta, Pakistan and the Philippines. However, only the reservations of Pakistan and Malta include the wording appearing in the United States reservation "all parties to the treaty affected by the decision". The reservations of El Salvador, India and the Philippines exclude disputes arising from the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties in the case before the Court (*I.C.J. Yearbook 1984-1985,* pp. 75, 78 and 92 respectively). Of course the latter version of the reservation is broader in scope, because, if the multilateral treaty reservation were to be applied as it appears in the Indian, Philippine and Salvadorian formulations, *all* the States parties to a multilateral convention would have to appear before the Court together with the original parties in the case. It is difficult to see how the reservation could apply to universal treaties such as the Charter of the United Nations, or even treaties of a regional ambit, such as the Charter of the Organization of American States – both in cause in the Nicaraguan Application – because that would amount to bringing before the Court the entire membership of the United Nations, and the regional organization itself.

The multilateral treaty reservation has been widely criticized by publicists ever since the 1946 United States Declaration was deposited with the Secretary-General of the United Nations. Indeed several writers, including some eminent American scholars, have considered it ambiguous, redundant and superfluous. Counsel for the United States recognized the doubts connected with the ambiguity of its formulation (hearing of 15 October 1984, afternoon) :

> "As the United States indicated in its Counter-Memorial, scholars discussing the reservation at the time of its inclusion in the declaration disagreed about whether the reservation required the presence before the Court of all treaty parties, or only of those treaty parties that would be affected by the Court's decision."

Moreover, at that time, there were also doubts as to the unclear wording of the proviso, especially as to whether it referred to "the treaty affected" or to "all parties affected".

In the present case the United States, while participating in its previous stages, has had the opportunity to clarify its construction of the meaning of the reservation. The United States Counter-Memorial contended in paragraph 252 (p. 105) :

> "The Court may, therefore, exercise jurisdiction over Nicaragua's claims consistent with the multilateral treaty reservation only if all treaty parties affected by a prospective decision of the Court are also parties to the case."

And in paragraph 253 (p. 105) it spelled out the "specific concerns" behind the reservation :

> "The multilateral treaty reservation reflects three specific concerns : (1) the United States does not wish to have its legal rights and obligations under multilateral treaties adjudicated with respect to a multilateral dispute unless the rights and obligations of *all* the treaty parties involved in that dispute will also be adjudicated ; (2) adjudication of bilateral aspects of a multilateral dispute is potentially unjust in so far as absent States may have sole possession of facts and documents directly relevant to the rights of the parties to the adjudication *inter se* ; and (3) adjudication of bilateral aspects of a multilateral dispute will inevitably affect the legal rights and practical interests of the absent States."

This threefold description of the reasons inspiring the reservation is not altogether convincing. As to the first point, it would indeed be extraordinary if a State making a declaration of acceptance of the Court's jurisdiction were to append to it reservations to protect the rights and interests of third States.

In his separate opinion to the Judgment of 26 November 1984 Judge Ruda rightly observes :

> "it does not seem logical that a State submitting a declaration accepting the compulsory jurisdiction of the Court, but excluding certain matters affecting its own interests from the jurisdiction, should act on behalf of third States" (*I.C.J. Reports 1984*, p. 456, para. 22).

The second point is equally unpersuasive. The "sole possession of facts and documents" by a third State is outside the competence of the Court to appraise. And this specific knowledge has nothing to do with participation in a multilateral treaty. It is possible that a State which is not a party to the treaty might possess such "facts and documents". Thirdly, it is certainly not true that "adjudication of bilateral aspects of a multilateral dispute will *inevitably* affect the legal rights and practical interests of the absent States" (emphasis added). It might, or might not, affect them. In the November 1984 Judgment the Court itself gave a specific example of a possible situation in which there would be no third State affected by the decision :

> "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 State's claim to be affected." (*I.C.J. Reports 1984*, p. 425, para. 75.)

In the Judgment of 26 November 1984 the Court dealt extensively with the multilateral treaty reservation in paragraphs 72 to 76 (*I.C.J. Reports 1984*, pp. 424-426). Having recognized the obscurity of the wording of the proviso, and referred to the difficulties of interpretation which can be traced back to its drafting, and having weighed up the meaning of similar reservations on the part of other States, the Court found, in paragraph 73, that in no way could the reservation bar adjudication, because Nicaragua's Application relied not only on conventional law but also on violation of a number of principles of customary and general international law, such as the non-use of force, non-intervention, respect for the independence and territorial integrity of States and freedom of navigation. These principles are valid and binding in themselves, even if they have been enshrined in the provisions of multilateral treaties. The Court observes that the States to which the argument of the United States refers, the neighbours of Nicaragua, namely, Costa Rica, Honduras and El Salvador, have all made declarations of acceptance of the Court's jurisdiction and could at any time

institute proceedings against Nicaragua if they felt their rights and interests to be in jeopardy. They could also resort to the incidental procedure of intervention under Article 62 or 63 of the Statute (*I.C.J. Reports 1984*, p. 425). Indeed, when considering the Declaration of Intervention filed by El Salvador on 15 August 1984 – which was rejected as untimely, because of the fact that the Court was entertaining the jurisdictional phase of the proceedings –, the Court did preserve the rights of El Salvador to intervene on the merits. But El Salvador did not use these rights. Nor did Honduras and Costa Rica, the only States that could possibly be affected by a decision of the Court in the current case.

