SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Judgment of the Court because I am in essential, though not entire, agreement with its two principal holdings.

I believe that the Court has jurisdiction in this case accorded by Article XXXI of the Pact of Bogotá, a jurisdiction which is not qualified by the conditions found in Article XXXII. Such doubt as I have on this question is reflected in the analysis which Judge Oda's opinion in this case sets forth, particularly his quotations of the authoritative conclusions of the former Secretary-General of the Organization of American States and the former Director of the Legal Department of the OAS, Dr. F. V. García-Amador, who do appear to condition jurisdiction under Article XXXI of the Pact upon fulfilment of the prerequisites prescribed by Article XXXII. It is clear that those prerequisites — notably, conciliation — have not been fulfilled in this case. Nevertheless, I do not find in the abbreviated analyses of these authorities reasons which lead me to conclude that the Court's construction of Article XXXI as independent of Article XXXII is unfounded. These two Articles, on their face, each appear to accord the Court an independent jurisdictional title. It may of course be asked why a single treaty should provide two independent routes to the Court's compulsory jurisdiction. Perhaps the answer to that question is that Article XXXII may have been intended to embrace disputes not of a juridical nature as well as "disputes of a juridical nature".

The admissibility of Nicaragua's Application raises more substantial doubts, by reason of the operation of Articles II and IV of the Pact of Bogotá. Believing as I do that jurisdiction in this case can only be founded on the Pact of Bogotá, and that accordingly Nicaragua's Application must be considered subject to the provisions of that Pact, those Articles initially appear to render Nicaragua's Application inadmissible because the substance of that Application is clearly comprehended by the Contadora process. That process, not being a pacific procedure established by the Pact, surely is a "special procedure", agreed upon by Nicaragua and Honduras as well as other States, which, if successfully concluded, would permit them to arrive at a solution of Nicaragua's essential causes of action. Moreover, the Contadora process in any event is a "pacific procedure" (it can hardly be a warlike procedure), from which it follows that, according to Article IV of the Pact, being a pacific procedure which "has been initiated . . . by agreement between the parties" before the bringing of Nicaragua's Application, "no other procedure may be commenced until that procedure is concluded". The Court avoids confronting more than one

knotty problem of the interpretation of Articles II and IV by its holding that the Contadora process was "concluded" at the time when Nicaragua filed its Application. It so holds despite the common view of the Parties that that process "has not been abandoned or suspended at any moment". The Court maintains that it appreciates the importance of this concordance of views between the Parties; nevertheless, it decides that the Contadora process, at any rate in the phase directed towards resolution of the substance of the issues before it, had concluded by 28 July 1986. This is, for the reasons set out by the Court, one plausible interpretation of the facts; one might also arrive at another plausible interpretation as the Parties appear to do; but I do not think that the Court's interpretation is untenable.

My most substantial reservations about the Court's Judgment turn upon its holdings of paragraph 54, which are in answer to the objections by Honduras to what has been termed the "serial" nature of the Applications which have been brought by Nicaragua in three inter-related cases against the United States of America in 1984 and against Costa Rica and Honduras in 1986 (see Lori Fisler Damrosch, "Multilateral Disputes", in Damrosch, ed., *The International Court of Justice at a Crossroads,* 1987, pp. 376, 379).

In its Memorial Honduras recalls that, by its Application of 9 April 1984 against the United States, Nicaragua submitted to the Court a set of facts forming part of the general conflict existing in Central America, and that, one month after the Judgment of the Court in that case, Nicaragua submitted to the Court, by its Applications against Costa Rica and Honduras, a second and a third set of facts pertaining to the same conflict. Honduras maintains that the

> "overall result of this behaviour on the part of Nicaragua constitutes . . . an artificial and arbitrary dividing up of the general conflict existing in Central America. Moreover, this result may have negative consequences for Honduras as a Defendant State before the Court, since it affects the guarantee of a sound administration of justice and undermines the principle laid down in Article 59 of the Statute of the Court.
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> 2.07. In fact, the successive Applications lodged by Nicaragua have presented to the Court, for Nicaragua's convenience, some facts forming part of the general conflict in Central America. But it is obvious that some other facts, while appertaining to the same general conflict, are inevitably absent from the proceedings before the Court.
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> The power granted to the Parties under Article 80 of the Rules of Court [to make counter-claims] does not totally remove this negative consequence; for it is possible for the State against which the claim is brought not to appear before the Court, as occurred in the case concerning *Military and Paramilitary Activities in and against Nicaragua*

after the Judgment of 26 November 1984. In this situation, the Court faces a great difficulty in the determination of the facts, as was acknowledged in the Judgment of 27 June 1986. But as regards subsequent disputes before the Court forming part of the same general conflict in the Region, if the facts in the previous case affect other States, the Defendant States in later proceedings will find themselves obliged to fill in previous gaps or to put other interpretations on the same facts, none of which would appear to be in conformity with the requirements of a sound administration of justice.

