CONTRE-MÉMOIRE DU NICARAGUA (COMPÉTENCE ET RECEVABILITÉ)

COUNTER-MEMORIAL OF NICARAGUA (JURISDICTION AND ADMISSIBILITY)

Volume I

INTRODUCTION

1. Nicaragua initiated this proceeding against Honduras by filing its Application with the Court on 28 July 1986. The Application sets forth massive violations on the part of Honduras of its legal obligations under the Charters of the United Nations and the Organization of American States and under general principles of international law. In particular, it recites that continuously since 1979, Honduras has violated its international legal obligations to Nicaragua: by permitting thousands of mercenaries to establish and maintain military bases and other facilities in Honduran territory for the purpose of carrying out armed attacks in and against Nicaragua; by providing vital intelligence and logistical support to facilitate the mercenaries' attacks on Nicaragua; by actively participating, through its own armed forces, in armed attacks staged by the mercenaries inside Nicaragua; and by engaging in repeated military manœuvres with the armed forces of the United States, near the Nicaraguan border, for the purpose of intimidating Nicaragua and intervening in Nicaragua's internal affairs.

2. The jurisdiction of the Court was invoked on the basis of declarations of Nicaragua and Honduras under Article 36 of the Statute of the Court accepting the compulsory jurisdiction of the Court, and on the basis of Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá), to which both Nicaragua and Honduras are parties.

3. Nicaragua asked the Court to adjudge Honduras to be in violation of its conventional and customary international legal obligations to Nicaragua not to use force or the threat of force against Nicaragua, and not to intervene in Nicaragua's internal affairs or violate Nicaragua's sovereignty or territorial integrity; to declare that Honduras should cease and desist from such actions; and to determine the reparations owing to Nicaragua in consequence of such transgressions. Nicaragua reserved the right to present a request that the Court indicate interim measures of protection.

4. On 29 August 1986, the Minister of Foreign Relations of the Government of Honduras advised the President of the Court that Honduras wishes to assert objections to the jurisdiction of the Court and to the admissibility of Nicaragua's Application. Accordingly, on 22 October 1986, the Court scheduled the submission of written pleadings on the questions of the Court's jurisdiction and the Application's admissibility as follows: the Memorial of Honduras was to be submitted by 23 February 1987, and the Counter-Memorial of Nicaragua was to be submitted by 23 June 1987.

5. It is the position of Nicaragua that the objections of Honduras to the jurisdiction of the Court and to the admissibility of the Application, set forth in the Memorial of 23 February 1987, are wholly without foundation.

6. Part I of this Counter-Memorial demonstrates that the Court has jurisdiction in this case under Article 36 of the Statute of the Court because the reservations to the Honduran declaration under Article 36 (2), filed on 26 May 1986, are invalid and have no legal effect.

7. Part II demonstrates that Article XXXI of the Pact of Bogotá by its express terms, by the contemporaneous understanding of the parties and by the weight of expert commentary, provides a separate and independent basis of jurisdiction for the Court in this case; contrary to the position advocated by Honduras, there is no requirement that the conciliation procedure described in the Pact be invoked, or that the parties be unable to agree upon arbitration, prior to recourse to the Court. Part II further demonstrates that the purported reservations to the Pact presented by Honduras 36 years after ratifying the Pact, have no legal effect. Part II also demonstrates that:

8. After seven years of unsuccessful diplomatic efforts to resolve the issues raised in the Application, it is plain that these issues have not been capable of resolution by direct negotiation. It is equally plain that, under the Pact of Bogotá, a State may not frustrate another State's right to recur to the Court merely by stating, contrary to the weight of the evidence (and contrary to its own behaviour) that "in its opinion" the dispute is capable of settlement by direct negotiation.

9. The multilateral negotiations known popularly as the Contadora process do not constitute a "special procedure" under Article II of the Pact of Bogotá, and therefore do not preclude Nicaragua from initiating other pacific procedures for resolution of the issues raised in the Application, including recourse to the Court. Moreover, the bilateral legal dispute between Nicaragua and Honduras identified in the Application is not even addressed by the Contadora process, which is instead a political solution of a series of regional controversies.

10. Part III demonstrates that even if, *arguendo*, the new reservations presented by Honduras to its declaration under Article 36 (2) of the Statute of the Court and the Pact of Bogotá were legally valid, they do not apply in the circumstances of this case and cannot serve to deprive the Court of jurisdiction either under Article 36 (2) of the Statute or Article XXXI of the Pact.

11. Part IV demonstrates that the Application is fully admissible, and in particular that it is sufficiently specific under the rules of the Court and prior decisions of the Court, and that the claims presented are legal claims fully capable of judicial resolution. Indeed, Nicaragua's legal claims are similar in nature to the ones the Court already found justiciable, and resolved, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*. The first part of the Honduras Memorial of 23 February 1987 (hereafter Memorial), constituting more than one-third of the Memorial, is addressed neither to the jurisdiction of the Court nor the admissibility of the Application. Rather, this part, entitled "The Background of the Dispute", addresses the merits of the Application and of the claims set forth therein. Indeed, this part sets forth various arguments (including "self-defence") that Honduras apparently intends to assert at the merits phase of this case in response to Nicaragua's claims, should the Court decide that it has jurisdiction and that the Application is admissible.

12. While Nicaragua considers it proper to await the merits phase of the case before presenting its evidence and arguments addressed to the merits of its claims, and the defences asserted in response thereto, the incompleteness of the "Background of the Dispute" presented in the Honduras Memorial makes it appropriate for Nicaragua to make certain preliminary remarks at this phase in order that the Court have the benefit of the views of both parties as to the nature of the present dispute.

13. The "Background of the Dispute" set forth in Part I of the Honduras

Memorial consists of two chapters. The first, entitled "The Present Dispute as Part of the General Conflict in Central America", purports to describe the factual context of the dispute between Nicaragua and Honduras, including, as related in Section I of this chapter, "the cause of the conflict in Central America". The incompleteness of this purported statement of the relevant facts is best shown by the omission of any reference whatsoever to the mercenary forces commonly known as the "*contras*". Nowhere in this 44-page exegesis on the facts related to the present dispute are the *contras* even mentioned. From reading the Honduras Memorial one would be surprised to learn that the *contras* exist, let alone that for more than six years — and continuing to the present day — as many as 10,000 of them have used Honduras as a base for launching military and paramilitary attacks in and against Nicaragua.

14. Honduras's role as a base of operations for the *contras* is a matter of public knowledge. It is even described in the dictionary. The 1987 edition of the *Dictionary of International Relations Terms*, an official publication of the United States Department of State, defines the word "*contras*" as follows:

> "Shortened form of the word 'contrarevolucionarios' (counterrevolutionaries), the term the Sandinista regime in Nicaragua uses for the guerrilla forces fighting against them. The Contras comprise former members of the Somozist National Guard, dissident right-wing former Sandinistas, and the Miskito Indian minority; each of these forces operates independently. *The Contras operate from bases in Honduras and Costa Rica and receive political and material support from the United States.* There have been recurrent armed clashes between Sandinista government troops and the rebels since March 1982." (Ann. 1, emphasis added, footnotes omitted.)

A footnote to the italicized sentence says:

> "The Reagan Administration has backed the Contras by various means, including joint manœuvers by the US with the Honduran Army, fleet exercises off the Nicaraguan coast, the secret mining of Nicaraguan harbors, and military supplies . . ."

15. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) Merits, Judgment, I.C.J. Reports 1986*, the Court found that the United States had trained, armed, equipped, financed and supplied the *contra* forces, and that these actions were in violation of customary international law. Just as the *contras* could not have carried out attacks in and against Nicaragua without being trained, armed, equipped, financed and supplied from the United States, they could not have carried out these attacks — and would not be able to carry them out today — without military encampments, training facilities, command centres, intelligence posts, and special airstrips and planes for transporting supplies to *contra* combatants — all located and maintained on Honduran territory. The unrestricted use of Honduran territory, particularly that part of it close to the frontier with Nicaragua, has been and remains vital to all military and paramilitary operations by the *contras*.

16. Senior Honduran officials have regularly made public statements acknowledging the widespread use of Honduran territory by the *contras* in conducting military and paramilitary operations against Nicaragua. Those statements include the following:

— On 17 April 1986, President José Azcona Hoyo openly acknowledged that *contra* forces operate from Honduras, stating that "They come and they

go. I believe that near the border they have camps, temporary camps." President Azcona added that "Honduras will not devote resources to guard the backs of the Sandinistas". (*New York Times*, 18 April 1986 (Ann. 2).)

— In a radio interview broadcast on 10 December 1986, President Azcona again admitted not only that the *contras* use Honduran territory to attack Nicaragua, but also that the Honduran Government was making no effort to prevent such use of its territory. President Azcona stated that "the *contras* have been going in and out of Honduras and Nicaragua", and that "[t]hey have been assembled to oust a government". President Azcona also admitted that "one of our concerns" is that the *contras* might be defeated and thus trapped in Honduras. President Azcona acknowledged that he had expressed that concern to the United States. However, when asked whether Honduras was pressing the United States to order the *contras* to leave Honduras, President Azcona replied: "No. We are not exerting pressure." (Transcript of statements broadcast on Tegucigalpa Radio America 1854 GMT 10 December 1986 (translation) (Ann. 3, pp. 385-386, *infra*); UPI 11 December 1986 (Ann. 4).)

17. — In another interview broadcast in April 1987, President Azcona engaged in the following colloquy with a reporter:

> "[Reporter] Mr. President, two National Congress deputies have said that you should go to Capire, on the Nicaraguan border, to see for yourself that *contras* are still there.
>
> [Azcona] . . . There possibly are some *contras* there, but I believe that that is given much . . . The Hondurans have been excessively preoccupied with that problem. We know that the problem exists; we did not create it and we all know its causes, which I have cited many times. We are making efforts to resolve it.
>
> [Reporter] Gradually?
>
> [Azcona] No, not all that gradually. *I believe that if there still are* contras *in Honduras, there are not thousands of them like in the past.*" (Tegucigalpa Voz de Honduras Network 0422 GMT 22 April 1987 (emphasis added) (translation) (Ann. 5).)

18. Other senior members of the Honduran Government have made similar admissions. For example, on 28 February 1986, Carlos Montoya, President of the Honduran Congress, told reporters that the *contras* attack Nicaragua from bases in Honduras, and stated that "Those rebels should be in Nicaraguan territory fighting the Sandinistas". (Reuters Ltd., 2 March 1986 (Ann. 6).)

19. Similarly, in a statement published in *Tiempo*, a Honduran newspaper, Foreign Minister Carlos López Contreras stated: "The Government of Honduras views the presence of the *contras* in the National territory as a defensive instrument."[1] (*Tiempo*, 24 November 1986 (Ann. 7).)

20. Honduran citizens affected by the *contras*' presence have publicly criticized the Honduran Government for permitting the *contras* to use Honduran territory and called upon it to expel them from the country. For example, in January 1987, Honduran coffee producers forced from their lands by *contra* forces sought the assistance of the Asociacion Hondurena de Productores de Cafe (AHPROCAFE), which in turn wrote a letter to various members of the United States Congress. The letter deplored the presence of the *contras* in

[1] "El gobierno de Honduras observa la presencia de la contra en el territorio nacional como instrumento defensivo."

Honduras, stating that more than 600 families had been displaced on their account. (Letter from AHPROCAFE dated 12 January 1987 (Ann. 8).)

21. Former *contra* leaders have also stated publicly, in some cases in sworn testimony, that the *contra* forces operate from bases in Honduran territory, receive training in Honduras, and regularly use airstrips and intelligence facilities in that State. Edgar Chamorro, a member of the *contras'* political directorate between 1982 and 1984 whose testimony was cited on several points in the Court's opinion in *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (*I.C.J. Reports 1986*, pp. 46, 54, 59, 63, 67), explained how essential these Honduran facilities are to the *contras*:

> "The C.I.A., working with United States military personnel, operated various electronic interception stations in Honduras for the purpose of intercepting radio and telephonic communications among Nicaraguan Government military units. By means of these interception activities and by breaking the Nicaraguan Government codes, the C.I.A. was able to determine — and to advise us of — the precise location of all Nicaraguan Government military units . . . This type of intelligence was invaluable to us. Without it our forces would not have been able to operate with any degree of effectiveness inside Nicaragua. The United States Government also made it possible for us to resupply our troops inside Nicaragua, thus permitting them to remain longer inside the country. Under cover of military manœuvers in Honduras during 1983, United States armed forces personnel constructed airstrips, including the one at Aguacate, that, after the C.I.A. provided us with airplanes, were instrumental in resupplying our troops." (Supplemental Annex G to Applicant's Memorial, para. 18.)

22. It should not be understood that Honduras has freely given its territory for use by the *contras*. On the contrary, it has been paid handsomely. In 1981, when the *contra* forces first began to launch attacks against Nicaragua, United States aid to Honduras (military and economic) totalled $45,300,000. By 1985, that figure had increased more than six-fold, to $296,000,000. (Central American Historical Institute Chronology, October 1986.) (A chart reflecting United States aid to Honduras from 1977 to 1987 is attached hereto as Annex 9.) United States funds have flowed not only to the Honduran national treasury, but also to senior Honduran politicians and military officers, present and past. As General Walter López Reyes, head of the Honduran armed forces from 1984-1986, stated at a news conference on 31 March:

> "[M]any politicians have been bribed by the CIA as part of an effort to control the general situation of the country to benefit the operations of the Nicaraguan counterinsurgents in Honduras." (*AP*, 1 April 1987 (Ann. 10).)

General Gustavo Alvarez Martínez, who left his position as head of the Honduran armed forces in March 1984, has publicly admitted that he received more than $50,000 from the United States Defense Department for "consulting work" over the last two years. (*Washington Post*, 10 May 1987 (Ann. 11).) Thus, it is not surprising that Honduras has come to be called "the Rented Republic", "Contra Country", and "the USS Honduras"[1].

[1] See Gregorio Selser, *Honduras, República Alquilada* (Mex-Sur S.A. 1983) ("the Rented Republic"); CBS "Sixty Minutes", 29 March 1987 ("Contra Country"); Interview with President Azcona, McNeil-Lehrer Report, 27 May 1986 ("USS Honduras").

23. Notwithstanding the above Honduras, in its Memorial to this Court, expresses astonishment that Nicaragua believes that there is an actual dispute between the two States. Honduras gives great prominence to a portion of a televised interview of Nicaragua's President Daniel Ortega Saavedra, in an effort to show that Nicaragua does "not have any problems with Honduras . . ." (Memorial, p. 11, *supra*). This is a distortion of the full statement by President Ortega, which is included in Annex 28 to the Memorial, and which sets forth quite clearly the "problems" Nicaragua has with Honduras — the very same "problems" that are identified in the Application:

> "*Question:* What is happening with Honduras? What is the attitude of Honduras? How do you define it?
>
> *Answer:* Well, Honduras is under a lot of pressure from the United States. It has been obliged to accept the presence of mercenary camps there; it has been obliged to accept American military bases, because it is under economic blackmail on the part of the United States.
>
> *Question:* When Israel saw that in Lebanon, it invaded Lebanon. Are you going to invade the border zone with Honduras?
>
> *Answer:* The thing is that we do not have any problems with Honduras. We have problems with the United States.
>
> We are fighting against the mercenary forces and we have been fighting with the mercenary forces in the border areas.
>
> *Question:* And you feel that you have the right to do so?
>
> *Answer:* Well, the thing is that this is not aggression against Honduras. That is, when the mercenary forces come from Honduras and invade our country, we defend ourselves and there is cross-fire and there is combat in the border zone and this is not an action directed against Honduras. To the contrary, I think that this helps the defence of the sovereignty of Honduras . . ."

24. Ignoring completely its own complicity with the United States in the very same military and paramilitary activities in and against Nicaragua that this Court has already adjudged illegal, the Honduras Memorial places the entire blame for the present dispute between Nicaragua and Honduras — and, indeed, for all of the disputes currently afflicting Central America — on Nicaragua. Honduras accuses Nicaragua of supplying arms to rebels in El Salvador, and of trespassing on Honduran territory in so doing. This is the same charge that the United States made in the *Military and Paramilitary Activities in and against Nicaragua* case, and which the Court found unsubstantiated:

> "[T]he evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorean armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period." (*I.C.J. Reports 1986*, p. 86, para. 160.)

25. Undeterred by this finding, the Honduras Memorial attributes the very opposite conclusion to the Court:

> "[S]ince the government of the Sandinista Front came to power in Nicaragua, the general conflict in the region has increased considerably as a result of the behaviour of Nicaragua itself towards other Central

American States, as is shown by the aid afforded by the government of the Sandinista Front to the armed opposition in El Salvador immediately after the fall of the government of President Somoza, which can be seen in the passage cited above from the judgment of the Court of 27 June 1986." (P. 16, *supra*.)

26. The passage in question attributes no responsibility whatsoever to the Nicaraguan Government for aiding the Salvadoran armed opposition; it says merely that:

> "between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador" (*I.C.J. Reports 1986*, p. 86, para. 160).

Later in the opinion, as shown above, the Court stated that the evidence did *not* substantiate that the Government of Nicaragua was responsible for any flow of arms, either during this period or thereafter.

27. Apart from mischaracterizing the Court's finding on this issue, only two instances of alleged arms trafficking by Nicaragua are cited by Honduras. Both incidents were fully described in documents taken into consideration by the Court in the *Military and Paramilitary Activities in and against Nicaragua*. (See, *ibid.*, p. 44 (referring to "*Revolution beyond our Borders, Sandinista Intervention in Central America*" (United States Department of State, September 1985)).) These incidents are:

(1) On 17 January 1981, a quantity of weapons and supplies that "had been well camouflaged inside a van" that allegedly entered Honduras from Nicaragua was discovered when the van was detained at Comayagua, in the middle of Honduras. Five Hondurans and twelve Salvadorans — and no Nicaraguans — were arrested for their involvement in this shipment of weapons and supplies. There is no evidence whatsoever that the Nicaraguan Government was responsible for, approved or knew anything about this shipment.

(2) On 7 April 1983, a van carrying ammunition (allegedly for rebels fighting against the Government of Guatemala) was intercepted at Choluteca, Honduras. The ammunition "had been packed in polyethylene bags and hidden in the sides of the van". According to Honduras, the van entered that country from Nicaragua. Again, there is no evidence whatsoever that the Government of Nicaragua was responsible for, approved or knew anything about this shipment. Indeed, there is no evidence that either this shipment or the one intercepted on 17 January 1981 originated in Nicaragua.

28. While Nicaragua has no knowledge about either of the two incidents described in the Honduras Memorial, it has never denied the possibility that, contrary to the Government's policy and efforts, some private individuals sympathetic to the Salvadoran rebels from time to time may have smuggled small quantities of arms or ammunition to El Salvador through or from Nicaraguan territory. In the *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua submitted an affidavit by its Foreign Minister, Father Miguel d'Escoto Brockmann (cited by Honduras at page 18, *supra*, of its Memorial), pointing out the difficulties Nicaragua faces in patrolling its long border with Honduras and preventing arms trafficking across the border by private individuals. However, Nicaragua has steadfastly denied, and continues to deny, that it has ever undertaken, approved or acquiesced in

any shipments of arms or other war *matériel* to rebels fighting against another Central American Government.

29. Honduras suggests that if Nicaragua cannot be expected to seal off its border completely from arms trafficking, then no more can be expected of it. (Memorial, p. 18, *supra.*) Perhaps this would be relevant if Nicaragua claimed only that from time to time small quantities of arms were smuggled clandestinely into Nicaragua from Honduras. Honduras cannot seriously contend, however, that it has been unable to detect the open presence of up to 10,000 armed *contras* on its territory, and the frequent cross-border movements (into and back out of Nicaragua) of large concentrations of *contra* combatants fully equipped for battle. Nor can Honduras seriously assert that it is unable to locate the *contras*' military bases, command centres, training facilities, intelligence posts or airstrips. Nicaragua itself has repeatedly informed Honduras of the precise locations of these facilities, and their whereabouts are a matter of public knowledge, having been identified on numerous occasions by the international news media.

30. The Honduras Memorial accuses Nicaragua of trafficking not only in arms but in guerrillas as well. "Since July 1979 the Honduran territory has also been used by the government of the Sandinista Front for the passage of insurgents to El Salvador." (P. 19, *supra.*) Only one incident is described, when a group of guerrillas (their nationality is not provided) was allegedly captured "on their way to El Salvador" *(ibid.)* by a Honduran military patrol at Las Cuevitas on 27 March 1983. There is no allegation, let alone evidence, that the guerrillas originated from, or ever set foot in, Nicaragua. Nor is there evidence of Nicaragua's responsibility for, approval or knowledge of this guerrilla group. Nicaragua denies any such responsibility, approval or knowledge.

31. The Honduras Memorial makes a tortured attempt to link Nicaragua to a variety of terrorist actions inside Honduras and against Honduran missions abroad. *(Ibid.)* While reciting that these incidents have been provoked by "[t]he internal armed conflict in El Salvador, which has been intensifying since 1978", Honduras also blames the incidents on "the support given to the guerrillas in that State by the government of the Sandinista Front since July 1979" *(ibid.)*. There is no attempt to specify the kind of "support" given by Nicaragua or how that "support" contributed to the terrorist actions described, other than an assertion that "persons connected with . . . the dominant movement in Nicaragua participated directly or indirectly in these incidents" *(ibid.)*. No such persons are named, either in the Memorial or in Annex 12 thereto (cited as the source of these accusations)[1], nor is there any indication of how he, she or they participated in the incidents complained of. The incidents themselves have no apparent connection with Nicaragua. Rather, they appear to have been undertaken in a misguided effort to advance the causes of rebels fighting against the Governments in El Salvador, Guatemala and Honduras itself. Indeed, according to Honduras's own Annex 12, rebel groups in all three countries have claimed responsibility, variously, for these actions. It is obvious that there is no basis whatsoever for linking Nicaragua or any of its citizens to these acts.

32. The Honduras Memorial accuses Nicaragua's armed forces of attacks

[1] Annex 12, it should be noted, is a speech given by the Permanent Representative of Honduras to the Permanent Council of the OAS on 14 July 1983. It consists of a series of accusations against Nicaragua without identifying sources or other evidentiary support. Thus, the only evidence offered in support of the accusations in the Honduras Memorial is a prior iteration of the same accusations, itself devoid of evidentiary support.

on Honduran frontier and customs posts, helicopters and boats; the mining of fields and roads along the frontier; and incursions into Honduran territory. While Nicaragua denies these charges in general, it acknowledges that since the *contras* began using Honduras as an operational base for launching attacks in and against Nicaragua, there have been occasional armed encounters between Nicaraguan and Honduran forces along the border, and that casualties in men and *matériel* have been suffered by both sides. Nicaragua consistently has done everything within its power to avoid such encounters. Nevertheless, they have occurred for two reasons. First, Honduras permits the *contras* to use its territory to carry out attacks in and against Nicaragua. Second, as set forth in the Application and as Nicaragua is prepared to prove at the merits phase of this proceeding, the Honduran armed forces have actively participated with the *contras* in many of their attacks inside Nicaragua, and provided them with artillery or air support for their operations. Thus, it is the illegal presence of the *contras* in Honduras — which is possible only because Honduras permits the *contras* to remain in its territory and to attack Nicaragua therefrom — that is responsible for the armed encounters that have occurred between the two States and for the tragic losses of life and property that both have suffered.

33. Honduras not only blames Nicaragua for causing the present dispute between the two States, but also for blocking all efforts to achieve a diplomatic solution. These accusations are equally fallacious. As to efforts to achieve a diplomatic solution, Nicaragua has vigorously and in good faith pursued both a bilateral negotiated settlement of its dispute with Honduras and a multilateral negotiated settlement of the dispute affecting all of Central America. A bilateral settlement consistently has been rejected by Honduras, which insists that any negotiated settlement must be regional, and therefore multilateral, in nature. Yet, a regional settlement has also been frustrated by Honduras, because any regional agreement would necessarily recognize the sovereignty of Nicaragua and require, consistent with international law, that all assistance to the *contras* be terminated.

34. Since 1981 Nicaragua has sought a bilateral settlement directly with Honduras. On 13 May 1981, the heads of State of the two countries met at the border post of El Guasaule. The Honduran President, General Policarpo Paz García, committed his Government to stop the attacks in and against Nicaragua by the *contras* and by elements of the Honduran army. (Ann. 12.) Despite this commitment, the attacks not only continued but intensified. On 21 April 1982, Nicaragua's Foreign Minister, Father Miguel d'Escoto Brockmann, presented his Honduran counterpart, Edgardo Paz Barnica, a 7-point plan for resolving the dispute between the two countries. It called for the signing of a non-aggression pact between Nicaragua and Honduras; the establishment of a system of joint patrol of the common border to prevent activities by armed groups that could endanger relations between the two countries; and for dismantling the *contra* military encampments in Honduran territory. The Honduran Foreign Minister responded in a note dated 23 April 1982 (Ann. 4 to the Honduras Memorial), rejecting a bilateral settlement of the dispute:

> "I understand, as was very clearly explained by Your Excellency, that your proposal is of a bilateral nature and is aimed at improving relations between our two countries, while the Honduran initiative is wider in scope, of a regional nature and with perhaps more ambitious objectives. Despite this, my Government considers that the regional approach should prevail since a major part of the problems confronted by

the Central American countries go beyond the possibility of a bilateral solution." (Ann. 4 to Honduras Memorial, p. 87, *supra*.)[1]

Honduras has maintained this position ever since, refusing to agree to any bilateral settlement of its dispute with Nicaragua.

35. Between April 1982 and June 1983, a number of meetings took place between high-level officials of Nicaragua and Honduras, including: a meeting of the Ministers of Defence and Chiefs of Staff on 20 May 1982; a meeting of the Chiefs of Naval Forces in July 1982; and various meetings of the Foreign Ministers and Vice Ministers. No agreements resulted, however. Honduras continued to assert that the dispute between the two countries could only be settled as part of an overall regional settlement agreed to by all of the Central American States. During this period and thereafter Nicaragua continued to make specific proposals for a bilateral settlement between Nicaragua and Honduras, as well as proposals for an overall regional settlement, which it saw as complementary to, and not inconsistent with, a bilateral settlement. (Ann. 13.) Honduras rejected every Nicaraguan overture. Since August 1982, Honduras has refused even to meet with Nicaragua outside of the context of a regional meeting involving all of the Central American States.

36. The Honduras Memorial accuses Nicaragua of blocking a regional settlement in Central America. Chapter I, Section 6, is entitled: "Nicaraguan Responsibilities for Blocking the Contadora Process." The section presents a version of events that has little in common with what has actually transpired. An accurate history of the Contadora process, dating from Nicaragua's agreement to participate (on 19 July 1983) through Nicaragua's agreement to sign the "final version" of the Contadora Treaty (on 17 June 1986), demonstrates that no Government co-operated more fully with Contadora than Nicaragua, and no Government did more to obstruct a final agreement than Honduras.

37. The first formal proposal made by the Contadora Group (Colombia, Mexico, Panama and Venezuela) was the Document of Objectives, presented for agreement by the five Central American States on 7 September 1983. It laid down broad guidelines on the objectives of the process, with regard to reaching agreement on enumerated substantive points and the steps to be followed along the way. Nicaragua agreed to the Document of Objectives, as did the other Central American States.

38. The Contadora Group then asked that each of the Central American States prepare concrete proposals for an agreement incorporating the principles set forth in the Document of Objectives. The Central American States were given until 1 December 1983 to present their proposals. Nicaragua was the only State to comply with this request. On 15 October 1983, Nicaragua presented a package of five proposed treaties, collectively called Legal Bases for Guaranteeing Peace and the International Security of the Central American States. (Ann. IX to Applicant's Request for Interim Measures in case concerning *Military and Paramilitary Activities in and against Nicaragua*.) In

[1] The Honduran Foreign Minister also rejected, in specific terms, Nicaragua's proposal for a non-aggression pact on the ground that such an agreement was "not necessary" and because of "other difficulties of a technical and practical nature" (p. 88, *supra*). The Honduran Foreign Minister rejected Nicaragua's proposal for dismantling the *contra* military encampments on the ground that "there are no camps of Somoza Revolutionaries in Honduras" (p. 89, *supra*). He went on to state that: "The truth of this assertion is proved by our willingness to accept a system of international monitoring and supervision on our territory." *(Ibid.)* As of the date of this Counter-Memorial, Honduras has refused to accept any such system.

addition to a regional treaty to be signed by all five Central American States, Nicaragua presented two bilateral treaties of friendship and co-operation (one between Nicaragua and Honduras, and one between Nicaragua and the United States) and one treaty guaranteeing non intervention in the internal conflict in El Salvador[1].

39. After months of negotiations, on 7 September 1984, the Contadora Group presented to the five Central American States a proposed treaty that it called its revised or "final version" of the "Contadora Treaty for Peace and Co-operation in Central America". In the covering letter to the five States, the Contadora members stated:

> "This latest version is the result of an intense process of consultations and a broad exchange of views with all the Central American governments . . .
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> . . . . . .
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> The signing of the Contadora Act on Peace and Co-operation in Central America should provide the basis for security and coexistence governed by mutual respect . . .
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> . . . . . .
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> In the light of the persistent threat to peace, we believe that the Governments of the region must expedite the process of assuming the legal commitments contained in the Contadora Act.
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> . . . . . .
>
> We are confident that in the not too distant future, we the Ministers for Foreign Affairs of the Contadora Group and our colleagues in the Central American region, once the improvements considered relevant are made, will be able to sign the Contadora Act on Peace and Co-operation in Central America."[2] (Communication from the Ministers for Foreign Affairs of the Contadora Group addressed to the five Central American heads of State (Ann. 14).)

40. In the weeks following the presentation of the Contadora Treaty, high officials of each of the Central American States made positive public state-

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[1] The proposed non-intervention treaty concerning El Salvador was neither "devious" nor "interventionist", as claimed in the Honduras Memorial (p. 31, *supra*). On the contrary, it would have guaranteed strict non-intervention in the internal affairs of El Salvador by prohibiting the contracting parties from supporting arms or other assistance to the parties to the internal conflict in that country.

[2] "Esta *última versión* es el resultado de un intenso proceso de consultas y de un amplio intercambio de puntos de vista con todos los gobiernos centro-americanos . . .

. . . . . .

La suscripción del Acta de Contadora para la Paz y Cooperación en Centroamerica debe conducir al establecimiento de una base de seguridad y convivencia mutuamente respetuosa . . .

. . . . . .

Ante la persistente amenaza de la ruptura de la paz es necesario, a nuestro juicio, *que los gobiernos de la región apresuren la adopción de los compromisos jurídicos contenidos en el Acta de Contadora.*

. . . . . .

Abrigamos la confianza de que en un futuro inmediato los Cancilleres del Grupo de Contadora y sus colegas de la región centroamericana, una vez hechas las *afinaciones* que se estimen pertinentes, podemos suscribir el Acta de Contadora para la Paz y la Cooperación en Centroamerica."

ments about it and there was great optimism that the Treaty would be signed. Then, on 22 September 1984, Nicaragua formally communicated its acceptance of the Treaty "without reservation" (Ann. 15). All of a sudden, the positive attitude of the other Central American States changed. As described by Oyden Ortega, the Foreign Minister of Panama and representative of his Government in the Contadora process:

> "We believed that at that moment that the days of peace and understanding were shining among the Central Americans. The situation began to change when the Nicaraguan Government formally manifested to the Presidents of the Governments that made up the Contadora Group that Nicaragua supported the revised Contadora Act without reservation and was prepared to sign it. In spite of the fact that the reaction of the Nicaraguan Government came after there had likewise been positive declarations from the other four Central American Governments, there arose an atmosphere of caution toward the revised Act on the part of those four Governments."[1]

41. Honduras reacted to Nicaragua's acceptance of the Contadora Treaty by calling for a meeting of the five Central American foreign ministers in Tegucigalpa, to discuss changes in the Treaty. The members of the Contadora Group itself were not invited. Nicaragua refused to participate, stating that the meeting was contrary to the Contadora process. Guatemala sent only a vice minister. The meeting resulted in a proposed treaty substantially different from the one presented by Contadora. On 20 October 1984, the Document of Tegucigalpa was provisionally agreed to by Honduras, El Salvador and Costa Rica, but not Guatemala. Thereafter the former three States were called the Tegucigalpa Group. The Contadora Group was displeased by the rump session and the draft treaty it produced. According to former Panamanian Foreign Minister Oyden Ortega:

> "We were very much struck by the fact that the Honduran Government would convene a meeting in Honduras of other Central American Governments, excluding the four Contadora foreign ministers, for the purpose of carrying out a joint review of the Act and suggesting the modifications that they considered appropriate.
>
> This new element indicated the beginning of a new moment of difficulty or crisis within the Contadora process, since the convening of the meeting broke an unwritten rule of the Contadora Group and of the joint meetings with the Central American foreign ministers.
>
> We were expecting small adjustments to refine the revised Act, but in many cases substantial modifications to the draft Act were presented.
>
> In fact, the observations presented by Honduras, El Salvador, Costa Rica and the United States implied — if applied literally — reopening the negotiation of matters of substance.
>
> The Government of Honduras proposed, as part of its exceptions to

[1] "Creíamos que en ese momento fulguraban los días de paz y entendimiento entre los centroamericanos. *La situación empezó a cambiar cuando el gobierno nicaraguense manifestó formalmente a los Presidentes de los gobiernos que integran el Grupo de Contadora, que Nicaragua apoyaba sin reservas el Acta Revisada de Contadora y estaba dispuesta a firmarla.* A pesar de que la reacción del Gobierno nicaraguense se dió cuando ya se habían producido las manifestaciones también positivas de los otros cuatro gobiernos centroamericanos, *se crea un ambiente de reserva al Acta Revisada* por parte de los otros cuatro gobiernos centroamericanos."

the Act, the creation of a disarmament committee. This would be unacceptable, above all, if it was meant to be established within the framework of the Inter-American Defense Board.

The ex-President of Venezuela, Carlos Andrés Peréz, at that time described the Document of Tegucigalpa as 'the anti-Contadora Act'."[1]

42. On 6 November 1984, the *Washington Post* revealed that the Government of the United States had intervened in the Contadora process to block acceptance of the revised Contadora Treaty by Honduras, Costa Rica and El Salvador. The *Washington Post* cited as its source a secret background paper for a meeting of the National Security Council, dated 30 October 1984. The paper, entitled "Background Paper for NSC Meeting on Central America", states:

> "We have effectively blocked Contadora Group efforts to impose the second draft of a Revised Contadora Act. Following intensive US consultations with El Salvador, Honduras and Costa Rica, the Central American submitted a counterdraft *(sic)* to the Contadora States on October 20, 1984. It reflects many of our concerns and shifts the focus within Contadora to a document broadly consistent with US interests." (Ann. 16, p. 404, *infra*.)

Commenting on the revelation of United States efforts to block acceptance of the Contadora Treaty, former Panamanian Foreign Minister Ortega writes: "An action was revealed whose consequences and form departed from the methods and objectives of the Contadora Group."[2]

43. At the urging of the members of the Contadora Group, and to break the impasse created by Honduras and the other members of the Tegucigalpa Group, Nicaragua agreed to negotiate changes in the "final version" of the Contadora Treaty that it had already accepted without reservation. The negotiations lasted through most of 1985, resulting in a new draft of the Contadora Treaty presented by the members of the Contadora Group on 7 October 1985. The five Central American States were given 45 days, or until 21 November 1985, to respond. Nicaragua responded on 11 November 1985 agreeing to most of the Treaty, but expressing specific concerns about certain pro-

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[1] "Nos llamó poderosamente la atención que el gobierno de Honduras citara a los otros gobiernos centroamericanos, con la exclusión de los cuatro Cancilleres de Contadora, a una reunión en ese país, con el proposito de efectuar una revisión conjunta del Acta y sugerir las modificaciones que estimaran convenientes.

Este nuevo elemento *indicaba el inicio de un nuevo momento dificil o de crisis dentro del proceso de Contadora, ya que la sola convocatoria rompía con una regla no escrita del Grupo de Contadora y de las reuniones conjuntas con los Cancilleres centroamericanos.*

Esperábamos pequenos ajustes para afinar el Acta revisada, y se presentaron en muchos casos modificaciones sustanciales al Proyecto de Acta.

De hecho, las observaciones presentadas por Honduras, El Salvador, Costa Rica y Estados Unidos *implicaban* — de ser aplicadas al pie de la lettre — *reabrir la negociación de aspectos sustantivos.*

El gobierno de Honduras planteó, como parte de las objectiones al Acta, la creación de un Comite *ad hoc* de desarme, lo cual resultaba inaceptable, sobre todo, si se pretendía hacerlo en el marco de la Junta Interamericana de Defensa.

El ex presidente de Venezuela Carlos Andrés Peréz, calificó en ese momento el Documento de Tegucigalpa como *'el anti-Acta de Contadora'*."

[2] "Quedaba al descubierto una acción cuyas consecuencias y forma *se apartaban de los métodos y objetivos del Grupo de Contadora.*"

visions. Nicaragua indicated its willingness to continue negotiating about these provisions, however. (See Ann. 11 to Honduras Memorial.) None of the other Central American States accepted the Treaty but negotiations continued.

44. On 7 June 1986, after further negotiations, the Contadora Group presented to the five Central American States the definitive and final version of the Contadora Treaty. In their official cover letter of 6 June 1986, the Foreign Ministers of the Contadora States said:

> "The Foreign Ministers of Colombia, Mexico, Panama and Venezuela will meet on the 6th of June, a date jointly agreed upon to conclude officially the negotiations on the Contadora Act for Peace and Cooperation in Central America and to proceed to its formalization . . .
>
> Today, we make a formal delivery of what, in the judgment of Contadora, should constitute the final version of the Contadora Act for peace and cooperation in Central America."[1]

45. Nicaragua promptly agreed to sign the Contadora Treaty. In a formal response to the Contadora Group of 17 June 1986, the Government declared:

> "Nicaragua, which always has been ready to sign the Act of Peace in the spirit of the Caraballeda message, considers that the Act of June 7, 1986, presented formally to the Central American countries by the Contadora Group, constitutes the only instrument that 'can and should bring about a rapid and effective conclusion to the negotiating process' to achieve peace in Central America."[2]

46. Honduras on the other hand, rejected the Contadora Treaty. In a communiqué of 13 June 1986, the Honduran Government stated:

> "The last proposed draft of the Act by Contadora does not constitute, in the opinion of the Government of Honduras, a document that establishes reasonable and sufficient obligations to guarantee its security."[3] (Ann. 19.)

In the official response to the Contadora Group, the Honduran Foreign Minister, Carlos López Contreras, wrote:

> "As I have already expressed verbally during our joint meeting in Panama, the Government of Honduras takes note of what was stated by the Contadora Group in the sense that the final draft of the Act com-

[1] "Los Cancilleres de Colombia, México, Panamá y Venezuela nos reunimos el 6 de junio, fecha comunmente acordada para dar por concluida oficialmente la negociación del Acta de Contadora para la paz y la Cooperación en Centroamérica y para proceder a su formalización . . .

