INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND
ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 26 NOVEMBER 1984

1984

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 26 NOVEMBRE 1984

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(NICARAGUA *v.* UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Jurisdiction of the Court — Article 36, paragraphs 2 and 5, of the Statute — Declaration under Article 36 of Permanent Court Statute by State which did not ratify Protocol of Signature of that Statute — Declaration valid but not binding — Effect of Article 36, paragraph 5, of International Court of Justice Statute — Significance of travaux préparatoires *— Conduct of States concerned — Significance of publications of the Court and of the United Nations.*

Claim of estoppel barring invocation of jurisdiction under Article 36, paragraph 2, of the Statute.

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Reservation attached to Optional-Clause declaration excluding disputes arising under multilateral treaty unless "all parties to the treaty affected by the decision are before the Court" — Meaning — Impossibility of identification of States "affected" at jurisdictional phase — Application of Article 79, paragraph 7, of Rules of Court.

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JUDGMENT

Present : President ELIAS ; *Vice-President* SETTE-CAMARA ; *Judges* LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, Sir Robert JENNINGS, DE LACHARRIÈRE, MBAYE, BEDJAOUI ; *Judge* ad hoc COLLIARD ; *Registrar* TORRES BERNÁRDEZ.

In the case concerning military and paramilitary activities in and against Nicaragua,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,

as Agent and Counsel,

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford ; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School ; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the *Institut d'Etudes Politiques de Paris,*

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C. ; Member of the Bar of the United States Supreme Court ; Member of the Bar of the District of Columbia,

as Counsel and Advocates,

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C. ; Member of the Bars of the District of Columbia and the State of California,

Mr. Paul W. Khan, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia

as Counsel

and

the United States of America,

represented by

Hon. Davis R. Robinson, Legal Adviser, United States Department of State,

as Agent and Counsel,

Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, United States Department of State,
Mr. Patrick M. Norton, Assistant Legal Adviser, United States Department of State,

as Deputy-Agents and Counsel,

Mr. Ted A. Borek, Assistant Legal Adviser, United States Department of State,
Mr. Myres S. McDougal, Sterling Professor of Law Emeritus, Yale University, Yale Law School, New Haven, Connecticut ; Distinguished Visiting Professor of Law, New York Law School, New York, New York,

Mr. John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, Charlottesville, Virginia,

Mr. Fred L. Morrison, Professor of Law, the Law School of the University of Minnesota, Minneapolis, Minnesota,
Mr. Stefan A. Riesenfeld, Professor of Law, University of California, School of Law, Berkeley, California, and Hastings College of the Law, San Francisco, California,
Mr. Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, Athens, Georgia ; Bemis Professor of International Law Emeritus, Harvard Law School, Cambridge, Massachusetts,

as Counsel,

Ms. Frances A. Armstrong, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Michael J. Danaher, Member of the Bar of the State of California,
Ms. Joan E. Donoghue, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Mary W. Ennis, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Peter M. Olson, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Jonathan B. Schwartz, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Jamison M. Selby, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. George Taft, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Gayle R. Teicher, Attorney-Adviser, Office of the Legal Adviser, United States, Department of State,

as Attorney-Advisers.

THE COURT,

composed as above,

delivers the following Judgment :

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of its Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By a letter from the United States Ambassador at The Hague to the Registrar dated 13 April 1984, and in the course of the oral proceedings held on the request by Nicaragua for the indication of provisional measures, the United States of America contended *(inter alia)* that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list. By an Order dated 10 May 1984, the Court rejected the request of the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed time-limits for the filing of a Memorial by the Republic of Nicaragua and a Counter-Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.

5. In the Memorial, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

6. On 15 August 1984, prior to the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. In a letter from the Agent of El Salvador dated 10 September 1984, which El Salvador requested should be considered as a part of its Declaration of Intervention, El Salvador stated that, if the Court were to find that it has jurisdiction and that the Application is admissible, it reserved the right "in a later substantive phase of the case to address the interpretation and application of the conventions to which it is a party relevant to that phase". Having been supplied with the written obser-

vations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the current phase of the proceedings.

7. On 8-10 and 15-18 October 1984 the Court held public sittings at which it was addressed by the following representatives of the Parties :

For Nicaragua :
H.E. Mr. Carlos Argüello Gómez,
Hon. Abram Chayes,
Mr. Ian Brownlie,
Mr. Paul S. Reichler,
Mr. Alain Pellet.

For the United States of America :
Hon. Davis R. Robinson,
Mr. Patrick M. Norton,
Mr. Myres McDougal,
Mr. Louis B. Sohn,
Mr. John Norton Moore.

8. In the course of the written proceedings the following Submissions were presented by the Parties :

On behalf of Nicaragua,

at the end of the Memorial :

"Nicaragua submits that:

A. The jurisdiction of the Court to entertain the dispute presented in the Application is established by the terms of the declaration of Nicaragua of 24 September 1929 under Article 36 (5) and the declaration of the United States of 14 August 1946 under Article 36 (2) of the Statute of the International Court of Justice.

B. Nicaragua's declaration of 24 September 1929 is in force as a valid and binding acceptance of the compulsory jurisdiction of the Court.

C. The attempt by the United States to modify or terminate the terms of its declaration of 14 August 1946 by a letter dated 6 April 1984 from Secretary of State George Shultz to the Secretary-General of the United Nations was ineffective to accomplish either result.

D. The Court has jurisdiction under Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 24 May 1958 over claims presented by this Application falling within the scope of the Treaty.

E. The Court is not precluded from adjudicating the legal dispute presented in the Application by any considerations of admissibility and the Application is admissible."

On behalf of the United States of America,

at the end of the Counter-Memorial :

"*May it please the Court,* on behalf of the United States of America, to adjudge and declare, for each and all of the foregoing reasons, that the

claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of this Court and (2) are inadmissible."

9. In the course of the oral proceedings the following Submissions were presented by the Parties :

On behalf of Nicaragua

(hearing of 10 October 1984) :

"Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua :

The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety."

On behalf of the United States of America,

(hearing of 16 October 1984) :

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Counter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984, (1) are not within the jurisdiction of the Court and (2) are inadmissible."

10. In accordance with Article 60, paragraph 2, of the Rules of Court, the two Parties communicated to the Court the written text of their final submissions as set out above.

* * *

11. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and paramilitary activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase the case concerns the jurisdiction of the Court to entertain and pronounce upon this dispute, and the admissibility of the Application by which it was brought before the Court. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits.

12. To found the jurisdiction of the Court in the present proceedings, Nicaragua in its Application relied on Article 36 of the Statute of the Court and the declarations, described below, made by the Parties accepting compulsory jurisdiction pursuant to that Article. In its Memorial, Nicaragua, relying on a reservation contained in its Application (para. 26) of the right to "supplement or to amend this Application", also contended that

the Court has jurisdiction under Article XXIV, paragraph 2, of a Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956.

13. Article 36, paragraph 2, of the Statute of the Court provides that :

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning :
>
> *(a)* the interpretation of a treaty ;
> *(b)* any question of international law ;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation ;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations, to be examined below, and expressed to

> "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration".

On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, signed by the United States Secretary of State, Mr. George Shultz, referring to the Declaration deposited on 26 August 1946, and stating that :

> "the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

This notification will be referred to, for convenience, as the "1984 notification".

14. In order to be able to rely upon the United States Declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a "State accepting the same obligation" within the meaning of Article 36, paragraph 2, of the Statute. For this purpose, Nicaragua relies on a

Declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. That Article provided that :

> "The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court"

in any of the same categories of dispute as listed in paragraph 2 of Article 36 of the Statute of the postwar Court, set out above. Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that :

> "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."

15. The circumstances of Nicaragua's Declaration of 1929 were as follows. The Members of the League of Nations (and the States mentioned in the Annex to the League of Nations Covenant) were entitled to sign the Protocol of Signature of the Statute of the Permanent Court of International Justice, which was drawn up at Geneva on 16 December 1920. That Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which read :

> *[Translation from the French]*
>
> "On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.
>
> Geneva, 24 September 1929.
>
> *(Signed)* T. F. MEDINA."

16. According to the documents produced by both Parties before the Court, on 4 December 1934, a proposal for the ratification of *(inter alia)* the Statute of the Permanent Court of International Justice and of the Protocol of Signature of 16 December 1920 was approved by the "Ejecutivo" (executive power) of Nicaragua. On 14 February 1935, the Senate of Nicaragua decided to ratify these instruments, its decision being published in *La Gaceta,* the Nicaraguan official journal, on 12 June 1935, and on 11 July 1935 the Chamber of Deputies of Nicaragua adopted a similar deci-

sion, similarly published on 18 September 1935. On 29 November 1939, the Ministry of External Relations of Nicaragua sent the following telegram to the Secretary-General of the League of Nations :

> "ESTATUTO Y PROTOCOLO CORTE PERMANENTE JUSTICIA INTERNACIONAL LA HAYA YA FUERON RATIFICADOS PUNTO ENVIARSELE OPORTUNAMENTE INSTRUMENTO RATIFICACION-RELACIONES."
>
> *[Translation]*
>
> (Statute and Protocol Permanent Court International Justice The Hague have already been ratified. Will send you in due course Instrument Ratification. Relations.)