The 1984 Judgment emphasized in paragraph 75 that : "it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified" (*I.C.J. Reports 1984*, p. 425).

Therefore the question whether other States are affected by the Judgment could only be finally settled during the merits phase of the Judgment. That is why the Court, considering that the former procedure of joinder of preliminary objections to the merits has been done away with as from the 1972 revision of the Rules of Court, decided to resort to Article 79, paragraph 7, of the present Rules. The Rule was used for the first time, and the Court found 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" (*I.C.J. Reports 1984*, pp. 425-426, para. 76).

The decision of the Court to apply Rule 79, paragraph 7, I submit, is sound and logical. It is only when the general lines of the Judgment to be given become clear that the States "affected" can be identified, if they exist at all. It is a curious situation : the finding as to whether there are third States parties to the multilateral treaties in question "affected" by the decision, and which they are, can be established only *ex post facto*. At the same time the reservation, although not having an exclusive preliminary character, remains a preliminary objection to jurisdiction, at least in so far as one of the sources of the law to be applied will be the multilateral treaties invoked by Nicaragua in its Application of 9 April 1984.

In these circumstances, the Court feels itself under the obligation to ascertain whether its jurisdiction is limited by virtue of the reservation in question (para. 47 of the present Judgment) and does so in a lengthy and exhaustive manner in paragraphs 47 to 56 of the Judgment.

It should be noted that this is a *sui generis* procedural situation, because although the jurisdictional phase of the case has been closed with the Judgment of 26 November 1984, one question of a preliminary character (albeit not "exclusively" so) was left pending, and the decision on that question should determine the law applicable and hence the whole structure of the Judgment.

The Court starts its examination of the problem by restricting the field to which the reservation could be applied, in relation to both the multilateral treaties involved and the States which might potentially be affected. Since Nicaragua has recognized that the duties and obligations arising from the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928 have been subsumed by the Charter of the Organization of American States, the Court considers

> "that it will be sufficient to examine the position under the two Charters [the Charter of the United Nations and the Charter of the Organization of American States], leaving aside the possibility that the dispute might be regarded as 'arising' under either or both of the other two conventions" (para. 47 of the Judgment).

On the other hand, in spite of the fact that the United States, in the jurisdictional proceedings, had listed Costa Rica, Honduras and El Salvador as States that could be "affected", the Court confines its consideration to El Salvador, because :

> "It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua." (Para. 48.)

I have no objection to the criteria chosen by the Court to restrict the area of application of the multilateral treaty reservation. In some ways it simplifies the problem, although it is undeniable that Honduras – from whose territory the *contras* operate – is as involved in the dispute as El Salvador, to say the least. But the crux of the question is that the whole of the United States argument rests on the use of the right of collective self-defence. El Salvador, in its Declaration of Intervention of 15 August 1984, told the Court that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise on its behalf the right of collective self-defence.

In paragraph 292, subparagraph (2), the Court

> "*Rejects* the justification of collective self-defence maintained by the United States of America in connection with the military and

> paramilitary activities in and against Nicaragua the subject of this case."

The justification of collective self-defence, belatedly invoked by the United States during the proceedings on jurisdiction and admissibility in 1984, if valid, should retroact at least to December 1981 when the above-mentioned activities actually began. Obviously the rejection of the Court covers equally the same period. Therefore, collective self-defence never justified such activities and the decision of the Court in no way changes the nature and character of the acts of the United States. They were not justified by collective self-defence and they continue not to be so. Hence, if there is no change in the actual situation, I do not see how El Salvador can claim to be "affected" by the decision of the Court. In its argument Nicaragua never placed in issue the right of El Salvador to receive from the United States all kind of assistance, military or otherwise (Memorial of Nicaragua, p. 193, para. 371). Therefore, El Salvador's rights in this respect cannot be affected by a decision of the Court in favour of Nicaragua. The decision of the Court in paragraph 292, subparagraphs (3), (4), (5), (6), (7), (8), (9), (10) and (11), I submit, could in no way affect the rights or obligations of El Salvador. The same can be said of the provision in subparagraph (12), calling on the United States to cease and desist immediately from the acts in question. El Salvador preserves its rights of receiving full support from the United States for its defence. But it can hardly be argued that El Salvador can claim a right to the continuance of direct or indirect military or paramilitary actions of the United States against Nicaragua, which are unrelated in any way to the territory of El Salvador. As for subparagraphs (13) and (14) – obligation in respect of reparation to be paid by the United States –, (15) – form and amount of reparation, to be settled by the Court – and (16) – calling on the Parties to settle the dispute by peaceful means –, they have nothing to do with El Salvador. Therefore the decision of the Court as it stands in the operative part of the Judgment could in no way "affect" El Salvador such as to warrant application of the multilateral treaty reservation. In this sense I do not concur with paragraph 51 of the reasoning. Nor do I agree with the argument contained in paragraph 53. The distinction between "adversely" affecting and otherwise, is irrelevant and beside the point. Nothing in the operative clause of the Judgment could, I submit, "affect" the rights or obligations of El Salvador either "adversely" or "favourably".