Hoy hacemos entrega formal de lo que a juicio del Grupo de Contadora debe constituir la *ultima versión* del acta de Contadora para la paz y la cooperación en Centroamérica." (Emphasis added.) (Ann. 17.)

[2] "*Nicaragua, que siempre ha estado dispuesta a firmar el Acta de Paz* en el espíritu del mensaje de Caraballeda, considera que el Acta del 7 de junio de 1986, presentada formalmente a los países centroamericanos por el Grupo de Contadora, *constituye el único instrumento que 'puede y debe propiciar una conclusión rápida y eficaz del proceso negociador', para alcanzar la paz en Centroamérica.*" (Ann. 18.)

[3] Original Spanish text:

"El último proyecto de Acta propuesto por Contadora no constituye, en la opinión del Gobierno de Honduras, un documento que establezca obligaciones razonables y suficientes para garantizar su seguridad."

pletes its mediation effort on the substantive aspects of the Act, and that the Contadora Group nevertheless remains available to assist in the negotiation of the operational and practical aspects of the same."[1] (Ann. 20.)

47. Since the Honduran Foreign Minister's objection to the Contadora Treaty, there have been daily attacks in and against Nicaragua by *contras* operating from bases in Honduras. The airstrip at Aguacate, like other airstrips inside Honduras, has been used on a daily basis to airdrop supplies to *contra* units inside Nicaragua. (Ann. 21[2].) Hundreds of *contras* have been trained in military tactics, sabotage, demolition, etc., at special training facilities inside Honduras, such as the one at Capire. *Contra* military activity emanating from Honduras and directed against Nicaragua has been higher over the past 12 months than at any previous time. Death and destruction inside Nicaragua are higher than at any previous time.

[1] "Como ya lo expresé verbalmente durante nuestra reunión conjunta en Panamá, el Gobierno de Honduras toma nota de lo expresado por el grupo de Contadora en el sentido de que el último proyecto de Acta agota *su gestión mediadora* en los aspectos sustantivos del Acta y que permanecerá, sin embargo, disponible para colaborar en la negociación de los aspectos operativos y prácticos de la misma."

[2] Annex 21 is the flight log obtained from the wreckage of a C-123 cargo plane that was shot down over Nicaragua on 5 October 1986. The sole surviving crew member, Mr. Eugene Hasenfus, a citizen of the United States, was captured by Nicaraguan armed forces. Mr. Hasenfus subsequently stated that the downed plane was on a mission to drop arms and other war *matériel* to *contra* forces inside Nicaragua. He stated that he had participated in numerous such missions and that he believed he was working for the Government of the United States. Mr. Hasenfus confirmed, as recorded in the flight logs, that the downed C-123 had made numerous trips into and out of the *contras*' airbase at Aguacate, Honduras, for the purpose of loading up and delivering supplies to *contra* forces inside Nicaragua. For the convenience of the Court the designator in the logs refers to the airbase at Aguacate.

PART I. JURISDICTION UNDER ARTICLE 36 (2) OF THE STATUTE OF THE COURT

48. The Application of Nicaragua asserts as a ground of the jurisdiction of the Court the declarations of the Parties made under Article 36 (2) of the Statute of the Court. Nicaragua's declaration was made on 24 September 1929, without reservation. It is currently in effect. (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 417.) Honduras accepted the jurisdiction of the Court in a series of declarations of which the most recent was filed on 20 February 1960, and recited that it was "for an indefinite term, starting from the date on which it is deposited with the Secretary-General of the United Nations". These two intersecting declarations confer jurisdiction on the Court in this case under the optional clause.

49. However, on 22 May 1986, Honduras purported to make a new declaration. Paragraph 1 recites the language of Article 36 (2) of the Statute. Paragraph 2 states:

> "This declaration shall not apply, however, to the following disputes to which the Republic of Honduras may be a party:
>
> *(a)* Disputes in respect of which the parties have agreed or may agree to resort to other means for the pacific settlement of disputes;
>
> . . .
>
> *(c)* Disputes relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras and in which it may find itself involved directly or indirectly;
>
> . . . (Memorial, Ann. 43.)

Paragraph 3 of the "new declaration" states that Honduras "reserves the right at any time to supplement, modify or withdraw this declaration or the reservations contained therein . . .". And paragraph 4 asserts that "This Declaration replaces the Declaration made by the Government of Honduras on 20 February 1960."[1]

50. Honduras contends that this "reservation" has the effect of ruling out jurisdiction of the present case. In this Part of the Memorial, Nicaragua will show that the reservation is not effective against it.

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[1] Paragraph 4 does not affect the analysis in this case. Whether a State bound by a prior declaration can modify the effect of the declaration is not affected by whether the new effort is denominated a "modification" or a "new declaration". See *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 417. The same rules apply in the case of total or partial denunciation of a declaration. *Right of Passage over Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, p. 142.

CHAPTER 1

THE COURT HAS JURISDICTION UNDER ARTICLE 36 (2) OF ITS STATUTE, AND THE HONDURAN DECLARATION OF 22 MAY 1986 IS NOT EFFECTIVE

51. Nicaragua contends, first, that Honduras cannot modify or partially denounce its declaration of 20 February 1960, and in any case such an attempted modification cannot be effective against Nicaragua in the circumstances of this case.

A. Having Been Made with No Stipulations as to Duration, the "New Declaration" by Honduras Could Not Be Withdrawn or Modified

52. The "new declaration" made by Honduras on 20 February 1960 accepting the compulsory jurisdiction of the Court read as follows:

> "The Government of the Republic of Honduras, duly authorized by the National Congress, under Decree No. 99 of 29th January 1960, to renew the Declaration referred to in Article 36 (2) of the Statute of the International Court of Justice, hereby declares:
>
> 1. That it renews the Declaration made by it for a period of six years on 19th April 1954 and deposited with the Secretary-General of the United Nations on 24th May 1954, the term of which will expire on 24th May 1960, recognizing as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice 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 and extent of the reparation to be made for the breach of an international obligation.
>
> 2. This new Declaration is made on condition of reciprocity, *for an indefinite term*, starting from the date on which it is deposited with the Secretary-General of the United Nations" (emphasis by the Government of Nicaragua).

53. This text differs from the two earlier declarations by Honduras, dated 2 February 1948 and 19 April 1954, both of which were for six years — the first giving no other details, whereas the second provided for the possibility of tacit renewal.

54. The question then is to determine whether a State bound by a Declaration of Acceptance of the compulsory jurisdiction of the Court that it has made "for an indefinite term" can modify or denounce that declaration. The reply can only be negative. Any other approach would be incompatible with the Optional Clause system.

55. The predominant conception of the legal nature of the link between States that accept the compulsory jurisdiction of the Court is stated by Charles de Visscher as follows:

> "The system of an Optional Clause may be analysed as a complex of bilateral conventions deriving from unilateral declarations which converge, giving rise to a consensual link between the declarant States with effect from the day their successive declarations are lodged." (Charles De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Pedone, Paris, 1963, p. 199.)[1]

56. The opinion of the best-qualified authors is the same. (See, in particular, Paul Guggenheim, *Traité de droit international public*, Librairie de l'Université, Geneva, 1954, Vol. II, p. 120; Sir Humphrey Waldock, "Decline of the Optional Clause", *BYBIL*, 1955-1956, p. 254; Sir Gerald Fitzmaurice, "The Law and Procedure of the I.C.J.", *BYBIL*, 1957, pp. 230-232, and *BYBIL*, 1958, p. 75; Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens, London, 1958, pp. 345- 346; Eric Suy, *Les actes juridiques unilatéraux en droit international public*, Librairie générale de droit et de jurisprudence, Paris, 1962, pp. 142-147; Eduardo Jiménez de Aréchaga, "International Law in the Last Third of a Century", *RCADI*, 1978-I, Vol. 159, p. 154.)

57. This analysis is fully confirmed by the jurisprudence of the Court which:

> "considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The *contractual relation* between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration." (*Right of Passage over Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, p. 146 (emphasis added).)

58. The Court reiterated this position in its decision of 26 November 1984:

> "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." (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 418 (emphasis added); see also p. 420.)

59. It follows necessarily that a State which has made a declaration under Article 36, paragraph 2, of the Statute is bound by it and cannot disengage unilaterally from the obligations entailed. To permit it to do so would be contrary to the contractual nature of the resulting relations and to the principle of good faith.

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[1] "Le système de la clause facultative s'analyse en un complexe de conventions bilatérales issues de déclarations unilatérales qui se rencontrent, cette rencontre ayant pour effet de faire naître successivement un lien consensuel entre les Etats déclarants à compter du jour du dépôt de leurs déclarations successives."

60. As the Court has stressed:

> "In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role." (*Ibid.*, p. 418.)

61. It follows that the law of treaties or, in any event, the general principles thereof applies to the legal problems relating to the application of declarations of acceptance of the Optional Clause, as the vast majority of authors emphasize:

> "Undoubtedly, the declarations under Article 36 (2) of the Statute, made as they are at different times and by different States are not in all respects exactly like a treaty. But they are essentially a treaty." (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens, London, 1958, p. 345.)

(See also E. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", *BYBIL*, 1948, pp. 142 *et seq.* or Sir Humphrey Waldock, *op. cit.*, p. 264; *Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 142 (dissenting opinion of Judge Read).)

62. The general principles of the law of treaties are, in particular, applicable to the termination of obligations deriving from optional declarations:

> "The legitimacy of terminating any declaration otherwise than in accordance with its terms must, on principle, hinge upon the rules governing the termination of treaties." (Sir Humphrey Waldock, *op. cit.*, p. 265.)

> "In general, unilateral termination of the obligations of the Optional Clause must be regarded as subject to conditions governing the termination of treaties." (L. Oppenheim, ed. by H. Lauterpacht, *International Law*, Longmans, London, 7th ed., 1951, p. 61.)

63. The applicable principles are set out in Article 56 (1) of the Vienna Convention on the Law of Treaties, relating to the "Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal":

> "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> *(a)* it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> *(b)* a right of denunciation or withdrawal may be implied by the nature of the treaty."

64. These provisions were adopted at the twenty-fourth plenary session of the United Nations Conference on the Law of Treaties, on 13 May 1969, by 95 votes for, none against and 6 abstentions. They are widely recognized as a codification of the rules of general international law. The Legal Service of the United Nations noted in a letter of 22 July 1971 to the Senegalese authorities:

> "[I]t is established that both the International Law Commission and the Vienna Conference have considered Article 56, at least as to its general principle, as recognizing the existing law linking States with one another, whether or not they are parties to the Convention." (Cited by Daniel Bardonnet, "La dénonciation par le Gouvernement sénégalais de la convention sur la mer territoriale et la zone contiguë et de la con-

vention sur la pêche et la conservation des ressources biologiques de la haute mer, en date à Genève du 29 avril 1958", *AFDI*, 1972, p. 143.)[1]

65. Similarly, Judge Sette-Camara noted in his separate opinion to the Advisory Opinion of the Court, dated 20 December 1980,

> "Article 56 [of the 1969 Vienna Convention] embodies rules of general international law within the meaning of Article 3 *(b)* [of this Convention]." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 186.)

66. And the Court itself has taken the view that Article 56 provides at least general indications of the pertinent rules. (*Ibid.*, pp. 94-95.)

67. The starting point of any reasoning is therefore that a treaty containing no provisions limiting its duration is not subject to unilateral denunciation. This emerges from the actual wording of the above-quoted Article 56, paragraph 1 — "A treaty . . . *is not* subject to denunciation or withdrawal *unless*: . . ." — and from the circumstances of its adoption. The first draft, drawn up in 1963 by the special ILC rapporteur, Sir Humphrey Waldock, was in fact worded more ambiguously. (See *ILC Yearbook*, 1963, Vol. II, p. 64.) In this form it met with almost unanimous opposition from the members of the International Law Commission (*ibid.*, Vol. I, pp. 100-107), and was extensively amended so as to reaffirm the basic principle (*ibid.*, pp. 239-241; also see *ibid.*, Vol. II, pp. 200-202). Indeed the principle was further strengthened as a result of government comments (*ILC Yearbook*, 1966, Vol. II, pp. 28 *et seq.*).

68. Neither of the two exceptions codified in subparagraphs *(a)* and *(b)* of Article 56 (1) is applicable to the facts of the present case: the possibility of denouncing the declarations of acceptance of the compulsory jurisdiction of the Court is not "implied by the nature of the treaty" and it is established that Honduras did not intend "to admit the possibility of denunciation or withdrawal".

69. In the cases where the question whether optional clause declarations are inherently susceptible of denunciation has arisen, the Court sustained its jurisdiction without reaching this question. (*Fisheries Jurisdiction* cases *(Jurisdiction of the Court), I.C.J. Reports 1973*, pp. 15-16, 60; and *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*.) In the *Military and Paramilitary Activities* case, the Court noted in its judgment of 26 November 1984 that "the right of immediate termination of declarations with indefinite duration is far from established". But it confined itself to observing that, in any event, the principle of good faith required a reasonable period of notice. (*I.C.J. Reports 1984*, p. 420.)

70. Virtually all authors exclude declarations of acceptance of the compulsory jurisdiction of the Court from the category of treaty provisions that "by their very nature" are subject to denunciation or withdrawal. (Edvard Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", *BYBIL*, 1948, pp. 142-143; Julius Stone, *Legal Controls of International Conflicts*, Rhinehart, New York, 1954, p. 127; M. Dubisson, *La Cour internationale de Justice*, LGDJ, Paris, 1964, p. 194; B. S. Murty, "Settlement of Disputes", in Max Sørensen, ed., *Manual of Public International Law*, Macmillan, London, 1968, p. 706; J. M. Verzijl, *International Law in*

[1] "[I]l est constant pour le service juridique que tant la Commission du droit international que la conférence de Vienne ont considéré cet article 56, au moins dans son principe général, comme la reconnaissance du droit existant, liant les Etats entre eux, qu'ils soient parties ou non à la convention."

an Historical Perspective, Vol. II, Sijthoff, Leyden, 1976, p. 428; D. W. Bowett, *The Law of International Institutions*, Stevens, London, 1982, p. 271. The few dissents are qualified and cautious in their views with the possible exception of that of Mr. Shihata (*The Power of the International Court to Determine Its Own Jurisdiction*, Nijhoff, The Hague, 1965, p. 167). This is true in particular of the position adopted by Ambassador Shabtai Rosenne, who observes that:

> "With regard to the terminal date, there are still found a few declarations which contain no provision for termination, and it is believed that, as previously discussed, effect would have to be given to any denunciation of these instruments." (*The Law and Practice of the International Court*, Sijthoff, Leyden, 1965, 2nd ed., 1985, p. 472.)

This conclusion is further qualified by his admission that the conclusion applies only to declarations made before 1945 (*ibid.*, p. 417), and the reasoning rests largely on the particular circumstances surrounding the dissolution of the League of Nations and the Permanent Court. (*Ibid.*, at pp. 415-417; see also Sh. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice*, Sijthoff, Leyden, 1960, pp. 24-27.)

71. Sir Humphrey Waldock's provisional, almost transient, position is still more guarded. In his second report on the law of treaties, the ILC special rapporteur "thought it right to bring under" the category of treaties for which denunciation or withdrawal was permissible on twelve months' notice, "however reluctantly, treaties of arbitration, conciliation or judicial settlement", in which he includes optional declarations. (*ILC Yearbook*, 1963, Vol. II, p. 68.) However, the doubt evinced by Sir Humphrey Waldock shows that this conclusion was based solely on "the modern trend towards declarations terminable upon notice". The position of the special rapporteur was rejected by almost all the members of the Commission several of whom — in particular Messrs. Castrén, Amado, Verdross, Bartos and Tunkin — protested at the inclusion of treaties of arbitration, conciliation and judicial settlement — or optional declarations — in the list of treaties that could be denounced unilaterally. Only Ambassador Rosenne took the opposite view (*ILC Yearbook*, 1963, Vol. I, pp. 100-107). Professor Briggs pointed out that the only argument used by the special rapporteur in support of his contention — the frequency of clauses providing expressly for a right of denunciation,

> "could with the same force be used to prove the opposite contention, that if treaties were silent about termination the parties had deliberately intended to exclude denunciation" (*ibid.*, at p. 103).

72. Sir Humphrey Waldock immediately acceded to these comments. (*Ibid.*, at p. 106.) At no time thereafter did either he or the other members of the Commission ever point to treaties for the peaceful settlement of disputes or declarations made in pursuance of the Optional Clause as examples of treaties that were inherently subject to unilateral denunciation.

73. In his remarkable article, "Decline of the Optional Clause", *BYBIL*, 1955-1956, Sir Humphrey asserts unambiguously the impossibility, in principle, of renouncing the terms of a declaration made for an indefinite term:

> "When the two States concerned are bound by such a declaration, they cannot free themselves from their obligations simply by giving notice to the Secretary-General. Nor can such a right be implied in Article 36 of the Statute, paragraph 3 of which clearly contemplates an indefi-

nite continuation unless provision for a time-limit is made when a State makes its declaration.

On principle, therefore, there is no right of unilateral termination of a declaration under the Optional Clause unless the right has been expressly reserved in the declaration. On the same principle also there is not, in the absence of an express term, any right of unilateral variation of a declaration previously made and still in force." (*Ibid.*, p. 265.)

74. This opinion follows from the more general view of most authors that there is certainly no general right of denunciation of a treaty of indefinite duration. (J. L. Brierly, *The Law of Nations*, Clarendon Press, Oxford, 1963, pp. 317 *et seq.*; see also Lord McNair, *The Law of Treaties*, Clarendon Press, Oxford, 1961, pp. 493 *et seq.*; Charles Rousseau, *Droit international public*, t. I, *Introduction et sources*, Sirey, Paris, 1971, p. 213; Sir Robert Jennings, "General Course on Principles of Public International Law", *RCADI*, 1967-II, Vol. 121, p. 565; Paul Reuter, *Introduction au droit des traités*, PUF, Paris, 1985, p. 136.)

75. Applying this general principle, Professor R. P. Anand concludes:

"There being no provision in the Statute, it seems reasonable to assume that the abrogation or expiry of the declaration will be subject to the general rules covering termination of treaties. This would normally mean that a state having made a declaration without any provision for its termination would not be entitled to cancel it as against other states having declarations for fixed periods except with their consent. Otherwise, termination of the declaration would not be justifiable except by reference to some special rule concerning the termination of treaties, such as, the doctrine of *rebus sic stantibus*. Moreover, under Article 36 (6) of the Statute, it would be for the Court to decide any dispute as to the validity of a purported cancellation of a declaration." (*Compulsory Jurisdiction of the International Court of Justice*, Asia Publishing House, London, 1961, p. 177.)

"It may or may not be expedient as a matter of policy to attach to acceptance of the Optional Clause a time-limit which can be renewed at will, but if a state has not seen fit to do so, it is clear that it intended to be and is bound permanently or until the other signatories of the Clause release it from its obligation." (*Ibid.*, p. 179.)

"On principle, therefore, there is no right of unilateral termination or variation of a declaration under the Optional Clause unless the right has been expressly reserved in the declaration." (*Ibid.*, p. 180.)

76. Moreover, judicial or arbitration clauses, far from being inherently liable to denunciation by mere notification, are particularly stable and, one might say, exceptionally "resistant" to changes in circumstances. Thus, Article 65, paragraph 4, of the Vienna Convention on the Law of Treaties provides:

"Nothing in the foregoing paragraphs [concerning the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty] shall affect the rights or obligations of the parties under any provision in force binding the parties with regard to the settlement of disputes."

77. The Court has, on a number of recent occasions, noted this stability of the dispute settlement clauses. (See *Fisheries Jurisdiction* cases, *Jurisdiction of the Court, I.C.J. Reports 1973*, pp. 20, 65; *United States Diplomatic and Consular*

Staff in Tehran, I.C.J. Reports 1980, p. 28.) Many courts of arbitration have ruled similarly. For example, the award made on 2 September 1930 in the case of *Lena Goldfields Company* v. *Soviet Government* (*Cornell Law Quarterly*, 1959, pp. 31 *et seq.*); the preliminary award made on 27 November 1975 by the sole arbitrator Professor R.-J. Dupuy in the case of *Texaco-Calasiatic* v. *Libyan Government* (see *JDI*, 1977, p. 328).

78. Declarations of acceptance of the compulsory jurisdiction of the Court are of the same nature as these clauses, and can under no circumstances be terminated in the absence of an express provision to that end.

79. Moreover, the practice with respect to optional clause declarations indicates that they may be modified or terminated only when such a right is reserved. Out of 46 States that have made such declarations, 36 have reserved the right to denounce or modify their declarations, subject or not to certain conditions. It would be absurd for States expressly to reserve the right to denounce or amend their declarations of acceptance of the compulsory jurisdiction of the Court if such a right were automatic or could be considered to be implied by the very nature of the declarations. Even Honduras, in its "new declaration" of 22 May 1986,

> "reserves the right at any time to supplement, modify or withdraw this Declaration or the reservations contained therein by giving notice to the Secretary-General of the United Nations".

But, if this right were inherent in any declaration, the stipulation would be totally superfluous.

80. Moreover, Honduras is now claiming the right of modification or partial withdrawal that it vigorously challenged in the case of El Salvador. In 1973 El Salvador sought to replace its 1921 declaration, ratified in 1930 and made for an indefinite term, with a new and more restrictive acceptance. The Honduran Foreign Affairs Minister protested as follows:

> "Leading authorities on international law take the position that a declaration not containing a time limit cannot be denounced, modified or broadened unless the right to do so is expressly reserved in the original declaration and that, accordingly new reservations cannot be made unless this requirement has been fulfilled.
>
> To say otherwise would mean accepting the notion that a State can unilaterally terminate its obligation to submit to the jurisdiction of the Court whenever that suits its interests, thus denying other States the right to summon it before the Court to seek a settlement of disputes to which they are parties. This could well undermine the universally applicable principle of respect for treaties and for the principles of international law; [there follows a paragraph on Paraguay's attempt at unilateral withdrawal of its declaration in 1938 and the protests that this aroused].
>
> For the reasons stated above, my Government challenges the declaration by which El Salvador seeks to revoke and replace its original declaration accepting the jurisdiction of the Court since the new declaration is improperly made, hence completely lacking in validity, and would set a precedent prejudicial to the stability of the legal institutions established by the international community and to the effective exercise of the right of States to settle their disputes under the guarantee provided by the highest judicial body so far conceived by man." (Letter of 21 June 1974, text in Shabtai Rosenne, *Documentation on the International Court of Justice*, Sijthoff and Noordhoff, Alphen, 1979, p. 362.)

81. In that letter, Honduras went on to set out its own thinking on this question more broadly:

> "We deem it appropriate to note in this connexion that my country, faithful to its tradition of total respect for international rules and procedures, has accepted the Statute of the Court without reservations of any kind, since it recognizes that such institutions represent the most appropriate means of settling disputes between States; we would also note that, with profound faith in the principles of law, it has always complied with the arbitral awards or judicial decisions rendered in the disputes which it has submitted for settlement, regardless of whether the Court found in its favour." (Rosenne, *op. cit.*, at pp. 363-364.)

82. The rules of general international law codified by Article 56, paragraph 1, of the Vienna Convention on the Law of Treaties applied to the present case mandate rejection of the "new declaration":

(a) it is established that it was not the intention of Honduras to subject its 1960 declaration to denunciation or restriction — as both the actual text and the letter of 21 June 1974 from its Foreign Affairs Minister demonstrate so unequivocally;

(b) more generally, since no right of denunciation or withdrawal can be deduced from the nature of the declarations of acceptance of the compulsory jurisdiction of the Court, in the absence of such an intention manifested at the time the declaration was made, no State — including Honduras — can modify or withdraw a declaration made for an indefinite term.

83. Thus, the purported "new declaration" of Honduras of 22 May 1986, is invalid.

B. In Any Event, the Change Adopted by Honduras Cannot Be Invoked against Nicaragua

84. Even if Honduras could terminate or modify its declaration, such a change could not be invoked against Nicaragua in the circumstances of this case.

85. Again, the general principles of the law of treaties as codified in the Vienna Convention are relevant. Article 56 (2) provides: "2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

86. Like all the provisions of Article 56, paragraph 2 is a direct application of the principle of good faith, and codifies at least the principle of the rule of customary law. Professor Paul Reuter suggests the special relevance of this principle in Inter-American law:

> "The time-limit laid down in Article 56, paragraph 2, is based on that in the Havana Convention on the Law of Treaties (Sixth International Conference of American States, Final Act, Havana, 1928, p. 135.)"[1] (*Introduction au droit des traités,* PUF, 1985, p. 163; see also Taslim O. Elias, *The Modern Law of Treaties*, Oceana Publications, Dobbs Ferry, 1974, p. 106.)

[1] "Le délai fixé à l'article 56, paragraphe 2, est inspiré de la convention de La Havane sur le droit des traités (Sixth International Conference of American States, Final Act, La Havane, 1928, p. 135)."

The one-year period of notice is the same as that in Article 17 of the Havana Convention.

87. As early as his second report to the ILC on the law of treaties, Sir Gerald Fitzmaurice, describing the law in force, pointed out that the denunciation of a treaty which was silent as to its duration could only take effect after "reasonable notice" (*ILC Yearbook*, 1957, Vol. II, pp. 34-35). The same principle was referred to by Sir Humphrey Waldock, who explained it by the need to promote stability in contractual relations and to preserve the rights of the other parties to a treaty. ("Second Report on the Law of Treaties", *ILC Yearbook*, 1963, Vol. II, pp. 68-69; see also p. 202 and *ILC Yearbook*, 1966, Vol. II, p. 274.) *No* member of the International Law Commission called into question the validity of the principle nor the reasonableness of the period of notice adopted. The only comment was by Mr. Lachs who proposed that the time-limit of 12 months should be *extended* if required by the nature of the rights and obligations provided for under the treaty. (*ILC Yearbook*, 1963, Vol. I, p. 240.) The text was adopted without any changes in the Vienna Convention and without any objection by any member of the ILC or by any State. (See *ILC Yearbook*, 1979, Vol. I, p. 225; Vol. II, Part I, p. 148; and Vol. II, Part II, p. 177.)

88. The Court itself stated clearly that the requirement of reasonable notice of a denunciation is a well-established principle of the law of treaties, *independent of the 1969 Convention:*

> "A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on Treaties between States and international organizations or between international organizations. Those provisions . . . specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of the right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, pp. 94-95; see also p. 96 and the separate opinion of Judge Sette-Camara, *ibid.*, p. 186.)

89. Even apart from the analogy with the law of treaties, a requirement of reasonable notice follows necessarily from the principle of good faith applicable both to treaties and to unilateral declarations by States. Professor Eric Suy writes:

> "When an obligation has been assumed unilaterally by a State and has been brought to the attention of other States directly concerned, who have shown by their attitude that they are relying thereon, it is not always clear on what grounds it can be claimed that this obligation can likewise be changed or cancelled unilaterally if this would shake confidence in international relations. The rule *pacta sunt servanda* or, to extend its scope, the rule that obligations must be respected, is the cornerstone of the whole system of contractual international legal relations. To consider that conventions or treaties are binding only inasmuch as based on a specific meeting of the minds and to deny that unilateral commitments are binding since the intention behind them is not matched by a similar intention evinced by the other party or parties, is to be over-formalistic and to lose sight of the very essence of all

legal rules, namely the regulation and harmony of relations between parties." (*Les actes juridiques unilatéraux en droit international public*, LGDJ, Paris, 1962, p. 271; see also Elisabeth Zoller, *La bonne foi en droit international public*, Pedone, 1977, pp. 283 *et seq.*)[1]

90. The International Court of Justice supported this analysis in its famous pronouncement of 1974:

> "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.
>
> . . . . . .
>
> One of the basic principles concerning 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. (*Nuclear Tests* cases, *I.C.J. Reports 1974*, pp. 267-268 and 472-473.)

91. This analysis was reiterated ten years later (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 418). It gives rise to important concrete consequences, in regard to the possibility of withdrawing from obligations assumed under such unilateral declarations:

> "The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration." (*I.C.J. Reports 1974*, pp. 270, 475.)
>
> "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." (*Military and Paramili-*

[1] "On ne voit pas toujours pour quelle raison une obligation assumée unilatéralement par un Etat, une fois qu'elle est arrivée à la connaissance des Etats directement intéressés et que ceux-ci ont démontré par leur attitude qu'ils s'y fiaient, serait susceptible d'être modifiée ou annulée de la même façon s'ils mettaient la sécurité des rapports internationaux à l'épreuve. La norme *pacta sunt servanda* ou, pour en étendre la portée, la norme selon laquelle les engagements doivent être tenus, est la clé de voûte de tout le système des rapports juridiques internationaux sur le plan contractuel. Considérer les conventions ou traités comme obligatoires pour l'unique raison qu'ils se fondent sur la volonté concordante de certains sujets de droit, en refusant de reconnaître quelque valeur obligatoire aux engagements unilatéraux parce que la volonté ne serait pas soutenue par une volonté concordante, c'est témoigner d'un formalisme trop rigide qui perd de vue l'essence même de toute réglementation, à savoir la sécurité et l'harmonie des rapports entre les sujets."

tary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 418.)

92. The Court stated explicitly in its Judgment of 26 November 1984 that reasonable notice was required before withdrawing from optional declarations of indefinite duration:

> "But the right of immediate termination for 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." (*Ibid.*, p. 420.)

93. The separate opinion of Judge Mosler is even more explicit:

> "It may be open to doubt whether the Nicaraguan Declaration can be terminated with legal effect immediately on notice, or only after a lapse of a certain time after such notice. Article 56 of the Vienna Convention refers to the 'nature of the treaty', or envisages a twelve months' notice. Applying the same ideas by analogy to the 'consensual bond' effected by declarations under the Optional Clause, the 'nature' of the bond is characterized by the equal significance of the obligations. This results from Article 36, paragraph 2, without any special reservation being necessary as provided for in paragraph 3 of the same Article. The Court emphasized in the case of *Right of Passage over Indian Territory (Preliminary Objections)* (*I.C.J. Reports 1957*, p. 145), that the principle of reciprocity forms part of the system of the Optional Clause. It does not follow from the 'nature' of an 'unconditional' declaration that it may be terminated at any time and with immediate effect. Article 56 of the Vienna Convention shows — and here again an analogy is suggested — that the termination of an obligation must be governed by the principle of good faith. Withdrawal without any period of notice seems to me not to correspond with this principle if a declaration has been made explicitly unconditional." (*I.C.J. Reports 1984*, p. 467.)

94. In its Judgment, the Court said that in that case the question of what reasonable period of notice would legally be required did not need to be further examined. (*Ibid.*, p. 420.)

95. The same is probably true here: Although the "new declaration" was deposited with the United Nations Secretary-General on 22 May 1986, he did not circulate it until 30 June. The "reasonable time" could not begin to run before that date. (Cf. Sh. Rosenne, *The Law and Practice of the International Court*, Sijthoff, Leyden, 1986, at p. 471.) The Application in the present case was filed on 28 July 1986, only four weeks after the circulation. Surely, a reasonable time had not elapsed by then.

96. Without accepting absolutely the period of 12 months provided for under Article 56, paragraph 2, of the Vienna Convention, the Court has said that 12 months is an indication of what would be a reasonable period:

> "Some indications as to the possible periods involved, as the Court has said, can be seen . . . in Article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,*

I.C.J. Reports 1980, p. 96. See also the separate opinion by Judge Sette-Camara, *I.C.J. Reports 1980*, p. 187.)

What is more, these provisions present this period as a minimum — "*not less than twelve months' notice . . .*".

97. Another indication of what "reasonable notice" should be taken to mean in this instance was given by Honduras itself when, in 1974, it challenged the withdrawal by El Salvador of its declaration of 1921. This withdrawal was effected on 26 November 1973, and Honduras protested on 21 June 1974, some seven months later. It is thus clear that at that date, Honduras did not believe that a reasonable period had elapsed. The same must necessarily apply in the present case.

98. In any event, "what is reasonable and equitable in any given case must depend on its particular circumstances" *(ibid.)*. It is essential that, in each case of this type, the notice given should be sufficient to comply with the *ratio legis* on which the requirement for reasonable notice is based, that is to allow the other States concerned to take appropriate measures.

99. Pursuant to the Optional Clause, the essential consideration is as follows: a State making a declaration for an unlimited period "offers" the other States parties to the Statute of the Court the permanent opportunity to settle in law any dispute they might have with it. This commitment would be devoid of substance if the State undertaking it could escape the Court's jurisdiction by means of a simple notification as soon as it got wind of a possible claim against it.

100. Superficially, the question might be thought analogous to that posed when a State declares its acceptance of the compulsory jurisdiction of the Court and immediately thereafter files an application against a State having earlier undertaken the same commitment *(Right of Passage over Indian Territory, I.C.J. Reports 1957)*. It might be thought that the solution adopted there could be applied to the present case. However, as Judge Mosler pointed out, any analogy between the two situations is extremely misleading (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, p. 467 (separate opinion of Judge Mosler)). First of all, Article 36, paragraphs 2 and 4, of the Statute contains clear provisions leaving no doubt that such declarations take immediate effect upon notification. The Statute makes no such provision in the event of the withdrawal of such a declaration. Secondly, and above all, a State that withdraws a declaration is in a completely different situation from a State that makes one: the latter undertakes a commitment in compliance with the spirit and letter of the Statute and the United Nations Charter; the former, on the other hand, is endeavouring to withdraw from an obligation that it has assured other States it will abide by.

101. No doubt a denunciation can produce an immediate effect if the State in question expressly retains such a right. But Honduras has not done so. On the contrary, it specified that it bound itself "for an indefinite term", and confirmed in 1974 that it recognized the Court as constituting "the most appropriate means of settling disputes between States". (Letter from the Minister of Foreign Affairs of Honduras, dated 21 June 1974, para. 81, *supra.*)

102. At the very least, a State in such a situation should not be permitted to oppose the jurisdiction of the Court, to which it freely consented, when another State, having a dispute with it at the time of the denunciation, takes all reasonable steps to bring the matter promptly before the Court.

103. Here again, it is doubtless not necessary to ask what might, in the abstract, constitute reasonable notice in such a situation. It is enough to observe

that it would be neither "reasonable" nor equitable to deny that the Court had jurisdiction in the circumstances of the present case:

(i) as will be shown below, a dispute had already arisen and was still in existence between Nicaragua and Honduras at the time when the latter decided to amend its declaration, on 22 May 1986 (see Chap. 5, paras. 235-283);

(ii) the "new declaration" by Honduras was only notified to the States parties to the Statute by the Secretary-General of the United Nations on 30 June 1986; it is therefor only as from that date that notice began to run (see para. 95, *supra*);

(iii) by filing an Application on 28 July 1986, namely within a period of days, Nicaragua has clearly shown itself to be reasonably diligent in this matter.

104. From whatever angle the question is examined, it is quite clear that the period between the time when Honduras claimed to have withdrawn from the system introduced by the Optional Clause in Article 36, paragraph 2, of the Statute and the date on which Nicaragua launched its Application did not amount to "reasonable notice". Thus the "new declaration" cannot be invoked against Nicaragua.

PART II. JURISDICTION UNDER THE PACT OF BOGOTÁ

CHAPTER 2

ARTICLE XXXI OF THE PACT OF BOGOTÁ PROVIDES A SEPARATE AND INDEPENDENT BASIS OF JURISDICTION IN THIS CASE

105. The Application of Nicaragua also maintains that the Court has jurisdiction in this case under the provisions of Article XXXI of the Pact of Bogotá, to which both Honduras and Nicaragua are parties. Article XXXI, in Chapter Five of the Pact entitled "Judicial Procedure", provides:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

The present case involves a legal dispute between two parties to the Pact concerning the interpretation of treaties and questions of customary international law. (Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, I.C.J. Reports 1984*, pp. 392, 431-438. See also Chapter 3, *infra*.) It thus falls unambiguously within the provisions of Article XXXI.

106. As discussed in Part I, Nicaragua and Honduras have both made declarations submitting to the jurisdiction of the Court under Article 36 (2) of the Statute. In 1986, Honduras entered a "new declaration". To this point Nicaragua's Memorial has argued that the "new declaration" is not applicable to the present case, and that jurisdiction is therefore present on the basis of the two coinciding Article 36 (2) declarations. If the Court agrees with Nicaragua's submission on that point, there is no need to go further because jurisdiction is established.

107. If, on the other hand, the Court is not satisfied that the 1986 "declaration" is inapplicable so that jurisdiction cannot properly be founded on Article 36 (2), it is Nicaragua's position that Article XXXI of the Pact of Bogotá provides a wholly independent basis of jurisdiction. To this Honduras replies that the 1986 reservation also modifies and limits its amenability to jurisdic-

tion under Article XXXI of the Pact of Bogatá[1], and that in any case resort to the Court under the Pact is subject to the condition of prior exhaustion of the conciliation procedure. This position cannot be sustained.

A. The Purported Reservation of Honduras to the Pact of Bogotá Was Not Made at the Time of Signature or Adherence to the Treaty and Is Therefore Ineffective to Vary the Obligations of Honduras under the Pact

108. In the context of a declaration under Article 36 (2) of the Court's Statute, a reservation is a statement limiting the scope of the declarant State's submission to jurisdiction. It may be made at the time the State first makes its declaration. However, as discussed in Part I, *supra*, if the right to alter or terminate the declaration is reserved expressly or by implication, a reservation limiting jurisdiction may be made unilaterally by the declarant at any subsequent time, on reasonable notice. Such a modification of the declaration operates to bar the assertion of a claim covered by the reservation if it takes effect before the Application is filed. (*Right of Passage over Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, pp. 142-143.)

109. Although Article XXXI, in its main features, is cast in the same terms as Article 36 (2) of the Statute of the Court, it is not a unilateral submission to jurisdiction as is a declaration under the Optional Clause. It is a provision of a multilateral treaty. As such, it is a binding obligation as between any two parties to the Pact. Judge Jiménez de Aréchaga has said that "at most the cited Article XXXI of the Pact of Bogotá does not constitute, in spite of its text, a strict application of the system of the optional clause"[2]. Instead, the obligatory competence of the Court under that provision is based "not in the optional clause properly (art. 36, 2) said but in the Conventions and Treaties in force (art. 36, 1)"[3]. (Cited in F. Fernández-Shaw, *La Organización de los Estados Americanos*, Madrid, 1962, p. 411.) The Pact is listed in the *Yearbooks* of the Court from 1948 to 1962 under the heading "Other Instruments", not "Acceptance of the Compulsory Jurisdiction of the Court" (see *I.C.J. Yearbook 1947-1948*, p. 143), and since 1962 under "Chronological list of other instruments governing the jurisdiction of the Court", rather than "Declarations recognizing as compulsory the jurisdiction of the Court" (*I.C.J. Yearbook 1961-1962*, p. 104).

110. Unlike the situation with respect to unilateral declarations under Article 36 (2) of the Statute of the Court, a party may not alter or vary its obligation under Article XXXI by its own unilateral act, any more than a party to the Convention on Diplomatic Privileges and Immunities could unilaterally modify the application to itself of the compromissory clause in that agreement. Thus, Honduras's "new declaration" and its "reservations" cannot affect its amenability to suit under Article XXXI.