The files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever despatched to Geneva. On 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification "dont le dépôt est nécessaire pour faire naître effectivement l'obligation" (the deposit of which is necessary to cause the obligation to come into effective existence). In the Nicaraguan Memorial, it was stated that "Nicaragua never completed ratification of the old Protocol of Signature" ; at the hearings, the Agent of Nicaragua explained that the records are very scanty, and he was therefore unable to certify the facts one way or the other. He added however that if instruments of ratification were sent, they would most likely have been sent by sea, and, the Second World War being then in progress, the attacks on commercial shipping may explain why the instruments appear never to have arrived. After the war, Nicaragua took part in the United Nations Conference on International Organization at San Francisco and became an original Member of the United Nations, having ratified the Charter on 6 September 1945 ; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

17. On the basis of these facts, the United States contends, first, that Nicaragua never became a party to the Statute of the Permanent Court of International Justice, and that accordingly it could not and did not make an effective acceptance of the compulsory jurisdiction of the Permanent Court ; the 1929 acceptance was therefore not "still in force" within the meaning of the English version of Article 36, paragraph 5, of the Statute of the present Court. In the contention of the United States, the expression in the French version of the Statute corresponding to "still in force" in the English text, namely "pour une durée qui n'est pas encore expirée", also requires that a declaration be binding under the Statute of the Permanent Court in order to be deemed an acceptance of the jurisdiction of the present Court under Article 36, paragraph 5, of its Statute.

18. Nicaragua does not contend that its 1929 Declaration was in itself

sufficient to establish a binding acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for which it would have been necessary that Nicaragua complete the ratification of the Protocol of Signature of the Statute of that Court. It rejects however the interpretation of Article 36, paragraph 5, of the Statute of the present Court advanced by the United States : Nicaragua argues that the phrase "which are still in force" or "pour une durée qui n'est pas encore expirée" was designed to exclude from the operation of the Article only declarations that had already expired, and has no bearing whatever on a declaration, like Nicaragua's, that had not expired, but which, for some reason or another, had not been perfected. Consistently with the intention of the provision, which in Nicaragua's view was to continue the pre-existing situation as regards declarations of acceptance of compulsory jurisdiction, Nicaragua was in exactly the same situation under the new Statute as it was under the old. In either case, ratification of the Statute of the Court would perfect its Declaration of 1929. Nicaragua contends that the fact that this is the correct interpretation of the Statute is borne out by the way in which the Nicaraguan declaration was handled in the publications of the Court and of the United Nations Secretariat ; by the conduct of the Parties to the present case, and of the Government of Honduras, in relation to the dispute in 1957-1960 between Honduras and Nicaragua in connection with the arbitral award made by the King of Spain in 1906, which dispute was eventually determined by the Court ; by the opinions of publicists ; and by the practice of the United States itself.

19. With regard to Nicaragua's reliance on the publications of the Court, it may first be noted that in the Sixteenth Report (the last) of the Permanent Court of International Justice, covering the period 15 June 1939 to 31 December 1945, Nicaragua was included in the "List of States having signed the Optional Clause" (p. 358), but it was recorded on another page (p. 50) that Nicaragua had not ratified the Protocol of Signature of the Statute, and Nicaragua was not included in the list of "States bound by the Clause" (i.e., the Optional Clause) on the same page. The first *Yearbook,* that for 1946-1947, of the present Court contained (p. 110) a list entitled "Members of the United Nations, other States parties to the Statute and States to which the Court is open. (An asterisk denotes a State bound by the compulsory jurisdiction clause)", and Nicaragua was included in that list, with an asterisk against it, and with a footnote (common to several States listed) reading "Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, 5, of Statute of the present Court)". On another page (p. 210), the text of Nicaragua's 1929 Declaration was reproduced, with the following footnote :

> "According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice

> (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry."

The *Yearbook 1946-1947* also includes a list (p. 221) entitled "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 (Article 36 of the Statute of the International Court of Justice)" and this list includes Nicaragua (with a footnote cross-reference to the page where its 1929 Declaration is reproduced).

20. Subsequent *Yearbooks* of the Court, up to and including *I.C.J. Yearbook 1954-1955,* list Nicaragua among the States with regard to which there were "in force" declarations of acceptance of the compulsory jurisdiction of the Court, made in accordance with the terms either of the Permanent Court of International Justice Statute or of the Statute of the present Court (see, e.g., *Yearbook 1954-1955,* p. 39) ; however, a reference was also given to the page of the *Yearbook 1946-1947* at which the text of Nicaragua's 1929 Declaration was printed (*ibid.,* p. 187). Nicaragua also continued to be included in the list of States recognizing compulsory jurisdiction (*ibid.,* p. 195). In the *Yearbook 1955-1956,* the reference to Nicaragua in this list (p. 195) had a footnote appended to it reading as follows :

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

A note to the same effect has been included in subsequent *Yearbooks* up to the present time.

21. In 1968 the Court began the practice, which has continued up to the present time, of transmitting a *Report* to the General Assembly of the United Nations for the past year. Each of these *Reports* has included a paragraph recording the number of States which recognize the jurisdiction of the Court as compulsory, and Nicaragua has been mentioned among these. For a number of years the paragraph referred to such States as having so recognized the Court's jurisdiction "in accordance with declarations filed under Article 36, paragraph 2, of the Statute". No reference has been made in these *Reports* to the issue of ratification of the Protocol of Signature of the Statute of the Permanent Court.

22. Nicaragua also places reliance on the references made to it in a number of publications issued by the Secretariat of the United Nations, all of which include it as a State whose declaration of acceptance of the jurisdiction of the Permanent Court has attracted the operation of Article 36, paragraph 5, of the Statute of the present Court. These publications are

the Second *Annual Report* of the Secretary-General to the General Assembly ; the annual volume entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary* ; the *Yearbook* of the United Nations ; and certain ancillary official publications.

23. The United States contention as to these publications is, as to those issued by the Registry of the Court, that the Registry took great care not to represent any of its listings as authoritative ; the United States draws attention to the caveat in the Preface to the *I.C.J. Yearbook* that it "in no way involves the responsibility of the Court", to the footnotes quoted in paragraphs 19 and 20 above, and to a disclaimer appearing for the first time in the *Yearbook 1956-1957* (p. 207) reading as follows :

> "The texts of declarations set out in this Chapter are reproduced for convenience 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."

It concludes that it is clear that successive Registrars and the *Yearbooks* of the Court never adopted, and indeed expressly rejected, Nicaragua's contention as to the effect of Article 36, paragraph 5, of the Statute. So far as the United Nations publications are concerned, the United States points out that where they cite their source of information, they invariably refer to the *I.C.J. Yearbook,* and none of them purport to convey any authority.

*

24. In order to determine whether the provisions of Article 36, paragraph 5, can have applied to Nicaragua's Declaration of 1929, the Court must first establish the legal characteristics of that declaration and then compare them with the conditions laid down by the text of that paragraph.

25. So far as the characteristics of Nicaragua's declaration are concerned, the Court notes that, at the time when the question of the applicability of the new Statute arose, that is, on its coming into force, that declaration was certainly valid, for under the system of the Permanent Court of International Justice a declaration was valid on condition that it had been made by a State "either when signing or ratifying" the Protocol of Signature of the Statute "or at a later moment", whereas under the present Statute, declarations under Article 36, paragraph 2, can only be made by "States parties to the present Statute". Since Nicaragua had signed that Protocol, its declaration concerning the compulsory jurisdiction of the Permanent Court, which was not subject to ratification, was undoubtedly

valid from the moment it was received by the Secretary-General of the League of Nations (cf. *Right of Passage over Indian Territory, I.C.J. Reports 1957*, p. 146). The Statute of the Permanent Court did not lay down any set form or procedure to be followed for the making of such declarations, and in practice a number of different methods were used by States. Nevertheless this declaration, though valid, had not become binding under the Statute of the Permanent Court. It may be granted that the necessary steps had been taken at national level for ratification of the Protocol of Signature of the Statute. But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations. It did announce that the instrument would be sent : but there is no evidence to show whether it was. Even after having been duly informed, by the Acting Legal Adviser of the League of Nations Secretariat, of the consequences that this might have upon its position vis-à-vis the jurisdiction of the Permanent Court, Nicaragua failed to take the one step that would have easily enabled it to be counted beyond question as one of the States that had recognized the compulsory jurisdiction of the Permanent Court of International Justice. Nicaragua has in effect admitted as much.

26. The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty. Consequently 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.

27. However, while the declaration had not acquired binding force, it is not disputed that it could have done so, for example at the beginning of 1945, if Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court. The correspondence brought to the Court's attention by the Parties, between the Secretariat of the League of Nations and various Governments including the Government of Nicaragua, leaves no doubt as to the fact that, at any time between the making of Nicaragua's declaration and the day on which the new Court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of the 1929 Declaration into a binding commitment ; no one would have asked Nicaragua to make a new declaration. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. This durability of potential effect flowed from a certain characteristic of Nicaragua's declaration : being made "unconditionally", it was valid for an unlimited period. Had it provided, for example, that it would apply for only five years to disputes arising after its signature, its potential effect would admittedly have disappeared as from 24 September 1934. In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court ; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.