Likewise, I disagree with the conclusion in paragraph 56 that the Court is debarred from applying the Charter of the United Nations, as a multilateral treaty.

Paragraph 55 of the Judgment discusses the same problem of the application of the multilateral treaty reservation in relation to the Charter of the Organization of American States, and especially in regard to Articles 18

and 20 dealing with non-intervention and the non-use of force. The Court concludes that it must regard itself as without competence to deal with either of the two claims of breach of the OAS Charter. As to the alleged violation of Article 18 of the OAS Charter by the United States intervention in the internal or external affairs of Nicaragua, a subject disposed of by subparagraph (3) of the operative part, I fail to see by what stretch of imagination such a decision could be said to affect El Salvador.

The so-called Vandenberg Amendment applies to disputes under multilateral treaties which are also multilateral disputes. The current case is between the Applicant – Nicaragua – and the Respondent – the United States of America. Any other State which has any reason to consider that it might be affected by a Judgment of the Court, and which has jurisdictional links with the Parties in the case, and with the Applicant in particular, is free to initiate proceedings of its own or to intervene under Articles 62 and 63 of the Statute. The only relevance of the multilateral treaty reservation in the merits phase of the proceedings is, I submit, that the Court cannot ignore the problem of third States parties to multilateral treaties which might be affected by the Judgment, and should deal with it in the proper terms, namely that they are free to come before the Court to defend their rights and interests if they so desire.

Of course the Court cannot ignore the existence of a certain generalized conflict in the Central American area. Judge Ruda, in his separate opinion appended to the November 1984 Judgment, dealt with it in these words :

> "It is true that there is a complex and generalized conflict among Central American countries, but not the whole conflict, with all its economic, social, political and security aspects, is submitted to the Court, only the claims of Nicaragua against the United States. Nicaragua has not presented any claims against Honduras, El Salvador and Costa Rica." (*I.C.J. Reports 1984*, p. 457, para. 24.)

We should abide by the categoric provision of Article 59 of the Statute, which confines the binding force of the *res judicata* to the parties in the case, and consequently bear in mind the fact that the expansion of the effects of the Judgment, so as to affect a third party, constitutes a departure from the general rule, and, like any exception, must therefore be founded in indisputable evidence.

For all these reasons I regret that the Court decided for the application of the multilateral treaty reservation, thereby precluding recourse to the Charter of the United Nations and the Charter of the Organization of American States as sources of the law violated by the Respondent.

I recognize that States which voluntarily deposit declarations of acceptance of the jurisdiction of the Court, pursuant to Article 36, paragraph 2, of the Statute, are free to append to the declaration whatever reservations

they deem necessary. But at the same time, the Court is free, and indeed bound, to interpret declarations and appended reservations, as it has done on many occasions.

I submit that the law applied by the Judgment would be clearer and more precise if we resorted to the specific provisions in issue, and that there is nothing to prevent us from doing so.

The late regretted Judge Baxter has maintained the superiority of treaties over other sources as evidence of law in very cogent terms :

> "The most telling argument for giving the treaty that effect is that it is superior to all other forms of evidence of the law. In the first place, the treaty is clear evidence of the will of States, free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law."

And further :

> "As one looks at the present state of international law and attempts to see into the future, it should be quite clear that treaty law will increasingly gain paramountcy over customary international law." (R. R. Baxter, "Treaties and Custom", *Collected Courses of the Hague Academy of International Law*, Vol. 129 (1970-I), pp. 36 and 101.)

It is for the reasons set out above that I have no choice but to vote against subparagraph (1) of paragraph 292 of the Judgment. But I fully concur with the rest of the Judgment, as I firmly believe that the non-use of force as well as non-intervention – the latter as a corollary of equality of States and self-determination – are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States.

With regard to the non-use of force, the International Law Commission in its commentaries on the final articles on the Law of Treaties said :

> "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (*International Law Commission Yearbook,* 1966, Vol. II, p. 247).

As far as non-intervention is concerned, in spite of the uncertainties which still prevail in the matter of identifying norms of *jus cogens,* I submit that the prohibition of intervention would certainly qualify as such, if the test of Article 53 of the Vienna Convention on the Law of Treaties is applied. A treaty containing provisions by which States agree to intervene, directly or indirectly, in the internal or external affairs of any other State

would certainly fall within the purview of Article 53, and should consequently be considered void as conflicting with a peremptory norm of general international law.

(Signed) José SETTE-CAMARA.