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[1] Honduras's new declaration was notified to the Secretary General of the Organization of American States on 22 May 1986. Nicaragua entered a protest pointing out that the attempted reservation "has no juridical effect whatever and constitutes a grave violation of the Pact of Bogotá" (Note from Minister of Foreign Affairs of Nicaragua to the Secretary General of the Organization of American States, 15 May 1987 (Nicaragua's Annex 22)).

[2] Original text in Spanish: "en rigor, el citado Articulo XXXI del Pacto de Bogotá no constituye, pese a su texto, una aplicación estricta del sistema de la claúsula opcional".

[3] "No en la claúsula opcional propriamente dicha (art. 36, 2), sino en las Convenciones y Tratados vigentes (art. 36, 1)."

111. In the context of a bilateral or multilateral treaty, a "reservation" is a derogation from the obligation of the treaty and must be made at the time of signature, or in any event when the party adheres to the treaty. Thus, Article 2 (1) *(d)* of the Vienna Convention on the Law of Treaties defines a reservation as

> "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." (United Nations Conference on the Law of Treaties, doc. A/CONF.89/27, 22 May 1969).

112. The purported Honduran reservation fits part of this definition very well. It forms part of a unilateral statement that "purports to exclude or modify the legal effect of" Article XXXI of the Pact of Bogotá "in [its] application to that State". But unlike the reservations to the Pact by Argentina, El Salvador, the United States and Nicaragua itself, they were not made at the time of signature or ratification, and thus cannot be effective to modify the obligations undertaken by Honduras.

113. Article 2 (1) *(d)* of the Vienna Convention expresses an unvarying rule of customary international law, about which no State or author has ever, to the knowledge of Nicaragua, expressed the slightest doubt. The rule conforms to the normal practice of multinational depositaries. As long ago as 1950, the Report of the Secretary-General of the United Nations on practices of the Secretariat with regard to reservations stated: "A State may have a reservation when signing, ratifying or acceding to a convention." (A/1372, para. 46.) In a 1976 Aide-Mémoire on the Practice of the Secretary-General as depositary of multilateral treaties with respect to reservations and objections, the Legal Counsellor of the United Nations stated that the practice of the Organization in regard to the definition of "reservation" follows Article 2 (1) *(d)* of the Vienna Convention. (*United Nations Legal Yearbook*, 1976, p. 218.)

114. So also with the Organization of American States. In its reply to a questionnaire from the United Nations Secretary-General in 1962, the OAS asserted that it complies very strictly in its practice with the foregoing principles. Indeed, it does not even consult other signatories to the treaty unless the reservation is included in the instrument of ratification. (1965 *ILC Yearbook*, Vol. II, p. 90.) Nor does it impose any time-limit for parties to lodge objections to proposed reservations. (*Ibid.*, p. 94.)[1]

115. The requirement that reservations be contemporaneous with signing or adherence to a treaty has a special place in the law of the Western Hemisphere. Article 6 of the Havana Convention on the Law of Treaties provides for reservations only at the time of ratification. See also Resolution XXIX of the Eighth International Conference of American States at Lima in 1928. Resolution X of the Inter-American Juridical Committee (1959) is even stricter:

> "I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union be-

[1] In the present case the Secretary General of the OAS has not consulted the signatories to the Pact of Bogotá with respect to the purported reservation of Honduras. Nicaragua has nevertheless interposed its objection within a year of the notification to the Secretary General by Honduras.

fore depositing the instrument of ratification or adherence the text of the reservations it proposes to make . . .

II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification."

116. Needless to say, the main authors who have studied the question of reservations to treaties are unanimous in support of the rule that reservations must be formulated "when signing, ratifying, accepting, approving or acceding to the treaty". (See, e.g., W. W. Bishop, Jr., "Reservations to Treaties", *RCADI*, 1961, Vol. II, p. 252; T. O. Elias, *The Modern Law of Treaties*, Dobbs Ferry, N.Y., 1974, pp. 32-33; P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, 1979, p. 164; J.-M. Ruda, "Reservations to Treaties", *RCADI*, 1975, Vol. III, pp. 114, 146, 193; M. D. Kappeler, *Les réserves dans les traités*, Verlag für Recht, 1958, p. 24; E. Jiménez de Aréchaga, *El Derecho Internacional Contemporaneo*, Madrid, 1980, p. 50; C. Sepúlveda, *Curso de Derecho Internacional Público*, 6th ed., Mexico City, 1974, pp. 128-129.)

117. Any attempt by a party to vary the obligations entered into, after adherence to the treaty, is simply an offer to amend it. As such it can only become effective in accordance with the treaty provisions for amendment or with the consent of the parties. (See Vienna Convention on the Law of Treaties, Part IV, Arts. 39-41.) There are no special provisions for amendment in the Pact of Bogotá, and the parties have not consented.

118. Honduras seems to attach some significance to the fact that "no objection, either from Nicaragua or from any other country, was raised by any of the member States of the Organization upon receipt of the Declaration of Honduras" (Memorial, at pp. 77-78, *supra*; see also pp. 56, 79, *supra*). This observation is incorrect in point of fact: Nicaragua entered an objection to the purported reservation on 15 May 1987, by note from its Minister of Foreign Affairs to the Secretary General of the OAS (Ann. 22). Although the Secretary General circulated the purported reservation to the Permanent Representatives of the member States (Memorial, Ann. 41), this was in no sense a notification to the contracting States with a view to their taking part in a "decision as to the action to be taken in regard to such proposal" as required by Article 40 of the Vienna Convention. And in any event, the silence of the parties cannot be taken as such a "decision" or as the "negotiation and conclusion of [an] agreement for the amendment of the treaty" within the meaning of that Article.

119. Thus the purported new declaration of Honduras cannot take effect either as a reservation or an amendment to the Pact of Bogotá. The obligations of Honduras under the Pact remain unimpaired by it.

B. Article XXXI Establishes a Binding Obligation to Submit to the Jurisdiction of the Court with Respect to Disputes in the Enumerated Categories between Parties to the Treaty, Independent of Any Other Unilateral or Bilateral Undertaking of Any Party with Respect to Such Disputes

120. Honduras contends that Article XXXI itself was meant to extend only to cases where the respondent State is otherwise subject to the jurisdiction of the Court by virtue of a separate declaration filed under Article 36 (2) of the Statute. On this reading, Article XXXI is not an independent and binding obligation, but simply an agreement to resort to the Court when the par-

ties to the dispute were otherwise obligated or disposed to do so. (Memorial, at pp. 65, 75, *supra*.)[1] This position is inconsistent with the language of Article XXXI, with the purpose of the Article, with the *travaux préparatoires*, and with the understanding of the parties at the time the Pact was signed. It is rejected by every publicist who has written on the Pact of Bogotá. They not only regard Article XXXI as a submission to jurisdiction independent of any declaration that a State may have made under Article 36 (2) of the Statute of the Court, but many point to this independent acceptance of compulsory jurisdiction as one of the prime achievements of the Pact of Bogotá. (See paras. 124-126, 158, *infra*.)

1. The Language of the Text

121. The obligation of Article XXXI is expressed in categorical and unqualified terms. In contrast to Article 36 (2) of the Court's Statute, which invites a generalized declaration recognizing the jurisdiction of the Court (subject of course to such reservations as the declaring State may wish to assert), Article XXXI is an undertaking of "the High Contracting Parties". It is limited *ratione personae* to "any other American State", and *ratione tempore* "so long as the present Treaty is in force". But it imposes no limit *ratione materiae* on the categories of cases listed in Article 36 (2). As noted above, it is listed in the *Yearbooks* of the Court under "Other Instruments", as opposed to declarations recognizing the compulsory jurisdiction of the Court. (See para. 109, *supra*.)

122. The Memorial of Honduras says that, "Article XXXI of the Pact authorises each State, *in accordance with any declaration made by that State before the occurrence of a dispute*, to seise the Court unilaterally" (Memorial, at p. 65, *supra* (emphasis added)). Of course, the italicized language in this quotation does not appear in Article XXXI. It is an invention of the Memorial. If Article XXXI meant what Honduras says it does, there would have been no need to include it in the Pact at all. For quite apart from Article XXXI, any State is already authorized to seize the Court unilaterally "in accordance with any declaration made by that State before the occurrence of the dispute". Thus Honduras's position contravenes the general maxim of treaty interpretation that the Court should give an operational effect to every provision of the treaty.

123. Recognition of the jurisdiction of the Court "*ipso facto* and without the necessity of any special agreement" in Article XXXI involves an element of reciprocity in that the undertaking is made only with respect to other

[1] The Memorial of Honduras seems to suggest at one point that a bilateral or multilateral agreement among States to submit to the jurisdiction of the Court with respect to disputes between them falling within the terms of Article 36 (2) would be inconsistent with the Statute of the Court. According to the argument of Honduras, such an agreement would therefore be void under Article 103 of the United Nations Charter, of which the Statute is a part. (Memorial, at p. 77, *supra*.) The asserted inconsistency between the compulsory obligation of Article XXXI and the Statute is illusory. Although the *scope* of the Article XXXI submission is identical to that described in Article 36 (2) of the Statute, the *basis* for jurisdiction, as noted in the text, *supra*, is to be found in Article 36 (1), which covers "all matters specially provided for . . . in treaties or conventions in force". See Judge E. Jiménez de Aréchaga, quoted paragraph 109, *supra*, and the treatment in the *Yearbooks* of the Court. *(Ibid.)*

parties[1]. Nevertheless, acceptance of the Court's jurisdiction is not qualified by the phrase "in relation to any other State *accepting the same obligation*", as in Article 36 (2). The conception of reciprocity imported by this phrase is fundamental to the practice with respect to reservations in optional clause declarations. (See, e.g., *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984.*) Indeed, that practice would make little sense without such a conception of reciprocity. But the ambulatory notion of reciprocity embodied in Article 36 (2), whereby the coincidence of declarations is measured as of the time an Application is filed, is not found in Article XXXI of the Pact. Instead, the Court's jurisdiction is recognized once and for all and without limitation. The absence of the Article 36 (2) reciprocity principle in the Pact of Bogotá negates Honduras's contention that Article XXXI permits subsequent "reservations" derogating from the obligation originally assumed by the Party.

2. *Purpose*

124. The fundamental purpose of the Pact of Bogotá was to establish compulsory adjudication, either by the Court or by arbitration, as the ultimate mode of settlement of all disputes, whatever their nature, arising between American States. The US Delegation Report states that "[t]he most important feature of the treaty on pacific settlement consists of the provisions for compulsory judicial settlement and arbitration contained in chapters four and five". (United States Department of State, *Report of the US Delegation to the Ninth International Conference of American States*, Washington, 1948, p. 47. See also, e.g., A. v. W. Thomas and A. J. Thomas, Jr., *The Organization of American States*, Dallas, 1963, p. 240; A. Herrarte, "Solución Pacífica de las Controversias en el Sistema Interamericano", p. 225, in Secretario General, Organización de los Estados Americanos, *Sexto Curso de Derecho Internacional Organizado por el Comite Jurídico Interamericano*, OEA/Ser.Q/V.C-6, CJI 40, p. 225; Inter-American Institute of International Legal Studies, *The Inter-American System, Its Development and Strengthening*, Dobbs Ferry, N.Y., 1966, pp. 78-79; R. L. Cardón, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano*, Buenos Aires, 1954, p. 75.)

125. The Memorial of Honduras itself recognizes this avowed purpose of the Pact (Memorial, at pp. 62-63, *supra*). It traces the history of this objective back to 1826 and the beginnings of co-operative relations among the countries of the American hemisphere (*ibid.*, at pp. 61-62, *supra*). The climax of this effort is described by the Memorial in a statement that Nicaragua accepts and that we quote here in full:

> "At the 'Inter-American Conference on the Problems of War and Peace', held in Mexico in March 1945, Resolution XXXIV stressed that the Inter-American Legal Committee on Peace should

[1] Although Article XXXI speaks of acceptance of jurisdiction "in relation to any other American State", and thus, "[e]l Pacto no exige expresamente la reciprocidad; no obstante, creemos que el compromiso solo obliga con relación a cualquier otro Estado americano *que acepte la misa obligación, como indica el Estatuto de la Corte (art. 36, parr. 2)*". ("The pact does not expressly require reciprocity; notwithstanding, we believe that the commitment is only obligatory in relation to any other American State *that accepts the same obligation* as the Statute of the Court indicates.") (R. L. Cardon, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano*, Buenos Aires 1954, p. 77; see also F. Fernández-Shaw, *La Organización de los Estados Americanos*, Madrid 1962, p. 411.)

'. . . coordinate the continental instruments for the prevention and peaceful solution of controversies in a manner such that the gradual and progressive application thereof shall necessarily result in the achievement of the desired ends'.

Thus in the terms of reference given to the Committee, *two of the key ideas* had appeared which were to inspire the drafting, in successive draft texts, of what was to become some three years later the Pact of Bogotá:

— First, the attempt to establish a rationalized *system* for settlement of disputes in the light of the lessons learnt from attempts made in previous treaties, which were heterogeneous, over-numerous and which had, for the most part, remained dead letters.
— Second, and this is perhaps even more remarkable, the assignment to such a system of the ultimate purpose of rendering compulsory, and as it were irreversible, the recourse to solutions that could only be peaceful. Such a system would offer, at the free choice of the States, a wide range of procedures for resolving disputes." (Memorial, at pp. 62-63, *supra* (emphasis in original).)

126. The objective "of rendering compulsory, and as it were irreversible, the recourse to solutions that could only be peaceful" is formally embodied in the OAS Charter itself, also a product of the Bogotá Conference. Article 25 states in general terms that in the case of disputes that cannot be settled by diplomatic means, "the Parties shall agree on some other peaceful procedure that will enable them to reach a solution". To implement this general obligation, Article 26 provides:

"A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period."

127. The Pact of Bogotá is the special treaty envisioned in Article 26 of the OAS Charter, and the obligation of Article 25 of the Charter is reiterated and elaborated as the central conception of the Pact in Article II:

"[I]n the event that a controversy arises between two signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, . . ."

128. The Pact provides for the usual array of voluntary methods of dispute settlement: good offices, mediation, investigation, conciliation and so forth. Specific modalities are established for each of these. A Party has complete freedom to select any of these means in an attempt to settle a dispute with another Party, and they may use "such special procedures as, in their opinion, will permit them to arrive at a solution" (Art. II. See Chap. 4, *infra*). All this corresponds with the objective noted in the Honduran Memorial that the "system would offer, at the free choice of the States, a wide range of procedures for resolving disputes" (Memorial, at p. 63, *supra*). But the key feature of the system is that a party can insist on compulsory settlement of *any* dispute, either by the Court under Article XXXI or Article XXXII or by

binding arbitration under Chapter Five, "if the Court declares itself to be without jurisdiction to hear and adjudge the controversy . . ." (Art. XXXV).

129. In support of its interpretation of Article XXXI Honduras argues that it is hardly thinkable for a State accepting the jurisdiction of the Court under the optional clause subject to certain reservations (and with the possibility of interposing further reservations at a later time) to accept at the same time an unlimited obligation of judicial settlement for the same types of controversies under the Pact. (Memorial, at pp. 75-77, *supra*.)

130. Honduras acknowledges that:

> "such a duality of schemes of recognition is theoretically not inconceivable. For example, many cases exist in which, in parallel to a declaration under Article 36, paragraph 2, made unilaterally and rendered subject to reservations, a State has agreed to bind itself without reservations in its relations with another State, for example in a treaty of friendship and co-operation. *The State concerned does so because, having regard to the nature of the relationship that it has traditionally had with the other State, it takes the view that there is no point in restricting the competence of the Court. . . .*" (*Ibid.*, at p. 77, *supra* (emphasis supplied).)

That passage describes precisely the basis on which the American States were prepared in 1948 to accept *inter se* a "compulsory and . . . irreversible" submission to the jurisdiction of the Court; when in 1945 the San Francisco Conference had rejected the idea of compulsory jurisdiction for the International Court of Justice and settled instead on the looser framework of the optional clause[1]. They conceived themselves as a more homogeneous community, bound by a distinctive regional history, culture, organization and political/legal tradition, where compulsory judicial or arbitral settlement was both possible and desirable.

131. As Charles G. Fenwick, the Director of the Department of International Law of the Pan American Union said:

> "There might be ground for not being willing to submit political controversies with non-Americans to the International Court; but within our inter-American circle, where we have built up a spirit of confidence, where we have developed a feeling of common interest, we ought to be able to say once and for all that every controversy, juridical and political should be submitted to the Court at The Hague. That view prevailed, and that view is the substance of the Treaty." (C. G. Fenwick, "Remarks", in *The Results of Bogotá, Lecture Series on the Bogotá Conference held at the Pan American Union, May 24, 25 and 26, 1948*, p. 38. See also, e.g., J. M. Yepes, *Del Congreso de Panama a la Conferencia de Caracas, 1826-1954*, Caracas, 1955, p. 217.)

132. To accept the Honduran contention that subsequent reservations to an optional clause declaration are automatically incorporated into the Article XXXI obligation under the Pact would frustrate the prime objective of the Pact to erect a comprehensive system of compulsory dispute settlement. Indeed, the Honduran Memorial acknowledges that

[1] Indeed, a majority of the delegations at San Francisco, especially the smaller ones, would have preferred a true compulsory jurisdiction and accepted the optional clause as an alternative only because the Great Powers particularly the United States and the Soviet Union, would have not accepted the Charter under those terms. (See generally *UNCIO Documents*, Vol. 13.)

"[i]t is in effect Articles XXXI to XXXV that hold the system in place and guarantee, in principle, that a peaceful solution is inevitable. Upon closer examination, however, it will be found that the system is not, it seems, held together so absolutely securely as its promoters had wished." (Memorial, at p. 64, *supra*.)

133. It is impermissible, however, for the Court to adopt an interpretation of a treaty that frustrates its acknowledged principal objective if a reading of the text that promotes the objective is fairly available.

3. Travaux Préparatoires

134. The Pact of Bogotá was based on two preliminary drafts prepared by the Interamerican Juridical Committee, the first in 1945 and the second in 1947. Each of these drafts provided for voluntary resort to the International Court of Justice by agreement of the parties. Thus, Article XVIII of the 1947 draft provided:

"Notwithstanding the provisions of the preceding article [establishing compulsory arbitration for 'controversies of any nature'], it is recognized that the Parties, if in agreement to do so, may submit their controversies to the International Court of Justice, when they have accepted previously its obligatory jurisdiction under the terms of Article 36 of its Statute.

The controversies to which this article is applicable are those referring to the following matters: [listing the four categories appearing in Article 36 (2) of the Statute of the Court]." (United States Department of State, *Report of the US Delegation to the Ninth International Conference of American States,* Appendix One — Preparatory Documents, p. 137.)[1]

135. The draft Article embodies the Honduran contention. Under it there is no obligation of judicial settlement at all. The possibility of recourse to the Court for disputes in the enumerated categories comes about only if the Parties are "in agreement to do so" and only if "they have accepted previously its obligatory jurisdiction". In such a case, the principle of reciprocity as embodied in Article 36 (2) would also be applicable. If the respondent had entered an applicable reservation before the case was filed, it would vitiate the previous submission to obligatory jurisdiction required by the draft Article.

136. The difficulty with the Honduran position is that the Pact of Bogotá did not accept Article XVIII of the 1947 draft. On the contrary, it decisively rejected the voluntary approach of the draft Article. As the Memorial of Honduras says there is "a qualitative leap as compared with the attempts made in the earlier treaties" (Memorial, at p. 64, *supra*). The contrast between the voluntary scheme of the draft Article and the peremptory language of Article XXXI is striking. The rejection of the draft Article evinces the unmistakable intention of the parties to the Pact to bind themselves to submit legal disputes to the Court as a matter of positive obligation, without regard to any other voluntary declaration or agreement. Article XXXI is not an

[1] Article XXIII of the 1945 draft provided:

"In the event that the parties to a controversy decide to submit it to judicial settlement, the court shall, as a general rule, be the International Court of Justice . . ." (*Ibid.*, at pp. 121, 129.)

agreement to agree. It is not an incorporation of obligations already assumed in reciprocal declarations of the parties under Article 36 (2) at the time an application is filed. It is an independent mutual treaty obligation.

4. Contemporaneous Understanding

137. The position that Article XXXI is an independent basis of jurisdiction, not dependent on and not qualified by any declarations parties may have made under Article 36 (2), is confirmed by the conduct of the parties at the time the Pact was negotiated. The United States did not ratify the Pact, but it was active in the negotiating process and signed the treaty at the end of the Bogotá Conference. However, it signed subject to the reservation that

> "The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4 of the Statute of the Court, and in force at the time of the submission of any case."

138. This reservation to the Pact was designed to ensure that the reservations to the United States declaration of 14 August 1946, submitting to the Court's jurisdiction under Article 36 (2) of the Statute, would not be overridden by United States adherence to the Pact of Bogotá. The quoted reservation would have been superfluous[1] had Article XXXI been intended, as Honduras asserts, to incorporate of its own force reservations and other limitations on Article 36 (2) declarations of the parties to the Pact. The understanding that Article XXXI does not incorporate limitations in Article 36 (2) declarations is expressly stated in the Report of the United States delegation to the Bogotá Conference explaining its reservation to the Pact quoted above:

> "Chapter four of the Treaty ('Judicial Procedure') begins by incorporating acceptance of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement in juridical disputes falling within the categories mentioned in article XXXVI (2) of the Statute of the Court (article XXXI) . . . *However, [article XXXI] does not take into account the fact that various states in previous acceptances of the Court's jurisdiction under article XXXVI (2) of the Statute have found it necessary to place certain limitations upon the jurisdiction thus accepted.* This was the case in respect to the United States, and since the terms of its declaration had, in addition, received the previous advice and consent of the Senate, the Delegation found it necessary to interpose a reservation to the effect that the acceptance of the jurisdiction of the Court as compulsory *ipso facto* and without special agreement is limited by any jurisdictional or other limitations contained in any declaration deposited by the United States under article XXXVI (4) of the Statute of the Court in force at the time of the submission of any case." (Emphasis added.) (United States Department of State, *Report of the US Delegation to the Ninth International Conference of American States,* Washington, 1948, p. 48.)

[1] The Honduran Memorial dismisses the United States reservation as "superfluous" (Memorial, at p. 75, footnote 2). That of course does not accord with the explanation given by the United States delegation and discussed in the text after this footnote.

The views of the United States delegation are especially authoritative because of the leading role played by the United States in the development of the Pact.

139. If Article XXXI did not incorporate reservations to Article 36 (2) declarations already existing in 1948 when the Pact was signed, *a fortiori* it would not incorporate limitations on such a declaration made after the Pact entered into force, like the purported Honduras "new Declaration". The text of the United States reservation to the Pact bears expressly on this point, also. It applies to "any jurisdictional or other limitations contained in any declaration deposited by the United States . . . *at the time of the submission of the case*" (emphasis added). The italicized language was necessary if the United States reservation to the Pact was to be effective to cover limitations that the United States might subsequently interpose to its Article 36 (2) declaration.

5. The Opinions of American Jurists and other Publicists

140. Honduras recognizes that "the greater number of authors, who in fact represent the majority doctrine on the subject" hold that "Article XXXI of the Pact, in referring to Article 36, paragraph 2, of the Statute of the Court, determines the extent of the Court's jurisdiction *ratione materiae*" — that is to say, without reference to the terms of any unilateral declaration a Party may have made under the optional clause. (Memorial, at p. 66, *supra*.) It is thus almost unnecessary to cite authority for this proposition. Nevertheless, we list a few of the pronouncements here to illustrate the uniformity and categorical nature of the opinions expressed by the most qualified experts. (E.g., F. V. García-Amador, "Report 92", in Max Planck Institute for Comparative Public Law and International Law, *Judicial Settlement of International Disputes*, New York, 1974; F. Fernández-Shaw, *La Organización de los Estados Americanos*, Madrid, 1963 p. 411; A. Herrarte, *Solución Pacífica de las Controversias en el Sistema Interamericano*, 220, 225, in Secretario General, Organización de los Estados Americanos, *Sexto Curso de Derecho Internacional Organizado por el Comite Jurídico Interamericano*, OEA/Ser.Q/V.C-6, CJI 40; Inter-American Institute of International Legal Studies, *The Inter-American System, Its Development and Strengthening*, Dobbs Ferry, N.Y., 1966, p. 79; F. Lavinia and H. Baldomir, *Instrumentos Jurídicos para el Mantenimiento de la Paz en América*, Montevideo, 1979, p. 29; R. L. Cardón, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano*, Buenos Aires, 1954, p. 76; H. M. Blackmer, *US Policy and the Inter-American Peace System*, Paris, 1952, p. 180; W. Sanders, *Bogotá Conference: Ninth International Conference of American States*, International Conciliation No. 442, June 1948, p. 403. And see Judge E. Jiménez de Aréchaga, cited para. 109, *supra*.)

CHAPTER 3

THE JURISDICTION OF THE COURT UNDER ARTICLE XXXI OF THE PACT IS NOT SUBJECT TO A CONDITION PRECEDENT OF EXHAUSTION OF THE CONCILIATION PROCESS

141. Although the Nicaraguan Application expressly founds the jurisdiction of the Court on Article XXXI of the Pact of Bogotá, Honduras contends that jurisdiction is defeated by the failure of the Parties to resort to conciliation. It contends that this is required by Article XXXII, which provides:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute."

142. The text of the relevant Articles, the history and preparatory work of the Bogotá Conference and the writings of publicists combine to demonstrate that failure of the conciliation procedure is a required precondition only in cases coming to the Court by virtue of Article XXXII of the Pact, and not in those where the Court has compulsory jurisdiction *ipso facto* under Article XXXI with respect to the categories of questions enumerated in Article 36 (2) of the Statute.

A. Comparison of the Texts of Articles XXXI and XXXII Shows that They Are Separate and Independent Modes of Access to the Court, and Resort to the Court under Article XXXI Is Not Subject to a Precondition of Conciliation

143. The pattern of the Pact as to judicial settlement is established by the two provisions relating to the jurisdiction of the Court. Article XXXI deals with disputes "of a juridical nature" as numerated in the categories of Article 36 (2) of the Statute of the Court, which are recapitulated in the text of Article XXXI. Article XXXII of the Pact has no such limitation and covers all disputes of whatever character.

144. The Report of the United States delegation to the Conference confirms this understanding of the two Articles. It states that Article XXXII "is distinguished from the previous article by the fact that its scope is not limited to 'disputes of a juridical nature', but embraces all disputes". (United States Department of State, *Report of the US Delegation to the Ninth International Conference of American States*, p. 48 (1948).)

145. A second major element of the architecture of the Pact appears in Article III:

> "The order of pacific procedures established in the present Treaty does not signify that the parties may not have recourse to the procedure which they consider most appropriate in each case, or that they should

use all these procedures, or that any of them have preference over others except as expressly provided."

Every publicist and commentator on the Pact agrees that there is no required order of resort to the methods of peaceful settlement established by it. The obligation is only to use one or the other of them if the dispute cannot be settled by negotiations and diplomatic means. (E.g., F. P. Olave, *Derecho Internacional Público*, Lima, 1966, p. 305; F. V. García-Amador, *The Inter-American System*, Vol. 1, Part 2, OAS, Washington, D.C., 1983, p. 233; United States Department of State, *Report of the US Delegation to the Ninth International Conference of American States*, Washington, 1948, p. 44; H. M. Blackmer, *US Policy and the Inter-American Peace System*, Paris, 1952, p. 180; R. L. Cardón, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano*, Buenos Aires, 1954, p. 75; A. F. Marchant, *La Conferencia de Chapultepec y su Importancia en el Sistema Interamericano: Conferencias de Chapultepec, Río de Janeiro, y Bogotá*, Santiago, 1968, pp. 152-153; J. M. Yepes, *Del Congreso de Panamá a la Conferencia de Caracas, 1826-1954*, Caracas, 1955, p. 212; Inter-American Institute of International Legal Studies, *The Inter-American System*, Dobbs Ferry, N.Y., 1966, pp. 79-80.)

146. The requirement that resort to conciliation shall have failed is expressly provided in Article XXXII, and obviously governs disputes that fall within its provisions. But there is no requirement of prior conciliation in Article XXXI. It follows that in disputes falling within the categories listed in that Article and in Article 36 (2) of the Statute of the Court, a party may apply directly to the Court without first availing itself of the Procedure of Conciliation and Investigation established by Chapter Three of the Pact. In such cases, that procedure has no "preference over" the Judicial Procedure mandated in Article XXXI.

147. From these two elements — the breadth of Article XXXII and the principle of free choice among settlement methods — together with the principle already discussed of compulsory settlement of all controversies (see paras. 124-126, *supra*) the structure of the régime of judicial settlement contemplated by the Pact emerges. A party has two routes of access to the Court. It may invoke the Court's jurisdiction directly under the *ipso facto* clause of Article XXXI if the dispute falls within one of the enumerated categories. Or, whether or not the dispute is "legal", the aggrieved State may first resort to conciliation. By selecting this second option, the party does not forfeit the right to ultimate judicial determination of legal disputes. For if conciliation fails, recourse to the Court is open under Article XXXII. And, if the Court should decide that it is without jurisdiction because the dispute is not of a juridical character, Article XXXV gives the aggrieved party the right to go to binding arbitration under Chapter Five of the Pact[1].

148. To interpret Article XXXII in the manner proposed by Honduras de-

[1] The United States believed that Article XXXII was too broad in that it might result in submission to the Court of questions beyond its competence to decide as a court of law. As a result, it entered a reservation at the time of signing the pact:

> "The United States does not undertake as the complainant State to submit to the International Court of Justice any controversy which is not considered to be properly within the jurisdiction of the court." (See *Report*, *supra*, at pp. 48-49.)

But as the Permanent Court observed,

> "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which

prives Article XXXI of any independent significance. The entire Article would be superfluous, since Article XXXII would cover all disputes, including those enumerated in Article XXXI. It is an elementary principle of the interpretation of treaties that they should be construed so as to give independent meaning to every provision.

B. The Work of the Inter-American Juridical Committee Both in Preparation for the Conference and in Subsequent Review of the Pact of Bogotá Supports the Textual Interpretation that Direct Resort to the Court Is Available under Article XXXI without the Necessity of Prior Conciliation

149. The history and provenance of the two Articles bears out the plain meaning of the texts. The Pact of Bogotá represents an evolution and integration of a number of treaties for pacific settlement of disputes theretofore in force among some or all of the American States. The most important of these were the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration, both signed in Washington on 5 January 1929[1].

150. The immediate impetus for the Pact of Bogotá was a Resolution of the Conference on the Problems of War and Peace at Mexico City in 1943 requesting the Inter-American Juridical Committee to draft a project for an "Inter-American Peace System". The Committee produced a number of drafts, the most important of which, as noted above, were the 1945 and 1947 drafts.

151. At the Bogotá Conference there were two basic approaches to the design of a system of peaceful settlement. The first, supported by the United States and the Governing Board of the Pan American Union would have continued the basic structure of the two 1929 treaties on conciliation and arbitration. "Legal questions" would be subject to compulsory arbitration. Other disputes would be settled by methods chosen by the parties assisted in cases where they could not agree by consultations with the organs of the Organization of American States. The second approach, embodied in the Report of the Inter-American Juridical Committee, was described as a more "rigid" approach. It mandated the ultimate resolution of all controversies by adjudication or compulsory arbitration. This second approach was adopted by the Conference. Although the final text departs substantially from that of the earlier drafts, many of the principles in the Committee's projects are nevertheless incorporated in the Pact of Bogotá. (See, e.g., W. Sanders, *Bogotá Conference: Ninth International Conference of American States*, International Conciliation No. 442, June 1948, p. 401; H. M. Blackmer, *US Policy and the Inter-American Peace System*, Paris, 1952, p. 180; C. G. Fenwick, "Remarks", in *The Results of Bogotá, Lecture Series on the Bogotá Conference held at the Pan American Union, May 24, 25 and 26, 1948*, p. 37.)

States entitled to appear before the Court cannot refer to it." (*Rights of Minorities in Upper Silesia (Minority Schools), P.C.I.J., Series A, No. 15*, p. 22 (1928). See also *South West Africa* cases, *I.C.J. Reports 1962*, p. 422; case concerning *Military and Paramilitary Activities in and against Nicaragua, Merits, I.C.J. Reports 1986*, p. 289 (Judge Schwebel, dissenting).)

In any case, the problem that concerned the United States was anticipated and is resolved by Article XXXV of the Pact.

[1] The treaties integrated into the Pact of Bogotá are listed in Article LVIII, which provides that they shall cease to be in force between parties that have ratified the Pact.

152. The roots of the distinction between Article XXXI and Article XXXII are in the two 1929 treaties on arbitration and conciliation. The first provided for compulsory arbitration of juridical disputes; and the second for conciliation in disputes of any kind, including political controversies. The Inter-American Juridical Committee highlighted this distinction in its Report on the 1945 Draft of an Alternative Treaty:

> "In 1929, at the close of the Washington Conference, the plenipotentiaries of the American Governments signed the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration. No attempt was made to coordinate the two procedures . . . *The arbitration procedure was made applicable to claims of right which were juridical in their nature, and the conciliation treaty extended to controversies of any kind.*" (*Ibid.*, at p. 89.)

That is, as between States parties, to these treaties, a State involved in a legal dispute with another could demand an arbitral settlement under the Arbitration Treaty. Or, whether or not the dispute was juridical in character, the complaining State could require the other to engage in conciliation under the Conciliation Convention.

153. This *modus operandi* of the earlier treaties is also recognized in the *Handbook for Delegates to the Ninth International Conference of American States* at Bogotá. It states that the General Treaty of Inter-American Arbitration required the parties

> "to submit to that procedure all differences of an international character which may arise between them by virtue of a claim of right . . . and which are juridical in their nature by reason of being susceptible of decision by application of the principles of law . . . The subjects expressly included in the category of juridical questions are the same as those appearing in Art. 36 of the Statute of the International Court of Justice."

By contrast the General Convention of Inter-American Conciliation of 1929 "included among the differences susceptible of conciliation all differences of whatever nature" (*ibid.*, at p. 49).

154. The Committee left no doubt of its desire to continue the system of compulsory arbitration or judicial settlement without preconditions for legal disputes:

> "The Juridical Committee is of the opinion that the procedure of arbitration should be put in the foreground and that attention should be directed to it as the preferable method of settling disputes of a juridical character which it has not been possible to settle by negotiation. An alternative to the procedure for arbitration would be the procedure of judicial settlement in case the States in controversy were parties to a treaty providing for the judicial settlement of juridical disputes . . .[1] At

[1] The report was issued before the establishment of the present Court. The Committee

> "believed it better to postpone the question of coordination of inter-American procedures with procedures before the Permanent Court until the reorganization of the Court at the close of the War" (*Report*, at p. 97).

But it noted that

> "nineteen American States are now members of the Permanent Court of International Justice at The Hague. Provision is accordingly made that juridical disputes may, as an alternative [to arbitration], be submitted to either procedure." *(Ibid.)*

> the same time, while arbitration and judicial settlement are recognized by the Committee as being in principle the proper procedures for the settlement of juridical disputes, it would seem unreasonable to deny to the parties the right to have recourse to the procedure of conciliation for the settlement of such disputes if they are in accord in preferring that more elastic procedure." (*Report of the Inter-American Juridical Committee on the 1945 Draft of an Alternative Treaty*, p. 89[1]; see also the discussion of Article XVIII of the 1947 draft, paras. 134-136, *supra*.)

Compulsory arbitration (or in the alternative judicial settlement) was thus the preferred procedure for disputes of a juridical character, although of course the possibility of voluntary resort to conciliation was left open.

155. On the other hand, the 1945 draftsmen intended that parties to other kinds of disputes would also be compelled to submit to some form of settlement procedure:

> "The principle on which the Alternative Draft proceeds is that all disputes which the parties are unable to settle between themselves . . . must be submitted to one or other of the two formal procedures, arbitration being the procedure appropriate to juridical disputes. But failing resort by the parties to arbitration on the ground of the non-juridical character of the dispute, the procedure of investigation and conciliation becomes obligatory without exceptions or qualifications." (*Ibid.*, at p. 94.)

156. In the 1945 draft, however, this procedure of investigation and conciliation would not eventuate in a determination binding on the parties. The next step was taken in the 1947 draft — a categorical obligation to accept binding determination in all types of disputes: Article XVII provided:

> "The High Contracting Parties bind themselves to submit to arbitration controversies of any nature, juridical or non-juridical, which have arisen or may arise in the future between them . . ."

157. Articles XXXI and XXXII of the Pact of Bogotá represent the culmination of this evolution. Compulsory jurisdiction of the Court for juridical disputes under Article XXXI, without the interposition of any other procedure, is simply an adaptation of the régime of compulsory adjudication already in effect for such disputes under the General Treaty on Arbitration. By that Treaty, the parties were already obligated to resort to binding arbitration of disputes enumerated in Article 36 (2) of the Statute of the Court, unless the aggrieved party voluntarily chose to pursue the conciliation process. By 1948, the uncertainty as to the organization of the Court that made the framers of the 1945 draft hesitate (see para. 154, footnote 1, *supra*), was resolved. Accordingly the Conference was prepared to opt for compulsory jurisdiction *ipso facto* in the four categories of disputes.

158. For other disputes, however, no previous treaty had obligated parties to submit to procedures that would result in a binding decision. Article XXXII was thus a major departure from pre-existing practice not only among

[1] The report recognized that under the earlier treaties the parties might have recourse to conciliation on a voluntary basis before submitting to arbitration if they so desire. But such recourse was not compulsory. The Arbitration Treaty stated only that it "did not preclude the parties, before resorting to arbitration, from having recourse to the procedure of conciliation and investigation" (*Report*, at p. 89).

American States but throughout the international community. It was regarded by commentators as the most important achievement of the Conference in the field of pacific settlement. (See, e.g., A. v. W. Thomas and A. J. Thomas, Jr., *The Organization of American States*, Dallas, 1963, p. 290; Inter-American Institute of International Legal Studies, *The Inter-American System, Its Development and Strengthening*, Dobbs Ferry, N.Y., 1966, pp. 78-79; F. Lavinia and H. Baldomir, *Instrumentos Jurídicos para el Mantenimiento de la Paz en América*, Montevideo, 1979, p. 29; R. L. Cardón, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano*, Buenos Aires, 1954, p. 75; H. M. Blackmer, *US Policy and the Inter-American Peace System*, Paris, 1952, p. 182.) In line with the position first adumbrated in Article XVII of the 1947 draft, Article XXXII added a stage in which the aggrieved party could obtain binding settlement of any dispute, legal or otherwise, if resort to conciliation (particularly appropriate for non-juridical disputes) should fail.

159. Retrospectively in 1985, the Inter-American Juridical Committee reiterated the distinction between Article XXXI and Article XXXII of the Pact that it had defined prospectively in the preparatory work. At the request of the Permanent Council of the OAS, the Committee made a study looking toward amendments to the Pact. Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), OEA/Ser.G, CP/doc.1603/85, 3 September 1985 (hereafter "the Opinion") (Ann. 23).