28. The characteristics of Nicaragua's declaration have now to be compared with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. The first condition concerns the relationship between the declarations and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by States parties to the Statute of the Permanent Court : it is sufficient for them to have been made "under" (in French, "en application de") Article 36 of that Statute. But those who framed the new text were aware that under that Article, a State could make such a declaration "either when signing or ratifying the Protocol . . . or at a later moment", i.e., that a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua's declaration. Apart from this relationship with the Statute of the Permanent Court, the only condition which declarations have to fulfil is that they should be "still in force" (in English) or "faites pour une durée qui n'est pas encore expirée" (in French). The Parties have devoted much argument to this apparent discrepancy between the two versions, its real meaning and the interpretation which the Court should adopt as correct. Drawing opposite conclusions from the jurisprudence of the Court, as contained in particular in the case concerning the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria),* they have expatiated on the respective arguments by which, they allege, it supports their own case.

29. The Court must in the first place observe that this is the first time that it has had to take a position on the question whether a declaration which did not have binding force at the time of the Permanent Court is or is not to be numbered among those to which Article 36, paragraph 5, of the Statute of the International Court of Justice applies. The case of the *Aerial Incident of 27 July 1955* featured quite a different issue – in a nutshell, whether the effect of a declaration that had unquestionably become binding at the time of the Permanent Court could be transposed to the International Court of Justice when the declaration in question had been made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court. In view of this difference in the issues, the Court does not consider that its decision in the *Aerial Incident* case, whatever may be its relevance in other respects, provides any pointers to precise conclusions on the limited point now in issue. The most that could be pointed out on the basis of the discussions surrounding the *Aerial Incident* case is that, at that time, the United States took a particularly broad view of the separability of an Optional-Clause declaration and its institutional foundation by contending that an Optional-Clause declaration (of a binding character) could have outlived by many years the court to which it related. But the present case also involves a problem of separability, since the question to be decided is the extent to which an Optional-Clause declaration (without binding force) can be separated

from the institutional foundation which it ought originally to have possessed, so as to be grafted onto a new institutional foundation.

30. Having thus stressed the novelty of the problem, the Court will refer to the following considerations in order to reach a solution. First, it does not appear possible to reconcile the two versions of Article 36, paragraph 5, by considering that both versions refer to binding declarations. According to this interpretation, upheld by the United States, Article 36, paragraph 5, should be read as if it mentioned "binding" declarations. The French text, in this view, would be the equivalent of the English text, for logically it would imply that declarations *dont la durée n'est pas encore expirée* are solely those which have acquired binding force. The Court, however, considers that it must interpret Article 36, paragraph 5, on the basis of the actual terms used, which do not include the word "binding". According to the *travaux préparatoires* the word "binding" was never suggested ; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded. Furthermore, the Court does not consider the French text to imply that *la durée non expirée* (the unexpired period) is that of a commitment of a binding character. It may be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence. But this effect does not necessarily have to be of a binding nature. A declaration validly made under Article 36 of the Statute of the Permanent Court had a certain validity which could be preserved or destroyed, and it is perfectly possible to read the French text as implying only this validity.

31. Secondly, the Court cannot but be struck by the fact that the French Delegation at the San Francisco Conference called for the expression "still in force" to be translated, not by "encore en vigueur" but by the term : "pour une durée qui n'est pas encore expirée". In view of the excellent equivalence of the expressions "encore en vigueur" and "still in force", the deliberate choice of the expression "pour une durée qui n'est pas encore expirée" seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force. Other interpretations of this proposal are not excluded, but it may be noted that both "encore en vigueur" and "pour une durée qui n'est pas encore expirée" would exclude a declaration, like that of France, which had been binding but which had expired by lapse of time. It can only be said, on the other hand, that the English version does not require (any more than does the French version) that the declarations concerned should have been made by States parties to the Statute of the Permanent Court and does not mention the necessity of declarations having any binding character for the provision to be applicable to them. It is therefore the Court's opinion that the English version in no way expressly excludes a valid

declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of a binding character.

32. The Court will therefore, before deciding on its interpretation, have to examine to what extent the general considerations governing the transfer of the powers of the former Court to the new one, and thus serving to define the object and the purpose of the provisions adopted, throw light upon the correct interpretation of the paragraph in question. As the Court has already had occasion to state in the case of the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria),* the primary concern of those who drafted the Statute of the present Court was to maintain the greatest possible continuity between it and its predecessor. As the Court then observed :

> "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" (*I.C.J. Reports 1959,* p. 145).

33. In the present case, the Parties, in their pleadings and in the course of the hearings, have drawn attention to certain statements bearing witness to this general preoccupation ; for example the report to his Government of the Chairman of the New Zealand delegation to the San Francisco Conference, who stressed that the primary concern had been "to maintain so far as possible the progress towards compulsory jurisdiction". If, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. That being so, the question is whether this intention sheds any light upon the present problem of interpretation of Article 36, paragraph 5.

34. In this connection it is undeniable that a declaration by which a State recognizes the compulsory jurisdiction of the Court is "in existence", in the sense given above, and that each such declaration does constitute a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes. Admittedly, this progress has not yet taken the concrete form of a commitment having binding force, but nonetheless, it is by no means negligible. There are no grounds for maintaining that those who drafted the Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. No doubt their main aim was to safeguard these latter declarations, but the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would certainly not square well with their general concern. As the Court said in the very similar matter of the already existing field of conventional compulsory jurisdiction, it was "a natural element of this compromise"

(then accepted by comparison with the ideal of universal compulsory jurisdiction) "that the maximum, and not some merely quasi optimum preservation of this field should be aimed at" (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964,* p. 32). Furthermore, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one which they in fact adopted.

35. On the other hand, the logic of a system substituting a new Court for the former one without the cause of compulsory jurisdiction in any way suffering in the process resulted in the ratification of the new Statute having exactly the same effects as the ratification of the Protocol of Signature of the former one would have had, that is to say, in the case of Nicaragua, the step from potential commitment to effective commitment. The general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection, it should not be overlooked that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the Charter of the United Nations. At that time, the consent which it had given in 1929 to the jurisdiction of the Permanent Court had not become fully effective in the absence of ratification of the Protocol of Signature ; but taking into account the interpretation given above, the Court may apply to Nicaragua what it stated in the case of the *Aerial Incident* of 27 July 1955:

> "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." (*I.C.J. Reports 1959,* p. 142.)

36. This finding as regards the interpretation of Article 36, paragraph 5, must, finally, be compared to the conduct of States and international organizations in regard to this interpretation. In that respect, particular weight must be ascribed to certain official publications, namely the *I.C.J. Yearbook* (since 1946-1947), the *Reports* of the Court to the General Assembly of the United Nations (since 1968) and 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.* The Court notes that, ever since they first appeared, all these publications have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. Even if the *I.C.J. Yearbook* has, in the issue for 1946-1947 and as from the issue for 1955-1956 onwards, contained a note recalling certain facts concerning Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, this publication has never modi-

fied the classification of Nicaragua or the binding character attributed to its 1929 Declaration – indeed the *Yearbooks* list Nicaragua among the States "still bound by" their declarations under Article 36 of the Statute of the Permanent Court (see paragraph 19, above). The same observation is valid for the Secretariat publication *Signatures, Ratifications, Acceptances, Accessions, etc.*, which derived its data, including footnotes, from the *I.C.J. Yearbook*. As for the reports of the Court, they are quite categorical in stating that Nicaragua had accepted compulsory jurisdiction, even if the distinction between acceptances made under Article 36, paragraph 2, and those "deemed" to be such acceptances, is not spelled out.

37. The Court has no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article). Admittedly, this testimony concerns only the result and not the legal reasoning that leads to it. However, the inclusion of Nicaragua in the "List of States which have recognized the compulsory jurisdiction of the International Court of Justice, or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice", as from the appearance of the first *I.C.J. Yearbook* (1946-1947), contrasts with its exclusion from the list in the last Report of the Permanent Court of International Justice of "States bound by the [optional] clause". It is therefore difficult to escape the conclusion that the basis of this innovation was to be found in the possibility that a declaration which, though not of binding character, was still valid, and was so for a period that had not yet expired, permitted the application of Article 36, paragraph 5, so long as the State in question, by ratifying the Statute of the International Court of Justice, provided it with the institutional foundation that it had hitherto lacked. From that moment on, Nicaragua would have become "bound" by its 1929 Declaration, and could, for practical purposes, appropriately be included in the same *Yearbook* list as the States which had been bound even prior to the coming into force of the post-war Statute.

38. The importance of this lies in the significance to be attached to the conduct of the States concerned, which is dependent on the testimony thus furnished by these publications. The point is not that the Court in its administrative capacity took a decision as to Nicaragua's status which would be binding upon it in its judicial capacity, since this clearly could not be so. It is that the listing found appropriate for Nicaragua amounted over the years to a series of attestations which were entirely official and public, and extremely numerous, and ranged over a period of nearly 40 years ; and that hence the States concerned – first and foremost, Nicaragua – had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36, paragraph 5, to the Nicaraguan Declaration of 1929.