On the other hand, the successive Applications lodged by Nicaragua from 1984 onwards have another prejudicial effect for the Defendant States in later proceedings, as is the case of the Republic of Honduras. This negative consequence arises from the assessment of facts in previous proceedings, those facts forming part of the same general conflict existing in Central America; and it may gravely undermine the principle of relativity of international adjudications laid down in Article 59 of the Statute of the Court." (Memorial of Honduras, paras. 2.06-2.07.)

The answers which paragraph 54 of the Court's Judgment gives to these contentions of Honduras in my view are not fully adequate, in the light of the following considerations.

In the proceedings before the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua,* Nicaragua levelled grave accusations against not only the United States, but against Honduras and Costa Rica. It claimed that those two States — most particularly Honduras — were acting in concert with the United States to support its use of military force against Nicaragua and its intervention in Nicaragua's internal affairs, especially by permitting "mercenaries" to operate from their territories against Nicaragua. Despite these accusations, Nicaragua did not in 1984 bring suit against either Honduras or Costa Rica, even though both of those countries at that time adhered to the Court's compulsory jurisdiction under the Optional Clause in the most unrestricted terms. Rather, Nicaragua maintained that its Application made "no claim of illegal conduct by any State other than the United States", and that it sought "no relief . . . from any other State".

For its part, in view of these accusations against Honduras and Costa Rica — and Nicaragua's further claim that El Salvador's armed forces were acting in the service of the United States — and in view of its own contention that its actions against Nicaragua were measures taken in collective self-defence of Nicaragua's neighbours, particularly El Salvador, against armed attack by Nicaragua, the United States maintained that the Court could not adjudicate Nicaragua's allegations against the United

States without also passing upon the lawfulness of the actions of Honduras, Costa Rica and El Salvador. These three States, the United States consequently contended, were indispensable parties and, in their absence, the Court should not proceed to render judgment on the merits.

Not only did the Court reject this contention but, shortly before, when El Salvador, in a declaration of intervention which strongly supported United States claims that it was under armed attack by Nicaragua and acting in collective self-defence with the United States, sought to exercise its "right to intervene in the proceedings" — the quotation is from the terms of Article 63 of the Statute — the Court denied its intervention. Its terse Order, which is virtually devoid of reasoning, held that the declaration of intervention was "inadmissible inasmuch as it relates to the current phase of the proceedings" — i.e., jurisdiction and admissibility; a ground which has no basis in the terms or purpose of Article 63. As has been widely recognized, that denial consequently is difficult to reconcile with the Statute and, since El Salvador was not accorded a hearing, more difficult still to reconcile with the explicit provision of Article 84 of the Rules of Court that, where there is objection to the admissibility of a declaration of intervention, "the Court shall hear the State seeking to intervene and the parties before deciding". The shutting out of El Salvador's participation not only affected the subsequent content and course of the proceedings. It appears also to have affected the subsequent decision of the United States to withdraw from the proceedings, in view of the fact that one of the two principal grounds of withdrawal cited by the United States on 18 January 1985 was the Court's summary rejection of El Salvador's application "without giving reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules".

While the Court in rejecting El Salvador's intervention at the stage of jurisdiction and admissibility implied that it was open to intervention by El Salvador at the stage of the merits, and elsewhere indicated that Honduras and Costa Rica as well as El Salvador had statutory possibilities of intervention open to them, it is obvious that its treatment of El Salvador could hardly have operated to encourage such interventions. Nor, for their part, did El Salvador, Honduras or Costa Rica in any event manifest any inclination to have their actions, some of which were the objects of Nicaraguan accusation, subjected to the Court's judgment, even if, in fact, the Judgment on the merits ultimately rendered by the Court on 27 June 1986 inevitably — by the nature of Nicaragua's Application and accusations and the defence of the United States — did pass upon those actions, factually and legally.