160. The study was the result of long-standing dissatisfaction among the members of the Organization of American States with the operation of the Pact of Bogotá. It addressed the question why the parties had not resorted more often to the procedures mandated in the Pact and why a number of American States had failed to ratify it. The Committee was charged with a comprehensive review of the operation of these procedures with a view to recommending amendments to improve the operation of the Pact. As it turned out, no amendments were adopted, but the preparatory opinion of the Committee and the report of its Rapporteur illuminate the meaning and operation of the judicial settlement provisions here in issue.

161. The Committee was chaired by Dr. Galo Leoro F. of Brazil, who was also the Rapporteur. In the Committee's view, the "automatic" feature of the Pact — the requirement of ultimate submission of all disputes whether legal or not to binding third-party determination — was the major impediment to fuller use of the procedures of the Pact. The Opinion emphasizes that either party is entitled to invoke the conciliation procedure described in the Pact, and in such a case:

> "[i]f the [Conciliation] Commission's efforts are unable to produce a solution, this entitles either of the parties, if they have not agreed upon an arbitral procedure, to have recourse to the International Court of Justice. In this case, the Court shall have compulsory jurisdiction, in accordance with Article 36, paragraph 1, of its Statute. (Article XXXII.)" (Opinion, at p. 429, *infra*.)

But judicial settlement may also be available without regard to any attempt at conciliation:

> "In any event, recourse to the International Court of Justice is available to the parties inasmuch as they declare that they recognize the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the Treaty may be in effect, in all

disputes of a juridical nature that are specified in the text of the Pact itself." (Opinion, at p. 429, *infra*.)

162. The Rapporteur's report on which the Committee's Opinion is based, makes even more explicit the two alternatives or, as he calls them "options" that an aggrieved party has for reaching the Court:

> "The Pact has had to make allowance for a situation whereby if a State Party wishes to invoke a given procedure . . . it may do so. If the controversy in question is of a juridical nature, it does this by recourse to the International Court of Justice, in which case jurisdiction is compulsory *ipso facto* for the parties (Article XXXI). If the controversy is of any other nature, the State may invoke the Pact by means of recourse to conciliation, in which case it has the right to request that the Permanent Council convoke the Commission of Investigation and Conciliation . . .
>
> . . .
>
> . . . By not making it binding upon the parties to resort to any given procedure, the Pact provides an option whereby if one of them wishes to use conciliation, that party may unilaterally request of the Permanent Council, the organ that is empowered to convoke the Commission of Investigation and Conciliation (Article XVI), that it do so . . .
>
> The other option the Pact provides is that if a party decides to go to the International Court of Justice . . . to settle any controversy of a legal nature, it will then have the compulsory jurisdiction, *ipso facto*, of that Court in respect of the other party (Article XXXI).
>
> . . .
>
> This direct recourse to the International Court of Justice, which comes about when a Party voluntarily brings the matter to that court of international jurisdiction, is entirely different from the recourse that a party has by law as a result of the automatic element of the Pact. In the latter case, jurisdiction is not based on Article XXXI, but rather Article XXXII, which provides that if conciliation leads to no solution, either party *shall be entitled* to have recourse to the International Court of Justice, which shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of its Statute.
>
> . . . In the Pact of Bogotá, provision has been made for the fact that the Court has: *(a)* compulsory jurisdiction for the controversies of a juridical nature as listed in Article XXXI, which it recognizes; and *(b)* compulsory jurisdiction for any controversy that comes to it as a result of unsuccessful conciliation . . ." (Pp. 467-468, *infra*.)

C. The Weight of the Teachings of the Most Highly Qualified Publicists of the Inter-American System Supports the Position that Exhaustion of the Conciliation Procedure Is Not a Precondition to Resort to the Court under Article XXXI of the Pact

163. Although there is some support in the writings of publicists for the position advanced by Honduras, particularly in very brief summary references to the Pact of Bogotá, and some of the publicists are not as clear as one would like, the weight of well-considered opinion takes the view that the failure of conciliation is not a precondition to the jurisdiction of the Court to entertain disputes of a juridical nature under Article XXXI of the Pact.

1. Publicists Not Cited in the Memorial of Honduras

164. Professor José J. Caicedo Castilla, a Vice Chairman of the Inter-American Juridical Committee, states unequivocally that the Pact provides two separate modes of access to the Court, one of which, Article XXXI, has no precondition of conciliation. In his authoritative work, *El Derecho Internacional en el Sistema Interamericano* (Madrid, 1970), he says:

> "The Pact attributes, in general, cognizance of the controversies among the American States to the International Court of Justice, and, in defect of that, organizes an arbitral system such that the Court will take cognizance of:
>
> (1) controversies of a juridical character, such as those enumerated by Art. 36 of the Statute of the Court;
>
> (2) non juridical controversies with respect to which the parties have not arrived at a solution in the conciliation procedure and have not agreed to resolve them by means of arbitration. *As a consequence, in this second case there is a restriction: the parties or one of them cannot recur directly to the court, but rather are obligated to commit themselves first to the conciliation procedure.* Only after the failure of this procedure does the court acquire competence, and besides that the parties should prove that they did not agree to submit their differences to arbitration."[1] (*Ibid.*, at p. 374 (emphasis added). See also J. J. Caicedo Castilla, *El Panamericanismo*, Buenos Aires, 1961, p. 259.)

Castilla talks of "este segundo caso" as comprising "controversias no jurídicas", because those are the only ones as to which direct resort to the Court under Article XXXI is, by definition, unavailable. It is clear, however, as suggested by the 1945 draftsmen and Dr. Leoro, as well as by the express provisions of Article III, that if an aggrieved State chose to do so, it could *elect* to use the conciliation procedure of Chapter Three for a dispute that concerned a juridical issue as well. The party making such an election would not forego its right to judicial settlement, for if conciliation failed to "lead to a solution" access to the Court would be available under Article XXXII.

165. F. Lavinia and H. Baldomir, in *Instrumentos Jurídicos para el Mantenimento de la Paz en America* (Montevideo, 1979) adopt the same analysis. Judicial settlement is "the principal mechanism of the system of pacific settlement relying for its effectiveness on a judicial body with universal and virtually obligatory competence".

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[1] "417. El Pacto atribuye en general el conocimiento de las controversias entre los Estados americanos a la Corte Internacional de Justicia, y en defecto de esta organiza un sistema arbitral.

De modo que la Corte conocerá:

1) de las controversias de carácter jurídico, tal como las enumera el art. 36 del Estatuto de la Corte;

2) de las controversias no jurídicas respecto de las cuales las partes no hayan llegado a una solución en el procedimiento de conciliación y no hayan concordado en solucionarlas por medio del arbitraje. *Por consiguiente, en este segundo caso hay una restricción: no pueden las partes o una de ellas acudir directamente a la Corte sino que están obligadas a someterse previamente al procedimiento de conciliación.* Solo por el fracaso de este procedimiento adquiere competencia la Corte, y ademas de eso las partes deben comprobar que no concordaron en someter la diferencia a arbitraje."

166. Thus, the Court may entertain[1]:

"(A) *In matters of a juridical character*

In cases where the parties are unable to agree to resolve the controversy through the methods previously studied, the Pact establishes an obligatory judicial determination as the method for the solution of conflicts of a juridical character before the International Court of Justice and in accordance with its statutes.

Article XXXI says that the contracting parties recognize the jurisdiction of the International Court of Justice as obligatory *ipso jure*, in respect to every other American State while the Pact remains in force, without the necessity of any special convention, in all controversies of a juridical character that may rise between them [of the four categories listed in Article 36 (2) of the Statute of the Court].

(B) *In matters of a non-juridical character*

When the controversy is of a non-juridical type, the parties or one of them cannot go directly to the Court, but are obligated first to use the method of conciliation. Only when the resort to conciliation does not lead to a result and they do not agree to resolve the matter by means of arbitration, can either of the parties resort to the International Court of Justice." (*Ibid.*, at pp. 29-30.)

Again, it is only in those cases where the aggrieved party "cannot go directly to the Court" that it must necessarily resort first to the conciliation procedure. In cases involving questions of a juridical character, direct access to the Court is open without preconditions by virtue of Article XXXI.

167. Professor Raúl Luis Cárdon, in *La Solución Pacífica de Controversias Internacionales en el Sistema Americano* (Buenos Aires, 1954), also distinguishes the two routes of access to the Court. He describes Article XXXII as "one of the most important clauses of the Pact of Bogotá" because it is the "maquinaria automática" that ultimately ensures a binding judicial or arbitral determination of the controversy. (*Ibid.*, at p. 75.)

"In principle, this leaves complete liberty to the parties to recur to the procedure that they consider most appropriate to resolve their controversy . . . but as regards the recurring to conciliation — by initial

[1] "A) *En asuntos de carácter jurídico*

En caso de que las partes no se pongan de acuerdo en resolver la controversia por los medios pacíficos anteriormente estudiados, el Pacto establece el arreglo judicial obligatorio como método para la solución de los conflictos de carácter jurídico a través de la Corte Internacional de Justicia y de acuerdo con sus estatutos.

El Artículo XXXI dice que las partes contratantes reconocen, respecto a cualquier otro Estado americano, como obligatorio ipso jure, sin necesidad de ninguna convencion especial mientras esté vigente este Pacto, la jurisdicción de la Corte Internacional de Justicia en todas las controversias de orden jurídico que surjan entre ellas y que versen sobre: [a list of the four categories in Article 36 (2) of the Statute of the Court follows].

B) *En asunto de carácter no jurídico*

Cuando la controversia es de tipo no jurídico, las partes o una de ellas no puede acudir directamente a la Corte, sino que están obligadas a utilizar previamente el método de la conciliación. Solo cuando en el transcurso de la conciliación no se logra un arreglo y tampoco se ponen de acuerdo en resolver el asunto por la vía del arbitraje, cualquiera de las partes podrá recurrir a la Corte Internacional de Justicia."

> agreement of the parties or by diplomatic means having failed — the 'automatic machinery' can be put into movement by only one of the parties to compel judicial or arbitral settlement."[1] *(Ibid.)*

168. A party who invokes conciliation is subject to the "automatic mechanism" of compulsory judicial or arbitral jurisdiction if the effort should fail.

But, Cárdon continues:

> "Nor is this the only way in which the Pact has given an obligatory character to the jurisdiction of the Court. This is also envisioned in Article 31, according to which the High Contracting Parties have declared that they recognize as obligatory *ipso facto*, without the need for a special agreement, while the Pact remains in force, with respect to any other American State, the jurisdiction of the International Court of Justice, in accordance with paragraph 2 of Article 36 of its Statute in all controversies of a juridical order arising between them [under the four headings of Article 36 (2)]." (*Ibid.*, at pp. 75-76.)[2]

Direct recourse to the Court is open for juridical disputes under Article XXXI.

169. Dr. Leoro, the 1985 Chairman and Rapporteur of the Inter-American Juridical Committee, takes the same position in a much earlier article, "El Pacto de Bogotá, Los Demas Instrumentos Inter-Americanos, La Carta de las Naciones Unidas y la Solución Pacífica de las Controversias", 4 *Revista Ecuatoriana de Derecho Internacional*, No. 4/5, p. 36 (1968-1969). Dr. Leoro describes the Pact's tripartite structure of binding settlement procedures as similar to sources cited in paragraph 158, *supra*:

> "The innovations of the Pact, in virtue of which this inter-American instrument has been applauded so much, consist really in the acceptance as obligatory, *'ipso facto'*, of the jurisdiction of the International Court of Justice for the controversies of 'a juridical order' (Art. XXXI); the recognition of recourse before the same Court when the conciliation procedure has failed and arbitration has not been agreed upon; (Art. XXXII): and the obligatory submission to arbitration when the court declares itself incompetent . . ." (*Ibid.*, at p. 39.)[3]

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[1] "En principio, este deja entera libertad a las partes para recurrir al procedimiento que consideren mas apropiado para resolver su controversia . . . Pero en cuanto se recurre a la conciliación — por acuerdo inicial de las partes o por haber fracasado los medios diplomáticos — la 'maquinaria automática' puede ser puesta en movimiento por una sola de las partes para compeler al arreglo judicial o arbitral."

[2] "No es ese el único caso en que el Pacto ha dado carácter obligatorio a la jurisdicción de la Corte. Esta además previsto por el artículo 31, segun el cual las Altas Partes contratantes han declarado que reconocen como obligatorio *ipso facto*, sin necessidad de ningun convenio especial, mientras esté vigente el presente Tratado, y respecto a cualquier otro Estado americano, la jurisdicción de la Corte Internacional de Justicia, de conformidad con el inciso 20 del artículo 36 de su Estatuto, en todas controversias de orden jurídico que surjan entre ellas . . ."

[3] "Las innovaciones del Pacto, en virtud de las cuales se ha aplaudido tanto a este instrumento interamericano, consisten realmente en la aceptación como obligatoria, 'ipso facto', de la juridicción de la Corte Internacional de Justicia para las controversias de 'orden jurídico' (Art. XXXI); el reconocimiento del recurso ante la misma Corte cuando haya fracasado el procedimiento de conciliación y no se haya convenido en un compromiso de arbitraje; (Art. XXXII): y el sometimiento obligatorio al arbitraje cuando la Corte se declare incompetente . . ."

The obligation of Article XXXI is presented as independent of Article XXXII and not conditioned on the failure of the conciliation procedure. Later the author reverts to this point, distinguishing between and discussing separately the origins of the Pact Articles in the pre-existing procedures for conciliation and arbitration.

170. Under the heading "*La conciliación*" he points out that the procedure envisioned in the General Inter-American Convention on Conciliation is taken into the Pact of Bogotá. But something new has been added:

> "The recognization that if this method fails without arriving at any solution and the parties have not agreed on an arbitral procedure, any of them will have the right to recur to the International Court of Justice in the form established by Article 40 of its Statute. The jurisdiction of the Court will remain obligatorily open in conformity with the first subparagraph of Article 36 of the same Statute (Art. XXXII)." (*Ibid.*, at pp. 57-58 (emphasis in original).)[1]

As discussed above, recourse to the Court is a final step after the conciliation procedure formerly available under the 1929 Treaty, providing a way for either of the parties to obtain a binding result if that procedure fails. Rather than conciliation being a necessary precondition of recourse to the Court, adjudication becomes the capstone of the conciliation process.

171. Under the heading of "*El arbitraje*", he notes the obligation of parties to the General Inter-American Treaty on Arbitration to submit to binding arbitration differences of a juridical nature that are susceptible of decision through the application of principles of law.

> "The arbitration, therefore, in this treaty, is a method of solution *applicable to all the controversies of a juridical order*, the same that in the Pact of Bogotá, with equal limitations as those contained in this treaty, are found submitted, on the other hand, *to the obligatory jurisdiction of the International Court of Justice* (Art. XXXI)." (*Ibid.*, at p. 58 (emphasis in original).)[2]

172. In Article XXXI cases, as under the 1929 General Treaty, direct recourse to binding settlement, without prior conciliation, is available.

173. Article XXXI and Article XXXII are thus alternative modes of access to the Court. Article XXXI takes the place of the pre-existing obligatory resort to arbitration for juridical questions (though of course, voluntary recourse to conciliation was possible in such cases if the complaining party so desired). Article XXXII replaces the pre-existing procedure of conciliation for other questions, but adds as a final step if conciliation fails compulsory adjudication, either by Court or arbitrator. (*Ibid.*, at pp. 57-58.)

174. F. Fernández-Shaw, in *La Organización de los Estados Americanos* (Madrid, 1963), after describing the contents and separate functions of Articles XXXII and Article XXXI, concludes:

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[1] "[E]l reconocimiento de que si este método fallara sin que se llegue a ninguna solución y las partes no hubiesen convenido a un procedimiento arbitral, cualesquiera de ellas *tendrá derecho a recurrir* a la Corte Internacional de Justicia en la forma establecida en el Artículo 40 de su Estatuto. La jurisdicción de la Corte quedará obligatoriamente abierta conforme al inciso lo del Artículo 36 del mismo Estatuto (Art. XXXII)."

[2] "El arbitraje [he says] por lo tanto. en este convenio, es método de solución *aplicable a todas las controversias de orden jurídico*, las mismas que en el Pacto de Bogotá con iguales limitaciones que las contenidas en este Tratado, se hallan sometidas, en cambio, *a la jurisdicción obligatoria de la Corte Internacional de Justicia* (Art. XXXI)."

> "Thus, the Court can entertain controversies of a juridical type under Article XXXI and non-juridical controversies when the parties have tried *(agotado)* the method of conciliation and do not have an agreement to arbitrate." (*Ibid.*, at p. 411.)[1]

As with the other commentators, the *requirement* that the parties first use the method of conciliation (as opposed to the possibility of voluntary conciliation) is applicable only to "*las controversias de tipo no jurídico*" not covered by Article XXXI.

175. Finally, Dr. Alberto Herrarte, former Foreign Minister of Guatemala and Vice Chairman of the Inter-American Juridical Committee, said in his lecture on *Solución Pacífica de las Controversias en el Sistema Interamericano* in the Sixth Course in International Law Organized for the Inter-American Juridical Committee in 1979:

> "The most important provisions of the Pact are in Article XXXI, which declares as obligatory *ipso facto* the jurisdiction of the Court in controversies of a juridical order to which subparagraph 2 of Article 36 of the Statute of the Court refers. This is: the American States by the Pact are making the declaration to which that subparagraph refers, in order to make obligatory *ipso facto* and without necessity of a special agreement, the jurisdiction of the Court in controversies of a juridical order that specifically are mentioned.
>
> In conformity with Article XXXII, the jurisdiction of the Court also remains obligatory for the other matters in which the conciliation procedure did not arrive at a solution and the parties had not agreed on an arbitral procedure. In that case, any of them can recur to the Court, relying upon the case indicated in the first subparagraph of our Article 36 of the already mentioned Statute, this is when the parties submit voluntarily matters to the Court." (Secretario General, Organizacion de los Estados Americanos, *Sexto Curso de Derecho Internacional Organizado por el Comite Jurídico Interamericano*, OEA/Ser.Q/V.C-6, CJI 40, at 225.)[2]

176. According to Herrarte, the Parties, in Article XXXI, have *inter se* made the declaration referred to in Article 36 (2) as to the classes of questions mentioned in that paragraph. Article XXXII, on the other hand, covers "los otros

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[1] The original Spanish text:

"Asi, pués, la Corte conocerá de las controversias de tipo jurídico segun el artículo XXXI y de las controversias de tipo no jurídico, cuando las partes hayan agotado el método de la conciliación y no se hayan puesto de acuerdo sobre si es procedente el método del arbitraje."

[2] "Las provisiones mas importantes del Pacto están en el Artículo XXXI, cuando declara como obligatorio *ipso facto* la jurisdicción de la Corte en las controversias de orden jurídico a que se refiere el inciso 20 del artículo 36 del Estatuto de la Corte. Esto es: los Estados Americanos por el Pacto están haciendo la declaración a que se refiere dicho inciso, para hacer obligatoria *ipso facto* y sin necesidad de convenio especial, la jurisdicción de la Corte en las controversias de orden jurídico que específicamente se mencionan.

Conforme al articulo XXXII, la jurisdicción de la Corte tambien queda obligatoria para los otros asuntos en los cuales el procedimiento de conciliación no llegara a una solución y las Partes no hubiesen convenido a un procedimiento arbitral. En ese caso, cualquiera de ellas puede recurrir a la Corte, homologándose el caso señalado en el inciso 10 del artículo 36 del ya citado Estatuto, ésto es cuando las Partes someten voluntariamente los asuntos a la Corte."

asuntos" and it is only with respect to them that the requirement of prior conciliation is imposed.

2. Publicists Cited in the Memorial of Honduras

177. Respondent, at pages 65-71, *supra*, of its Memorial, presents the opinions of a number of publicists in support of its position that an effort at conciliation is a necessary prerequisite to recourse to the Court under Article XXXI as well as under Article XXXII, where the requirement expressly appears. Although some of these do support this view, others are misconstrued in the Memorial or treat the matter only in brief and summary fashion without extensive consideration or analysis of the text of the Articles. Moreover, only one is a Latin American jurist working in the tradition of inter-American law.

W. Sanders, *The Bogotá Conference: Ninth International Conference of American States*, International Conciliation No. 442, June 1948, cited in the Memorial, p. 67, *supra*.

178. A careful reading of Mr. Sanders shows that his position is not necessarily inconsistent with Nicaragua's. His more detailed description of the judicial settlement Articles seems to make precisely the distinction Nicaragua now maintains:

> "In the chapter on judicial procedure, the parties recognize the jurisdiction of the International Court of Justice as compulsory *ipso facto* in *all disputes of a juridical nature*, in conformity with Article 36, paragraph 2, of the Statute of the Court.
>
> Moreover, when conciliation procedures have not led to a solution and the parties have not been able to agree upon an arbitral procedure, any one of them can refer *any dispute* [as distinguished from disputes of a juridical nature] to the International Court of Justice under Article 40 of the Statute . . .
>
> The net result of these interlocking procedures is the following: *The parties are not required to resort in the first instance to any particular procedure of those set out in the Treaty* . . . They may have recourse to the International Court of Justice or set up an arbitral tribunal, *even in non-legal questions*, rather than refer the matter to mediation or conciliation. However, if conciliation is tried and fails and the parties cannot agree on arbitration, any one of them can force a reference to the Court." (*Op. cit.*, pp. 403-404 (emphasis supplied).)

The discussion of conciliation *is in connection with the settlement of "non-legal questions" falling under Article XXXII.* Resort to conciliation is a way by which a party can "force a reference to the Court" for the resolution of such non-legal questions[1]. For legal questions, which fall under the *ipso facto* provisions of Article XXXI, however, the parties have accepted the compulsory jurisdiction of the Court in conformity with Article 36 (2) of its Statute. Mr. Sanders's fuller treatment is thus consistent with the position that conciliation is not a precondition of jurisdiction under Article XXXI.

L. Delbez, "L'évolution des idées en matière de règlement pacifique des conflits", 55 *Revue générale de droit international public* 5 (1951), cited in the Memorial, p. 67, *supra*.

[1] To be sure, the Court might not consider it had jurisdiction in such a case, but in that event compulsory arbitration is available under Article XXXV.

179. Professor Delbez's comments occupy less than a page in a long article devoted to other agreements and forums. His basic assumption is that, despite Article III, the settlement process should "normally" follow a prescribed sequence of modalities, from "good offices and mediation" through "investigation and conciliation" to "proceedings before the I.C.J." (*op. cit.*, p. 21). This assumption, as the Honduran Memorial itself notes (Memorial, p. 67, footnote 1, *supra*), is incorrect. Article III expressly stipulates that there is no preferential order among the dispute settlement methods prescribed and that the parties are entirely free to choose any one of them, unless expressly provided otherwise. This freedom of choice is an essential feature of the Pact. (See authorities cited in paragraph 145, *supra*.)

180. Professor Delbez's conclusion cannot be divorced from his erroneous assumption. Of course, if the Pact did indeed provide for a hierarchically ranked sequence of methods, those higher in the sequence could not be employed before lesser ones were exhausted. It would follow, as Professor Delbez concludes, that conciliation is a precondition to adjudication. But if the treaty expressly rejects such a hierarchy, then there can be no requirement that one method should be pursued before another, unless the instrument specifically so provides. It is an indication of the deficiency in Professor Delbez's line of analysis that he does not even cite Article XXXI. The conclusion is unfortunately inescapable that Professor Delbez did not fully grasp the scheme of the Pact.

A. v. W. Thomas and A. J. Thomas, Jr., *The Organization of American States*, Dallas, 1963, cited in the Memorial, p. 66, *supra*.

181. The quotation in the Memorial from the cited work is correct. However, the bulk of the authors' ensuing discussion and analysis is an effort to discredit what they call

> "the dubious distinction between legal, justiciable, or juridical disputes on the one hand and non justiciable, non juridical, non legal, or political disputes on the other" (*op. cit.*, p. 291).

Like it or not, the difference between the procedures contemplated in Article XXXI and Article XXXII of the Pact of Bogotá reflects that distinction. If the authors are unwilling to recognize the distinction *ab initio*, they surely will be unable to appreciate the potential differences between the two categories that would lead to the requirement of previous conciliation for one and not for the other.

R.-J. Dupuy, *Le nouveau panaméricanisme*, Paris, 1956, cited in the Memorial, p. 68, *supra*; G. Connell-Smith, *The Inter-American System*, London, 1966, cited in the Memorial, p. 69, *supra*; H. von Mangholdt, *Arbitration and Conciliation in Judicial Settlement of International Disputes, A Symposium*, Max Planck Institute of Comparative Public International Law, cited in the Memorial, p. 70, *supra*.

182. Each of these works has a single conclusory sentence, quoted in the Memorial, asserting without analysis or citation of authority that conciliation is a precondition of resort to the Court under the Pact. In the circumstances, they must be regarded as derivative rather than the well-considered independent views of individual publicists.

183. Of all the authors cited in the Memorial, therefore, only García-Amador presents an extended analysis in support of the Honduran position.

Conclusion

184. Nicaragua makes the following submissions with respect to the jurisdiction of the Court under the Pact of Bogotá:

(i) The acceptance of the jurisdiction of the Court under Article XXXI, "*ipso facto* and without the necessity of any special agreement" is a treaty obligation binding on the parties falling within the terms of Article 36 (1) of the Statute of the Court as a "matter[] specially provided for . . . in treaties or conventions in force".

(ii) The acceptance of jurisdiction under Article XXXI of the Pact of Bogotá is not and cannot be qualified by the purported "reservation" or "new declaration" of Honduras dated 22 May 1986.

(iii) The jurisdiction of the Court over this case, which the parties accepted "*ipso facto*, without the necessity of any special agreement" under Article XXXI, is not subject to a prior condition that the conciliation process established by the Pact shall have failed to provide a solution.

CHAPTER 4

ARTICLES II AND IV OF THE PACT OF BOGOTÁ DO NOT CONSTITUTE A BAR TO THE COURT'S JURISDICTION IN THE PRESENT DISPUTE

185. Honduras argues that the mutual submission to the Court's jurisdiction based on the Pact of Bogotá is negated, in the circumstances of the present case, by Articles II and IV of the Pact.

Article II states that:

> "in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

And Article IV provides:

> "[O]nce any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

186. Honduras purports to find in this language two separate bases for negating the exercise of jurisdiction by the Court in this case. First, Honduras argues that the obligation undertaken by the contracting parties to use the procedures established in the Pact, including recourse to the Court, is subject to the condition precedent that "in the opinion of the parties" — which Honduras reads as "in the opinion of *both* parties" — the dispute cannot be settled by direct negotiations through the usual diplomatic channels. Honduras contends that merely by expressing the opinion that its dispute with Nicaragua *can* be settled by direct negotiations, it can prevent the jurisdiction of the Court from attaching. Indeed, it can prevent recourse to any of the procedures for peaceful settlement defined in the Pact.

187. Second, Honduras argues that the Contadora process, in which both Nicaragua and Honduras have been participating constitutes a "special procedure" under Article II that "in their opinion" — which Honduras reads as "in the opinion of *one* of them" — "will permit them to arrive at a solution". Honduras contends that by virtue of Article IV, as long as the Contadora process continues neither these parties (nor it would seem, any other Central American States participating in Contadora) can invoke any of the pacific procedures of the Pact, including the procedure of judicial settlement, to deal with bilateral issues between them that might be said to be within the purview of Contadora.

188. Neither of these positions can be seriously maintained. As will be shown, to accept either would be to frustrate the central purpose of the Pact — "the ultimate purpose of rendering compulsory, and as it were irreversible, the recourse to" binding modes of resolving *all* disputes between parties.

A. Article II Does Not Condition Recourse to the Court under Article XXXI upon Agreement by All Parties that a Dispute Cannot Be Settled by Direct Negotiations

189. Honduras acknowledges that "it is in effect Articles XXXI to XXXV that hold the system in place and guarantee, in principle, that a peaceful solution is inevitable" (Memorial, at p. 64, *supra*). They do so by providing some form of binding third-party settlement of all types of controversies that might arise between parties to the Pact: direct recourse to the Court for disputes of a juridical character enumerated in Article 36 (2) of the Statute (Art. XXXI); recourse to the Court after an attempt at conciliation for all controversies (Art. XXXII); and arbitration if it should appear that the Court "declares itself to be without jurisdiction" (Art. XXXV, subject to certain limited exceptions). This whole carefully constructed scheme of compulsory jurisdiction would be shattered if, as Honduras contends, a party could veto resort to these modes of settlement simply by saying that in its opinion the dispute can be settled by direct negotiation between the parties. Of what value is a binding acceptance of the compulsory jurisdiction of the Court, either directly under Article XXXI or after conciliation under Article XXXII, if the parties retain the unrestricted right to accept or reject the Court's jurisdiction in any particular case merely by uttering such an opinion?

190. Yet that would be precisely the effect of Honduras's interpretation of Article II. According to Honduras, any contracting party may escape its commitments under Chapters Four and Five of the Pact with respect to any particular dispute merely by stating that, in its opinion, the dispute can be settled by direct negotiations. The mere expression of the opinion is binding on the Court since the question of whether the dispute can be settled by direct negotiations is "not for objective evaluation by the Court". (Memorial, at p. 42, *supra*.)

191. As demonstrated in the two preceding chapters, and as admitted by Honduras, the fundamental purpose of the Pact of Bogotá was to establish a comprehensive and compulsory system for the peaceful resolution of disputes between the American States. The objective was to obligate the contracting parties to submit all controversies that could not be settled by normal diplomatic means to binding procedures of dispute resolution, primarily adjudication by the International Court of Justice. This central purpose would be completely frustrated if Honduras's interpretation of Article II were to prevail. Under that interpretation, any State wishing to avoid adjudication — or any other dispute resolution procedure set forth in the Pact — could do so merely by stating, however erroneously or disingenuously, that in its opinion the dispute can be resolved by negotiations. It is axiomatic that the Court must resist adopting a proffered interpretation of treaty language that frustrates the entire purpose of the treaty.

192. Honduras's interpretation contradicts the language of the Pact as well as its purpose. In the first place, as shown in Chapter 3 above, the language of Article XXXI is unequivocal and unconditional. The obligations undertaken in that Article are not expressed as a subject to any conditions precedent. On the contrary, acceptance of jurisdiction "*ipso facto, without the necessity of any special agreement*" (emphasis added) negates a requirement that each party to a dispute agree that it cannot be settled by negotiation.

193. Article II itself states only that in the event of a controversy "which, in the opinion of the parties, cannot be settled by direct negotiations . . . the parties bind themselves to use the procedures established in the present Treaty . . .". It does not necessarily follow that such recourse is available *only*

when it is the opinion of the parties that the dispute cannot be settled by direct negotiations[1]. It is perfectly logical (and much more consistent with the purpose of the Pact) to read Article II as setting forth one circumstance — but not the exclusive one — in which the parties bind themselves to use the procedures set forth in the Pact, namely when they are of the opinion that their dispute cannot be settled by direct negotiations. Under this reasoning, Article IV sets forth other circumstances in which the parties are bound to use one of the specific procedures set forth in the Pact. Because Article XXXI is unconditional, it applies regardless of the opinion of the parties as to whether the dispute can be settled by negotiations.

194. The true construction of the words "in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels . . ." (and the only interpretation consistent with the central purpose of the Pact) is that the parties to a dispute are bound to use the procedures in the Pact whenever one of them believes that it cannot be settled by diplomacy. This reading is confirmed by the peaceful settlement provisions of the Charter of the Organization of American States, concluded at the same Bogotá Conference, which were the foundation of the Pact of Bogotá. As has already been pointed out (*supra*, para. 126), Article 23 of the Charter (now Article 25) imposed a binding obligation on the members of the Organization to agree to a peaceful procedure for the settlement of any dispute "which, in the opinion of one of them, cannot be settled through the usual diplomatic channels . . .". Article 24 (now Article 26) mandated "[a] special treaty" to establish procedures and means for their application "so that no dispute between American States shall fail of definitive settlement *within a reasonable period*" (emphasis added). These Articles are addressed to the same problem as Article II of the Pact, and it should be read in *pari materia* with Article 23 of the superordinate Charter. In particular, the reference in the Charter to the necessity of settlement within a reasonable period precludes the proposed Honduran construction, which would give any party to a dispute the means of preventing settlement indefinitely.

195. The Court itself has frequently construed clauses in compromissory agreements requiring prior resort to diplomatic negotiations. It has held that 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. There is no reason to believe that the parties to the Pact of Bogotá intended anything different when they agreed to such a clause in Article II, especially in view of the express language of Articles 23 and 24 of the Charter of the OAS, which were concluded simultaneously. Judge Ago expressed the same idea in his separate opinion to the Judgment of the Court of 26 November 1984:

> "More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists." (*Military and Paramilitary Activities in and against Nicaragua,*

[1] Article II does *not* say, for example, that *unless* the parties are of the opinion that their dispute cannot be settled by direct negotiations through the usual diplomatic channels, the parties shall *not* use the procedures established in the present Treaty . . .

Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 1984, pp. 515-516.)

196. Authoritative commentators have also rejected an interpretation of such a clause that would give a State party an absolute veto, enabling it to be used unilaterally to block resort to the Court by contending that further negotiation might be fruitful. They have deemed it unacceptable that a State should renege on a jurisdiction it has accepted simply by alleging that negotiations, interrupted by the lodging of an Application, could have continued.

197. Thus, when there is disagreement between the parties, the issue is to be resolved not so much on the basis of the particular form of words used in the compromissory instrument, but by an objective evaluation of the possibilities for settlement of the dispute "by direct negotiations through the usual diplomatic channels". This is the position of Ambassador Rosenne:

> "Neither Court, it seems, has attached much significance to these different formulations [in the title of jurisdiction, referring to disputes which *cannot be* or *are not* settled by negotiation] and both have directed their attention in the cases mentioned, to an examination of the question whether the existence of a deadlock in the negotiations is established, and whether any reasonable probability exists that further negotiations would lead to a settlement." (*The Law and Practice of the International Court*, Sijthoff, Leyden, 1965, 2nd ed., 1985, Vol. II, p. 515.)

198. Rosenne's analysis reflects very accurately the consistent jurisprudence of the Court. Thus, for example, in the *Right of Passage over Indian Territory* case, the Court rejected the third preliminary plea in bar by India that prior negotiations had not been exhausted, commenting that

> "While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them, on the principal legal issue which is now before the Court, namely, the question of the right of passage, an examination of the correspondence shows that the negotiations had reached a deadlock." (*I.C.J. Reports 1957,* p. 149.)

199. Similarly, interpreting Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations and Consular Rights of 1955 between the United States and Iran, the Court held that

> "the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded *in limine* any question of an *agreement* to have recourse to 'some other pacific means' for the settlement of the dispute".

The United States was therefore entitled to bring a case before the Court on the basis of this provision. (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 27.) The same reasoning led the Court to the same conclusions with regard to Article XXIV of the Treaty of Friendship, Commerce and Navigation of 1956 between the United States and Nicaragua (*Military and Paramilitary Activities in and against Nicaragua, I.C.J Reports 1984*, p. 428; *I.C.J. Reports 1986*, p. 137; see also the separate opinions of President Nagendra Singh and Judge Sir Robert Jennings, *I.C.J. Reports 1984*, pp. 445-446, 555-556.)

200. The P.C.I.J. reached the same result in interpreting Article 26 of the Mandate for Palestine of 1920. It dismissed the preliminary pleas in bar

entered by the United Kingdom that there was nothing to show that the dispute could not be settled by negotiation:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short: this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable or refuses to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation." (Case of the *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2,* p. 13.)

This analysis was followed in its entirety by the present Court in its Judgment of 21 December 1962 holding that the requirement of prior diplomatic negotiations laid down in Article 7 of the Mandate for South West Africa was met as soon as "a deadlock was reached" in the negotiations (*South West Africa* cases, *I.C.J. Reports 1962,* p. 345). Thus, in so far as Article II of the Pact of Bogotá contains a requirement that the dispute cannot be resolved by direct negotiations, that requirement presents no obstacle to the exercise of jurisdiction by the Court in this case.

201. The facts of the present case fully satisfy the cited pronouncements of the Court. Nicaragua has been protesting diplomatically to Honduras continuously since 1980 with respect to all of the Honduran actions described in the Application: the acceptance of thousands of mercenaries establishing and maintaining military bases and other facilities in Honduran territory for the purpose of carrying out armed attacks in and against Nicaragua; the provision of vital intelligence and logistical support to facilitate the mercenaries' attacks on Nicaragua; the active participation of Honduran armed forces in attacks staged by the mercenaries inside Nicaragua; and the conduct of continuous military manœuvres with the armed forces of the United States for the purpose of intimidating Nicaragua and intervening in its internal affairs. Numerous diplomatic protests have been registered. Notwithstanding these protests, Honduras's unlawful activities have not only continued, but steadily intensified.

202. Since 1981, Nicaragua unsuccessfully has sought a settlement through direct negotiation with Honduras, as described in the Introduction (paras. 1-47, *supra*). The heads of State of the two countries met on 13 May 1981 to discuss these matters, but the transgressions complained of by Nicaragua grew only worse thereafter. Several meetings took place subsequently, involving high-ranking military and civilian officials from both States, but still there was no progress toward a settlement. (Paras. 34-35, *supra.*) A watershed was reached in April 1982 when, in response to the Nicaraguan Foreign Minister's 7-point plan for resolving the dispute, the Honduran Foreign Minister wrote back rejecting any and all bilateral efforts to reach a settlement (para. 34, *supra*). Since then, Honduras has steadily maintained its position of refusing to engage in direct negotiations with Nicaragua, either through the usual diplomatic channels or otherwise[1]. On this record, it is evident that there is no

[1] Honduras does not contend, nor could it, that the participation of the two States, among others, in the multilateral Contadora process, constitutes "direct negotiations through the usual diplomatic channels". The Contadora negotiations are neither "direct" (as between Nicaragua and Honduras) nor are they "the usual diplomatic channels". The relation of the Contadora process to the jurisdictional issues is discussed more fully in paragraphs 204-234, *infra.*

likelihood of direct negotiations between the Parties even occurring, let alone leading to a settlement.

203. Under the established jurisprudence of this Court and its predecessor, this is more than sufficient to satisfy any requirement of prior recourse to diplomacy that might exist.

B. The Contadora Process Is Not a "Special Procedure" under Article II of the Pact of Bogotá and, in Any Event, It Does Not Address the Bilateral Legal Dispute between Nicaragua and Honduras

204. Honduras also contends that the continued functioning of the Contadora process defeats the Court's jurisdiction in this case, because it is a "special procedure" within the meaning of Article II of the Pact. Once such a procedure has been initiated, according to Article IV, "whether by agreement between the parties or in fulfilment of the present Treaty . . . no other procedure may be commenced until that procedure is concluded". Thus, says Honduras, Nicaragua is precluded from resorting to the Court under Article XXXI until the Contadora process "has been concluded".