39. Admittedly, Nicaragua itself, according to the information furnished to the Court, did not at any moment explicitly recognize that it was bound by its recognition of the Court's compulsory jurisdiction, but neither did it deny the existence of this undertaking. The Court notes that Nicaragua, even if its conduct in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* was not unambiguous, did not at any time declare that it was not bound by its 1929 Declaration. Having regard to the public and unchanging nature of the official statements concerning Nicaragua's commitment under the Optional-Clause system, the silence of its Government can only be interpreted as an acceptance of the classification thus assigned to it. It cannot be supposed that that Government could have believed that its silence could be tantamount to anything other than acquiescence. Besides, the Court would remark that if proceedings had been instituted against Nicaragua at any time in these recent years, and it had sought to deny that, by the operation of Article 36, paragraph 5, it had recognized the compulsory jurisdiction of the Court, the Court would probably have rejected that argument. But the Court's jurisdiction in regard to a particular State does not depend on whether that State is in the position of an Applicant or a Respondent in the proceedings. If the Court considers that it would have decided that Nicaragua would have been bound in a case in which it was the Respondent, it must conclude that its jurisdiction is identically established in a case where Nicaragua is the Applicant.

40. As for States other than Nicaragua, including those which could be supposed to have the closest interest in that State's legal situation in regard to the Court's jurisdiction, they have never challenged the interpretation to which the publications of the United Nations bear witness and whereby the case of Nicaragua is covered by Article 36, paragraph 5. Such States as themselves publish lists of States bound by the compulsory jurisdiction of the Court have placed Nicaragua on their lists. Of course, the Court is well aware that such national publications simply reproduce those of the United Nations where that particular point is concerned. Nevertheless, it would be difficult to interpret the fact of such reproduction as signifying an objection to the interpretation thus given ; on the contrary, this reproduction contributes to the generality of the opinion which appears to have been cherished by States parties to the Statute as regards the applicability to Nicaragua of Article 36, paragraph 5.

41. Finally, what States believe regarding the legal situation of Nicaragua so far as the compulsory jurisdiction of the Court is concerned may emerge from the conclusions drawn by certain governments as regards the possibility of obliging Nicaragua to appear before the Court or of escaping any proceedings it may institute. The Court would therefore recall that in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* Honduras founded its application both on a special agreement, the Washington Agreement, and on Nicaragua's Optional-Clause declaration. It is also difficult for the Court not to consider that the United States letter of 6 April 1984 implies that at that date the United States, like

other States, believed that Nicaragua was bound by the Court's jurisdiction in accordance with the terms of its 1929 Declaration.

42. The Court thus finds that the interpretation whereby the provisions of Article 36, paragraph 5, cover the case of Nicaragua has been confirmed by the subsequent conduct of the parties to the treaty in question, the Statute of the Court. However, the conduct of States which has been considered has been in relation to publications of the Court and of the United Nations Secretariat which, as noted in paragraph 37 above, do not indicate the legal reasoning leading to the conclusion that Nicaragua fell within the category of States to whose declarations Article 36, paragraph 5, applied. The view might have been taken that that paragraph applied because the Nicaraguan telegram of 29 November 1929 in itself constituted ratification of the Protocol of Signature. It should therefore be observed that the conduct of Nicaragua in relation to the publications in question also supports a finding of jurisdiction under Article 36, paragraph 2, of the Statute independently of the interpretation and effect of paragraph 5 of that Article.

43. Nicaragua has in fact also contended that the validity of Nicaragua's recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties. The argument is that Nicaragua's conduct over a period of 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court by way of a recognition of the application of Article 36, paragraph 5, of the Statute to the Nicaraguan Declaration of 1929. Likewise the conduct of the United States over a period of 38 years unequivocally constitutes its recognition of the essential validity of the Declaration of Nicaragua of 1929 as a result of the application of Article 36, paragraph 5, of the Statute. As a consequence it was recognized by both Parties that any formal defect in Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court did not in any way affect the essential validity of Nicaragua's consent to the compulsory jurisdiction. The essential validity of the Nicaraguan declaration as an acceptance of the compulsory jurisdiction is confirmed by the evidence of a long series of public documents, by the general opinion of States and by the general opinion of qualified publicists.

44. The United States however objects that this contention of Nicaragua is flatly inconsistent with the Statute of the Court, which provides only for consent to jurisdiction to be manifested in specified ways ; an "independent title of jurisdiction, as Nicaragua calls it, is an impossibility". The Statute provides the sole bases on which the Court can exercise jurisdiction, under Articles 36 and 37. In the particular case of Article 36, paragraph 5, the Statutes of the two Courts provide a means for States to express their consent, and Nicaragua did not use them. The United States urges what it describes as policy considerations of fundamental importance : that compulsory jurisdiction, being a major obligation, must be based on the clearest manifestation of the State's intent to accept it ; that

Nicaragua's thesis introduces intolerable uncertainty into the system ; and that that thesis entails the risk of consenting to compulsory jurisdiction through silence, with all the harmful consequences that would ensue. The United States also disputes the significance of the publications and conduct on which Nicaragua bases this contention.

45. The Court would first observe that, as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, *inter alia*, the case concerning the *Temple of Preah Vihear*. On that occasion it stated : "The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute." (*I.C.J. Reports 1961*, p. 31.)

46. The Court must enquire whether Nicaragua's particular circumstances afford any reason for it to modify the conclusion it then reached. After all, the reality of Nicaragua's consent to be bound by its 1929 Declaration is, as pointed out above, attested by the absence of any protest against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States. The question is therefore whether, even if the consent of Nicaragua is real, the Court can decide that it has been given valid expression even on the hypothesis that the 1929 Declaration was without validity, and given that no other declaration has been deposited by Nicaragua since it became a party to the Statute of the International Court of Justice. In this connection the Court notes that Nicaragua's situation has been wholly unique, in that it was the publications of the Court itself (since 1947, the *I.C.J. Yearbook* ; since 1968, the *Reports* to the General Assembly of the United Nations), and those of the Secretary-General (as depositary of the declarations under the Statute of the present Court) which affirmed (and still affirm today, for that matter) that Nicaragua had accomplished the formality in question. Hence, if the Court were to object that Nicaragua ought to have made a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.

47. The Court therefore recognizes that, so far as the accomplishment of the formality of depositing an optional declaration is concerned, Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a

State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting "the same obligation" under that Article.

* * *

48. The United States, however, further contends that even if Nicaragua is otherwise entitled to invoke against the United States the jurisdiction of the Court under Article 36, paragraphs 2 and 5, of the Statute, Nicaragua's conduct in relation to the United States over the course of many years estops Nicaragua from doing so. Having, it is argued, represented to the United States that it was not itself bound under the system of the Optional Clause, Nicaragua is estopped from invoking compulsory jurisdiction under that clause against the United States. The United States asserts that since 1943 Nicaragua has consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and when the occasion arose that this was material to the United States diplomatic activities, the United States relied upon those Nicaraguan representations.

49. The representations by Nicaragua relied on by the United States were as follows. First, in 1943, the United States Ambassador to Nicaragua consulted the Nicaraguan Foreign Minister on the question whether the Protocol of Signature of the Statute of the Permanent Court had been ratified by Nicaragua. According to a despatch from the Ambassador to Washington, a decree of July 1935 signed by the President of Nicaragua, mentioning the approval of the ratification by the Senate and Chamber of Deputies, was traced, as was a copy of the telegram to the Secretariat of the League of Nations dated 29 November 1939 (see paragraph 16, above). The decree stated that it was to become effective on the date of its publication in *La Gaceta*. The Ambassador informed his Government that :

> "The Foreign Minister informs me that the decree was never published in *La Gaceta*. He also declared that there is no record to the instrument of ratification having been transmitted to Geneva. It would appear that, while appropriate legislative action was taken in Nicaragua to approve adherence to the Protocol, Nicaragua is not legally bound thereby, in as much as it did not deposit its official document of ratification with the League of Nations."

According to the United States, the United States and Nicaragua could

only have understood at that point in time that Nicaragua was not bound by the Optional Clause, and that understanding never changed.

50. Secondly, in 1955-1958 there was diplomatic contact between Honduras, Nicaragua and the United States over the dispute which was eventually determined by the Court as the case of the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960,* p. 192). One of the questions then under examination was whether Honduras would be entitled to institute proceedings against Nicaragua in reliance upon the 1929 Declaration and Article 36, paragraph 5, of the Statute, and in this connection the Government of Honduras requested the good offices of the Government of the United States. In a conversation between the Nicaraguan Ambassador in Washington and United States officials on 21 December 1955, "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", and the Ambassador was recorded to have "indicated that an agreement between the two countries would have to be reached to overcome this difficulty". The United States interprets this as a statement of Nicaragua's understanding that it was not bound by the Optional Clause. Further, on 2 March 1956 the Ambassador is alleged to have observed that there was

> "some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of the Court's jurisdiction was never sent".