Promptly after the rendering of the Court's Judgment of 27 June 1986 against the United States, Nicaragua discovered after all (contrary to what it had pleaded in its case against the United States) that it did have legal

claims against Honduras and Costa Rica and filed its Applications of 28 July 1986 against both States. Should the instant case reach the phase of the merits, it is to be expected that Nicaragua will invoke, as it has already invoked, against Honduras the findings of fact and conclusions of law reached by the Court in the *Military and Paramilitary Activities in and against Nicaragua* case not only against the United States but, at least inferentially, against Honduras, even though Honduras was not a party to that case. As noted, it was Nicaragua's choice not to initiate suit against Honduras in 1984, despite its accusations against Honduras and Honduras's unreserved adherence to the Optional Clause which then was in force.

Nicaragua has rather preferred to pursue serial actions, however prejudicial they may be to what Honduras describes as the sound administration of justice. That such an action may indeed be prejudicial is not open to doubt. If the Court's Judgment of 27 June 1986, which rejects on factual and legal grounds the defence of the United States that it acted against Nicaragua in collective self-defence of El Salvador, Honduras and Costa Rica, were to be applied to the instant case, Honduras could be deprived of a principal defence to Nicaragua's claims even before pleadings on the merits of the case are exchanged.

When the Court denied the requests of Malta and Italy to intervene in other cases under Article 62 of the Statute — where it "shall be for the Court to decide" on intervention — the Court nevertheless gave assurances to Malta and Italy that when it came to adjudicate the merits it would ensure that their interests would not be prejudiced by their absence. It gave effect to those assurances. When El Salvador sought to intervene in the *Military and Paramilitary Activities in and against Nicaragua* case under Article 63 of the Statute — that is, to exercise its statutory "right to intervene in the proceedings" — the Court summarily denied the request, gave El Salvador no such assurances, and rendered a judgment which, on any view, must be profoundly prejudicial to the interests of El Salvador as it presented them to the Court in its denied declaration of intervention.

Now, in the instant case, when Honduras complains with apparent justification of the position in which it finds itself as a result not only of Nicaragua's litigating tactics but the Court's acceptance of them, what does the Court offer in response?

A very mixed response. On the one hand, the Court concludes that it cannot uphold the contention of Honduras that the procedural situation created by Nicaragua's splitting up of the overall conflict into separate disputes is contrary to the requirements of good faith and the

proper functioning of international justice. On the other hand, the Court holds that:

> "In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute)." (Judgment, para. 54.)

It follows from this latter holding that if, at the stage of the merits, a Party to the instant case should endeavour to rely on the findings of fact of the Judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua,* the Court will not accept such reliance but will require that Party to establish the facts in the present case taking account of the usual rules of evidence. Despite the fact that that Judgment passed upon causes of action which are found in the instant case, and despite the fact that Honduras is repeatedly specified both in the pleadings of the *Military and Paramilitary Activities in and against Nicaragua* case and in the Court's Judgment, considerations of *res judicata* cannot apply since that case was another case, to which the Parties were not the same as the Parties to this case.

This says no more than what the terms of Article 59 of the Statute require. Nevertheless, in the circumstances, it is important that the Court says it, and, if the instant case reaches the stage of the merits, it will be crucial for the Court to give full effect to Article 59. In the nature of the situation with which the Parties and the Court are confronted, that will not be simple. Can the Court, which, in its Judgment of 27 June 1986, not only acquitted Nicaragua of charges of acts of unlawful intervention in the affairs of its neighbours which were tantamount to armed attack, but also acquitted Nicaragua of certain acts of unlawful intervention altogether, consider, without regard to these holdings, the facts of the instant case as the evidence may show them to be? Can the Court, which in its Judgment of 27 June 1986 considered as established the fact that certain transborder military incursions into the territory of Honduras are imputable to the Government of Nicaragua, consider, without regard to that holding, the facts of the instant case as the evidence may show them to be?

The importance of the Court giving the most rigorous effect in the current case to the import of Article 59 is, in my view, the greater for an extraordinary reason. To apply the findings of fact of the Court's Judgment of 27 June 1986 to the merits of the instant case would be the more prejudicial because certain of those findings — critical findings at that — do not in fact correspond to the facts. In Judge Oda's restrained phrase appraising the Court's finding of the facts in *Military and Paramilitary Activities in and against Nicaragua,* it is "beyond any doubt that the picture

of the present dispute painted by the Court is far from the reality". And to apply certain of the Court's conclusions of law in that case to the merits of the instant case would be no less prejudicial, because certain of those conclusions were and are in error.

(Signed) Stephen M. SCHWEBEL.