205. The concept of "special procedures" has not been judicially defined nor much elucidated by the commentators. Mexico, which introduced the idea in the debates at Bogotá, had in mind cases in which some specialized expertise might be useful in solving a particular controversy.

> "A controversy whose character is fundamentally economic might be resolved by an expert appraisal. In the case of a technical controversy about engineering, it could be arranged that a technical engineer organization carry out an investigation and resolve it." (Ministerio de Relaciones Exteriores, *Novena Conferencia Internacional Americana, Actas y Documentos*, Bogotá, 1953, Vol. IV, p. 126.)[1]

The Contadora process certainly does not fit that description. However, apart from this, *there is nothing in the books.*

206. The question must thus be approached as one of principle. In this light, it is appropriate to make some preliminary observations.

207. *First*, under Article IV, the initiation of any special procedure constitutes a waiver of rights, not only of recourse to the Court, but to any other mode of pacific settlement until that procedure is "concluded". Since such waivers are not to be lightly inferred, the party asserting the bar should be able to point to some express indication that the process in question was regarded as a special procedure within the meaning of Article II or that a waiver was intended.

208. *Second*, Article IV refers to a procedure initiated "by agreement between the parties or in fulfilment of the present Treaty . . .". This seems to import an agreement confined to the parties to the particular dispute, with particular reference to that dispute. Moreover, when a procedure other than one specified in the Pact is in issue, there should be some acknowledgment, express

[1] Original text in Spanish.

> "Una controversia fundamentalmente económica puede resolverse con una valorización de expertos. En una controversia de técnica de ingeniería, se puede llegar a establecer que un organismo técnico de ingeniería haga una labor de investigación y la resuelva."

or implied, that the process is undertaken for the purpose of discharging the treaty obligations of the parties.

209. *Third*, the procedures specified in the Pact all have definite time-limits. Under Article XIII, if "no solution to the controversy has been reached within five months after mediation has begun, the parties *shall have* recourse without delay to any one of the other procedures" established by the Pact (emphasis added). Article XXV provides that a Conciliation Commission "shall conclude its work within a period of six months from the date of its installation . . .". These tight time-limits reflect the demand of the OAS Charter for a system of peaceful settlement to ensure "that no dispute between American States shall fail of definitive settlement within a reasonable time" (Art. 23 (now Art. 25)). It follows that an open-ended process, without a fixed terminus, should not be considered a special procedure within the meaning of the Pact, unless an intention to the contrary is very clearly expressed.

210. When considered in the light of these general principles, the Contadora process, though undoubtedly of the utmost importance for the general exploration and resolution of the overall regional problem does not qualify as a "special procedure" within the meaning of Article II and subject to the waiver requirements of Article IV.

1. Neither the Parties, the Contadora Countries Nor Any Other State or Competent International Organization Has Given Any Indication, Express or Implied, that the Contadora Process Is a Special Procedure within the Meaning of Article II

211. It is reasonable to suppose that if the participants in the Contadora process had understood it to be a "special procedure" under Article II of the Pact of Bogotá — such that until its conclusion no other pacific procedure could be used — this understanding would have been manifested somewhere in the numerous Contadora documents and drafts that have been prepared and circulated, in the declarations of the five Central American States[1] participating in the process, in the declarations of the four States that comprise the Contadora Group[2] or in the declarations of the four States that comprise the Support Group[3]. All 13 States connected with the Contadora process are members of the Pact of Bogotá, and would plainly have an interest in whether their participation in the process might affect their right to any other pacific procedure under the Pact during the pendency of the process.

212. It is significant, then, that not a single Contadora document or draft, not a single declaration by any member of the Contadora Group, and not a single declaration by any member of the Support Group suggests in any way that the Contadora process is a "special procedure" under Article II of the Pact of Bogotá, or that it has been understood as such by any of the 13 American States connected with these multilateral negotiations. Indeed, with the sole exception of Honduras's statement in its Memorial of 23 February 1987, not a single declaration by any Central American State has reflected such an understanding of the Contadora process. Honduras itself manifested a contrary understanding prior to the filing of its Memorial. In 1985, the Honduran plenipotentiary to the Contadora process said that Contadora was a procedure totally outside the Pact of Bogotá:

[1] Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.
[2] Colombia, Mexico, Panama and Venezuela.
[3] Argentina, Brazil, Peru and Uruguay.

"On the other hand, the continental system of the Organization of American States, which is endowed with an instrument for the pacific settlement of disputes such as the Pact of Bogotá or with an instrument of collective security such as the Treaty of Rio, is too lethargic to play a role in the case of Central America." ("La crise centraméricaine et les négociations de Contadora", *AFDI*, 1985, pp. 272-273.)[1]

2. The Contadora Process Cannot Have the Effect of Waiving Recourse to Other Procedures, as Required by Article IV of the Pact, because It Has Never Been Envisaged as an Exclusive Means to Settle Disputes among Central American Countries

213. The Contadora process is not an organization or activity of the Organization of American States. It is not a Pan American effort, but a strictly Latin American one. The notion that Contadora is the exclusive venue for the solution of disputes between Central American countries has never been accepted, either by the Contadora Group itself, other international organs such as the United Nations, the OAS or this Court or by any Central American State. Honduras itself did not take that position before the present proceeding.

214. *Honduras* — On 29 March 1983, Honduras urged the Permanent Council of the OAS to invite the States of Central America to begin direct negotiations on a five-country basis. On 5 April it tabled a draft resolution to that end. (Memorial, Annex 10.) Again in July of that year it requested a meeting of the Council to examine threats to peace and security in Central America. (*Ibid.*, Annex 12.) At the express request of the Contadora Group, the draft resolution was not debated. Clearly, however, Honduras did not consider the Contadora process as precluding other avenues of settlement among the parties.

215. In October 1984, Honduras fostered the creation of the Tegucigalpa Group of three Central American States to oppose a Contadora initiative. (See Introduction, paras. 41-43, *supra*.)

216. In a recent article on the Contadora negotiations Professor Jorge Ramón Hernández Alcerro, the Honduran representative, said:

"National or internal negotiations are naturally insufficient to re-establish a normal situation in Central America. Bilateral negotiations do not suffice either, since we should then have to exclude conflicts of a national or multilateral nature."[2] ("La crise centraméricaine et les négociations de Contadora", *AFDI*, 1985, p. 272.)

217. All these pronouncements establish that Honduras does not view the Contadora process as precluding its resort to other forums and methods for resolving Central American issues and problems.

218. *The OAS, the United Nations and the Court* — It is apparent from the many instances where the organs of the United Nations and the OAS consi-

[1] The original text in French:

"D'un autre côté, le système continental de l'Organisation des Etats américains, doté d'un instrument international de règlement pacifique des différends."

[2] The original text is in French:

"Les négociations nationales ou internes sont naturellement insuffisantes pour rétablir la normalité en Amérique centrale. Les négociations bilatérales ne suffisent pas non plus, car nous laisserions en dehors les conflits d'ordre national ou les conflits de caractère multilatéral."

dered issues arising out of the situation in Central America that the operation of the Contadora Group is not conceived as foreclosing resort to these other political forums. However, the actions of these organizations go further and indicate expressly that Contadora is not regarded as displacing bilateral or other direct settlement efforts between the parties.

219. For example, in his report to the General Assembly of 9 October 1985, the Secretary-General of the United Nations emphasizes the need to seek bilateral solutions to border incidents:

> "Concurrently with the Contadora Group's search for a comprehensive solution, any border incidents that arise should be dealt with directly by the parties." (Memorial, Ann. 21, p. 143, *supra*, sec. 11.)

220. Similarly, in Resolution 702 (XIV/84), 17 November 1984, the OAS General Assembly resolved:

> "5. To urge all the Central American governments to manifest their will for peace and *to intensify their consultations among themselves* and with the Contadora group." *(Ibid.)*

221. The International Court of Justice itself, in the *Military and Paramilitary Activities* case, said it was

> "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 examination by the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case" (*I.C.J. Reports 1984,* pp. 440-441).

222. *The Contadora Group* — One would suppose that the Contadora Group itself would be the most jealous of its own exclusive jurisdiction, if it had such. On the contrary, the Group has encouraged the employment of a wide variety of settlement processes, except in rare circumstances, as in the case of the attempted formation of the Tegucigalpa Group by Honduras, where it appeared that such alternative avenues were not being pursued in good faith but were an effort to obstruct Contadora's own activities. Indeed, the Declaration of Cancún asserts that it is the States of Central America "which must shoulder the primary responsibility and make the major effort in the search for agreements insuring peaceful coexistence" (Memorial, Ann. 13). And the preamble to the revised Act for Peace and Co-operation in Central America expressly states that it is "without prejudice to the right of recourse to other competent international forums"[1] (Ann. 24).

223. Contadora has approved not only resort to more comprehensive political forums, but also bilateral and direct negotiating initiatives among the Central American States. Thus it encouraged "the resumption of talks between the Governments of the United States and of Nicaragua . . ." (Carabelleda Message, 12 January 1986, Memorial, Ann. 24). It has also supported various bilateral approaches between Nicaragua and Costa Rica:

— the joint Nicaragua-Costa Rica Commission, created on 15 June 1982 pursued its efforts for more than a year after the beginning of the Contadora consultations;

[1] Original text in Spanish: "sin perjuicio del derecho de recurrir a otros foros internacionales competentes".

— Contadora was instrumental in the negotiation of an agreement establishing a Commission on Supervision and the Prevention of Border Incidents on 15 May 1984;
— in August and September 1984, the two countries undertook bilateral negotiations under the auspices of the French Government, aimed at resolving bilateral frontier problems;
— the Contadora Group and the Support Group also endorsed the meeting between the Vice Ministers of Foreign Affairs of the two countries in Managua on 28 February 1986;
— most important of all, the joint communiqué published in January 1987 by the Contadora Group and the Support Group after a peace mission to the capitals of the five Central American countries does not criticize Nicaragua's Applications to the Court, although Honduras and, to a lesser extent, Costa Rica, have launched an intense diplomatic campaign against these Applications. On the contrary, the communiqué emphasized that "the persistence of acts which violate international law" — which is precisely what the Court is empowered to determine — was one of the "greatest obstacles rendering dialogue difficult". (Memorial, Annex 33, p. 185, *supra*.)

224. There is no reason to believe that the attitude of the Contadora countries would be any different towards bilateral diplomatic exchanges between Nicaragua and Honduras. The reason for the failure of such support to appear in the record is the categorical rejection by Honduras of any bilateral negotiations.

225. Nicaragua itself, as noted above, has continuously sought direct bilateral talks with the Government of Honduras to resolve the issues between them. Although, as noted, since 1982 Honduras has consistently rejected these approaches, it has never cited the existence of the Contadora Group as a special procedure under Article II of the Pact of Bogotá as grounds for its refusal.

3. The Contadora Process Cannot Be a Special Procedure within the Meaning of Article II because Its Subject-Matter Is Distinct from the Dispute before the Court

226. The Contadora process, if it is successful, will lead to a diplomatic solution geared to a political compromise. The Court, by contrast, is required to adjudicate on the sole basis of international law. Thus, the purpose of the two exercises is different: the task of Contadora is to bring about through multilateral and political channels the conditions for a lasting peace in the whole region. The Court is being asked to settle a bilateral dispute on the basis of law. The difference in the character of the controversies submitted to the two procedures is apparent from a comparison of the basic documents in each. Nicaragua's Application asks the Court to find:

(a) that the acts and omissions of Honduras in the material period constitute breaches of the various obligations of customary international law and treaties specified in the body of this Application for which the Republic of Honduras bears legal responsibility;
(b) that Honduras is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;
(c) that Honduras is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under the pertinent rules of customary international law and treaty provisions.

227. The provisions of the Draft Act of Contadora do not address any of these legal concerns of Nicaragua. Its sole purpose is to establish for the future the conditions of lasting peace in the region. As the Group itself explained, the Act

> "would establish the basis for respectful coexistence in the region and would promote sustained economic and social development and the strengthening of democratic and pluralistic solutions".

Its object is not to determine responsibilities in a dispute between two States or to fix the amount of the resulting reparation. A multilateral diplomatic forum, such as Contadora, addressing the broad and interacting problems of the region, would be very poorly equipped to resolve legal rights and obligations. From the beginning, the focus of Contadora has been "the political, economic and social problems which jeopardize the peace, democracy, stability and development" of the region (Memorial, Ann. 9). That is very different from the subject-matter of the dispute submitted to the Court in Nicaragua's Application[1].

Honduras itself concedes this point:

> "[T]he Contadora approach was not confined to a simple resolution of legal claims: it embraces agreements on legislative programmes, on military manœuvres, on levels of armaments, on foreign, military bases, on arms traffic, economic and social matters, refugees, and the establishment of new organs of supervision . . . [E]ven to the extent that the proposed Act will deal with the very issues which are the subject of the present claims by Nicaragua (or the inevitable counter-claims by Honduras), it cannot necessarily be assumed that there will be complete identity between what the Act might contain, and what a further judgment of the Court might contain. For, almost inevitably, to be acceptable to all parties the Act resulting from the Contadora process will have to involve elements of compromise. Such elements are foreign to the Court's judicial task, and thus no necessary identity of treaty (the proposed Act) and judgment can be assumed." (Memorial, at pp. 47-48, *supra*.)[2]

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[1] Honduras also argues that the participation of the two countries in the Contadora process makes this a dispute "in respect of which the Parties have agreed ... to resort to other means for the pacific settlement of disputes" and thus it is excluded from the jurisdiction of the Court by paragraph 2 *(b)* of the purported "new declaration" of Honduras. It has already been shown that this so-called new declaration is invalid in general, and ineffective against Nicaragua in particular, as a derogation from the 1960 declaration of Honduras accepting the jurisdiction of the Court under the Optional Clause. It has also been shown that this purported new declaration cannot affect the acceptance of the Court's jurisdiction by Honduras under Article XXXI of the Pact of Bogotá. The reasons adduced in this chapter showing that the Contadora process is not a "special procedure" under Article II of the Pact of Bogotá are equally potent to demonstrate that the dispute is not one "in respect of which the parties have agreed . . . to resort to other means for the pacific settlement of disputes" within the meaning of paragraph 2 *(b)* of the purported declaration.

[2] Honduras suggests that even if the Contadora process is not a "special procedure" under Article II of the Pact of Bogotá, Nicaragua is nevertheless precluded from recourse to this Court under "elementary principles of good faith" by virtue of the Declaration of Esquipulas signed by the Presidents of the five Central American States in May 1986. (Memorial, p. 47, *supra*.) This suggestion is completely unsupportable and can be dispensed with quickly.

As Honduras itself recognizes, the agreement of the Central American Presidents was simply .

4. To Require that the Contadora Process Has Concluded before Permitting Nicaragua to Invoke the Jurisdiction of the Court Would Not Serve the Purpose of the Exhaustion Requirement of Article IV

228. Contadora is a broadly political process, aimed at unravelling a broad complex of regional problems. The Group has always insisted that it is an exclusively political forum. So have the Central American countries. In the Declaration of Esquipulas, of 25 May 1986, the five Central American heads of State agreed:

> "that the best *political* forum which is at present available to Central America for the achievement of peace and democracy and the reduction of tensions produced in the countries of the region is the Contadora process" (Memorial, Ann. 26 (emphasis added)).

229. There can be no doubt that there is a general regional conflict in Central America. Nicaragua does not contest that fact nor the fact that the Contadora process is "the best political forum" for dealing with it. It is a privileged though not exclusive way of seeking solutions to the root causes of the general conflict that has spread throughout the region.

230. For that very reason, resort to such processes in general and to the Contadora process in particular should not be made contingent on waiver of a party's right to invoke other processes for the solution of bilateral disputes that exist alongside the general conflict. The settlement of such disputes depends not so much on the Contadora Group as on direct means of pacific settlement between the States concerned. The parties should not be forced to choose between a process designed to attack the roots of the general conflict and the varied modes of dispute settlement that can help to improve bilateral relations among them.

231. Article IV of the Pact of Bogotá requires no such choice. It was designed essentially to prevent what might be called "forum-shopping" in bilateral disputes — where a party invokes one settlement process and, if it seems to be going against him, breaks off and switches to another, thus avoiding an adverse result.

"That the best political forum which is at present available to Central America for the achievement of peace and democracy and the reduction of tensions produced in countries of the region is the Contadora process . . ." (Memorial, pp. 46-47, *supra*, and Ann. 26.)

Nicaragua has always been, and remains committed to this position. It has always been, and remains prepared to carry out its commitment to Contadora in good faith. However, there is nothing whatsoever in this commitment that requires Nicaragua (or any other State) to abandon its conventional rights under the Pact of Bogotá to use the pacific procedures set forth in the Pact, including recourse to this Court to resolve a separate and distinct bilateral legal dispute that is not even addressed by Contadora. Indeed, the Declaration of Esquipulas on which Honduras's "good faith" argument is based clearly states that Contadora is the *best political* forum which is *at present* available. There was no statement that Contadora was intended to be the *exclusive* forum and, indeed the language of the Declaration strongly suggests the contrary. Moreover, the objective of Contadora, according to the very language cited by Honduras, is stated as "the achievement of peace and democracy and the reduction of tensions", not the resolution of bilateral legal disputes, the determination of legal rights and responsibilities or the awarding of reparations.

Thus, neither Nicaragua nor any other State committed itself — in the Declaration of Esquipulas or at any other time — to use the Contadora process as the exclusive forum for the resolution even of the regional political disputes to which it is addressed, let alone to renounce its conventional rights in respect of bilateral legal disputes outside Contadora's preview.

232. That is not the case here. Nicaragua has supported and continues to support the Contadora process. It is the only one of the five Central American States that has expressed its willingness to adhere to every version of an Act of Contadora proposed by the Contadora Group. Honduras has refused to accept these initiatives, and in one case, Honduras organized the Tegucigalpa Group for the express purpose of defeating such a Contadora proposal.

233. Thus, Nicaragua is not seeking to abort Contadora or escape from it. On the contrary, Nicaragua has affirmed that it will continue to play an active role in the Contadora process, and there is no reason to doubt that this is so. The Pact of Bogotá does not require Nicaragua to forego bilateral methods of peacefully resolving bilateral problems in order to do so.

234. For these reasons, the bilateral legal dispute between Nicaragua and Honduras must be considered separate and distinct from the regional problems addressed by the Contadora process. As such, the Nicaragua-Honduras dispute is not subject to any "special procedure" under Article II of the Pact that would prevent resort to the Court until the Contadora process is concluded.

PART III

CHAPTER 5

THE MEANING AND APPLICATION OF THE RESERVATION OF HONDURAS CONCERNING ARMED CONFLICTS

A. General

235. The Memorial of Honduras invokes the reservation to the declaration on the jurisdiction of the Court dated 22 May 1986 according to which the declaration "shall not apply" to

> "*disputes relating to acts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly*".

236. The present section of the Counter-Memorial has the purpose of examining the meaning and mode of application of the reservation referred to in the previous paragraph, quite independently of the question whether it is applicable in the context of Article XXXI of the Pact of Bogotá.

B. Admissibility of the Reservation

237. In the Memorial in paragraph 4.14, the Respondent State invokes the reservation in the following passage:

> "4.14. The Statement of Facts contained in the Nicaraguan Application of 28 July 1986, paragraphs 2-9, 11, 13-20; and the description of the Nature of the Claim, paragraph 30, clearly demonstrate that the dispute alleged by Nicaragua falls within the terms of this reservation. Indeed, the essence of the Nicaraguan complaint is that Honduras has allowed its territory to become the base for hostile, armed expeditions by the *contras* and also by the armed forces of Honduras itself against Nicaragua. The dispute is therefore necessarily one covered by this reservation."

238. This mode of presenting a "preliminary objection" is incompatible with the clear provisions of Article 79 of the Rules of Court, of which paragraph 2 provides:

> "The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached."

239. The relevant part of the Respondent's Memorial makes no attempt at proper compliance with the Rules either in respect of the facts or "the law on which the objection is based". The reference to the text of the Nicaraguan Application is disingenuous to say the least. The text of an Application is not

a mode of proof but is directed to the purposes indicated in Article 38, paragraph 2, of the Rules of Court. Thus the Application is to contain "a succinct statement of the facts and the grounds *on which the claim is based*" (emphasis supplied), and the purpose is to indicate the facts *which it is intended to prove*. It is wholly improper for the Respondent to seek to rely upon recitals contained in the text of the Application.

240. It might be otherwise if the Respondent were to be understood as *admitting* the facts related in the Application, but there is no evidence of such intent, and such intent is not to be lightly inferred.

241. The preliminary objection must set out the facts on which it is based. (See Rosenne, *The Law and Practice of the International Court*, Sijthoff, Leyden, 1965, 2nd ed., 1985, p. 450.) Reference to the contents of the Application circumvents the Rules of Court especially when such reference is not accompanied by any facts independently evinced by the Respondent.

242. In any event, even if, for the sake of argument, it were in principle appropriate to refer to the Application in the present context, the matters related in the paragraphs of the Application cited by the Memorial do not provide any support for the proposition that those matters "originate in armed conflicts or acts of a similar nature".

243. Thus, with reference to the paragraphs cited in the Honduran Memorial:

(i) Paragraph 2 refers to "armed attacks against the territory of Nicaragua" and such attacks do not necessarily constitute an "armed conflict" (as will be explained in more detail subsequently).

(ii) Paragraph 3 refers to "armed attacks consisting of sporadic forays into Nicaraguan territory with the object of rustling cattle and pillaging peasant communities". It is difficult to detect the existence of an "armed conflict" in this type of setting.

(iii) Paragraph 4 refers to attacks aimed at government installations, the ambushing of military patrols, and attacks upon civilians. Serious though such incidents were, their occurrence does not of itself produce evidence of an ongoing state of affairs which could amount to an "armed conflict".

(iv) Paragraph 5 merely states that these activities were the subject of diplomatic Notes directed to the Honduran Government.

(v) Paragraph 6 refers to changes in the composition, training and organization of the armed bands.

(vi) Paragraph 7 refers to a single incident.

(vii) Paragraph 8 refers to the sending of protest Notes to Honduras.

(viii) Paragraph 9 refers to the holding of talks between the Heads of State of Nicaragua and Honduras on 13 May 1981 at Guasaule. As will be demonstrated in due course, the Joint Communiqué which was agreed upon makes no reference either to an armed conflict or to anything similar.

(ix) Paragraph 11 refers simply to an increase in the number of armed attacks.

(x) Paragraphs 13 to 20 refer to attacks and other incidents, including aerial intrusions, and also to actions constituting threats of force. However, such incidents and episodes are diverse in character and intermittent. This material does not produce the profile of an "armed conflict".

(xi) Paragraph 30 constitutes a formal statement of the nature of the claim and contains no evidence that the breaches of legal duties specified in the body of the Application could, with any justification, be characterized as an "armed conflict or acts of similar nature".

244. The conclusion warranted by this examination of the material passage of the Respondent's Memorial is that both as a matter of form and as a

matter of substance the "preliminary objection" presented is substantially incompatible with the Rules of Court and consequently inadmissible.

C. Failure to Discharge the Burden of Proof

245. Apart from the question of the admissibility of the preliminary objection advanced by Honduras within the legal régime of the Rules of Court, there is a separate issue concerning the burden of proof to be discharged by a State invoking a reservation to its acceptance of jurisdiction by virtue of the Optional Clause. In the first place, as a matter of principle and good policy a preliminary objection must have substance and respectability. In short, it must not be a mere manœuvre built out of formal appearance and tactical need. In the words of Dr. Shabtai Rosenne:

> "The important thing is that the document setting forth the objection should indicate what the facts are on which the objection is based. This is necessary in order to prevent the right to suspend the proceedings on the merits from being used abusively or frivolously. It thus accords a measure of protection to the State against which the objection is made, and enables the Court to exercise judicial control over what is technically an exceptional procedure." (*The Law and Practice of the International Court*, 2nd ed., 1965, p. 450.)

246. In the submission of the Government of Nicaragua, the Memorial of Honduras has failed to discharge the burden of proof on the relevance and validity of the reservation invoked. The formal and peremptory mode of invocation adopted in the Memorial involves precisely the type of abuse adverted to by Dr. Rosenne in the passage quoted. As the Court observed in its Judgment in the jurisdiction phase of the case of *Nicaragua* v. *United States*, "it is the litigant seeking to establish a fact who bears the burden of proving it . . ." (*I.C.J. Reports 1984*, p. 437, para. 101). In the present case the Respondent State has not adduced any evidence as such to justify the use of the "armed conflicts" reservation, and the formal mode of calling up the reservation is not legally sufficient to put it in issue.

247. Whilst the Government of Nicaragua does not, in the light of the foregoing, consider that the Respondent State has succeeded in putting its "armed conflicts" reservation in issue, all relevant questions will be examined in spite of this necessary element of contingency.

D. The Application of the "Armed Conflicts" Reservation in the Light of the Conduct of the Parties

248. It is necessary to examine the meaning and application of the phrase "armed conflicts or acts of a similar nature" in terms of objective criteria and this examination will be undertaken in due course. However, the conduct of the Parties in the material period must be taken into account in that it provides cogent evidence of the actual nature of the relations of Honduras and Nicaragua. Such evidence is significant first, because it provides a framework or coherent political context within which specific incidents can be appreciated and, secondly, because the contemporaneous views and conduct of the Parties most closely concerned provide the best evidence of the existence or otherwise of an "armed conflict".

249. When the conduct of the Parties is examined it will be seen that they

did not consider that an "armed conflict" existed. Moreover, their attitudes were completely in line with the normal experience of States facing abnormal situations in their border regions. The occurrence of incursions, border incidents and other episodes of violence, are commonly regarded for what they are — illegal acts, acts constituting threats to the peace or breaches of the peace — but *unless other circumstances are present* these are not considered to amount to "war" or "armed conflict".

250. In fact, it is a matter of public knowledge that the Governments of Honduras and Nicaragua have not characterized their relations in terms of "armed conflict". An episode which typifies the situation is the talks between the Heads of State at El Guasaule and the Joint Communiqué which was then adopted, dated 13 May 1981 (Ann. 12). The text of the Joint Communiqué, in material part, is as follows:

> "Among the themes treated in the meeting was in the first term the analysis of the problems that have occurred on the frontier between both countries, foreign to the will of the Governments of Nicaragua and Honduras, and that caused an apparent distancing.
>
> During the meeting, both executives agreed to exhort the media for social communications to moderate the tone and treatment that are given to the problems that have been arising as the best contribution of those media to the process of approachment and peaceful solution to any problem that could exist . . .
>
> Both executives agreed upon the scheduling of the following meetings:
>
> The first meeting to be effectuated into Tegucigalpa, at the level of Foreign Ministers, and will have as an objective the interchange of opinions regarding the international political situation and the relations between both sister countries.
>
> The second meeting to be effectuated in Managua, will be at the level of Ministers of Defense and Chiefs of Staff, and will have as an end the preparation of joint plans of action to eliminate the risks of new incidents in the border zone.
>
> Both executives manifested their purpose of making known to potential highjackers of airplanes or boats that they will not find, either in Honduras or Nicaragua, any type of protection or asylum."[1]

[1] Original text in Spanish:

"Entre los temas tratados en la reunión, estuvo en primer término el análisis de los problemas que se han sucedido en la frontera entre ambos paises, ajenos a la voluntad de los gobiernos de Nicaragua y Honduras, y que han dado lugar a un aparente distanciamiento.

Durante la reunión, ambos mandatarios acordaron exhortar a los medios de comunicación social, a moderar el tono y tratamiento que se le da a los problemas que han venido surgiendo como el mejor aporte de estos medios al proceso de acercamiento y pacífica solución de cualquier problema que pudiera existir . . .

Ambos mandatarios acordaron la programación de las siguientes reuniones:

La primera reunión se efectuará en Tegucigalpa, a nivel de Ministros de Asuntos Exteriores, y tendrá como objetivo el intercambio de criterios sobre la situación política internacional y las relaciones entre ambos países hermanos.

La segunda reunión, a efectuarse en Managua, será a nivel de Ministros de Defensa y Jefes de Estados Mayores, y tendrá como finalidad la elaboración de planes de acción conjunta para eliminar los riesgos de nuevos incidentes en la zona fronteriza.

Ambos mandatarios manifestaron su propósito de hacer saber a potenciales secuestradores de aviones o barcos que no encontraran, tanto en Honduras como en Nicaragua, ningun tipo de protección o asilo."

251. The text of this document both as a whole and in detail is plainly incompatible with the existence of an "armed conflict" in the frontier region. The principal foci are the improvement of the forms of dialogue between the two Governments and "the elimination of the risks of new incidents in the frontier region".

252. The absence of any characterization of the facts and incidents affecting relations between the two countries as an "armed conflict" is also evident in key statements of the Honduran Government in subsequent years.

253. In a speech to the OAS Council special session on 14 July 1983, Roberto Martínez Ordoñez, Honduran Ambassador to the OAS, described "the critical situation in Central America". Elaborating on this theme, the Ambassador stated the following:

> "The Honduran constitutional government, headed by Roberto Suazo Cordova, thoroughly aware of its duties as a member of this organization, has given and continues to give its fullest support and co-operation to the efforts of the brother countries that make up the Contadora Group, with the clear objective of reaching, through a civilized dialogue and as soon as possible, serious regional agreements to reach a comprehensive settlement to the problems of the region.
>
> The key issues that characterize the Central American crisis were clearly identified at the outset of preliminary contacts between the foreign ministers of Colombia, Mexico, Panama, and Venezuela and the five Central American countries, which culminated in their first meeting held in Panama City from 19 to 21 April.
>
> In the communiqué issued by the Contadora Group after this meeting, the problem areas were identified as follows: the arms buildup, the control of weapons and their reduction, arms trafficking, the presence of military advisers and other forms of foreign military assistance, actions aimed at destabilizing the internal order of states, threats and verbal aggression, military incidents, and border tension."

254. There is no reference to an "armed conflict". The most serious elements in the list are "military incidents, border tension". Moreover, when later in the speech the Ambassador refers to "acts of provocation and aggression against Honduras" there is still no characterization of the situation as one involving "armed conflict" in the border region. Allowing for some rhetorical embellishment, the context is one of border tension and border incidents.

[255-]256. Some eight months later, Mr. Flores Bermudez expressed essentially similar views on behalf of Honduras in the Security Council. Apart from various assertions that certain of Nicaragua's actions (or alleged actions) threatened "the stability of the region", the strongest statement the Honduras representative had to make was as follows:

> "Despite this democratic path which is now being strengthened in Honduras, my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population. Those elements, which have obliged Honduras to strengthen its defences, are mainly the disproportionate amount of arms in Nicaragua, the constant harassment along our borders, the promotion of guerrilla groups which seek to undermine our democratic institutions, and the war-mongering attitude of the Sandinist commanders, whose reckless, aggressive statements we mentioned earlier.
>
> We do not wish to get into a squabble with our neighbour, Nicaragua. What we do want is to say that to cast the Central American problem in

terms of Nicaragua's interests, as reflected in the initial draft resolution submitted by that country is a conceptual error. It is not just one country which is affected; it is not only one country which is suffering from conflicts. It is not only one people which is suffering and bewailing the fate of its children: it is not just Honduras and Nicaragua. It is a Central American problem, without exception, and it must be solved regionally. This view has been brought out again and again by all Central Americans throughout the Contadora negotiation process and must be reflected in the decisions adopted by this Council." (S/PV.2529, pp. 37-38, United States Counter-Memorial, Ann. 60.)

257. These official statements, taken together with the Joint Communiqué of 14 July 1981, indicate that the Honduran Government regarded the situation to be unsatisfactory and to involve potential threats to the peace of the region. However, *in terms of specific charges of violent action* the complaint is essentially about border incidents and sporadic incursions.

258. This conclusion is amply confirmed by the three diplomatic Notes addressed by Honduras to the Nicaraguan Government on 5 July 1983, 11 July 1983, and 20 July 1984. (United States Counter-Memorial, Ann. 61.) These *three* Notes cover a period of *one* year. The first related to two incidents caused by mines. The second related to four incidents covering a period of a few days, and the third to a single incident. A persual of these three Notes provides a significant and authentic commentary upon the more generalized assessments in the speeches of Honduran representatives before international organizations. Their contents (which are purely *ex parte* expressions of view of behalf of Honduras) do not provide evidence of a state of affairs which could reasonably be described as an "armed conflict". It would in any case be unusual for a government to describe border incidents and incursions in terms of an "armed conflict". The Honduran documentation (as to the contents of which the Government of Nicaragua reserves its position) in the Annexes to the Memorial confirms the picture of sporadic border incidents separated both in time and in location (see Anns. 48-51, inclusive).

259. The evidence of the Honduran attitude is given further confirmation by the contents of the important Honduran Note dated 18 April 1984 addressed to the Secretary-General of the United Nations (Ann. 25). The Court will no doubt recall that by this date the Honduran Government would be aware of the Nicaraguan Application dated 9 April 1984 and it can thus be assumed that the text of the Note of 18 April would have been the object of considerable attention. The Note refers to the existence of "disputes" and makes certain accusations against Nicaragua, but nowhere does it refer to, or assume the existence of, an "armed conflict" between Honduras and Nicaragua. In the same vein, the only reference to the provisions of the United Nations Charter is to Article 52 concerning regional settlement of disputes. No reference is made to Article 39 or 51, either directly or by implication.

E. The Criteria Relevant to the Determination of an Armed Conflict or Acts of Similar Nature

(a) *The Concept of an Armed Conflict*

260. Whilst the legal sources are replete with examinations of the concepts of "armed attack", "aggression", "the use of force", "war" and so forth, there is little or no guidance on the meaning of the term "armed conflict".

(See, for example, Sørensen (ed.), *Manual of Public International Law*, Macmillan, London, 1968, pp. 744-750; Whiteman, *Digest of International Law*, Vol. 10 (US Department of State Publication, 8367, released April 1968).) In so far as the term "armed conflict" is a term of art, it refers to a conflict to which the humanitarian law of war may be applicable or it appears to provide the contemporary equivalent of the concept of "war" or "state of war". However, even if in certain contexts the term constitutes a term of art with a uniform and certain content — and this is a matter of doubt — for present purposes the task is to determine the meaning of the term in the context of the Honduran declaration and the "preliminary objection" based thereon.

261. There is no presumption that the phrase thus employed by Honduras corresponds to any term of art or technical definition. In any case, the attendant phrase "or acts of a similar nature" qualifies the principal reference though without necessarily extending its scope.

262. In approaching the interpretation and application of the words, "armed conflicts or acts of a similar nature" two sets of criteria are relevant. The first set concerns the mode of application of the second set, and comprises two criteria as follows:

(i) The standard is to be based on the ordinary political judgment of an experienced government; and

(ii) the criteria are to be applied bearing in mind that the reservation is an exception to an acceptance of jurisdiction under the Optional Clause and that the burden of proof as to its application lies upon the Respondent State.

263. The second set consists of certain objective criteria or indicia based upon ordinary considerations of logic and policy. This set will be examined *seriatim*.

(b) *There Must Be a Use of Armed Force Which Is Persistent*

264. A primary element in the concept is the persistence of the use of armed force. The occurrence of border incidents, cross-frontier incursions, and aerial trespass does not amount to an armed conflict. Indeed sporadic violence and the commission of serious breaches of international law may and usually do take place against a background of generally normal relations and a stable territorial status quo based upon an absence of belligerent relations and the existence of an undisputed and properly demarcated frontier. Border incidents and cross-frontier incursions do not form part of a situation which can be characterized, without a lapse into eccentricity, as an "armed conflict". As the relevant diplomatic correspondence and official Honduran statements *(supra)* show, the situation between Nicaragua and Honduras in the material period presents a classical picture of frontier incidents and tension in the frontier region, but an absence of persistent conflict between armed forces.

(c) *The Use of Armed Force Should Have a Marked Intensity*

265. As a matter of the ordinary understanding of words the term "conflict" imports a certain degree of intensity of violence, denoting a test of will involving a substantial commitment of fire power and effectives. Thus *Chambers 20th Century Dictionary* (1983 edition) defines "conflict" to mean "a violent collision: a struggle or contest: a battle: a mental struggle". It is extremely doubt-

ful whether a sporadic pattern of frontier incidents and cross-frontier incursions could be said to attain the requisite level of intensity in any circumstances.

(d) *The "Armed Conflict" Must Be the Subject of a Notification to the Security Council in Accordance with Chapter VII of the United Nations Charter*

266. If a State claiming to be the victim of acts of violence by another State fails to make the notification to the Security Council required for the purposes of Chapter VII of the United Nations Charter, the acts of violence will not be classified by organs of the United Nations, including the Court, as an armed conflict entailing a possible decision to take enforcement measures, but as a matter of the peaceful settlement of disputes falling within Chapter VI. This proposition is based upon the Judgment of the Court in the jurisdiction phase of the case of *Nicaragua* v. *United States* (*I.C.J. Reports 1986*, p. 434, para. 94). This criterion is not proposed as being in all respects conclusive but it is a powerful indicator of the realities and Honduras has not made such a notification at any time.

(e) *The "Armed Conflict" Must Be the Subject of a Request by One of the States Concerned for Help in the Exercise of Collective Self-Defence*

267. This is a common sense indicator very similar to the factor previously examined. In the Judgment on the Merits in the case of *Nicaragua* v. *United States*, the Court applied this principle for the purpose of deciding whether the acts of the United States in question were justified by the exercise of the right of collective self-defence against an armed attack. The Court explained the legal position in the following passages of the Judgment:

> "232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.
>
> 233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently." (*I.C.J. Reports 1986*, p. 120, paras. 232-233.)

(f) *There Must Be a Recognition of Belligerency and of the Application of the Laws of Neutrality vis-à-vis a Third State*

268. In any normal context the existence of an armed conflict poses the question of relations between the protagonists and neutral States. It is absolutely clear that at no stage have relations between Nicaragua and Honduras been of a character which called in question the application of the law of neutrality.

(g) *The Continued Existence of a Pattern of Normal Diplomatic and Economic Relations Creates a Strong Presumption against the Existence of an "Armed Conflict" between the States Concerned*

269. This is an evidential indicator which reflects the realities of international life. In fact, throughout the relevant period Nicaragua and Honduras have maintained a pattern of normal relations. The pattern of normal relations between the two States includes the following elements:

(i) The maintenance of diplomatic relations.
(ii) The continuance of trade relations.
(iii) The maintenance of road, rail and air links, and postal and telegraphic communications.
(iv) No termination or suspension of treaties on the supposition that a state of war or armed conflict justified such action.
(v) An absence of restrictions of the kind normally imposed upon the nationals of a hostile neighbour in time of war or armed conflict.

(h) *The Attitude of Third States in Recognizing the Absence of an Armed Conflict*

270. An important evidential factor in the determination of the existence or otherwise of an "armed conflict" or "acts of a similar nature" in the relation between the parties is the attitude of third States in recognizing the absence of an armed conflict. In the nature of things much of the evidence is circumstantial in that third States omitted to characterize, either expressly or by implication, the situation in the frontier region as an "armed conflict". The omission can only be recorded as a matter of general and public knowledge.