It is contended that the United States relied on these representations by Nicaragua ; the United States has produced documents to support the claims that the entire premise of United States diplomatic efforts was that Nicaragua was not a party to the Optional Clause, and observes that in the eventual proceedings before the Court between Nicaragua and Honduras, Nicaragua manifested its hostility to the compulsory jurisdiction of the Court. Nicaragua has made no direct reply to the United States argument of estoppel, which was only fully developed during the oral proceedings ; however, the position of Nicaragua as to its own conduct is, as indicated above, that so far from having represented that it was not bound by the Optional Clause, on the contrary its conduct unequivocally constituted consent to be so bound.

51. For the same reason, the Court does not need to deal at length with the contention based on estoppel. The Court has found that the conduct of Nicaragua, having regard to the very particular circumstances in which it was placed, was such as to evince its consent to be bound in such a way as to constitute a valid mode of acceptance of jurisdiction (paragraph 47, above). It is thus evident that the Court cannot regard the information obtained by the United States in 1943, or the doubts expressed in diplomatic contacts in 1955, as sufficient to overturn that conclusion, let alone to support an estoppel. Nicaragua's contention that since 1946 it has consistently maintained that it is subject to the jurisdiction of the Court, is

supported by substantial evidence. Furthermore, as the Court pointed out in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969,* p. 26), estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice. The Court cannot regard Nicaragua's reliance on the optional clause as in any way contrary to good faith or equity : nor can Nicaragua be taken to come within the criterion of the *North Sea Continental Shelf* case, and the invocation of estoppel by the United States of America cannot be said to apply to it.

* * *

52. The acceptance of jurisdiction by the United States which is relied on by Nicaragua is, as noted above, that dated 14 August 1946. The United States contends however that effect must also be given to the "1984 notification" – the declaration deposited with the Secretary-General of the United Nations on 6 April 1984. It is conceded by Nicaragua that if this declaration is effective as a modification or termination of the Declaration of 14 August 1946, and valid as against Nicaragua at the date of its filing of the Application instituting the present proceedings (9 April 1984), then the Court is without jurisdiction to entertain those proceedings, at least under Article 36, paragraphs 2 and 5, of the Statute. It is however contended by Nicaragua that the 1984 notification is ineffective because international law provides no basis for unilateral modification of declarations made under Article 36 of the Statute of the Court, unless a right to do so has been expressly reserved.

53. The United States insists that the effect of the 1984 notification was a modification and not a termination of its 1946 Declaration. It argues that, notwithstanding the fact that its 1946 Declaration did not expressly reserve a right of modification (as do the declarations made under Article 36 by a number of other States), the 1984 notification effected a valid modification of the 1946 Declaration temporarily suspending the consent of the United States to the adjudication of the claims of Nicaragua. For the United States, declarations under Article 36 are *sui generis,* are not treaties, and are not governed by the law of treaties, and States have the sovereign right to qualify an acceptance of the Court's compulsory jurisdiction, which is an inherent feature of the Optional-Clause system as reflected in, and developed by, State practice. It is suggested that the Court has recognized the existence of an inherent, extra-statutory, right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing of an Application. The United States also draws attention to the fact that its declaration dates from 1946, since when, it

asserts, fundamental changes have occurred in State practice under the Optional Clause, and argues that to deny a right of modification to a State which had, in such an older declaration, not expressly reserved such a right would be inequitable and unjustified in the light of those changes in State practice.

54. Nicaragua argues further, in the alternative, that the 1984 notification may be construed as a purported termination of the United States Declaration of 1946 and, in effect, the substitution of a new declaration, and that such an attempt at termination is likewise ineffective. As noted in paragraph 13 above, the 1946 Declaration was to remain in force "for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration". Accordingly, if the 1984 notification constituted a termination of the 1946 Declaration (whether or not accompanied in effect by the making of a revised declaration) it could only take effect on 6 October 1984, and was as yet ineffective when the Application of Nicaragua was filed on 9 April 1984. Both Parties apparently recognize that a modification of a declaration which only takes effect after the Court has been validly seised does not affect the Court's jurisdiction : as the Court found in the *Nottebohm* case,

> "Once the Court has been regularly seised, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible" (*I.C.J. Reports 1953,* p. 122),

and the same reasoning applies to a supervening withdrawal or modification of a declaration.

55. The first answer given by the United States to this contention of Nicaragua is that the 1984 notification was, on its face, not a "termination", and the six months' notice proviso was accordingly inapplicable. However, in the view of the United States, even if it be assumed for the sake of argument that the six months' notice proviso was applicable to the 1984 notification, the modification made by that letter was effective vis-à-vis Nicaragua, even if not effective *erga omnes.* As already explained, one contention of the United States in relation to its own Declaration of 1946 is that States have a sovereign, inherent, extra-statutory right to modify at any time declarations made under Article 36 of the Statute in any manner not inconsistent with the Statute (paragraph 53, above). Similarly Nicaragua's 1929 Declaration, being indefinite in duration, not unlimited, is subject to a right of immediate termination, without previous notice by Nicaragua. The United States, on the other hand, while enjoying the inherent right of unilateral modification of its declaration, has bound itself

by the proviso in its 1946 Declaration to terminate that declaration only on six months' notice. On this basis, the United States argues that Nicaragua has not accepted "the same obligation" (for the purposes of Art. 36, para. 2, of the Statute) as the United States six months' notice proviso, and may not therefore oppose that proviso as against the United States. According to the United States contention, the principles of reciprocity, mutuality and equality of States before the Court permit the United States to exercise the right of termination with the immediate effect implicitly enjoyed by Nicaragua, regardless of the six months' notice proviso in the United States Declaration. The United States does not claim on this ground to exercise such a right of immediate termination *erga omnes,* but it does claim to exercise it vis-à-vis Nicaragua.

56. Nicaragua first denies that declarations under Article 36 are always inherently terminable ; the general view is said to be that declarations which contain no provision for termination continue in force indefinitely, in contractual terms ; the question how far they may be terminable is governed by the principles of the law of treaties applicable to consensual legal relations arising within the system of the Optional Clause. Nicaragua concludes that its declaration was made without limit of time, and that there can be no legal justification for the view that it is subject to unilateral modification. The thesis that Nicaragua has not accepted "the same obligation" as the United States is, Nicaragua suggests, completely baseless. So far as reciprocity is concerned, Nicaragua concludes from its examination of the views of publicists that reciprocity is *ex hypothesi* inapplicable to time-limits, as opposed to express reservations reserving the power to modify or terminate declarations, and that in respect of such express reservations reciprocity can only operate when a specific act of modification or termination is notified by virtue of the express reservation.

57. The terms of the 1984 notification, introducing substantial changes in the United States Declaration of Acceptance of 1946, have been quoted above ; they constitute an important element for the development of the Court's reasoning. The 1984 notification has two salient aspects : on the one hand it states that the 1946 Declaration of acceptance shall not apply to disputes with any Central American State or arising out of or related to events in Central America ; on the other hand it states that it is to take effect immediately, notwithstanding the terms of the 1946 Declaration, and is to remain in force for two years.

58. The argument between the Parties as to whether the 1984 notification should be categorized as a modification or as a termination of the 1946 Declaration appears in fact to be without consequence for the purpose of this Judgment. The truth is that it is intended to secure a partial and temporary termination, namely to exempt, with immediate effect, the United States from the obligation to subject itself to the Court's jurisdiction with regard to any application concerning disputes with Central

American States, and disputes arising out of events in Central America. Counsel for the United States during the hearings claimed that the notification was equally valid against Nicaragua whether it was regarded as a "modification" or as a "termination" of the Acceptance Declaration.

59. Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date ; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it. However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases. In the *Nuclear Tests* cases the Court expressed its position on this point very clearly :

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration." (*I.C.J. Reports 1974*, p. 267, para. 43 ; p. 472, para. 46.)

60. In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role ; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the *Nuclear Tests* cases :

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." (*Ibid.*, p. 268, para. 46 ; p. 473, para. 49.)

61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months' notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-à-vis other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.

62. The United States has argued that the Nicaraguan 1929 Declaration, being of undefined duration, is liable to immediate termination, without previous notice, and that therefore Nicaragua has not accepted "the same obligation" as itself for the purposes of Article 36, paragraph 2, and consequently may not rely on the six months' notice proviso against the United States. The Court does not however consider that this argument entitles the United States validly to act in non-application of the time-limit proviso included in the 1946 Declaration. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions. As the Court observed in the *Interhandel* case :

> "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other party, Switzerland, has not included in its own Declaration." (*I.C.J. Reports 1959,* p. 23.)

The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six months' notice against the United States – not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it.

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if

reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined : it need only be observed that from 6 to 9 April would not amount to a "reasonable time".

64. The Court would also recall that in previous cases in which it has had to examine the reciprocal effect of declarations made under the Optional Clause, it has determined whether or not the "same obligation" was in existence at the moment of seising of the Court, by comparing the effect of the provisions, in particular the reservations, of the two declarations at that moment. The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seised. The United States argument attributes to the concept of reciprocity, as embodied in Article 36 of the Statute, especially in paragraphs 2 and 3, a meaning that goes beyond the way in which it has been interpreted by the Court, according to its consistent jurisprudence. That jurisprudence supports the view that a determination of the existence of the "same obligation" requires the presence of two parties to a case, and a defined issue between them, which conditions can only be satisfied when proceedings have been instituted. In the case of *Right of Passage over Indian Territory*, the Court observed that

> "when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations" (*I.C.J. Reports 1957*, p. 143).