271. In addition, there are a substantial number of multilateral declarations and resolutions of the political organs of the United Nations which do not characterize the relation between Honduras and Nicaragua in terms of an "armed conflict" or "acts of similar nature".

272. The relevant instruments include the following:

(i) "Note by the United Nations Secretary-General on 'The Situation in Central America'", S/16041, 18 October 1983. (Ann. 25.)
(ii) United Nations General Assembly resolution 38/10, 11 November 1983. (Ann. 26.)
(iii) Security Council resolution 530 (1983), 19 May 1983. (Ann. 27.)

273. The last-mentioned instrument is of particular significance. One of the principal *consideranda* to the resolution provides as follows:

> "*The Security Council,*
>
> . . .
>
> *Deeply concerned*, on the one hand, at the situation prevailing on the inside of the northern border of Nicaragua and, on the other hand, *at the consequent danger of a military confrontation between Honduras and Nicaragua*, which could further aggravate the existing crisis situation in Central America . . ." (emphasis supplied).

274. This resolution was adopted in May 1983 and it characterizes the situation prevailing on the northern border of Nicaragua only in terms of a "consequent danger" of a "military confrontation between Honduras and Nicaragua". Obviously, such a characterization is a considerable remove from the existence of an "armed conflict".

275. In conclusion, the attitude of third States, as evidence in the resolutions of the political organs of the United Nations and otherwise, confirmed the absence of an "armed conflict" on the northern border of Nicaragua during the material period.

F. The Application of the Criteria in the Present Case

276. The cumulative effect of the criteria and indicia reviewed above is to rule out the application of the "armed conflicts" in the circumstances of the present case. Whilst there has been a series of incidents of which Nicaragua has cause to complain, there is, of course, no equivalence between breaches of international law and an "armed conflict". The relations between Nicaragua and Honduras in the material period did not involve a belligerency. The relevant statements from the Parties, and from external sources such as organs of the United Nations, reveal border tension and sporadic incidents. They do not indicate the existence of an "armed conflict". The exercise of political judgment by experienced governments both within the region and elsewhere did not result in an evaluation to the effect that an "armed conflict" existed.

277. The incidents cited in the Nicaraguan Application form particular delictual episodes and there is no evidence adduced by the Respondent to establish that these incidents involved "*facts or situations originating in armed conflicts or acts of a similar nature*". Nor is any evidence adduced by the Respondent to establish that the "armed conflicts or acts of a similar nature" were of a kind "*which may affect the territory of the Republic of Honduras*". Nor is any evidence adduced to establish that the "armed conflicts or acts of a similar nature" were those in which Honduras was "*involved directly or indirectly*".

278. These important conditions set forth in the Honduran reservation present issues of fact which, it is submitted, cannot properly be determined on the basis of inference or presumption. The issues are to be approached on the basis that the reservation is an exception to an acceptance of jurisdiction under the Optional Clause and, further, on the basis that the burden of proof as to the application of the reservation, and in particular the proof of critical elements of fact, lies upon the Respondent State.

G. The Reservation Does Not Possess an Exclusively Preliminary Character

279. Whilst the Government of Nicaragua does not consider that the "armed conflicts" reservation of Honduras is applicable in the circumstances, it is necessary to examine all the pertinent questions, in spite of this inevitable proviso. In the circumstances of the case there is strong justification for deciding that in any event the reservation concerned does not possess "an exclusively preliminary character" and thus the question of its application should be postponed for determination at the stage of the merits. In the jurisdiction phase of the case of *Nicaragua* v. *United States*, the Court recognized that such a way of proceeding was open to it in accordance with Article 79, paragraph 7, of the present Rules of Court (*I.C.J. Reports 1984*, p. 425, para. 73; and see also the Judgment on the Merits, *I.C.J. Reports 1986*, pp. 31-32, para. 43).

280. The "armed conflicts" reservation of Honduras is pre-eminently qualified for this procedure for two reasons. First, and as a matter of essence, the issues of fact and law which it inevitably presents cannot be approached either effectively or conveniently at the jurisdiction phase. The reservation trenches on questions of evidence and the essential legal merits of the case to such an extent that treatment at the merits phase is both appropriate and necessary. Indeed, the circumstances are closely parallel to those attending the multilateral treaty reservation in issue in the case of *Nicaragua* v. *United States*, where the Court disposed of the pertinent objection during the merits phase (*I.C.J. Reports 1986*, pp. 29-38, paras. 37-56). In particular, the "armed conflicts" reservation presents "a question concerning matters of substance relating to the merits of the case". (*I.C.J. Reports 1984*, p. 425, para. 76; *I.C.J. Reports 1986*, pp. 31-32, para. 43.)

281. The grounds for postponement to the merits phase cannot be those of efficiency and convenience alone. To determine the applicability of the reservation during the present phase would involve prejudging the merits at a point when the actual state of the pleadings on the matters relating to the reservation is highly unsatisfactory, given the superficial and peremptory mode by which the Respondent State has purported to invoke the reservation. The Respondent's Memorial does not adduce any evidence whatsoever, and the reference to the contents of the Application is not an acceptable form of adducing evidence. An Application is a formal notice of claim. According to the Rules of Court, it involves the "institution of proceedings" and not the beginning of the pleadings.

282. The foregoing considerations lead inexorably to the conclusion that the preliminary objection of Honduras based upon its "armed conflicts" reservation should be determined not to possess an exclusively preliminary character and, consequently, should be adjudicated upon at the merits stage.

H. Submissions Relating to the "Armed Conflicts" Reservation and "Preliminary Objection" of Honduras

283. On the basis of the consideration set forth in the previous paragraphs the Government of Nicaragua presents the following submissions.

(a) The "preliminary objection" based upon the "armed conflicts" reservation of Honduras is presented in a mode which is incompatible with the Rules of Court and is consequently inadmissible.

(b) The burden of proof in respect of the matters of fact which must be proved in order to justify the application of the reservation has not been discharged by the Respondent State and consequently the "preliminary objection" based upon the reservation has not been put in issue.

(c) There is no evidence adduced by the Respondent State to justify the application of the "preliminary objection" concerned.

(d) The conduct of the Parties at the material period is incompatible with the existence of an "armed conflict" or "acts of a similar nature".

(e) In any event, the facts as revealed in available documentation and as matters of public knowledge do not constitute "an armed conflict" or "acts of a similar nature" according to objective criteria and relevant indicia.

(f) Without prejudice to the foregoing, the "preliminary objection" does not, in the circumstances of the present case, possess an exclusively preliminary character in that the issues of fact and law which it inevitably presents cannot be determined effectively at the jurisdictional stage of the proceedings.

PART IV. THE ADMISSIBILITY OF THE APPLICATION

284. Honduras contends in Chapter II of its Memorial (pp. 33-39, *supra*) that Nicaragua's Application is "artificial" and vague. According to Honduras,

> "[t]hese characteristics of artificiality and vagueness are in themselves grounds upon which the admissibility of the Application ought to be denied" (*ibid.*, p. 13, *supra*; see also pp. 48, 80, *supra*).

Taking this further, Honduras suggests that these considerations somehow run counter to the "justiciability" of the dispute, not "inherently" (p. 56, *supra*), but because of the circumstances in this particular case. Consequently, Honduras invites the Court to "refrain from exercising its judicial function in these proceedings" (p. 13, *supra*; cf. also pp. 37, 39, *supra*). As shown below, these arguments are completely without merit.

CHAPTER 6

NICARAGUA'S APPLICATION IS FULLY ADMISSIBLE AND JUSTICIABLE

285. As shown below, the Application lodged by Nicaragua against Honduras on 25 July 1986 is neither artificial nor vague. To the contrary, it fully meets the requirements of the Statute and Rules of Court by succinctly stating the nature of the acts taken by Honduras against Nicaragua, and the legal principles and rules contravened by those acts. Moreover, even if Nicaragua's Application were in some way artificial or vague — it is not — that would not be sufficient reason to declare the Application inadmissible. Similarly, Honduras errs in attributing improper political motives to Nicaragua based on the filing of the Application — but even if Honduras were correct, the existence of political motives would not impair the Application's admissibility, since the Application relates to a perfectly "justiciable" dispute.

A. The Application Is Neither Vague Nor Incomplete

286. Honduras repeatedly refers to the purported "vagueness" and "incompleteness" of Nicaragua's Application (Memorial, p. 13, *supra*; cf. also pp. 34, 37, 38, 48, 80, *supra*), and contends that "the facts and grounds on which the claim is based" are not stated with sufficient precision (cf. *ibid.*, pp. 37 *et seq.*, *supra*).

287. The conditions to be met by an Application submitted to the Court are laid down in Article 40, paragraph 1, of the Statute and Article 38, paragraphs 1 and 2, of the Rules of Court. These Articles provide:

Article 40 of the Statute:

> "1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

Article 38 of the Rules of Court:

> "1. When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.
>
> 2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

288. As is apparent, paragraph 1 of Article 38 of the Rules of Court is drafted in almost exactly the same way as Article 40, paragraph 1, of the Statute, adding only a number of limited provisions. Paragraph 2 of Article 38, on the contrary, strengthens the statutory requirements, but it too imposes only limited obligations upon States, as attested by the expression "as far as possible".

289. This carefully drafted formula first appeared in Article 32, paragraph 2, of the 1936 Rules of Court (which corresponds to Article 38, paragraph 2, of the present text), for which the preparatory work unmistakably demonstrates that this was simply a recommendation to States and not an obligation which, if not respected, would render the Application inadmissible (cf. *P.C.I.J., Series D, 3rd add.*, pp. 156 *et seq.* and p. 574).

290. This coincides, furthermore, with the position of the Court itself:

> "The Court notes that whilst under Article 40 of its Statute the subject of a dispute brought before the Court *shall be* indicated, Article 32 (2) of the Rules of Court requires the Applicant 'as far as possible' to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving a succinct statement of the facts and grounds on which the claim is based." (*Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963*, p. 28.)

291. In applying these provisions, the Court has always adopted a very flexible attitude and taken "a broad view" (*Société commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173). In so doing, it has remained faithful to its own jurisprudence, whereby: "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." (*Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A, No. 2*, p. 34; cf. also *Certain German Interests in Polish Upper Silesia, Jurisdiction, P.C.I.J., Series A, No. 6*, p. 14; *Northern Cameroons, I.C.J. Reports 1963*, pp. 27-28; *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, pp. 428-429.)

292. A remarkable illustration of this attitude is to be found in the judgment pronounced by the Permanent Court on 14 June 1938, in the case of the *Phosphates in Morocco*. France requested the Court to declare the application inadmissible on the ground that:

> "[t]he Royal Italian Government has not clearly explained the grounds of jurisdiction on which it relies in bringing the case before the Court by Application and as, accordingly, it has not adequately complied with the terms of Article 32[1] of the Rules of Court" (*Phosphates in Morocco, P.C.I.J., Series A/B, No. 74*, pp. 16-17).

The Court rejected the objection, noting

> "[t]hat the explanations furnished in the course of the written and oral proceedings enable it to form a sufficiently clear idea of the nature of the claim submitted in the Italian Government's Application" (*ibid.*, p. 21).

293. This holding clearly demonstrates that the admissibility of the Application does not depend on its precision; what matters is that the Court should be able to acquire, thanks to the written and oral proceedings, a "sufficiently clear idea" of the nature of the claim formulated in the Application.

294. There are, moreover, excellent legal reasons why this is so. As was pointed out by Judge Read in his opinion in the *Certain Norwegian Loans* case:

[1] Article 32 has since become Article 38 of the Rules of Court.

> "The Statute, by Article 40, imposes on the Applicant Government the requirements that 'the subject of the dispute and the Parties shall be indicated'. It does not require that the issues shall be defined; and, indeed, it makes it abundantly clear, by Article 48, that the definition of the issues by submissions is to be done in the course of the Written and Oral Proceedings[1]. Applications have usually contained statements of the issues involved; but these have been treated by this Court and the Permanent Court as indications of the nature of the case." (*I.C.J. Reports 1957*, p. 81.)

295. It should be remembered that the Application must indicate "the subject of the dispute" (Art. 40, para. 1, of the Statute and Art. 38, para. 1, of the Rules of Court) and, "as far as possible", "the precise nature of the claim" (Art. 38, para. 2, of the Rules of Court). However, the "submissions" appear only in the Memorial and Counter-Memorial (Art. 49 of the Rules of Court). Indeed, the "final submissions" are made only "at the conclusion of the last statement made by a party at the hearing" (Art. 60, para. 2), and until that time, it is customary for parties to be able to modify their conclusions, provided the nature of the dispute is not modified (cf. *Société commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173; M. Bos, *Les conditions du procès en droit international public*, Bibl. Visseriana, Vol. XIX, 1957, pp. 176 *et seq.*; Sh. Rosenne, *The Law and Practice of the International Court*, Sijthoff, Leyden, 1965, 2nd ed., 1958, pp. 584-589).

296. Thus, the Application introduces the case, and lays down its outline in a general fashion. But it does not imprison either the parties or the judges in a rigid framework and, contrary to what Honduras seems to think, it is not expected much less required to be a "miniature version" of the case it is putting forward.

297. Honduras does not contest that Nicaragua's Application indicates "the party making it", "the State against which the claim is brought" and "the subject of the dispute". Similarly, it does not appear to consider that "the nature of the claim" is insufficiently precise.

298. Instead, Honduras focuses principally upon the requirement of Article 38 (2) of the Rules of Court that the Application provide a "succinct statement of the facts and grounds on which the claim is based". Nicaragua has certainly provided such a statement. Honduras claims, however,

> "that a large number of the matters put forward by Nicaragua do not constitute concrete acts or omissions, identifiable by reference to place and to time. In reality, those matters are concerned with indeterminate situations or with opinions about intentions." (Memorial, p. 37, *supra*.)

In fact, the portions of the Application cited by Honduras do all relate to concrete acts or omissions by Honduras. At the appropriate time, that is, during the merits phase of the case, the Government of Nicaragua will submit evidence that clearly demonstrates this to be the case. At this point — and this is even more true of the application stage — there is no obligation for the Applicant State to produce the evidence that supports its claim (although some of that evidence is included simply by way of illustration in the exhibits attached to this Counter-Memorial). One of the main objects of the subsequent pro-

[1] In this regard, the French text of Article 48 shows that this is so, while the English text is obscure.

cedure is to prove the facts, and one wonders what useful purpose could be served by this procedure if the Applicant State had *in limine litis* to supply absolute proof of all the facts on which its case is based.

299. In the 1936 and 1972 Rules, paragraph 2 of former Article 32 (which subsequently became Article 35 and then 38) of the Rules of Court specified that the "succinct statement of the facts and grounds" which had to be contained "as far as possible" in the Application, was to be developed "in the Memorial, to which the evidence will be annexed". According to authoritative commentators, the fact that this specification was abandoned in the 1978 Regulations

> "in no way provides that the Court intends to accept in future that developments and supporting proof be appended to the application. It would rather seem that it considered this provision to be pointless in view of well-established practice."[1] (Geneviève Guyomar, *Commentaires du Règlement de la Cour internationale de Justice*, Paris, 1983, p. 239; cf. also Shabtai Rosenne, *Procedure in the International Court*, Nijhoff, The Hague, 1983, p. 92.)

300. The second contention made by Honduras regarding the vagueness of the Application is equally without merit. Honduras argues that

> "another large group of matters put forward by Nicaragua in this Application consists of matters containing only a reference to the year in which they allegedly took place, without any geographical location on the territory in which they occurred. That is inadmissible, bearing in mind on the one hand that such matters are used as a basis for allegations of a very grave nature, which range from intervention in the internal affairs of Nicaragua to threats of or the use of force against Nicaragua." (Memorial, p. 37, *supra*.)

Honduras refers in particular to items 4, 6 and 13 (which are general presentations) and item 21 (which does not describe facts but introduces the subsequent presentation of the "legal grounds on which the claim is based").

301. As already shown, the Application is not the right place to detail all the various facts on which it relies. Indeed, in the present case, the "statement of facts" could not have been kept "succinct" had it been necessary to prove point by point the various breaches of international law which have to be attributed to Honduras. Nicaragua is, of course, prepared to establish these breaches in a detailed and exact manner during the subsequent stages in the procedure, when such detail becomes appropriate.

302. Moreover, Nicaragua has, in item 19 of the Application, already presented by way of example some of the most serious acts committed by Honduras in violation of international law. As the Permanent Court recognized in the case concerning the *Prince von Pless Administration*, this approach — presenting certain facts in the Application by way of example — is in conformity with statutory and regulatory requirements. (Order made on 4 February 1933, *P.C.I.J., Series A/B, No. 52*, p. 14.)

303. Honduras attempts to strengthen its argument of inadmissibility by

[1] The original French text:

"ne prouve pas du tout que la Cour ait l'intention d'admettre à l'avenir que les développements et preuves à l'appui soient joints à la requête. Il semblerait plutôt qu'elle ait considéré cette disposition comme inutile, compte tenu d'une pratique bien enracinée à présent en cette matière."

suggesting that "the lack of any geographical location" makes certain of Nicaragua's charges impossible to prove (or disprove) because of the inhospitable and inaccessible nature of the frontier area. According to Honduras, the lack of geographical specificity "makes the task of Honduras in conducting its own investigation into the allegations virtually impossible" (Memorial, p. 38, *supra*).

304. This point, however, has no bearing on the admissibility of the Application. An applicant's case is "not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof" (case concerning *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 1984*, p. 437). Instead, questions of the sufficiency of proof must be dealt with at the merits stage of a case, where each party is required to adduce sufficient evidence to support its submissions to the Court. As the Court stated in *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*:

> "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 . . . 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 . . ." (*I.C.J. Reports 1984*, p. 437.)

Thus, Nicaragua cannot prevail unless the evidence satisfactorily establishes the validity of its claims.

305. Honduras appears to fear that in this case it will be especially difficult for it to adduce evidence of the facts it relies upon. In fact, the obstacles to gathering evidence pertaining to acts occurring in the frontier area are at least as great for Nicaragua as for Honduras. But even if Honduras should experience special difficulties in this regard, the Court has previously declared itself willing to admit:

> "a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized as a special weight when it is based on a series of facts linked together and leading logically to a single conclusion" (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 18).

306. Thus, the difficulties invoked by Honduras cannot in any way be regarded as insuperable. Moreover, as already noted, those difficulties are not peculiar to Honduras, and more importantly, are not grounds for declaring the Application to be inadmissible.

307. Honduras's final objection to the drafting of Nicaragua's Application is Honduras's claim that the Application "deliberately confuses facts of a different nature and which can be attributed to different causes" (Memorial, p. 38, *supra*). As the principal example of this alleged obfuscation, Honduras claims that the Application attributes to Honduras certain acts which Honduras claims may only be imputed to the "*contras*". Of course, the assistance supplied by Honduras to armed Somocist groups operating from its territory, and the responsibility accruing to Honduras because of that assistance, is one of the main grievances presented in the Application, and one of the main points which the Court is requested to elucidate at the merits phase of the case. Certainly "the existence of any fact which, if established, would constitute a breach of international obligation", to quote the very terms of Ar-

ticle 36, paragraph 2, of the Statute, is not a point that can or should be determined at this stage, where the preliminary objections are being examined.

308. Honduras's second complaint of deliberate obfuscation concerns the incident that occurred at the frontier on 18 April 1985, cited in paragraph 19 of the Application. Clearly, if proven, a violation of waters which come under Nicaraguan jurisdiction, along with the use of armed force, falls well within the scope of the breaches of the rules of international law for which Nicaragua is entitled to reproach Honduras. However Honduras now wishes to characterize this incident, it is up to the Court to determine whether breaches of international law occurred and, if so, their nature and consequences. Further, it is somewhat astonishing that Honduras should find anything confusing about this example: in the "Chronology of Incidents with the Republic of Nicaragua" which Honduras has itself supplied to the Court, as Attachment No. 48 to its Memorial, Honduras lists as many as 31 incidents which occurred at sea and, it would seem, in the territorial waters of the Parties.

309. Although all the arguments invoked by Honduras in support of the alleged inadmissibility of the Application lack any consistency, they appear ultimately to reduce to an argument that Nicaragua has not yet supplied the Court with detailed evidence in support of its claims. As shown, however, this is not the purpose of the Application, which should be confined to "a succinct statement of the facts and grounds on which the claim is based"; rather, this is the purpose of the procedure on the merits.

B. Nicaragua's Application Is a Fully Justiciable Legal Dispute

310. Honduras also complains about the Application's purported "artificiality" (cf. Memorial, pp. 13, 48 and 80, etc., *supra*). This argument seems to be broken down into two parts: first, that Nicaragua had political motives for filing the Application; and second, that by applying to the Court, Nicaragua has attempted in an arbitrary fashion to split up a general conflict involving Central America as a whole into several bilateral disputes.

311. Honduras contends that this case is not "justiciable". Conscious of the fact that the Court firmly rejected a comparable argument put forward by the United States in *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* (*I.C.J. Reports 1984*, pp. 431 *et seq.*), Honduras disavows the view that such a dispute is "inherently non-justiciable" (Memorial, p. 56, *supra*); it nonetheless contends that "the Court should refrain from exercising its judicial function in these proceedings" (*ibid.*, p. 13, *supra*). Although its rationale is not clear, Honduras claims that "the requirements for the due administration of international justice will be adversely affected" by taking a bilateral approach to a regional problem (*ibid.*, p. 34, *supra*; cf. also pp. 39 or 48, *supra*).

312. Thus, without invoking precise legal reasons, Honduras invites the Court not to exercise its functions, much more for reasons of expediency than of law. The Court should no doubt refuse to take a position on a case if, in so doing, it has to exceed the "inherent limitations" in its judicial function (*Northern Cameroons, I.C.J. Reports 1963*, p. 30). In this particular case, however, nothing of this kind has been, or could be, alleged by Honduras, which expressly admits that the claim is not "inherently non-justiciable".

313. Moreover, the Court has always considered that it should not pick and choose from among the cases submitted to it. In the *Nuclear Tests* case, for example, the Court found that the claims were groundless, but went on to state:

> "This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others." (*I.C.J. Reports 1974*, p. 271.)

Indeed, once the Court has been regularly seized, it must give judgment:

> "Where . . . 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 these submissions . . ." (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 431.)

314. Furthermore, in the present case, none of the objections raised by Honduras should lead this Court to refuse to exercise its judicial functions. Honduras objects first to the political motives which it claims inspired Nicaragua's Application. In its view, this "is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character" (Memorial, p. 80, *supra*; cf. also pp. 13, 20, 48, etc., *supra*). If the Government of Honduras means by this that the dispute submitted to the Court is "political" and does not enter into the category of "legal disputes" laid down in Article 36 of the Statute, it would merely be artificially re-opening the old and futile quarrel about the distinction between justiciable and "non-justiciable" cases.

315. Clearly, the case that Nicaragua has brought before the Court has a political origin and political causes. This is true of all disputes between States. As Hans Morgenthau wrote:

> "[A]ny external action by a State in fact involves its relationship with other States and, from the standpoint of the goal pursued, all external action by a State is thus always political"[1] (*La notion du politique et la théorie des différends internationaux*, Sirey, Paris, 1933, p. 25; cf. also Hersch Lauterpacht, "La théorie des différends non justiciables en droit international", *RCADI*, 1930-IV, Vol. 34, pp. 563-564, or Guy de Lacharrière, *La politique juridique extérieure*, Economica, Paris, 1983, *passim*, in particular pp. 150-151).

316. All international disputes thus have political and legal aspects. Viewed from a particular angle, they appear to be political, and viewed from a different angle, they appear to be legal, as the Court found in its Advisory Opinion of 20 July 1962:

> "It has been argued that the question put to the Court is intertwined with political questions and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, p. 155.)

317. This close interconnection between the legal and political aspects is all the more inevitable as the Court "lives" in an eminently political environment. As "the principal judicial organ of the United Nations", its activity cannot be dissociated from that of the Organization and it is called upon by its

[1] "[T]oute action de l'Etat à l'extérieur touche en fin de compte à ses relations avec d'autres Etats, et, du point de vue du but qu'elles poursuivent, toutes les actions extérieures de l'Etat sont ainsi toujours politiques."

very vocation to participate in the achievement of the goals, obviously political in nature, assigned to that Organization:

> "The definition of the status of the Court as a principal organ, and the principal judicial organ, of what is essentially a political organization, the United Nations, emphasizes that international adjudication is a function which is performed within the general framework of the political organization of the international society, and that the Court has a task that is directly related to the pacific settlement of international disputes and hence to the maintenance of international peace . . . Litigation is but a phase in the unfolding of a political drama." (Sh. Rosenne, *The Law and Practice of the International Court,* Sijthoff, Leyden, 1965, 2nd ed., 1985, p. 2; see also the Court's judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 22.)

318. In fact one of the main characteristics of all the cases submitted to the Court is that they pose factual problems in a political context, which first have to be resolved before the judicial function can be performed:

> "It is true that, in order to reply to the questions, the Court will have to determine certain facts, before being able to assess their legal significance. However, a mixed question of law and fact is nonetheless a legal question within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute." (*Western Sahara, I.C.J. Reports 1975,* p. 19; cf., also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia, I.C.J. Reports 1971,* p. 27; *Aegean Sea Continental Shelf, I.C.J. Reports 1978,* p. 13.)

319. Thus, there are no disputes that are "by nature" political as opposed to others that are "legal" in substance. The general view is that a dispute is — or becomes — legal as soon as it is examined by a legal body whose task is to form a view based on rules of law, according to the legal arguments invoked by the parties.

> "Thus legal disputes are disputes which reveal, in the considerations which underlie the contentions, a difference of opinion on a matter which may be decided according to a rule of law which is indisputable, or the existence of which at the least may be supported by legal arguments." (H. Morgenthau, *op. cit.*, p. 20.)[1]

(See also H. Lauterpacht, *The Function of Law in the International Community,* Archon Books, Connecticut, 1966, pp. 187-189; V. Bruns, "La Cour permanente de Justice internationale: son organisation et sa compétence", *RCADI,* 1937-IV, Vol. 62, p. 611; H. Kelsen, *The Law of the United Nations,* Stevens & Sons, London, 1951, p. 478; M. Bos, *Les conditions du procès en droit international public,* Bibl. Visseriana, Vol. XIX, 1957, p. 57; R. Higgins, "Policy Considerations and the International Judicial Process", 17 *ICLQ,* 1968, pp. 58, 74; Ch. Rousseau, *Droit international public,* t. V, *Les rapports conflictuels,* Sirey, Paris, 1983, p. 254; Sh. Rosenne, *op. cit.*, p. 369; etc.)

[1] "Les différends juridiques sont donc des différends qui révèlent, dans les considérations motivant les affirmations, une divergence d'opinion sur un point susceptible d'être tranché en vertu d'une règle de droit incontestable, ou dont l'existence peut à tout le moins être soutenue à l'aide d'arguments juridiques."

320. It is the submission of a dispute to the Court which renders it "legal" and which, one might say, "depoliticizes" it. This is why, as the Permanent Court stated in 1928:

> "[t]he Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it." (*Rights of Minorities in Upper Silesia (Minority Schools), P.C.I.J., Series A, No. 15*, p. 22.)

321. This very open character of the Court's jurisdiction is alone compatible with the highly comprehensive drafting of Article 36 of the Statute, which refers to "all cases" or "all matters" which parties submit to the Court. (See *South West Africa* cases, *I.C.J. Reports 1962*, p. 423 (separate opinion of Judge Jessup); *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 289 (dissenting opinion of Judge Schwebel).)

322. Moreover, the Court has never refused to judge a case on the pretext that it has political aspects. There would be no point in listing the many such cases it has judged. Let it suffice to quote the Court's decision in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

> "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. 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.)

323. Thus, the Court would not deviate from its judicial functions by pronouncing judgment in this case; on the contrary, it would deviate from its judicial function by refusing to pronounce judgment. By following Honduras's line of argument on this point, the Court would be refusing to help the parties peacefully resolve their dispute and avoiding performance of its function as the "principal judicial organ of the United Nations".

324. In this particular case, Honduras's argument is all the more groundless as Nicaragua's Application requests the Court to adjudge and declare:

— that the acts and omissions of Honduras constitute breaches of its obligations under international law;
— that Honduras is under a duty to cease and to refrain from all such acts; and
— that it is under an obligation to make reparations for all injury caused to Nicaragua by these breaches.

If the concept of legal dispute "by nature" has any meaning at all, it is obviously here: these requests exactly reflect the different categories of "legal dispute" listed in Article 36, paragraph 2, of the Statute of the Court, i.e.:

(a) the interpretation of treaties;
(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.

325. Regarding the more precise argument based on the political motives or objectives that Honduras attributes to Nicaragua, it should be pointed out that, according to its own settled jurisprudence, the Court does not deal with the reasons underlying a State's decision to submit a particular dispute to the Court. This position was expressed with particular clarity in the Advisory Opinion concerning the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*:

> "It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court . . . the Court is not concerned with the motives which may have inspired this request . . ." (*I.C.J. Reports 1947-1948*, p. 61; see also *Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, p. 61.)

326. This position of principle was reaffirmed in the Opinion of 20 December 1980. Pursuant to arguments developed during the Assembly of the WHO prior to the Court's opinion being sought, the Court was requested "to decline to reply to the present request by reason of its allegedly political character". The Court replied:

> "In none of the written and oral statements submitted to the Court, on the other hand, has this contention been advanced and such a contention would, in any case, have run counter to the settled jurisprudence of the Court. That jurisprudence establishes that if, as in the present case, a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155). Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 87.)

Similarly, in the *Northern Cameroons* case, the Court did not uphold the United Kingdom's arguments about the motives attributed to the applicant State (cf. *I.C.J. Reports 1963*, pp. 261-265, 281-284).

327. Although the Court does not inquire into the motives underlying an application, it may be of some interest to consider one of the features on which Honduras relies in order to denounce the alleged political motives of the Government of Nicaragua. According to Honduras, the purported artificiality of the Application stems principally from the fact that it is indissociable from the Judgment pronounced by the Court on 27 June 1986 in the dispute between Nicaragua and the United States (Memorial, pp. 11, 13, 33 *et*

seq., 34 etc., *supra*). Honduras reaches this conclusion based on "the short period of time that has elapsed since the Judgment was pronounced and the Application was deposited" (*ibid.*, p. 33, *supra*), and on the fact that "a third State, the United States of America, is also repeatedly referred to in the Application" (*ibid.*, p. 33, *supra*).

328. Nicaragua does not claim that the two cases are completely independent of one another; quite the contrary. Moreover the Judgment of 27 June 1986 clearly establishes a connection. As Honduras remarks, it contains several references to facts concerning the relationship between Honduras and Nicaragua (*ibid.*, pp. 33, 35 *et seq.*, *supra*). But, contrary to Honduras's conclusion, there is nothing inappropriate or "artificial" about this connection, and *a fortiori*, nothing that should induce the Court to declare the Application inadmissible.

329. First, there is no reason why the *de facto* and *de jure* considerations, carefully investigated by the Court (see *I.C.J. Reports 1986*, pp. 24 *et seq.*, pp. 38 *et seq.*) and found valid in June 1986, should no longer be valid today. Moreover, it is a basic principle of international law that States must respect the rules thereof, independently of any jurisdictional decision.

330. Second, the 1986 Judgment as such is not applicable to Honduras; as noted by Honduras itself, that Judgment is valid only with respect to the "activities of the Government of the United States in relation to Nicaragua" (Memorial, p. 15, *supra*). In accordance with the provisions of Article 59 of the Statute of the Court, it "has no binding force except between the parties and in respect of that particular case".

331. Third, it is worth noting that in the *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, the Court, though fully aware of the larger situation in Central America that constituted the backdrop of the bilateral dispute submitted to it, in no way refused to exercise its jurisdiction (*I.C.J. Reports 1984*, pp. 430-431, 440-441).

332. The situation is in all respects similar in the present instance: there is on the one hand a tense general situation, and on the other hand, a certain number of bilateral disputes — either between States of the region and outside States, as was the case with the dispute submitted to the Court by Nicaragua in 1984 — or between States of the same region, as in the case of the present dispute. Let it suffice to say here that the two categories of dispute are clearly distinct (cf. the separate opinions of Judge Ruda, *I.C.J. Reports 1984*, p. 457, and Judge Sette-Camara, *I.C.J. Reports 1986*, p. 198) and may not be joined.

333. Along the same lines, Honduras opposes any examination of the merits of this case because it claims the Court is not in a position to express a view on all the aspects of what is allegedly a global dispute, both regarding the State concerned (cf. Memorial, pp. 20, 33, 34, 36-37, 39, 48, etc., *supra*) and regarding the various aspects involved — political, economic, military, etc. (cf. *ibid.*, pp. 27 *et seq.*, pp. 44 *et seq.*, *supra*). It also contends that the Court is not equipped to resolve these various problems effectively (*ibid.*, pp. 45, 47-48, *supra*).

334. It has said too much or too little. Contrary to what Honduras implies, the Court cannot and should not lose interest in the general political, economic and social context of the applications made to it, although this context is never the actual subject of a dispute. (Cf. *Free Zones*, Order of 7 June 1932, *P.C.I.J., Series A/B, No. 46*, p. 162; *Competence of the ILO, P.C.I.J., Series B, No. 13*, p. 23.) At the same time, the existence of a larger context, whatever its nature may be, is never an obstacle to the Court's expressing a judgment as to the merits of the case submitted to it. In the case concerning *United States*

Diplomatic and Consular Staff in Tehran, the Iranian Government drew the Court's attention to the fact that the dispute that the United States had submitted to it was only a marginal and secondary aspect of a larger conflict from which it could not be dissociated. On two occasions, the Court firmly rejected this argument:

> "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 1979,* p. 15; cf. also *I.C.J. Reports 1980,* pp. 19-20.)

335. Subsequently, the United States had occasion to make a similar argument:

> "[t]he allegations of the Government of Nicaragua comprise but one of the complex of interrelated political, social, economic and security matters that confront the Central American region" (*Military and Paramilitary Activities in and against Nicaragua, Request for the Indication of Provisional Measures, I.C.J. Reports 1984,* p. 18; *Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 439).

In response, the Court merely referred back to its Judgment of 24 May 1980, from which it reproduced the most significant extract (see *supra*). The same principle applies to the present case particularly as, in the case brought by Nicaragua against the United States, the Court clearly accepted that "the subject matter of the dispute" submitted to it also formed "part of wider issues affecting Central America" (*I.C.J. Reports 1986,* p. 22).

336. Of course, if other States consider that their "interest(s) of a legal nature" could be affected by the judgment of the Court in this case, they "are free to institute separate proceedings, or to employ the procedure of intervention" (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 431; cf. also p. 425). They are, moreover, in a position to do so, since, in accordance with the provisions of Article 42 of the Rules of Court, the Registrar transmitted a copy of the Application to all Members of the United Nations and other States entitled to appear before the Court.

337. Notwithstanding the claim of Honduras that the dispute brought before the Court would not lend itself to a bilateral solution, which has already been examined, it is clear that the present dispute has the characteristics of a "legal dispute" within the meaning of Article 36 of the Statute. In accordance with the famous definition given by the Permanent Court: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Mavrommatis Palestine Concessions, Preliminary Objections, P.C.I.J., Series A, No. 2,* p. 11.) Nicaragua's Application to the Court of 25 July 1986 concerns a dispute which tallies with that definition in every possible way; in the Application Nicaragua has listed the categories of acts which it attributes to Honduras — giving precise examples — along with the rules of international law with which these acts do not conform. Honduras has stated that it contests that these acts occurred, the interpretation of these acts, and whether they are in breach of the rules of law currently in force. There is thus, quite obviously, a "legal dispute" which the Court is competent to hear, and the alleged inadmissibility of the Application cannot be sustained, since "there is no dispute which States entitled to appear before the Court cannot refer to it" (*Rights of Minorities in Upper Silesia (Minority Schools), P.C.I.J., Series A, No. 15,* p. 22 prec.).

PART V. SUBMISSIONS

A. On the basis of the foregoing facts and arguments the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. For the reasons set forth in this Counter-Memorial the purported modifications of the Honduran declaration dated 20 February 1960, contained in the "Declaration" dated 22 May 1986, are invalid and consequently the "reservations" invoked by Honduras in its Memorial are without legal effect.

2. Alternatively, in case the Court finds that the modifications of the Honduran "Declaration" dated 22 May 1986 are valid, such modifications cannot be invoked as against Nicaragua because on the facts Nicaragua did not receive reasonable notice thereof.

3. Without prejudice to the foregoing submissions, the "reservations" invoked by Honduras are not applicable in any event in the circumstances of the present case: thus —

(a) the dispute to which the Application of Nicaragua relates is not the subject of any agreement by the Parties to resort to other means for the pacific settlement of disputes; and, in particular, neither the Contadora process nor the provisions of the Pact of Bogotá constitute the "other means" to which the pertinent reservation refers;

(b) the dispute to which the Application of Nicaragua relates is not a dispute "relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly", and, in the alternative, the "reservation" in question does not possess an exclusively preliminary character and therefore the issue of its application is postponed for determination at the stage of the merits.

4. The "reservations" invoked by Honduras are not applicable in any event to the provisions of Article XXXI of the Pact of Bogotá, which provides an independent basis of jurisdiction within the framework of Article 36, paragraph 1, of the Statute of the Court.

5. The application of the provisions of Article XXXI of the pact of Bogotá is not subject either to the conciliation procedure referred to in Article XXXII of the Pact, exhaustion of which is a condition of recourse to the Court exclusively within the context of Article XXXII, or to the condition of an agreement upon an arbitral procedure which relates exclusively to Article XXXII.

6. The grounds of inadmissibility of the Application alleged to derive from the provisions of Articles II and IV of the Pact of Bogotá have no legal basis.

7. All the other grounds of inadmissibility alleged in the Honduran Memorial have no legal basis and must be rejected.

B. As a consequence of these conclusions the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. The Court is competent in respect of the matters raised in the Application submitted by the Government of Nicaragua on 28 July 1986.

2. The competence of the Court exists: by virtue of the Honduran declaration dated 20 February 1960 accepting the jurisdiction of the Court in conformity with the provisions of Article 36, paragraph 2, of the Statute of the Court; *or* (in case the declaration of 1960 has been validly modified) the Honduran declaration of 1960 as modified by the declaration dated 22 May 1986, and the Nicaraguan declaration dated 24 September 1929; *and/or* by virtue of the provisions of Article XXXI of the Pact of Bogotá and Article 36, paragraph 1, of the Statute of the Court.

3. The Application of Nicaragua is admissible.

C. For these reasons the Government of Nicaragua respectfully asks the Court to declare that it has jurisdiction or, alternatively, to reserve any question which does not possess an exclusively preliminary character for decision at the stage of the merits.

D. In respect of all questions of fact referred to in the Memorial of Honduras not expressly considered in the present *Counter-Memorial*, the Government of Nicaragua reserves its position.

This original copy
of the Counter-Memorial
is certified on behalf of
the Government of Nicaragua.

(Signed) Ambassador Carlos ARGÜELLO G.,
Agent of the Republic of Nicaragua.

22 June 1987.

Volume II

ANNEXES TO THE COUNTER-MEMORIAL OF NICARAGUA

Annex 1

DICTIONARY OF INTERNATIONAL RELATIONS TERMS, UNITED STATES DEPARTMENT OF STATE LIBRARY, 1987

Contras: Shortened form of the word "countrarevolucionarios" (counter-revolutionaries), the term the Sandinista régime in Nicaragua uses for the guerrilla forces fighting against them[1]. The Contras comprise former members of the Somozist National Guard, dissident right-wing former Sandinistas, and the Miskito Indian minority; each of these forces operates independently[2]. The Contras operate from bases in Honduras and Costa Rica, and receive political and material support from the United States[3]. There have been recurrent armed clashes between Sandinista government troops and the rebels since March 1982[4].

See also: Boland Amendment; Caraballeda Declaration; CONDECA; Contadora Group; Kissinger Commission; Lima Group; Linowitz Report; Reagan Doctrine.

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[1] Following six months of civil war, which resulted in the overthrow of President Anastasio Somoza, the Sandinista National Liberation Front came into power in July 1979. See Forrest D. Colburn, "Nicaragua Under Siege", *Current History*, Mar. 1985, p. 108.

[2] *Keesing's* (CE-5) (1983), pp. 32305-32307. See also Richard L. Millett, "Nicaragua's Frustrated Revolution", *Current History*, Jan. 1986, pp. 5-39.

[3] The Reagan Administration has backed the *Contras* by various means, including joint manœuvres by the US with the Honduran Army, fleet exercises off the Nicaraguan coast, the secret mining of Nicaraguan harbors and military supplies. In December 1982, however, the Boland amendment became law, terminating US aid to the Contras for the following two years. Details are given in *Keesing's* (CE-5) (1983), pp. 32486-32493. In January 1985 President Reagan announced that the United States would boycott the proceedings of the International Court of Justice on Nicaragua's suit alleging US aggression. *See Facts on File* (CE-3) (1985), p. 45. On May 1, 1985, the Reagan Administration imposed a trade embargo against Nicaragua. For a discussion see the *Economist*, June 29, 1985, pp. 75-76. On August 1, 1985, Congress, as part of the fiscal 1986 foreign aid appropriation, provided $27 million in non-lethal aid for the Contras, to be monitored by the National Security Council and administered by the CIA. See the *Washington Post*, Aug. 4, 1985, p. A5. On June 25, 1986, in response to the President's request, the House of Representatives authorized the resumption of US military aid to the Contras after September 1, 1986, as part of a $100 million military and non-military aid package. See Peter Osterlund, "Reagan Persistence, Compromise Won the Day for Contra Aid", *Christian Science Monitor*, June 27, 1986, p. 36. The Soviet Union has been the chief arms supplier to the Sandinista régime. See Richard L. Millett, "Nicaragua's Frustrated Revolution", *Current History*, Jan. 1986, p. 5.

[4] *Keesing's* (CE-5) (1983), pp. 32302-32306.

Annex 2

"CONTRA PRESENCE IN HONDURAS", *NEW YORK TIMES*, 18 APRIL 1986

[Not reproduced]

Annex 3

INTERVIEW AND NEWS CONFERENCE GIVEN BY PRESIDENT JOSÉ AZCONA, TEGUCIGALPA CADENA AUDIO VIDEO AND RADIO AMERICA, 10 DECEMBER 1986, PRINTED IN *FBIS*, 11 DECEMBER 1986

Azcona Reviews Nicaragua Incursion, US Aid

[Interview with President José Azcona by David Romero; date and place not given — recorded]

[Text] [Azcona] The truth is that there is no war. What we experienced was an invasion by Nicaragua. The Nicaraguans crossed into Honduras through El Espanol Valley, Maquingales, Las Mieles, in that area, and established positions. They even dislodged small Honduran detachments stationed in that area. This happened 8 to 10 days ago. The intensity of this operation was greater than the one that occurred in March.

In the face of this situation the Honduran Foreign Ministry sent protest notes to the Nicaraguan Foreign Ministry. These protest notes went unheard. On Saturday morning, I contacted the President of Nicaragua to ask him to withdraw the Nicaraguan troops from Honduran territory and said that if the withdrawal was not ordered we would be forced to eject them.

On Thursday, a confrontation was reported in the area of Las Mieles. At that time, three Honduran soldiers were wounded and two others were reported missing. One of the soldiers has been found, but the other one is still in the hands of the Sandinists, in the hands of the EPS. The President of Nicaragua denied the charge that there were Nicaraguan troops in the area of Las Mieles, but he did admit that the troops could be to the east of that area. In the face of this denial, we decided that something had to be done to force them to respect our territory, and that is why on Saturday afternoon several planes attacked several positions in that area.

Since we received no information regarding the Nicaraguan withdrawal from our territory, on Sunday morning there was another attack, this time stronger and better organized than the Saturday attack. We also began the operations to transfer infantry troops to the area. This was done with helicopters.

[Romero] Mr. President, the Nicaraguan Government has accused your Government of bombing positions within Nicaragua. Their television station showed clips showing that Nicaraguan territory was attacked.

[Azcona] No. This . . . no . . . we can . . . We have the disposition [disposicion] of denying that because it is not true. We have gone . . . [changes thought] have been the object of provocations for several days by the Nicaraguan forces. In that area there are nests of artillery that have a range of 21 km and they are set 3 or 4 km from the border. Since this artillery has a 21-km range and is located 3 or 4 km from the border, it means that they can hit targets 16 km into our territory. That is a provocation. They should remove all that artillery from that area; move it back to a distance that if they fire a shell it will not cross the border.

A few days ago a cistern truck was hit by one of their grenades and destroyed. This happened in the area between Cifuentes and Trojes. We have

more than 1,000 Honduran families who have been displaced because of this occupation, and we will not allow our territory to be occupied by anyone. We do not care if Nicaragua has 300,000 soldiers or whether they use their whole budget to arm them. This is psychotic attitude, it is madness. We are not going to use all our budget to arm the country, but with what we have we will repel any aggression that we may experience, and, the Army has the constitutional duty to protect our territorial integrity. The Army will do its duty at all costs.

[Romero] The Nicaraguan Government claims their military mobilization on their side of the border is due to the fact that Honduras is lending Honduran territory for attacks by the Nicaraguan counterrevolutionaries.

[Azcona] We are not going to launch any attack on Nicaragua. We have said this over and over again. The Nicaraguan problem, the problem of the counterrevolutionaries and that of the refugees, which we are enduring, is to be blamed on the Sandinist Government. Let them see how they resolve their domestic affairs and leave us alone. If the Sandinist Government were a democratic government like the Honduran Government, there would be no counterrevolutionaries and we would not have 80,000 Nicaraguan refugees here who are creating great problems for us in addition to the problems we already have.

[Romero] Mr. President, Nicaragua has proposed that an international UN commission be sent to supervise the lengthy Nicaraguan-Honduran border. Is your Government prepared to accept that proposal?

[Azcona] What we want is for Nicaragua to comply with the commitment it made with the OAS in 1979 so that there may be peace in Nicaragua and we may all live in peace. Here in Honduras we live in total peace. We have no political prisoners, we have no political exiles, there are no counterrev . . . [word not finished, changes thought] there are no armed Hondurans attacking the government of a neighbouring country. In other words, this is the best evidence that reason is on our side. When a country has counterrevolutionaries, when a country has so many refugees in neighbouring countries, there is something wrong in that country. When something is wrong in a country, then the first people to be blamed are those who are leading that country, in this case, the Sandinist Front, which is the party, the political group, in the government.

[Romero] Your Government's refusal to accept UN or OAS supervision on the border could be interpreted as an effort to hide something from the international community or from these very important organizations that watch for peace in the world.

[Azcona] We are open to everyone here. Journalists come here. Honduran papers have even published communiqués from the Sandinist government. I would like to see if Nicaragua would allow the publication of Honduran Government communiqués. I don't think so. This is the difference between a democratic government, a country that lives in democracy, and a country that lives in oppression, under a dictatorial government.

[Romero] Mr. President, is there the possibility, or are diplomatic actions being adopted alongside the military actions of recent days, to consolidate peace or at least to avoid more clashes in this area?

[Azcona] We don't want war with anyone. We are not a warlike country. We are a peaceful country. What we want is respect toward our territorial integrity and for the Nicaraguans of the EPS who are on our side of the bor-

der to leave immediately, because otherwise we will have to make an effort, regardless of how great it may be, and expel them.

[Romero] Does this mean that there is the possibility that there will be new clashes to expel these elements that the Honduran Government says are still in Nicaraguan [as heard] territory?

[Azcona] Our troops are advancing already. Our infantry troops have been mobilized to clean up that area. If they do not withdraw, there will be confrontations within our territory. The Honduran soldiers have received strict orders to stay within our border and not step a single inch into Nicaraguan territory. However, within our territory we must protect our rights.

[Romero] Could we know about mobilization capabilities or for how long this search by the Honduran Army could last?

[Azcona] I believe that the area is a difficult one. Mobilizations have to be carried out by helicopter. On the Nicaraguan side it is different because there are roads that reach that area. We have to do it by air, by helicopter, and this takes time. We expect that the area will have been searched in 2 or 3 days. Let's hope that by then all Nicaraguans who are inside will be out, because otherwise there will necessarily be confrontations, and they would take place inside our territory. This would be very regrettable. I ask the Nicaraguan Government, as I asked President Ortega on Saturday, to pull out all the armed men they have sent inside our country.

[Romero] Were there Honduran Army casualties this past weekend?

[Azcona] No, because this was a confrontation with the Honduran Air Force and, fortunately, in spite of heavy anti-aircraft and missile fire, none of our planes was hit, and they all returned to their bases safely.

[Romero] Mr. President: You — the Honduran Government — virtually said that the Contadora Group [efforts] collapsed because of an apparent lack of good will on the part of the two Governments — the Honduran and the Nicaraguan Governments — to resolve the conflict through peaceful means. Can that view and the recent clashes be considered the beginning of a prolonged war in Central America?

[Azcona] No. The Contadora Group [efforts] failed because at the beginning the group lacked the strength to make Nicaragua sign the document. We were willing to sign it on various occasions.

The Contadora Group was too soft, conciliatory and lenient with the Nicaraguan Government. This prevented the signing of the document, which several times we were ready to sign. The Contadora Group lacked the determination to pressure [Nicaragua]. I believe they acted in very good faith and selflessly. We have acknowledged this and we appreciate it. However, a greater determination to pressure the Nicaraguan Government into signing the document and abiding by its provisions was lacking. Thus, a good opportunity to resolve this problem was lost.

[Romero] The Nicaraguan Government has accused your Government — actually, the US Government — of intervening in this affair because the US Government assisted the Honduran Armed Forces troop transport operation.

[Azcona] In that case we could say that the Soviet Government is intervening also, because Nicaragua does not manufacture arms, and Nicaragua is saturated with weapons. Nicaragua has 10, 20, 30, or 50 times more weapons than Honduras. Therefore, the Soviet Union is also intervening in Central America; and to a greater extent than the United States is.

We reject that accusation because Honduras is a sovereign country that requested assistance to move its troops to that area because we do not have transport helicopters. And we will request that assistance as many times as is necessary, whether a third country likes it or not. The security of our country and people is our concern.

We know that Nicaragua is mounting a large-scale campaign to discredit the Honduran Government. However, I want to tell the Nicaraguan Government and the world that Honduras does not have money to spend on publicity. Honduras's money goes into health and education, and to feed its population. Thank God, and despite all the problems we have, Honduras is not facing the problems that people in Nicaragua are facing. This is because we are not spending the money we need for our people's basic needs on publicity or arms.

[Romero] What was the cost of the US assistance to Honduras?

[Azcona] There was no cost. A military assistance treaty was signed in 1954. Based on this we requested the assistance because we did not have helicopters. If we had transport helicopters we would have used our own. Initially, we thought we would not need assistance because we believed that our aircraft could transport the troops to nearby strips, from where we could move them on small helicopters. However, we realized this could not be done, and we requested assistance exclusively for transportation.

[Romero] In convoking the 1954 treaty and in the event of the outbreak of war — though we hope this will not happen — can Honduras continue to convoke that treaty that provides US military assistance?

[Azcona] Our duty as president of Honduras and the constitutional duty of the Armed Forces is to ensure that the national territory is respected. We will make sure it is respected in so far as we can. Therefore, the important thing is that, instead of mounting campaigns against Honduras, the EPS soldiers will leave our country. If they do not, we will be obliged to expel them.

[Romero] International dispatches have reported that there is an agreement between the Honduran and US Governments to expel the *contras* from Honduran territory.

[Azcona] We have said time and again that the *contra* phenomenon is not the Hondurans' fault. The *contra* phenomenon is the fault of a government that violates Nicaraguan rights. I told Ortega this to his face in Esquipulas. I have said this to him and to all of them many times: Open political options to all sectors of Nicaraguan society and this will ease the pressure. When a government does not allow others to exercise power or aspire to power, violent situations ensue. Why don't we have violence in Honduras? Because the Honduran president was elected for a 4-year term, after which he will turn over power to whoever the Honduran people elect, no matter what party that person is from. There is no pressure because all those who have political aspirations and believe that they have the people's support have the opportunity to vie for power.

[Romero] Is it true that — as it was announced by the White House, in Washington — an agreement between your Government and the US Government exists to expel the *contras*, which are estimated to number 20,000 armed men, and transfer them to an undetermined place?

[Azcona] We have said — and we maintain — that the counterrevolutionaries must fight for their country's freedom in Nicaragua. Those problems must be resolved between Nicaraguans. However, we have made no such

demand [emplazamiento]. Some *contras* are in Nicaragua, others go in and out of Honduras. It is very difficult for us to protect that border. We have said that many times. It costs a lot of money to mobilize a single battalion. It must be mobilized by helicopter. Let us say that we have to protect the entire border to cover the Sandinists' backs. We would not be able to do that with less than 30,000-40,000 men, and that would take an enormous chunk out of budget. We will not allot those funds for that purpose. We have other, more important needs, including improving our people's health and education and creating sources of employment.

[Romero] President Azcona is showing a map here. Eng. Azcona, could you explain what these areas marked here really mean?

[Azcona] No, this is a map of Honduras that the General Highway Directorate gave me; it shows where certain highway projects will be carried out, here in the northern, central and southern areas. No, this has nothing to do with the matter at hand. I only brought it to explain the small area of our territory touching Nicaraguan territory that has been occupied by the Sandinist forces. That area was the target of an aerial attack. They will continue to be targets of aerial attacks should they not withdraw from our territory.

[Romero] There are reports stating that there are still 2,500 Sandinist soldiers in Honduran territory. Is that true?

[Azcona] We estimate that there were more than 3,000 men of various units that they call BLI [Battalions for Unconventional Warfare], light infantry brigades, and other border-vigilance forces. I guess that most of those troops should have left our territory. Otherwise, we will continue to exert pressure. The number of forces that we have deployed to that area do not even compare to the troops they sent there inside our territory and near that territory.

[Romero] Why was that border area not guarded? This is an exaggeration; why were 3,000 men able to enter Honduran territory? Was there no vigilance in that area?

[Azcona] We had 15-men detachments at each point there. Our Armed Forces are limited in number; you are well aware of this. We barely have 16 battalions. I can tell you that the concentration of Nicaraguan forces in only that small area is nearly the size of our total forces in all of Honduras. That is, imagine that we in Honduras with the four branches of the Armed Forces, including the police, do not even have 30,000 men, and in the EPS, it is said, that Nicaragua has 180,000 men and 100,000 plus men in the militia. In other words, they are 10 times as large as our Armed Forces. This holds true in a country with fewer inhabitants than our country.

[Romero] [Words indistinct] means that a clash with Nicaragua would have disastrous consequences?

[Azcona] Well, in an open war, we would request the aid of the United States or any other friendly country, because, I repeat, we are not involved in an arms race nor do we own an arsenal such as the one that Nicaragua has, which is valued between $2 and $3 billion; that is an absurd fact for a small country. Our arsenal is not even 1/100th of their's.

[Romero] Mr. President, does this mean that should there be a confrontation — and we do not wish this to be true — should there be an open war, would it be possible, then, that US troops would come to aid the Honduran Army because of the limited number of troops in comparison to Nicaragua?

[Azcona] I believe that we would be forced to resort to that aid to defend our territory, and inside Honduras, not to invade Nicaragua. I have repeatedly stated that Honduras does not wish to invade Nicaragua nor will it lend its territory to the troops of any foreign power to (?invade) Nicaragua.

However, that is not the same as having to defend ourselves. If we are attacked inside our territory, we will accept the help of anyone offering us help. Of course, we have an agreement with the United States. We can count on that aid at any time.

[Romero] One more question, Mr. President: Since the beginning, your Government has been involved in serious international charges. Specifically, it has been said that our territory is being used to supply with arms the insurgent Nicaraguan groups that are allegedly in Honduran territory. This has given a very weak international image to your Government.

[Azcona] No, that is not true. Democratic governments throughout the world have already understood our position. That is completely false. What Radio Moscow and Radio Havana report or what stations managed by the international left report is one thing, but the truth is that reality cannot be concealed for long.

Nicaragua is a country where all freedoms and rights are being violated; where the entire economy is being wasted in arms; where they have 300,000 men [in the Armed Forces]. On the other side is Honduras, a country where democracy is respected; where citizens rights are being respected, where there are no political prisoners, no political exiles, where we do not have even one person as a refugee in another country; where nobody is persecuted for political reasons. Our Armed Forces are professional, but reduced in size. We spend a small percentage of our budget to maintain our Armed Forces. The world understands this, and the situation has been changing quickly.

Of course, we cannot expect understanding from socialist countries, but we do expect understanding from democratic countries, and we are indeed receiving their support and they will continue to support us. I am referring to Japan, the FRG, Italy, Spain, France, England, the Netherlands and the Scandinavian countries.

Of course, as always, the intense propaganda carried out by the Sandinist régime has to reap some dividends. However, as the president of Honduras, I cannot irresponsibly spend the Honduran people's money in waging an international campaign to voice our truths. I am subject to a budget approved by the National Congress in which you can see a small budget for the Foreign Ministry. We do not have funds to carry out publicity campaigns throughout the world to explain our reality.

[Romero] The national and international press has been complaining because the Honduran Government, unlike Nicaragua, has not allowed them to reach the site of the conflict to get an on-site report of what really happened at the border area.

[Azcona] Well, our Armed Forces offered to transport newsmen to that area. Of course, what they will encounter is a rural area, because we do not have large towns there. However, we can take them to the towns that have been looted by the EPS.

[Romero] In view of this delicate situation that we are experiencing in the Central American area, specifically in these two brother countries, what would be your message, Mr. President?

[Azcona] Well, the Sandinist government is the one experiencing a deli-

cate situation as a result of its attempt to continue oppressing its people and consolidating itself in power — that is, trying to establish absolute power. We have no internal problems. The people here realize perfectly well that Honduras has been attacked and the Honduran Government and Armed Forces have acted in defense of national interests and in keeping with the Republic's Constitution.

Therefore, we do not have problems. We do have problems, but not exactly that kind of problem. We have other problems: We have problems with health, education and housing. Those are the problems we are trying to resolve.

Azcona Discusses Incursion with News Media

[News conference given by President José Azcona in the Room of Mirrors of the Presidential House — live]

[Text] [Moderator] President José Azcona will now hold a news conference. I want to ask you to identify your organization and yourselves.

[Azcona] I will gladly reply to your questions regarding the situation with our sister Republic of Nicaragua in the border area. I want you to ask specific questions. I hope that you will publish my replies objectively.

[Reporter] [Question indistinct]

[Azcona] Right after our aerial attacks on EPS positions on our side of the border, we learned that they began to retreat toward their country. As for the help being offered by the Government of President [José] Napoléon Duarte, I wish to say that Honduras is immensely grateful and [word indistinct] with the solidarity shown by the Salvadoran Government.

[Reporter] [Question indistinct]

[Azcona] The Honduran Army has not sustained casualties except for one person missing since last week when three individuals and three soldiers were wounded. Two soldiers disappeared; one of them was found Sunday. I think it was Sunday. The other one, I believe, is still in the hands of the enemy. No casualties have been reported yet.

[Reporter] Did Sandinists enter Honduran territory?

[Azcona] [Words indistinct] 7 or 8 km. There is an area along the border where the border curves sharply. Through various points in that area, they entered 3 to 4 km into Honduran territory. Farther away to the west, there were places where they entered approximately 8 km inside our territory.

[Reporter] The Sandinists claim that Honduras attacked three sites inside Nicaraguan territory. What is your reply to this?

[Azcona] We bombed positions occupied by EPS forces inside Honduras. I also wish to say that there are very heavy deployments going on near the Honduran border area, including artillery and tanks that could have been very easy targets for our Air Force.

However, we did not attack them although they — with the mere presence of long-range artillery near the border area — are already threatening our territory [second break in reception] inside Nicaraguan territory, although I do think that it prompted a Honduran protest, because they maintain artillery with a range of over 20 km at a location 6 km from our border. This means that when fired they would have a reach of 16 km [as heard] inside our territory.

[Reporter] Could we say that there are two armies concentrated there facing each other and that something could happen?

[Azcona] No, there is no army there, because we only transported two battalions . . . [Azcona corrects himself] that is one battalion. Actually, the large force near the border is made up of 30,000 Nicaraguan men. We have deployed small contingents from helicopters. We believe that we will not need to deploy other troops because the Sandinist government must realize that should there be an aggression against Honduras, the entire Honduran people will stand behind their government and Armed Forces, as they have expressed in telegrams that we are receiving from various sectors: the transportation sector, political parties, peasant, labor and business sectors, municipal organizations and so on.

[Reporter] [Words indistinct] regarding this conflict before the United Nations and other organizations?

[Azcona] With regard to the United Nations, it appears that the Nicaraguan Government has proposed filing a report before the UN Security Council. We are ready to do this. Our ambassador at the United Nations, Mr. Martinez Osorio, already has all the information necessary to answer any accusation that may be made at that Organization.

Regarding embassies, all of our ambassadors have already received instructions to report the truth of the situation. We spoke to our foreign minister, who was in the Netherlands yesterday, so he can make contacts with various governments, particularly those of the EEC, to brief them on the situation. We are doing this so that these governments are not targets of Sandinist government misinformation.

[Moderator] Julio Armando Valdez of HRN [Voz de Honduras Network] has a question.

[Valdez] [Words indistinct] do you have confidence in Contadora, the United Nations, and the OAS?

[Azcona] Yes, but we must not play with words. No one has spoken about a hunger march. It was said that displaced people are coming to Tegucigalpa. We will help them because it is the Government's duty to do so. We will also request help from abroad, particularly from the US Government, to help us handle that situation. However, it will not necessarily be a hunger march. If that happens, it will only confirm what we have said: that the area was occupied by Sandinist forces. The people coming to Tegucigalpa will be our best evidence of that.

[Reporter] What kind of relations has your Government established [words indistinct] to resolve this problem?

[Azcona] The Honduran Government has a reciprocal military assistance agreement, signed in 1954, still in effect. Several protocols have been added to it that deal with improvements of airports, the treatment of US technicians in Honduras, and other things. Three of four protocols were signed. They were approved by the National Congress and the US Congress, and they are in effect. Therefore, there is no need for new agreements. There are documents signed by both parties in which the United States has pledged to help us in the event of an aggression by any country ruled by a communist régime.

[Reporter] Speaking of agreements with the United States: Is there any understanding with the United States that will prevent, in the event of a

contra defeat, the *contras* from being trapped in Honduras, thus constituting a greater burden for your country?

[Azcona] We have discussed this with the United States. However, its officials have said that there is no need to think about this because the counterrevolutionaries who go into Nicaragua will stay there. However, it has been one of our concerns and we have told the United States about it.

[Reporter] Are you exerting pressure for [words indistinct] there?

[Azcona] No. We are not exerting pressure. We have said over and over that the counterrevolutionaries' raison d'être is to fight for the liberation of Nicaragua in Nicaragua. That is our desire: that they be in Nicaragua. The counterrevolutionary forces were established for that purpose.

[Moderator] You are smiling a lot. Stein [not further identified]. I want to ask you to please give all the members of the press an opportunity [words indistinct].

[Reporter] [Question indistinct]

[Azcona] We believe that there were approximately 2,500 Sandinists inside Honduran territory on Friday and Saturday. We presume that there are fewer of them now. We will continue to bomb the positions they are occupying. We will also use our forces, our Army, to expel them from the country.

[Reporter] [Question indistinct]

[Azcona] I do not have exact information on that at this time. I believe there are still some troops there.

[Moderator] Roy Arthur of *La Prensa* newspaper has a question.

[Arthur] Mr. President, has the National Security Council, over which you preside, already determined the role of the Nicaraguan rebels, the *contras* in these conflicts?

[Azcona] We have analysed this problem. However, the main point is that our territory was occupied by forces of another country, without Honduras's permission, and the forces had to be removed. Our Constitution establishes that our Armed Forces have to protect the national territory, and this was the point, that those forces had to get out of Honduras. This is why I called Nicaraguan President Ortega on Saturday morning and told him that the Nicaraguan troops had to be taken out of Honduras. Otherwise, there would be problems because we were going to fulfil our duty. The Honduran people were demanding that the Government not allow the presence of Nicaraguan forces in Honduras.

[Moderator] David Romero from Radio America will ask a question.

[Romero] Mr. President, the current situation is appropriate to get the Nicaraguan *contras*, who are allegedly in Honduran territory, out. Moreover, today international news dispatches report that those counterrevolutionaries are willing to leave Honduras.

[Azcona] There are two different things: One is that the *contras* have been going in and out of Honduras and Nicaragua. They have assembled to oust a government. Another is an invasion by a government's regular forces to occupy territory and positions inside the territory of another formally-constituted government. Those are two somewhat different things.

The Nicaraguan Government does not have one valid argument to use — because there are counterrevolutionaries, or anything else — to come and oc-

cupy Honduran territory. The Nicaraguan Government is responsible for the counterrevolutionaries and the refugees we have in Honduras. No one else is to be blamed.

If the Nicaraguan Government were democratic and fulfilled its pledge to the OAS; if it gave the Nicaraguan people a possibility or hope of solving their problems through political or peaceful means, I believe that there would not be counterrevolutionaries. Also, there are no Honduran Armed Forces in any neighbouring country trying to topple that government. We do not have refugees or political prisoners. Therefore, we must look for the source of the problem. The problem stems from the lack of freedom in Nicaragua. As long as that situation continues in Nicaragua, it is very likely that there will be counterrevolutionaries inside or outside Nicaragua, political prisoners, and refugees leaving Nicaragua. That is the problem. Solving the problem is exclusively up to the Sandinist government.

[Moderator] [Name indistinct] newspaper *El Tiempo*.

[Reporter] [Words indistinct] the Irangate scandal in Washington could weaken US policy in Central America, to the extent that Honduras may be left alone with the *contra* problem?

[Azcona] We are not alone with that problem. We are not part of that problem. I insist time and again that Nicaragua's problem is not Honduras's. This is the Nicaraguan's problem. Regarding the sale of weapons to Iran through Israel, I do not think that it will have a negative impact on this matter involving Nicaragua.

It is in the interest of the United States that Iran not fall under the USSR sphere of influence. Moreover, it is also in the interest of the United States that penetration of the Soviet bloc in America does not continue.

[Reporter] You said that this could have an impact in terms of US support for the *contras* and that at any given time it could also have an impact on Honduras.

[Azcona] I do not see how this could have an impact on Honduras. As I told you, Honduras does not have domestic problems. We do not need . . . [changes thought] I do not see how it could have an impact. If the *contras* are eliminated, Honduras will not be the only nation to suffer the consequences. It will have an impact on El Salvador, Guatemala, Mexico and ultimately on the United States and Costa Rica as well. It will not have an impact only on Honduras. We do not have any direct problem with the Sandinist government. We do not have any problems, directly or bilaterally. There is a problem in the region caused by the alignment of one country in the area with the Soviet bloc and the ensuing US reaction which does not accept that situation.

[Moderator] Here is reporter Teodoro Diaz. I ask you not to monopolize the news conference and give your colleagues time, too, because the news conference will end soon.

[Diaz] Mr. President, why does your Government not accept that a special UN force watch the border to avoid more conflicts?

[Azcona] A special UN force . . . we accept surveillance in the area, but we are not going to fall into a Sandinist Government trap because what they want is to have a force take care of their backs. That is what they want, in addition to bilateral treaties with Costa Rica and Honduras. They want a security belt, and in this way they can advance on and impose totalitarianism in Nicaragua. We must consider all these things. We are open, there are press representatives

from all over the world here who can visit the area, and we are going to take them there. However, of course we are not going to fall into prepared traps, either. What Nicaragua wants — and perhaps that was the main objective of the invasion against Honduras — is to have a force come onto the scene, and then everything will be just fine, the area will be neutralized, and they [not further identified] will be free to do whatever they want.

The important thing here is that the OAS should make Nicaragua comply with the commitments it acquired in 1979, in the sense that Nicaragua would have a system based on a mixed economy, ideological pluralism, press freedom, religious freedom, freedom of association, in sum, all the freedoms to which all the peoples of the world are entitled.

If the Nicaraguan Government really wanted to comply with those commitments, it has an opportunity at the beginning of the year when six political parties representing the civilian opposition in Nicaragua made a clear proposal to the Sandinist Government. So, if they were really sincere, they had a good chance then to accept that initiative. It is exactly the same as when they have been asked to sign the Contadora Document. They have refused to sign it on two or three occasions. When they thought that perhaps it would be good for them, or maybe because the other countries were opposed to it, they hurriedly said they would sign it. However, the document was ready to be signed on three occasions and they refused.

[Moderator] Rafael Castellanos, of Radio Tegucigalpa.

[Castellanos] Mr. President, what will your Government do since Nicaraguan stations are constantly saying that Honduran troops, led by the United States, bombed a Nicaraguan town?

[Azcona] We have repeated this over and over. What is important is that Nicaragua does not allow anything to be said against the Nicaraguan Government, which is an absolutist and totalitarian government. However, here in Honduras, the media is ready to publish reports from Nicaragua. We will see if they — through *Barricada* or *El Nuevo Diario* — will publish our communiqués with the protests that the Honduran Foreign Ministry has filed before the Nicaraguan Foreign Ministry. If they do not allow this, we will not permit the publication of bulletins issued by the Nicaraguan Government, either. We are at a complete total disadvantage with them, as no reporter in Nicaragua dares to say anything against the Sandinist Government or anything that will contradict Nicaragua's position. However, because we live in a demo-cracy here, everyone is free to express himself. Nevertheless, we should also try to be more patriotic and less inclined to help the enemy.

[Reporter] [Words indistinct] expecting a Nicaraguan counterattack after the Honduran Air Force bombings?

[Azcona] I do not believe that it will take place because the only thing we did was exercise our rights. If it did take place, we will be prepared to handle the situation by requesting help from the United States and other friendly countries.

[Moderator] Let us allow [words indistinct] from Radio America to ask a question and then [words indistinct] from HRN [Voz de Honduras Network] to ask the last question.

[Reporter] Daniel Ortega said that he would not respect the border because in his opinion you had [words indistinct] about 80 territorial violations. It seems that they want a permanent presence in this area. Have you declared this area an open war zone with the EPS?

[Azcona] Certainly not. We will not renounce the sovereignty of our territory, not even a square inch. What happened was that there has been an excess of prudence, let's not say of tolerance, to avoid any conflict with Nicaragua. However, the time came when this could not continue. This is why those positions were bombed. Should they enter the territory again they will continue to be bombed or repelled with other types of attack. Ortega said that this was a no-man's-land and that is why the EPS entered that territory. All right, let him enter again. However, he should not complain when his units are bombed and Nicaraguan soldiers are killed.

[Reporter] Can the Honduras-Nicaragua mixed commission, the OAS, or any international organization keep watch on this area to prevent a conflict?

[Azcona] (?Such a measure) would mean deploying 12,000 or 15,000 UN soldiers. I doubt that any one country has enough money for this. We seek something different. We seek to have a commission, formed by UN member countries and friendly to Nicaragua, come to either condemn or support the Sandinist régime.

We are not going to fall into a trap. If we knew that this would really help bring peace in Central America . . . In fact, we already asked for this at the OAS in May when we visited the United States. We went to the OAS and delivered a speech asking the OAS to resume authority in Central America and demand that the Sandinist régime fulfil its 1979 pledge. This pledge was the final blow to dictator Anastasio Somoza and permitted the Sandinists to come to power. Had it not been for this pledge, it would have taken the Sandinists a long time to overthrow Somoza and who knows whether they would have succeeded at all. Opposition against the United States is being voiced now, but we should keep in mind that the Junta of National Reconstruction was proposed by two US ambassadors, Mr. White and Mr. Pezullo. Much has already been said about the United States and continues to be said. The truth is, however, that the OAS and the US Government gave the Sandinists the final push that led to the revolution's success on the condition that they abide by their OAS commitments. This is something which they have not done.

[Reporter] [Words indistinct]

[Azcona] No. I don't think there is going to be a war with Nicaragua. I do not think at all that there will be a war with Nicaragua. You foreign newsmen can clearly see that Honduras is not in a state of war or anything like that. There is calm. All activities are being carried out as usual. It is true that some actions have occurred at the border. We are, however, trying to solve the problem.

[Reporter] Mr. President, excuse me. (?will you) take your struggle inside Nicaragua?

[Azcona] It will depend on the Nicaraguan people's response. No struggle can be excused without the people's support. If the Nicaraguan people back the counterrevolutionaries, and their policy established wherever they pass in Nicaragua proves to be good for the people, as we believe it will be, the *contras* can succeed.

[Reporter] Mr. President, the Nicaraguan Government regards your description of the Sandinist government as dictatorial and a violation of human rights as meddling in Managua domestic affairs.

[Azcona] No. We have not meddled. We are a member of the OAS. We have also suffered the effects of this Nicaraguan system. Therefore, we are

entitled to protest. If the Nicaraguans build a wall at the border and it prevents Nicaraguan refugees from entering Honduras, and there is no possibility of any counterrevolutionaries or subversives entering our country, we would be all the happier. But as long as we suffer the effects of this government, we are fully entitled to demand Nicaragua's domestic democratization anywhere we speak.

[Moderator] The last question will be asked by Julio Armando Pacheco.

[Reporter] [Words indistinct] a second diplomatic stage has been initiated in which Nicaragua leads us by 90 percent. What is your Government's strategy?

Annex 4

"PRESIDENT SAYS HE HASN'T EXPELLED CONTRAS", UNITED PRESS INTERNATIONAL, 11 DECEMBER 1986

President José Azcona, in a rare recognition of Contra rebel presence in Honduras, said he has not asked the United States to order the Contras back over the border to Nicaragua.

Azcona went on national radio Wednesday to deny reports his Government is trying to expel the US-backed rebels from Honduras. Later, he told reporters Honduras would prefer it if the rebels fought their battles in Nicaragua.

"What we have said and what we do maintain is that the counterrevolutionaries (Contras) should be fighting in Nicaragua for the freedom of their homeland, but we have not made any requests in that regard", Azcona said.

"The Honduran Government is not pressing the United States so that the Contras leave Honduran territory. But it has made known (to the US Government) its concern over the presence of these irregular forces in the country", Azcona said.

Honduran officials have said Nicaraguan soldiers crossed into Honduras last week in an apparent attempt to strike at Contra camps, wounding three Honduran soldiers and capturing two.

On Sunday, Honduran warplanes strafed Nicaraguan troop positions and US-piloted helicopters ferried troops into the area, some 80 miles east of Tegucigalpa to repel the attack.

Managua earlier reported seven of its soldiers were killed in the fighting.

"The Contras are in Nicaragua but enter and exit Honduras because it is very difficult for us to guard that border", he said in a rare recognition of the Contras' presence in the rugged frontier hills.

Tegucigalpa has never officially recognized that up to 15,000 Contras operate out of Honduran base camps.

Azcona told reporters Honduras would continue to fight any Nicaraguan presence in Honduras but said he did not foresee war between the two nations.

"What we are going to do is to continue to bomb the positions they occupy and also employ our army to force them out of the country", Azcona said. However, he said, "I do not believe there will be war with Nicaragua. Not in any way."

In Managua, Nicaraguan President Daniel Ortega called Azcona's statements "highly dangerous" and blamed Honduras for the recent border conflicts.

"Honduras has created the problem by ceding to US Government pressures and allowing the mercenary camps", Ortega said.

"The new philosophy of President Azcona, that of using arms, shows that eventually the Honduran armed forces might bomb Nicaraguan artillery that is in Nicaraguan territory, because the Nicaraguan artillery can reach up to 13 miles inside Honduran territory", he said.

Annex 5

"INTERVIEW WITH PRESIDENT JOSÉ AZCONA", TEGUCIGALPA VOZ DE HONDURAS, 22 APRIL 1987, PRINTED IN *FBIS*, 28 APRIL 1987

[Not reproduced]

Annex 6

"HONDURAN CONGRESS LEADER SAYS NICARAGUA REBELS SHOULD GO", REUTERS NORTH EUROPEAN SERVICE, 2 MARCH 1986

[Not reproduced]

Annex 7

ARTICLE QUOTING HONDURAN FOREIGN MINISTER LÓPEZ CONTRERAS, *EL TIEMPO*, 24 NOVEMBER 1986

[Not reproduced]

Annex 8

LETTER FROM AHPROCAFE TO UNITED STATES CONGRESSMEN, 12 JANUARY 1987

[Not reproduced]

Annex 9

UNITED STATES ECONOMIC AND MILITARY AID TO HONDURAS 1977-1986, FROM BANANA CASES TO CONTRA BASES: A CHRONOLOGY OF UNITED STATES-HONDURAN RELATIONS, JANUARY 1977 TO JULY 1986, CENTRAL AMERICAN HISTORICAL INSTITUTE (WASHINGTON, D.C., 1986); AND "US SAID TO LINK LATIN AID SUPPORT FOR CONTRAS", *NEW YORK TIMES*, 18 MAY 1987

[Not reproduced]

Annex 10

"FORMER ARMY CHIEF SAYS CIA BRIBED HONDURAN POLITICIANS", *ASSOCIATED PRESS*, 1 APRIL 1987

[Not reproduced]

Annex 11

"OUSTED CHIEF OF HONDURAN MILITARY WAS HIRED AS US DEFENSE CONSULTANT", *WASHINGTON POST*, 10 MAY 1987

[Not reproduced]

Annex 12

GUASAULE DECLARATION. JOINT COMMUNIQUÉ ISSUED BY HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF HONDURAS, GENERAL POLICARPO PAZ GARCÍA, AND THE CO-ORDINATOR OF THE NATIONAL RECONSTRUCTION GOVERNING JUNTA OF NICARAGUA, COMMANDER OF THE REVOLUTION DANIEL ORTEGA SAAVEDRA, AS A RESULT OF THEIR MEETING ON 13 MAY 1981 AT THE FRONTIER STATION OF EL GUASAULE, NICARAGUA

[See Memorial of Honduras, Ann. 2, supra*]*

Annex 13

EXAMPLES OF NICARAGUAN PROPOSALS TO HONDURAS

[Spanish texts not reproduced]

A

Embassy of Nicaragua.
Tegucigalpa,
Republic of Honduras.