> "It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding." (*Ibid.*, p. 144.)

The coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings. The Court has then to ascertain whether, at that moment, the two

States accepted "the same obligation" in relation to the subject-matter of the proceedings ; the possibility that, prior to that moment, the one enjoyed a wider right to modify its obligation than did the other, is without incidence on the question.

65. In sum, the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation.

* *

66. The conclusion just reached renders it unnecessary for the Court to pass upon a further reason advanced by Nicaragua for the ineffectiveness of the 1984 notification. An acceptance of the compulsory jurisdiction of the Court, governed in many respects by the principles of treaty law, cannot, Nicaragua argues, be contracted or varied by a mere letter from the United States Secretary of State. Drawing attention to the provisions of the Constitution of the United States as to the power of making treaties, Nicaragua contends that the 1984 notification is, as a matter of United States law, a nullity, and is equally invalid under the principles of the law of treaties, because it was issued in manifest violation of an internal rule of law of fundamental importance (cf. Art. 46 of the Vienna Convention on the Law of Treaties). However, since the Court has found that, even assuming that the 1984 notification is otherwise valid and effective, its operation remains subject to the six months' notice stipulated in 1946, and hence it is inapplicable in this case, the question of the effect of internal constitutional procedures on the international validity of the notification does not have to be determined.

* * *

67. The question remains to be resolved whether the United States Declaration of 1946, though not suspended in its effects vis-à-vis Nicaragua by the 1984 notification, constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States has invoked proviso *(c)* to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

> "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".

This reservation will be referred to for convenience as the "multilateral treaty reservation". Of the two remaining provisos to the declaration, it has not been suggested that proviso *(a)*, referring to disputes the solution of which is entrusted to other tribunals, has any relevance to the present case. As for proviso *(b)*, excluding jurisdiction over "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", the United States has informed the Court that it has determined not to invoke this proviso, but "without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court".

68. The United States points out that Nicaragua relies in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on 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. In so far as the dispute brought before the Court is thus one "arising under" those multilateral treaties, since the United States has not specially agreed to jurisdiction here, the Court may, it is claimed, exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. The United States explains the rationale of its multilateral treaty reservation as being that it protects the United States and third States from the inherently prejudicial effects of partial adjudication of complex multiparty disputes. Emphasizing that the reservation speaks only of States "affected by" a decision, and not of States having a legal right or interest in the proceedings, the United States identifies, as States parties to the four multilateral treaties above mentioned which would be "affected", in a legal and practical sense, by adjudication of the claims submitted to the Court, Nicaragua's three Central American neighbours, Honduras, Costa Rica and El Salvador.

69. The United States recognizes that the multilateral treaty reservation applies in terms only to "disputes arising under a multilateral treaty", and notes that Nicaragua in its Application asserts also that the United States has "violated fundamental rules of general and customary international law". However, it is nonetheless the submission of the United States that

all the claims set forth in Nicaragua's Application are outside the jurisdiction of the Court. According to the argument of the United States, Nicaragua's claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties mentioned above, and Nicaragua in its Memorial itself states that its "fundamental contention" is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. The evidence of customary law offered by Nicaragua consists of General Assembly resolutions that merely reiterate or elucidate the United Nations Charter ; nor can the Court determine the merits of Nicaragua's claims formulated under customary and general international law without interpreting and applying the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua's claims.

70. Nicaragua on the other hand contends that if the multilateral treaty reservation is given its correct interpretation, taking into account in particular the *travaux préparatoires* leading to the insertion by the United States Senate of the reservation into the draft text of the 1946 Declaration, the reservation cannot preclude jurisdiction over any part of Nicaragua's Application. According to Nicaragua, the record demonstrates that the reservation is pure surplusage and does not impose any limitation on acceptance of compulsory jurisdiction by the United States. The amendment whereby the reservation was introduced was conceived, intended and enacted to deal with a specific situation : a multiparty suit against the United States that included parties that had not accepted the Court's compulsory jurisdiction. Nicaragua contends, not that the reservation is a nullity, but that when its meaning is properly understood, it turns out to be redundant. The United States interpretation of the reservation finds no support, according to Nicaragua, in its legislative history, and would establish a thoroughly unworkable standard inasmuch as it would be necessary to ascertain in what circumstances a State not party to a case should be deemed "affected" by the decision which is yet to be taken by the Court. Nicaragua argues that the supposed interests of those States that the United States alleges might be affected by a decision in this case are either non-existent or plainly beyond the scope of any such decision, and that the communications sent by those States to the Court fail to establish that they would be so affected.

71. Furthermore, Nicaragua denies that its claims based on customary law are no more than paraphrases of its allegations of violation of the United Nations Charter, and emphasizes that the same facts may justify invocation of distinct causes of action. Specifically, the provisions of the United Nations Charter relating to the use of force by States, while they may still rank as provisions of a treaty for certain purposes, are now within

the realm of general international law and their application is not a question exclusively of interpreting a multilateral treaty. The law relating to the use of force is not contained wholly in the Charter, and in the practice of States claims of State responsibility involving violence may be and frequently are formulated without relying on the Charter. Accordingly, Nicaragua submits that the multilateral treaty reservation, even if it has any relevance or validity, has no application to the claims of Nicaragua based upon customary international law.

72. The multilateral treaty reservation in the United States Declaration has some obscure aspects, which have been the subject of comment since its making in 1946. There are two interpretations of the need for the presence of the parties to the multilateral treaties concerned in the proceedings before the Court as a condition for the validity of the acceptance of the compulsory jurisdiction by the United States. It is not clear whether what are "affected", according to the terms of the proviso, are the treaties themselves or the parties to them. Similar reservations to be found in certain other declarations of acceptance, such as those of India, El Salvador and the Philippines, refer clearly to "all parties" to the treaties. The phrase "all parties to the treaty affected by the decision" is at the centre of the present doubts. The United States interprets the reservation in the present case as referring to the States parties affected by the decision of the Court, merely mentioning the alternative interpretation, whereby it is the treaty which is "affected", so that all parties to the treaty would have to be before the Court, as "an *a fortiori* case". This latter interpretation need not therefore be considered. The argument of the United States relates specifically to El Salvador, Honduras and Costa Rica, the neighbour States of Nicaragua, which allegedly would be affected by the decision of the Court.

73. It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated. Therefore, since

the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946 Declaration.

74. The Court would observe, further, that all three States have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, at any time, to come before the Court, on the basis of Article 36, paragraph 2, with an application instituting proceedings against Nicaragua – a State which is also bound by the compulsory jurisdiction of the Court by an unconditional declaration without limit of duration –, if they should find that they might be affected by the future decision of the Court. Moreover, these States are also free to resort to the incidental procedures of intervention under Articles 62 and 63 of the Statute, to the second of which El Salvador has already unsuccessfully resorted in the jurisdictional phase of the proceedings, but to which it may revert in the merits phase of the case. There is therefore no question of these States being defenceless against any consequences that may arise out of adjudication by the Court, or of their needing the protection of the multilateral treaty reservation of the United States.

75. The United States Declaration uses the word "affected", without making it clear who is to determine whether the States refered to are, or are not, affected. The States themselves would have the choice of either instituting proceedings or intervening for the protection of their interests, in so far as these are not already protected by Article 59 of the Statute. As for the Court, it is only when the general lines of the judgment to be given become 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 State's claim to be affected. Certainly the determination of the States "affected" could not be left to the parties but must be made by the Court.

76. At any rate, this is a question concerning matters of substance relating to the merits of the case : obviously the question of what States may be "affected" by the decision on the merits is not in itself a jurisdictional problem. The present phase of examination of jurisdictional questions was opened by the Court itself by its Order of 10 May 1984, not by a formal preliminary objection submitted by the United States ; but it is appropriate to consider the grounds put forward by the United States for alleged lack of jurisdiction in the light of the procedural provisions for such objections. That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, 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.

* * *

77. It is in view of this finding on the United States multilateral treaty reservation that the Court has to turn to the other ground of jurisdiction relied on by Nicaragua, even though it is *prima facie* narrower in scope than the jurisdiction deriving from the declarations of the two Parties under the Optional Clause. As noted in paragraphs 1 and 12 above, Nicaragua in its Application relies on the declarations of the Parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invokes also a 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary foundation for the Court's jurisdiction. Since the multilateral treaty reservation obviously does not affect the jurisdiction of the Court under the 1956 Treaty, it is appropriate to ascertain the existence of such jurisdiction, limited as it is.

78. The United States objects to this invocation of a jurisdictional basis not specified in the Application instituting proceedings : it argues that in proceedings instituted by means of an application, the jurisdiction of the Court is founded upon the legal grounds specified in that application. An Applicant is not permitted, in the view of the United States, to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its Application. While Nicaragua in its Application purported to reserve the right to amend that Application, and invokes that reservation to justify adding an alternative jurisdictional basis, the United States contends that it is ineffective, as it cannot alter the requirements of the Statute and Rules of Court.

79. Nicaragua has not advanced any arguments to refute the United States contention that the belated invocation of the 1956 Treaty is impermissible. During the oral proceedings the Agent of Nicaragua merely explained that in order to respect the Court's indications regarding the necessity of being as concise as possible, Nicaragua had omitted from the oral arguments presented on its behalf a number of arguments developed in the Memorial, and still asserted by Nicaragua. The Agent stated that Nicaragua does maintain that the 1956 Treaty constitutes a "subsidiary basis" for the Court's jurisdiction in the present proceedings, and the final submissions of Nicaragua incorporated by reference Submission D in the Memorial of Nicaragua, asserting jurisdiction under the Treaty.

80. The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to

examine the merits of a case, it is certainly desirable that "the legal grounds upon which the jurisdiction of the Court is said to be based" should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified "as far as possible" in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans, I.C.J. Reports 1957,* p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78,* p. 173). Both these conditions are satisfied in the present case.

81. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956, reads as follows :

> "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."

The treaty entered into force on 24 May 1958 on exchange of ratifications ; it was registered with the Secretariat of the United Nations by the United States on 11 July 1960. The provisions of Article XXIV, paragraph 2, are in terms which are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 27, para. 52). In the present case, the United States does not deny either that the Treaty is in force, or that Article XXIV is in general capable of conferring jurisdiction on the Court. It contends however that if the basis of jurisdiction is limited to the Treaty, since Nicaragua's Application presents no claims of any violations of it, there are no claims properly before the Court for adjudication. In order to establish the Court's jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court ; but according to the United States, Nicaragua cannot establish such a connection. Furthermore, the United States has drawn attention to the reference in Article XXIV to disputes "not satisfactorily adjusted by diplomacy", and argues that an attempt so to adjust the dispute is thus a prerequisite of its submission to the Court. Since, according to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has

failed to satisfy the Treaty's own terms for invoking the compromissory clause.

82. Nicaragua in its Memorial submits that the 1956 Treaty has been and was being violated by the military and paramilitary activities of the United States in and against Nicaragua, as described in the Application ; specifically, it is submitted that these activities directly violate the following Articles :

Article XIX : providing for freedom of commerce and navigation, and for vessels of either party to have liberty "to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation", and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.

Article XIV : forbidding the imposition of 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.

Article XVII : forbidding 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 XX : providing for freedom of transit through the territories of each party.

Article I : providing 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.

83. Taking into account these Articles of the Treaty of 1956, particularly the provision in, *inter alia,* Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia,* as to the "interpretation or application" of the Treaty. That dispute is also clearly one which is not "satisfactorily adjusted by diplomacy" within the meaning of Article XXIV of the 1956 Treaty (cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* pp. 26-28, paras. 50 to 54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted ; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceed-

ings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

> "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6,* p. 14).

Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims.

* * *

84. The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua's Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function". Some of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect. These grounds will now be examined ; but for the sake of clarity it will first be convenient to recall briefly what are the allegations of Nicaragua upon which it bases its claims against the United States.

85. In its Application instituting proceedings, Nicaragua asserts that :

> "The United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an 'army' of more than 10,000 mercenaries ... installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua",

and that Nicaragua has already suffered and is now suffering grievous consequences as a result of these activities. The purpose of these activities is claimed to be

> "to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States".

86. The first ground of inadmissibility relied on by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. The United States first asserts that adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of other States, in particular those of Honduras, since it is alleged that Honduras has allowed its territory to be used as a staging ground for unlawful uses of force against Nicaragua, and the adjudication of Nicaragua's claims would necessarily involve the adjudication of the rights of third States with respect to measures taken to protect themselves, in accordance with Article 51 of the United Nations Charter, against unlawful uses of force employed, according to the United States, by Nicaragua. Secondly, it is claimed by the United States that it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. Nicaragua questions whether the practice of the Court supports the contention that a case cannot be allowed to go forward in the absence of "indispensable parties", and emphasizes that in the present proceedings Nicaragua asserts claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State. Nicaragua's Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source). As another basis for the indispensable status of third States, the United States contends that facts concerning relevant activities by or against them may not be in the possession or control of a Party. Nicaragua refers to the powers of the Court under Article 44 of the Statute and Article 66 of the Rules of Court, and observes that it would be in the third States' interest to provide the United States with factual material under their control.

87. This contention was already raised by the United States at the stage of the proceedings on the request for provisional measures when it argued that

> "the other States of Central America have stated their view that Nicaragua's request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations. These other Central American States are indispensable parties in whose absence this Court cannot properly proceed." (*I.C.J. Reports 1984*, p. 184, para. 35.)

The United States then referred to communications addressed to the Court by the Governments of Costa Rica and El Salvador, and a telex message to the United Nations Secretary-General addressed by the Government of Honduras which, according to the United States, "make it quite clear that Nicaragua's claims are inextricably linked to the rights and interests of

those other States", and added "Any decision to indicate the interim measures requested, or a decision on the merits, would necessarily affect the rights of States not party to the proceedings" *(ibid.)*. It should be pointed out, however, that in none of the communications from the three States mentioned by the United States was there any indication of an intention to intervene in the proceedings before the Court between Nicaragua and the United States of America, and one (Costa Rica) made it abundantly clear that it was not to be regarded as indicating such an intention. At a later date El Salvador did of course endeavour to intervene.

88. There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943,* to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954,* p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction ; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.

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89. Secondly, the United States regards the Application as inadmissible because each of Nicaragua's allegations constitutes no more than a reformulation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council. All allegations of this kind are confided to the political organs of the Organization for consideration and determination ; the United States quotes Article 24 of the Charter, which confers upon the Security Council "primary responsibility for the maintenance of international peace and security". The provisions of the Charter

dealing with the ongoing use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means. Under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.

90. Nicaragua contends that the United States argument fails to take account of the fundamental distinction between Article 2, paragraph 4, of the Charter which defines a legal obligation to refrain from the threat or use of force, and Article 39, which establishes a political process. The responsibility of the Security Council under Article 24 of the Charter for the maintenance of international peace and security is "primary", not exclusive. Until the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement ; and even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court. From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.

91. It will be convenient to deal with this alleged ground of inadmissibility together with the third ground advanced by the United States namely that the Court should hold the Application of Nicaragua to be inadmissible in view of the subject-matter of the Application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the "inherent right of individual or collective self-defence" under Article 51 of the Charter. This is, it is argued, a reason why the Court may not properly exercise "subject-matter jurisdiction" over Nicaragua's claims. Under this head, the United States repeats its contention that the Nicaraguan Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and proceeds to demonstrate that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. The United States points to the approach made by Nicaragua to the Security Council on 4 April 1984, a few days before the institution of the present proceedings : the draft resolution then presented, corresponding to the claims submitted by Nicaragua to the Court, failed to achieve the requisite majority under Article 27, paragraph 3, of the Charter. However, this fact, it is argued, and the perceived likelihood that similar claims in future would fail to secure the required majority, does not vest the Court with subject-matter jurisdiction over the Application. Since Nicaragua's Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consid-

eration in the Security Council. Furthermore, in order to reach a determination on what amounts to a claim of aggression the Court would have to decide whether the actions of the United States, and the other States not before the Court, are or are not unlawful : more specifically, it would have to decide on the application of Article 51 of the Charter, concerning the right of self-defence. Any such action by the Court cannot be reconciled with the terms of Article 51, which provides a role in such matters only for the Security Council. Nor would it be only in case of a decision by the Court that the inherent right of self-defence would be impaired : the fact that such claims are being subjected to judicial examination in the midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.

92. Nicaragua observes in this connection that there is no generalized right of self-defence : Article 51 of the Charter refers to the inherent right of self-defence "if an armed attack occurs against a Member of the United Nations". The factual allegations made against Nicaragua by the United States, even if true, fall short of an "armed attack" within the meaning of Article 51. While that Article requires that actions under it "must be immediately reported to the Security Council" – and no such report has been made – it does not support the claim that the question of the legitimacy of actions assertedly taken in self-defence is committed exclusively to the Security Council. The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, whereas these concepts are not applicable to the relations among international institutions for the settlement of disputes.

93. The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the *United States Diplomatic and Consular Staff in Tehran* case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu.* In that case the Court held :

> "In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise." (*I.C.J. Reports 1980,* p. 21, para. 40.)

The Court in fact went further, to say :

> "Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in

respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that :

> 'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.' " (*I.C.J. Reports 1980,* p. 22, para. 40.)

94. The United States argument is also founded on a construction, which the Court is unable to share, of Nicaragua's complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4, of the United Nations Charter. The United States argues that Nicaragua has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with the provisions of Chapter VI. This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.

95. It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security . . ."

The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision

for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the *Corfu Channel* case (*I.C.J. Reports 1949,* p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force. The Court was concerned with a question of a "demonstration of force" (cf. *loc. cit.,* p. 31) or "violation of a country's sovereignty" *(ibid.)* ; the Court, indeed, found that

> "Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*Ibid.,* p. 35.)

What is also significant is that the Security Council itself in that case had "undoubtedly intended that the whole dispute should be decided by the Court" (p. 26).

97. It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft ; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the case. The United States did not contradict Nicaragua's argument that the United States indeed brought these suits against the Respondents in this Court, rather than in the Security Council. It has argued further that in both the *Corfu Channel* case and the *Aerial Incident* cases, the Court was asked to adjudicate the rights and duties of the parties with respect to a matter that was fully in the past. To a considerable extent this is a question relevant to the fourth ground of inadmissibility advanced by the United States, to be examined below. However the United States also contends that the *Corfu Channel* case, at least, shows that it was the fact that the incident in question was not part of an ongoing use of armed force that led the Security Council to conclude that its competence was not engaged. In the view of the Court, this argument is not relevant.

98. Nor can the Court accept that the present proceedings are objectionable as being in effect an appeal to the Court from an adverse decision of the Security Council. The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations. As to the inherent right of self-defence, the fact that it is referred to in the Charter as a "right" is indicative of a legal dimension ; if in the present proceedings it becomes necessary for the Court to judge in this respect between the Parties – for the rights of no other State may be adjudicated in these proceedings – it cannot be debarred from doing so by the existence of a procedure for the States concerned to report to the Security Council in this connection.

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99. The fourth ground of inadmissibility put forward by the United States is that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. The allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes. The situation alleged in the Nicaraguan Application, in particular, cannot be judicially managed or resolved ; continuing practical guidance to the Parties in respect of the measures required of them is critical to the effective control of situations of armed conflict such as is there alleged to exist. But the Court has, it is said, recognized that giving such practical guidance to the Parties lies outside the scope of the judicial function. The United States does not argue that the Application must be dismissed because it presents a "political" question rather than a "legal" question, but rather that an allegation of an ongoing use of unlawful armed force was never intended by the drafters of the Charter to be encompassed by Article 36, paragraph 2, of the Statute. It is also recalled that the circumstances alleged in the Application involve the activities of "groups indigenous to Nicaragua" that have their own motivations and are beyond the control of any State. The United States emphasizes, however, that to conclude that the Court

cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter.

100. Nicaragua contends that, inasmuch as the United States questions whether the Court would have at its disposal vital evidence necessary to resolve the dispute, the problem is not so much the nature of the dispute as the willingness of the Respondent fully to inform the Court about the activities of which it is accused. Nicaragua also points to the *Corfu Channel* case as showing, as the Court has noted above (paragraph 96), that the Court does exercise its judicial functions in situations of armed conflict. The Court will decide in the light of the evidence produced by the Parties, and enjoys considerable powers in the obtaining of evidence. Nicaragua disputes that the judicial function, being governed by the principle of *res judicata,* is "inherently retrospective", and therefore inapplicable to a fluid situation. Nicaragua concedes that a judgment delivered by the Court must be capable of execution, but points out that such a judgment does not by itself resolve – and is not intended to resolve – all the difficulties between the parties. The Court is not being asked to bring an armed conflict to an end by nothing more than the power of words.

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (*Corfu Channel, I.C.J. Reports 1949,* p. 18 ; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it ; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess this question also on the basis of each specific submission, and in the light of the facts as then established ; it cannot at this stage rule out *a priori* any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court "neither can nor should contemplate the contingency of the judgment not being complied with" (*Factory at Chorzów, P.C.I.J., Series A, No. 17,* p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter ; and

"Once the Court has found that a State has entered into a com-

mitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it." (*Nuclear Tests, I.C.J. Reports 1974,* p. 272, para. 60 ; p. 477, para. 63.)

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102. The fifth and final contention of the United States under this head is that the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America. In the contention of the United States, the Contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appopriate method for the resolution of the issues of Central America. That process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very heart of the claims and issues raised by the Application. The United States repeats its contention (paragraph 89, above) that the Contadora process is a "regional arrangement" within the meaning of Article 52, paragraph 2, of the Charter, and contends that under that Article, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. The exhaustion of such regional processes is laid down in the Charter as a precondition to the reference of a dispute to the Security Council only, in view of its primary responsibility in this domain, but such a limitation must *a fortiori* apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters. Nicaragua is, it is claimed, under a similar obligation under Articles 20 and 21 of the Charter of the Organization of American States. Furthermore, Nicaragua is asking the Court to adjudicate only certain of the issues involved in the Contadora process, and this would have the inevitable effect of rendering those issues largely immune to further adjustment in the course of the negotiations, thus disrupting the balance of the negotiating process. The Nicaraguan Application is incompatible with the Contadora process and, given the commitment of both Parties to that process, the international endorsement of it, and its comprehensive, integrated nature, the Court should, it is contended, refrain from adjudicating the merits of the Nicaraguan allegations and hold the Application to be inadmissible.

103. Nicaragua points out that the United States is not taking part in the Contadora process, and cannot shelter behind negotiations between third States in a forum in which it is not participating. The support given by the international community to the Contadora process does not constitute an obstacle to the exercise by the Court of its jurisdiction ; and the United Nations Charter and the Charter of the Organization of American States do not require the exhaustion of prior regional negotiations. In reply to this objection of the United States as well as to the third ground of inadmissibility (paragraphs 91 *et seq.,* above), Nicaragua emphasizes the parallel competence of the political organs of the United Nations. The Court may

pronounce on a dispute which is examined by other political organs of the United Nations, for it exercises different functions.

104. This issue also was raised at the stage of the request by Nicaragua for provisional measures, when the Court noted that

> "The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the 'Contadora Process', which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates." (*I.C.J. Reports 1984,* p. 183, para. 33.)

To this Nicaragua then replied that, while it was

> "actively participating in the Contadora Process, and will continue to do so, our legal claims against the United States cannot be resolved, or even addressed, through that Process" (*ibid.,* p. 185, para. 38).

Nicaragua further denied that the present proceedings could prejudice the legitimate rights of any other States or disrupt the Contadora Process, and referred to previous decisions of the Court as establishing the principle that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects and that the Court should not decline its essentially judicial task merely because the question before the Court is intertwined with political questions.

105. On this latter point, the Court would recall that in the *United States Diplomatic and Consular Staff in Tehran* case it stated :

> "The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important." (*I.C.J. Reports 1980,* p. 19, para. 36.)

And, a little later, added :

> "Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and

unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." (*I.C.J. Reports 1980,* p. 20, para. 37.)

106. With regard to the contention of the United States of America that the matter raised in the Nicaraguan Application was part of the Contadora Process, the Court considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court. It may further be recalled that in the *Aegean Sea Continental Shelf* case the Court said :

> "The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu.* Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973,* p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function." (*I.C.J. Reports 1978,* p. 12, para. 29.)

107. The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a "regional arrangement" for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter which reads as follows :

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

108. In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court ; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determi-

nation in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding.

* *

109. The Court thus has found that Nicaragua, as authorized by the second paragraph of Article 36 of the Statute of the Permanent Court of International Justice, made, on 24 September 1929, following its signature of the Protocol to which the Statute was adjoined, an unconditional Declaration recognizing the compulsory jurisdiction of the Permanent Court, in particular without conditions as to ratification and without limit of time, though it has not been established that the instrument of ratification of that Protocol ever reached the Secretariat of the League. Nevertheless, the Court has not been convinced by the arguments addressed to it that the absence of such formality excluded the operation of Article 36, paragraph 5, of the Statute of the present Court, and prevented the transfer to the present Court of the Declaration as a result of the consent thereto given by Nicaragua 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. It has also found that the constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.

110. Consequently, the Court finds that the Nicaraguan Declaration of 24 September 1929 is valid, and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute of the Court, a "State accepting the same obligation" as the United States of America at the date of filing of the Application, so as to be able to rely on the United States Declaration of 26 August 1946. The Court also finds that despite the United States notification of 6 April 1984, the present Application is not excluded from the scope of the acceptance by the United States of America of the compulsory jurisdiction of the Court. Accordingly the Court finds that the two Declarations do afford a basis for the jurisdiction of the Court.

111. Furthermore, 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.

* *

112. In its above-mentioned Order of 10 May 1984, the Court indicated provisional measures "pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America". It follows that the Order of 10 May 1984, and the provisional measures indicated therein, remain operative until the delivery of the final judgment in the present case.

* * *

113. For these reasons,

THE COURT,

(1) (a) *finds,* by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui ; Judge *ad hoc* Colliard ;

AGAINST : *Judges* Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(b) *finds,* by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui ; Judge *ad hoc* Colliard ;

AGAINST : *Judges* Ruda and Schwebel.

(c) *finds,* by fifteen votes to one, that it has jurisdiction to entertain the case ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui ; Judge *ad hoc* Colliard ;

AGAINST : Judge Schwebel.

(2) *finds,* unanimously, that the said Application is admissible.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of November, one thousand nine hundred and eighty-four, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of Nicaragua and to the Government of the United States of America, respectively.

(Signed) Taslim O. ELIAS,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO and Sir Robert JENNINGS append separate opinions to the Judgment of the Court.

Judge SCHWEBEL appends a dissenting opinion to the Judgment of the Court.

(Initialled) T.O.E.
(Initialled) S.T.B.