PROPOSAL FROM THE CHANCELLOR MIGUEL D'ESCOTO TO THE CHANCELLOR EDGARDO PAZ BARNICA

(1) To hold a meeting immediately between the chiefs of the armies of Honduras and Nicaragua in the framework of the Guasaule agreements.
(2) Based on the above-mentioned meeting, to make non-aggression agreements between the Governments of Nicaragua and Honduras.
(3) To establish a system of joint patrols in our common border to prevent activities of armed elements who endanger relations between both countries.
(4) To dismantle the camps of Somocista counter-revolutionary groups in Honduran territory, and cause the withdrawal from the border zone of any kind of concentration of these Somocist elements.
(5) To prevent the installation of any foreign naval base in the Fonseca Gulf without the express agreement of the three States whose sovereignty jointly covers this Gulf.
(6) To undertake systematic bilateral programmes in the political, economic, diplomatic, military and security fields, as well as, cultural social and sports, etc., in order to strengthen relations between both countries, to analyse common problems and to promote peace.
(7) To proceed in an organized manner, with the co-operation of the appropriate international organizations, towards the eventual voluntary repatriation to Nicaragua of those Misquitos who wish to do so.

April 21st 1982.

B

Ministry of Foreign Affairs,
Managua, Nicaragua.

March 15th 1982.

Directorate of Legal Affairs
ACZ/No. 108

Dear Minister,

I have the honour to address myself to Your Excellency, in order to report on the serious situation that now obtains in Central America.

Considering the sincere desire of the Government of Nicaragua to strengthen her bonds with the sister republic of Honduras, we consider it appropriate that a meeting between the Ministers of Foreign Affairs of Honduras and of Nicaragua be held on a date convenient to Your Excellency. It is our belief, that through a frank and fraternal dialogue, it will be possible to achieve a greater understanding between our nations, which will be of clear benefit to the peace and tranquillity to the whole of the long-suffering Central American region.

The acute crisis in which Central America has fallen today, requires from us great maturity and patriotism in order to prevent greater disorder, the first and main victims of which will be the peoples of the region.

We are confident that Your Excellency will positively welcome our invitation to dialogue. I take this opportunity to reiterate to Your Excellency proof of my highest and most distinguished consideration.

Miguel D'ESCOTO BROCKMANN,
Minister for Foreign Affairs.

To the Right Honorable Edgardo Paz Barnica,
Minister of Foreign Affairs,
Tegucigalpa, Honduras.

C

Ministry of Foreign Affairs,
Managua, Nicaragua.

Chancellery
MDB/gm No. 197

August 24th 1982.

Excellency,

As you must be aware, in recent months relations between our two countries have experienced considerable tension, caused by a series of events:

mainly the deterioration of the situation on our common border. This state of affairs puts the peace of Central America at risk, in face of which, my Government is determined not to curtail efforts contributing to the improvement of our mutual relations.

This has always been our desire, which we recently reiterated with the invitation sent by the Co-ordinator of our Government of National Reconstruction, Commander of the Revolution Daniel Ortega Saavedra, to Your Excellency Dr. Roberto Suazo Cordova, President of the Republic of Honduras.

Your Excellency, I believe this to be a most convenient time to recapture the spirit of the agreements reached at the summit meeting of El Guasaule on May 13th 1981, and that of our discussions held during my visit to Tegucigalpa on April 21st of this year. In that sense, with great pleasure, I could receive you in Managua sometime next week, on the 1st, 2nd or 3rd of September, at your convenience.

I am in no doubt, Excellency, that this meeting will bring about highly positive results for the welfare of both our countries.

With my highest consideration and personal regard.

Miguel D'ESCOTO BROCKMANN.
Minister for Foreign Affairs.

The Right Honorable Edgardo Paz Barnica,
Minister of Foreign Affairs.
Tegucigalpa, Honduras.

D

Official letter No. 828-DSM

Tegucigalpa, D.C., September 9th 1982.

Dear Minister,

I have the honour to address myself to Your Excellency, in order to accompany the letter sent by the Constitutional President of the Republic Dr. Roberto Suazo Cordova to the General Co-ordinator of the National Government of Reconstruction of Nicaragua, Commander Daniel Ortega Saavedra.

Likewise, I wish to refer to Your Excellency's telex of the 4th of the present month, in which you reiterate your suggestion that we meet in Managua in order to discuss the present situation between our two countries.

Unexpected circumstances and previous engagements have made it impossible for me to attend the meeting referred to by Your Excellency. However, I believe such meeting could be held as soon as these circumstances permit.

I wish to reiterate to Your Excellency the determination of the Government of Honduras to work for the consolidation of fraternal and respectful relations between our two countries, and the exchange of points of view and criteria conducive to the implementation of the Peace Proposal for Central America formulated by the Government of Honduras on March 23rd last.

Your Excellency should rest assured of our conviction that dialogue is the best way of analysing situations and of solving problems. This conviction springs from our honest interest in the creation of the conditions necessary to establish the bases for a long and lasting understanding between Honduras and Nicaragua.

I take this opportunity to reiterate to Your Excellency, this proof of my highest and most distinguished consideration.

Edgardo PAZ BARNICA,
Minister of Foreign Affairs.

The Right Honorable Dr. Miguel d'Escoto B.,
Minister of Foreign Affairs,
Managua, Nicaragua.

Annex 14

COMMUNICATION FROM THE MINISTERS FOR FOREIGN AFFAIRS OF THE CONTADORA GROUP ADDRESSED TO THE FIVE CENTRAL AMERICAN HEADS OF STATE

Panama, 7 September 1984.

Sir,

On 9 June 1984 we had the pleasure of transmitting to you, on behalf of our respective Governments, the draft "Contadora Act on Peace and Co-operation in Central America". Today we respectfully submit a new version reflecting the observations and views which the five Central American Governments have put forward concerning the draft Act.

This latest version is the result of an intense process of consultations and a broad exchange of views with all the Central American Governments, which provided the Contadora Group with valuable ideas for revising and enhancing the Act and for facilitating a consensus that would be reflected in legal commitments undertaken by all the parties.

The purpose of this effort was to find viable formulas that would reconcile the various interests and to promote appropriate and firm political understandings that would guarantee regional security and respect for national sovereignty.

The revised version of the Contadora Act once again highlights the principal role of the Central American Governments in the peaceful settlement of the disputes and in overcoming regional problems.

The process of dialogue and negotiation that motivated the Contadora Group has enabled significant progress to be made in the search for peace and co-operation, progress which is reflected today in numerous points of agreement and in the creation of a coherent framework of understanding embodied in this revised version of the Contadora Act. The Central American Governments should now display the political will needed to give legal force to the commitments formulated during this process and should therefore adopt whatever realistic and equitable formulas for conciliation they deem appropriate.

The signing of the Contadora Act on Peace and Co-operation in Central America should provide the basis for security and coexistence governed by mutual respect which is essential for guaranteeing the political and economic stability so desired by the peoples of the area.

The progress made in the effort to prevent any aggravation of the conflicts in the region, the advance in the diplomatic negotiations, the strengthening of the political will to foster dialogue and understanding, and the broad international support for the Contadora process are all clear. However, it should not be forgotten that the arms build-up in the region is still continuing, as are the armed aggression, the border incidents, the destabilization operations and the foreign military presence.

In the light of the persistent threat to peace, we believe that the Governments of the region must expedite the process of assuming the legal commit-

ments contained in the Contadora Act. Similarly, it is imperative for other governments with interests and links in the region to respect the right of self-determination of the Central American peoples and demonstrate unequivocal support for political negotiation in place of force, and for understanding and co-operation among all the governments of the region.

Negotiating implies yielding some ground in order to secure the ultimate objective which is considered essential. Only through honourable, just and serious agreements, based on conciliation and not imposed, will it be possible to achieve regional security, a prerequisite for peace and development in the Central American countries.

The Contadora Group today expresses its satisfaction at the progress in negotiations and at the development of an effective framework for a political and legal understanding. At the same time, it reaffirms its unswerving commitment to continue promoting dialogue, as well as diplomatic efforts to ensure that the principles of international law are fully applied and that the Central American peoples exercise their right of self-determination.

As you know, the United Nations and the Organization of American States have expressed their confidence in and support for the work of the Contadora Group. In various resolutions, they have stated that they wish to be kept informed of the progress of the negotiations which we have been promoting with a view to achieving peace and dialogue in Central America. We will therefore notify those international organizations in due course of the progress made in the important phase that has culminated in the submission of the revised version of the Act, which we are today transmitting to you.

We are confident that in the not too distant future, we the Ministers for Foreign Affairs of the Contadora Group and our colleagues in the Central American region, once the improvements considered relevant are made, will be able to sign the Contadora Act on Peace and Co-operation in Central America.

Accept, Sir, the assurances of our highest consideration.

(Signed) Augusto RAMIREZ OCAMPO,
Minister for Foreign Affairs of Colombia.

(Signed) Bernardo SEPÚLVEDA AMOR,
Minister for Foreign Affairs of Mexico.

(Signed) Oyden ORTEGA DURAN,
Minister for Foreign Affairs of Panama.

(Signed) Isidro MORALES PAUL,
Minister for Foreign Affairs of Venezuela.

Annex 15

NICARAGUAN ACCEPTANCE OF CONTADORA, 22 SEPTEMBER 1984

[Spanish text not reproduced]

(Telex Message)

Managua, 21st Sept. 1984

President and Friend:

I am pleased to address myself to you in this occasion, in order to transmit the Nicaraguan response to the draft of the Revised Act elaborated by the Contadora Group and forwarded to us with note dated September 7th of this year from the Ministers of Foreign Affairs of Colombia, Mexico, Panama and Venezuela.

Nicaragua at present faces a serious increase in the threats and military aggression on the part of the Government of the United States of America, that in recent weeks has returned to its series of murders, the kidnapping of men, women and children, extensive damage to the economy, and the destruction of the scarce resources of this country.

At the same time, the threatening presence of North American naval vessels just a few miles from our coast-line, the direct participation of CIA mercenaries in attack on our territory and the incursions from neighbouring territories of more than six thousand Somocista counter-revolutionaries, makes up a scenario of aggression that our nation continues to repulse with all its energy and patriotism.

The will of Nicaragua to contribute to the limit of its possibilities to find peaceful solutions to the grave regional situation, as well as the recognition that the revised Act constitutes an important effort to reconcile differences and to equilibrate the requirements of all parties, has led us to consider the above-mentioned revised Act as a decisive instrument for the achievement of peace in the region.

For the reasons set out here, we bring to your attention the decision of the Government of Nicaragua to accept in its totality and immediately to sign, without modification, the revised Act of September 7th presented by the Contadora Group in pursuit of peace and the security of all the peoples of Central America.

Nicaragua is conscious of the need to achieve a peace agreement for the whole region, as soon as possible, in the form proposed by the Governments of the countries that make up the Contadora Group; we are also conscious that the agreement reached between the five Central American countries to guarantee peace and security in the region, will only be sufficient if it can count upon a normal and obligatory undertaking by the United States Government. Nicaragua considers it indispensable in order to achieve the noble objectives which constitute the meaning of Contadora, that the United States sign and ratify the additional protocol of the Act, and in consequence, bring to an immediate halt the aggression against Nicaragua. Taking into account

the view of the Contadora Chancellors in their letter of September 7th to the Heads of State of Central America, that the revised Act "reflects the observations and commentaries that the five Central American Governments had formulated on the draft" and that "this latest version is the result of an intense process of consultation and an ample exchange of points of view with all the Central American Governments", as well as what is indicated later on in the sense that "to negotiate implies to give some concessions in order to achieve one maximum objective thought to be essential", Nicaragua considers that it is essential that amendments or modifications not to be introduced. If this were to occur, the result would only be endless discussions that would serve to interfere with the peace process that our peoples are right to demand so urgently.

President and friend, please receive the gratitude of the people of Nicaragua for your continuing efforts to support the achievement of peace in the region.

The people of Nicaragua, while endorsing the Revised Act of Contadora, continue to defend their right to self-determination, sovereignty and independence, with their lives still threatened by the aggressive policy of the North American Government.

So long as aggression does not cease, the Government of Nicaragua will continue to defend its inalienable right to adopt all measures necessary to guarantee our security and territorial integrity.

Fraternally,

Daniel ORTEGA SAAVEDRA.

Annex 16

A: "DOCUMENT DESCRIBES HOW US 'BLOCKED' A CONTADORA TREATY", *WASHINGTON POST*, 6 NOVEMBER 1984; B: "BACKGROUND PAPER FOR NSC MEETING ON CENTRAL AMERICA", 30 OCTOBER 1984

A

The Reagan administration believes it has "effectively blocked" what it views as an "unsatisfactory" regional peace settlement in Central America, according to a secret background paper prepared for a National Security Council meeting last Tuesday that the President attended.

The paper also outlines a wide-ranging plan to convince Americans and the rest of the world that Sunday's Nicaraguan elections were a "sham", promoting this view through US embassies, politicians, labor organizations, non-government experts, and public reports.

The briefing paper, marked "secret/sensitive", was obtained by *The Washington Post* from governmental sources. It provides a detailed look at the administration's approach to the Sandinista government just days before elections in Nicaragua and the United States.

It is not known whether all the items in the briefing paper were discussed. Secretary of State George P. Shultz and Assistant Secretary for Inter-American Affairs Langhorne A. Motley also attended what was described by officials yesterday as a "briefing".

The paper discussed the administration's approach to the draft version of the Contadora peace treaty that was completed Sept. 7. It was negotiated by the foreign ministers of Mexico, Panama, Colombia and Venezuela, who first met for the purpose in 1982 on the small Panamanian island of Contadora.

The treaty's principal thrust is to reduce foreign military influence, establish mechanisms for arms control, and prevent the Central American countries from making or sponsoring war on each other.

On Sept. 21, Nicaragua unexpectedly announced it would sign the 55-page draft treaty. The Reagan administration had not publicly criticized it up to that point.

Since the Sandinistas announced their willingness to sign it, three countries — Honduras, El Salvador and Costa Rica — reversed their previous position of support for the treaty and, along with the United States, sought extensive modifications in the draft to improve verification and execution mechanisms.

The paper declares:

> "We have effectively blocked Contadora Group efforts to impose a second draft of a revised Contadora Act. Following intensive US consultations with El Salvador, Honduras and Costa Rica, the Central American *sic* submitted a counterdraft to the Contadora states on Oct. 20, 1984 . . . that shifts concern within Contadora to a document broadly consistent with US interests."

The United States repeatedly has portrayed the decision by Central American countries not to approve the initial draft treaty as one made independently by those countries, despite consultations.

The briefing paper expresses concern that a fourth Central American country, Guatemala, has been reluctant to back its three neighbors in seeking changes in the treaty. "We will continue to exert strong pressure on Guatemala to support the basic Core Four position", the paper says. The "uncertain support" of Guatemala is "a continuing problem", it adds. The term "Core Four" refers to Guatemala, Honduras, El Salvador and Costa Rica.

Mexico has been the most insistent promoter of signing the Sept. 7 version of the Contadora treaty. The briefing paper notes that Guatemala, because of its problems with guerrilla insurgency along the Mexican border, is seeking closer ties to Mexico, providing a "strong incentive" for Guatemala to lean toward the Mexican view.

But the paper concludes in a summary:

> "We have trumped the latest Nicaraguan/Mexican efforts to rush signature of an unsatisfactory Contadora agreement, and the initiative is now with the Core Four, although the situation remains fluid and requires careful management."

The paper notes that the administration recently has had "mixed" success in dealing with Nicaragua. "Congressional failure to fund the armed opposition is a serious loss, but our handling of the Nicaraguan election issue and Sandinista mistakes have shifted opinion against the sham elections", it says.

This was the administration line before and after the election. But the paper outlines ways in which this view should be promoted throughout the world.

It calls for encouraging "sympathetic American intellectuals and academics", "US labor" and "selected US political figures" to lobby their counterparts in Europe and Latin America, seeking critical statements about the election.

Another proposal was for the United States to use "selected embassies" in Europe and the Western Hemisphere to promote administration views.

"Embassy Bonn will approach West German ex-chancellor Willy Brandt to determine if he plans to make any public statement" on the election following the withdrawal of a key opposition party.

That withdrawal "has now left the Sandinistas holding a near worthless hand", the paper says.

The document also takes note of US-Nicaraguan bilateral talks hosted by Mexico. At the 6th round, held in September, the US aide "tabled" a comprehensive statement by Nicaragua, the background paper says, adding that the Sandinistas have adopted the Sept. 7 version of the Contadora treaty as their negotiation position vis-à-vis the United States as well.

B

The situation in Central America, particularly in El Salvador and in the regional peace talks, is moving in a direction favorable to US interest, though difficult problems remain. In Nicaragua, the picture is mixed. Congressional failure to fund the armed opposition is a serious loss, but our handling of the Nicaragua election issue and Sandinista mistakes have shifted opinion against the sham elections. We have trumped the latest Nicaraguan/Mexican efforts

to rush signature of an unsatisfactory Contadora agreement and the initiative is now with the Core Four, although the situation remains fluid and requires careful management.

This paper provides a summary assessment of issues raised in the NSC memorandum of October 24, 1985.

Central American Negotiations

(1) *US-Nicaragua bilateral talks.* Ambassador Shlaudeman has held six meetings with Vice-Foreign Minister Tinoco. The seventh round is set for October 29-30. We tabled a comprehensive statement at the most recent meeting on September 25. Nicaragua's adoption of the September 7 Acta as its negotiating position at Manzanillo has virtually eliminated earlier Honduran concern that the Manzanillo talks might "undercut Contadora". To the contrary, it has led them to see that our bilateral talks strengthen the Core Four position within Contadora. Pursuant to Presidential decision a key US objective remains to help obtain a Contadora treaty which simultaneously implements the Contadora 21 Objectives and provides for effective verification. Reports and key documents on these talks since the NSPG meeting of June 25, 1984, include:

— Memorandum for Mr. McFarlane from Mr. Hill, September 28, 1984.
— Calendar of Reciprocal Steps, September 6, 1984.
— Memorandum for Mr. Hill from Mr. Kimmitt, August 31, 1984.
— Memorandum to the President from Acting Secretary Dam, August 21, 1984.
— Memorandum from Ambassador Shlaudeman to the Secretary, August 2, 1984.
— Memorandum from the President, July 28, 1984.
— Memorandum from the Secretary to the President, June 26, 1984.

(2) *Core Four position on the draft Contadora Treaty.* We have effectively blocked Contadora Group efforts to impose the second draft of a Revised Contadora Act. Following intensive US consultations with El Salvador, Honduras and Costa Rica, the Central American submitted a counterdraft *(sic)* to the Contadora States on October 20, 1984. It reflects many of our concerns and shifts the focus within Contadora to a document broadly consistent with US interests. A copy of the new draft is being sent to each NSC agency, with English translation expected by the October 30 meeting. We will continue to seek Core Four support for these concerns expressed by us but not "incorporated" in the revised Core Four drafts. A survey of proposed Core Four changes is contained in Tegucigalpa 13080 and San José 8392.

The Four Contadora Group Vice-Ministers will meet in Panama October 31-November 1 for technical review of the Core Four drafts and revision of their own. Contadora Group Foreign Ministers would then meet November 9-10 to review recommendations of the Vice-Ministers and all nine Foreign Ministers would meet in Brasilia at the time of the OAS General Assembly November 17. Contadora spokesmen have become notably subdued recently on prospects for an early signing. While some now concede that agreement may not be reached for some months, others remain concerned that early signature is desirable. Secretary Shultz will discuss next steps in this process at the NSC meeting.

(3) *Proposed US efforts to obtain Guatemalan Co-operation in Contadora Process.* The uncertain support of Guatemala for the Core Four is a continuing

problem. Guatemala's chief security concern is its guerrilla insurgency and the sanctuary that it has, until recently, enjoyed in Mexico. Mexico's removal of the border refugee camps and the need for future co-operation provide a strong incentive pulling Guatemala toward Mexico in Contadora. We have undertaken intensive efforts with Foreign Minister Andrade and Guatemalan Chief of State Mejia on this issue. Illustrative of these efforts were the Secretary's October 10 meeting in Panama with General Mejia (Secto 12025), the Secretary's meeting with Andrade and other Core Four foreign ministers in New York on October 5 (State 298926) and President Duarte's efforts with General Mejia (San Salvador 11393 and Guatemala 10043). Serious personality problems between Honduran Foreign Minister Paz Barnica and Andrade continue to hamper efforts to keep the Core Four together. We will continue to exert strong pressure on Guatemala to support the basic Core Four position.

(4) *Mexican and Nicaraguan activity at the UN, OAS* et al. Mexican and Nicaraguan representatives have been highly active but so far unsuccessful in efforts to obtain international endorsement for the September 7 Contadora draft. The Secretary was direct in expressing our displeasure at Mexican conduct at the UNGA (State 302056). Reports and actions relating to recent Nicaraguan Mexican activity at the United Nations are contained in USUN 2845, 2763, 2884, and State 315605, 315894, 317226 and 317809. A summary report of the EC-Contadora Foreign Ministers conference is contained in San José 7644.

(5) *US efforts to help the Core Four.* Covered under item (2) above. The following cables describe several aspects of recent US efforts to help the Core Four countries secure acceptance of an acceptable draft: San Salvador 12140, Tegucigalpa 12799 and San José 6244.

(6) *Any plans for US signature of documents.* This requirement is unclear but presumably refers to the unauthorized backgrounding in Washington during the Secretary's last trip to the region that an agreement would be signed with Nicaragua in Mexico. That backgrounding was erroneous and unhelpful to US interest. The Administration is on record in opposition to signing a Protocol, both in principal *(sic)* and specifically in the case of Contadora. We have attempted to prevent adoption of a Protocol that would be open to Cuban, Soviet, or other unwelcomed signatories. However, this continues to be an important concern.

(7) *US expectations of future events and strategy to obtain an acceptable treaty.* Secretary Shultz will address this question in his presentation in the NSC meeting.

Public Diplomacy about the November 4, 1984, Election in Nicaragua

We have succeeded in returning the public and private diplomatic focus back in the Nicaraguan elections as the key stumbling block to prospects for national reconciliation and peace in the region. The breakdown of the Cruz negotiations in Rio, corroboration by SI members that Arce backed away from the SLN position once it became apparent that Cruz was prepared to seek approval of the Arce proposal have all contributed to this turn of events, as has Duarte's La Palma initiative. The PLI withdrawal from the elections has now left the Sandinistas holding a near worthless hand. An election held on November 4 will not give them the legitimacy they covet, although it will further consolidate Sandinista control over Nicaragua. Efforts continue to press the Sandinistas to postpone the elections and agree to Coordinadora demands.

Our public diplomacy strategy, approved by the NSC, is contained in Mr. Kimmitt's Memorandum to Mr. Hill, dated October 24, 1984. A follow-up memorandum on the Nicaragua elections is attached.

Attachment. As stated.

Public Diplomacy on Nicaragua Elections

A. Plans to provide the facts to the US public

S/LDP has prepared a report, "Resource Book: The Sandinista Election in Nicaragua", which documents the undemocratic nature of the election. Advance copies are already being distributed to selected journalists, and on October 29 it will be released formally. Copies will be transmitted to selected members of Congress who are likely to comment on the Nicaraguan elections (Senate Foreign Relations Committee, House Foreign Affairs Committee, etc.) and sent to our general mailing list of government officials and influential opinion leaders around the country.

S/LDP is preparing a compilation of statements on the elections by Sandinistas themselves, key political and church leaders in Nicaragua and notable foreign leaders. This paper, translations of Bayardo Arce's speech to the Nicaraguan Socialist Party, and the FSLN's propaganda plan for the elections will be distributed to selected members of Congress, journalists and opinion makers.

ARA is preparing a report comparing the Nicaraguan elections with those in El Salvador for release to the press and selected members of Congress.

Administration officials will give background briefings and interviews to selected members of the press and seek opportunities to appear on the media to discuss the elections.

S/LDP is preparing a Public Diplomacy guidance on the elections for use throughout the government.

We shall encourage non USG experts to make public statements, prepare articles, and appear on the media programs, especially immediately prior to and following the November 4 elections, e.g., the morning TV shows on November 5.

Following the elections, S/LDP will prepare a follow-up report on the elections analysing how the process unfolded the meaning of the results, and the prospects for pluralism in Nicaragua's future.

B. Plans to provide the facts to the international community

In selected OECD and ARA posts we will approach significant and knowledgeable national leaders, in and out of government, to encourage public statements condemning the Nicaraguan elections as they are now set up. Useful statements could come from government officials, political party leaders including international parties, such as (SI EDU), intellectuals, church and labor leaders.

We will encourage selected US political figures to contact their counterparts in Europe and Latin America asking that they (the counterparts) make public statements criticizing Nicaraguan elections.

US labor will contact counterpart organizations in Europe and Latin America seeking statements criticizing elections in Nicaragua as now set up.

We will encourage sympathetic American intellectuals and academics to

contact their counterparts in Europe and Latin America to examine the validity of the elections in Nicaragua, or to get their counterparts to let Nicaraguan leadership know (preferably through public statements or letters) that they are skeptical of the elections as now set up, that they have serious doubts about the elections now that the Contadora and PLI have withdrawn, and that they will be watching the elections closely both before and after November 4.

We will follow up with the Vatican recent statement condemning persecution of the Church in Nicaragua.

Selected embassies in OECD and ARA countries will be asked to approach key contacts to review our views on the elections in Nicaragua. Media contacts should be encouraged to write editorials questioning the validity of the elections.

Embassy Bonn will approach Willy Brandt to determine if he plans to make any public statements on the Nicaraguan elections now that the PLI has withdrawn from the campaign.

USIA will send a fact sheet on Nicaraguan elections via Wireless File to Europe and Latin America.

VOA and Wireless File commentary will be sent using statements questioning the validity of the Nicaraguan elections made by European and Latin American Leaders.

VOA and Wireless File commentary will carry S/LDP prepared backgrounder on Sandinista elections.

Wireless File will distribute Comandante Bayardo Arce's speech to the policy committee of the Partido Socialista de Nicaragua and other relevant material prepared by S/LDP.

Annex 17

LETTER FROM FOREIGN MINISTERS OF CONTADORA COUNTRIES TO FOREIGN MINISTERS OF CENTRAL AMERICAN COUNTRIES, 6 JUNE 1986

[Spanish text not reproduced]

Managua, 6th June 1986.

His Excellency Dr. Miguel d'Escoto Brockmann,
Minister of Foreign Affairs of Nicaragua.

We, the Ministers of Foreign Affairs of Colombia, Mexico, Panama and Venezuela met on the 6th of June 1986, a date jointly agreed in order to officially conclude the negotiations on the Act of Contadora for Peace and Co-operation in Central America, and to proceed towards its ratification. We shared our conclusions with the Ministers of Foreign Affairs of Argentina, Brazil, Peru and Uruguay. Jointly, we examined the situation in Central America and analysed the perspectives of diplomatic negotiation in the Region.

We observe, that besides some positive attitudes, there still prevail in Central America situations of deterioration of conflict. Regional and national security interests oblige us not to desist from our objective of Peace. This situation implies the responsibility to continue to give our attention to the solution of the regional crisis, conscious as we are of its importance and the values that are compromised for all our continent.

We began our reflection by analysing the Declaration of Esquipulas, which contains the conclusions of a meeting which is now considered to be historic, if only because of the fact of having brought together the five heads of State of Central America. The Esquipulas declaration affirms that the Contadora process constitutes "the best vehicle available to Central America to date, in order to achieve peace and democracy and reduce political tensions". In another of its sections, the Declaration expresses the will of "the Governments of Central America to sign the Act of Contadora for Peace and Co-operation in Central America, with the intent of fully complying with all the commitments and procedures contained therein".

We analysed, also, the advances and conclusions made in the latest meeting held between the plenipotentiaries of the Central American nations and the Vice-Ministers of the Contadora Group. At that time, we indicated that it was essential to reach a definitive understanding on the only matters still pending agreement in the Contadora Act: that is, the limitation of the arms race, and the suspension and regulation of international military manœuvres. We proved that this objective could not be wholly achieved.

The meetings of Plenipotentiaries have permitted the statement in depth and in all their magnitude of the premises and fundamentals from which the five countries work. In this way, we have arrived at the conclusion that on these bases it is possible to arrive at a conciliation of interests, bringing together the points of coincidence contained in the different proposals.

We noted with interest that the Plenipotentiaries of the Central American

countries, after recognizing the impossibility of signing the Contadora Act on the agreed date, communicated to their respective governments their intention to continue our negotiating process and that the Group of Contadora should continue fulfilling its task of active mediation in search of feasible and balanced agreements for all parties directly or indirectly involved.

We, the Ministers of Foreign Affairs of the Contadora Group, taking into consideration these precedents, have come to the following conclusions, secure in the belief that they will be shared by the Governments of Central America, in the first place, in response to the positions formulated in the Esquipulas Declaration, we state once again the determination of the Governments of the Contadora nations to go on offering our participation in this diplomatic negotiating process which represents the hopes of articulating an eminently Latin American political action. We consider that it is necessary, at the same time, to clearly define the prerequisites of this negotiation and the framework within which it should be conducted in order to attain the high aims which we have indicated. Therefore, the countries of the Contadora Group and those of the Support Group, have considered it opportune to issue a declaration in which we allude to these questions, as well as to the obstacles to, and perspective of the peace process as a whole.

Today we formally deliver that which, in the opinion of the Contadora Group, constitutes the final draft of the Act of Contadora for Peace and Cooperation in Central America. The text incorporates the essential political commitments related to the substantive aspects. Once this question is resolved, we propose to proceed immediately to another phase of the negotiations, referring to matters of an operational character and which will refer mainly to the establishment of the Verification and Control Commission.

With the outline established above, we have drafted a balanced and fair text, from the point of view of all parties. As far as the topic of the control and reduction of the arms race is concerned, in our opinion there is validity in some of the criteria put forward by the Plenipotentiaries. In the first place, it is necessary to formulate as soon as possible an inventory of the actually existing armaments in the countries of the region and suitable for reduction or elimination. To this list it is necessary to apply a factorization table based on equivalent values of technological capacity and destructive power.

In relation to international military manœuvres, the recent proposals conform the validity of our previous positions. We propose to maintain a general criterion of balance and reciprocity on other equally important topics in the area of regional security.

Other questions considered, such as pending matters for agreement, are of a different nature. It will be possible to take them up systematically to the extent that the commitments related to the substantial parts of the Act have been defined and accepted. For example, before agreeing upon the system of verification and control, it is necessary to define what is to be verified and controlled. The proposed Statute, although it may need completion and refinement, logically belongs to the area of regulations. In its later revision and negotiation, the Statute should be considered as part of the Act; and in no case can it be placed in opposition to the central themes of the relevant chapter, which has already been agreed upon. It is necessary to define as well the norms contained in the final dispositions and in the corresponding protocol.

In parallel or joint actions, we propose to start the necessary consultations for the interaction of the mechanisms for implementation and evaluation which the Act foresees, as well as resolve the questions related to the financing of, and headquarters of, the corresponding organization.

Among the matters tabled, there exists one which merits special consideration: the moment of entry into operation of the commitments in the Act. Throughout the negotiating process, we have tried out the most varied formulae in order to achieve an acceptable solution, based upon international law, experience and practice. It has not yet been possible to find a satisfactory formula. One possibility is that the entry into operation of the agreements and commitments of the Act should occur when the five Central American Governments have ratified it, on the basis of the procedures established in their respective internal legislation. The Central American Governments have offered to ask the legislative powers of their countries not to frustrate the efforts to achieve peace and co-operation in the Central American Isthmus that we have supported and maintained together in the last three and a half years.

The definition of this topic in terms already mentioned, inevitably obliges us to re-examine other aspects of the Act itself. On previous formulae and in order to secure the required simultaneity of the agreements, part of the preparation for its execution was to take place between the moment of its signing and that of ratification of the corresponding legal instrument. In the present circumstances, it is necessary for all these preparations to evolve in a different framework, through specific agreement of the executive powers of the Central American countries. We are in no doubt that this agreement will become reality, thus reflecting a political will expressed in so many occasions.

On this assumption, an attempt will be made to create the mechanisms of verification in the matter of security and control, that can begin to function provisionally. If these mechanisms cannot be integrated in the short run, the Central American Governments and those of the Contadora Group could take in hand this provisional procedure and carry out the tasks required by such preparations.

In this case, a distinction becomes necessary. A considerable part of the agreements registered in the section on security in the Act, such as the prohibition of support to irregular forces and to acts of subversion, terrorism, or sabotage, are principles of international law which only need to be underlined or ratified. They have validity and actuality independently of what the Act itself determines. These international obligations no country can elude and their enforcement can not be subject to particular circumstances. Additionally, their explicit observation would create a climate of confidence indispensable to reverse the present warlike tendencies and contribute to the pacification of the region.

In the negotiating framework we propose, actions related to the preparation for the rapid execution of the agreements on the matter of security, would take place after signing the Act. As far as the question of armament and a halt to the arms race is concerned, for example, the duration and terms of control and reduction will be established, according to the criteria presented in the substantive area of the Act. As an obligatory point of reference, the registration of arms inventories and arms personnel would be compulsory. The same would apply to the obligations defined in terms of stages and timetables in the section on security, that would have to be determined, at the same stage, with similar procedures to those indicated above.

The formulae and the scheme that we propose gather the proposals of the different Central American Governments in an effort to synthesize and compatibalize them. Although they can not reflect integrally all the points of view of any particular country, they do correspond to the essentials of the basic concerns contained in each proposal.

We have no doubt that we can count upon the favourable answer of the

Central American Governments. In that way, our diplomatic effort will be supported by solid bases and not only its continuity will be guaranteed, but also the required depth that it requires. Above all, we will give a demonstration of the capacity for political harmony, efficacy, unity and cohesion that, as genuine Latin Americans, we are obliged to produce in face of the difficulties and changes of our times.

We maintain the conviction with which we worked indefatigably during three years and a half in favour of a statute for peace in Central America, which today we deliver to the five Governments in the region. We trust that you, as prime trustees for Peace and Co-operation in the region, will take the decisions required to enforce the Act of Contadora.

We take this opportunity to reiterate to you, our assurance of our consideration and friendship.

Dr. Augusto RAMIREZ OCAMPO,
Minister of Foreign Affairs
of Colombia.

Lic. Bernardo SEPÚLVEDA AMOR,
Minister of Foreign Affairs
of Mexico.

Dr. Jorge ABADIS ARIAS,
Minister of Foreign Affairs
of Panama.

Dr. Simon ALBERTO CONSALVI,
Minister of Foreign Affairs
of Venezuela.

Annex 18

NICARAGUAN RESPONSE TO CONTADORA, 17 JUNE 1986

[Spanish text not reproduced]

Ministry of Foreign Affairs,
Managua. Nicaragua.

Managua, June 17th 1986.

Dear Minister,

I have the pleasure to address myself to Your Excellency, with reference to the draft of the Contadora Act for Peace and Co-operation in Central America, submitted to the Chancellors of Central America on the 7th of June during the latest ministerial meeting, together with the Message of Panama and the Explanatory Note on the draft of the Act. These three important documents represent the position of both the Contadora Group and Support Group on the negotiating process in Central America.

Under the present circumstances, we believe it fitting to remember that the Group of Contadora submitted to the Central American countries on the 7th of September 1984, a revised version of the Act, asserting then that it was "the result of an intense process of consultations and after an ample exchange of points of view with all the Central American Governments".

In a diplomatic note dated September 21st 1984, the Government of Nicaragua informed the Contadora countries of its decision "to accept in its totality and immediately sign, without any kind of modification, the Revised Act of the 7th of September".

After this acceptance by Nicaragua was made public, the North American Government embarked in a strenuous campaign designed to impede the signing of this regional agreement, thus achieving what they themselves called "The Effective Blockade" of the draft proposed by the Contadora Act. The National Security Council document of October 30th 1984, defines this strategy of the North American Government to boycott Contadora.

As a consequence of the rejection and North American pressures, although the Contadora Group had already officially concluded the negotiations of the Act, it was decided to re-open this negotiating process which now culminates in its new draft of the Act, submitted on June 7th 1986.

The Contadora Group in its note of June 6th, points out that as to the present situation, "there prevail in Central America, together with some positive signs, situations that imply a considerable deterioration of the conflict". The North American Government, far from collaborating in the creation of conditions that favour peace efforts, has intensified its military manœuvres in Honduras, along the border with Nicaragua, and continues to increase its bellicose policies and interventions against our country. This is demonstrated by continual US threats of invasion and its decision to increase military and economic aid to the mercenary forces at its service, openly contravening international law as indicated by the May 10th 1984 decision of the International Court

of Justice, and attempting to jeopardize the United States Congress itself with these actions in violation of US law.

All this demonstrates the unvarying conduct of the United States Government in continuing with its terrorist policy and the sabotage of the negotiating efforts pursued by Contadora.

Likewise, the USA continues to use the territory of neighbouring countries as a sanctuary and base of aggression against Nicaragua, without indicating by any actions or signs that this might cease. On the contrary, some Central American Governments try to justify their tolerance of and support for this kind of practice.

It is for that reason that Nicaragua shares these objectives with the Chancellors of Argentina, Brazil, Colombia, Mexico, Panama, Peru, Uruguay and Venezuela in the Message of Panama, that

> "it would be illusory to believe that the compiling alone of the draft of a treaty will solve the crisis. It would also be necessary to advance towards the creation of the right conditions for the signing of the Peace Treaty itself."

Based on what has been said previously, after a thorough analysis of the last draft of the Act, of the Message of Panama and of the Explanatory Note (all essential documents for the correct interpretation of the negotiating process and that of its future stages) the Government of Nicaragua announces the following:

First: That Nicaragua has always been ready to sign the Peace Act within the spirit of the Caraballeda Message, and considers that the 7th of June 1986 Act, presented formally to the Central American countries by the Contadora Group, constitutes the only instrument "capable of producing a quick and efficient conclusion of the negotiating process", in order to achieve peace for Central America.

Second: Considering the Explanatory Note from the Contadora Group dated June the 6th where it is proposed that "it is necessary to compile as quickly as possible an inventory of all existing weapons in the countries of the region susceptible to reduction or elimination" and in agreement with the list of military matters that Nicaragua considers subject to reduction, limitation, regulation and elimination within the framework of the negotiations, the Government of Nicaragua is prepared to deliver to Contadora an inventory of the following military matters:

1. All types of military aeroplanes.
2. All types of military helicopters.
3. Military aerodromes.
4. Battle tanks.
5. Heavy mortars of more than 120 mm.
6. Self-propelled anti-aircraft cannon.
7. Multiple rocket launchers.
8. Artillery of more than 160 mm.
9. Self-propelled artillery.
10. Surface to surface rocket launchers on naval vessels.
11. All military vessels.
12. International military manœuvres.
13. Foreign military bases.
14. Foreign military advisors.

Third: In line with the Explanatory Note of Contadora, the Government of Nicaragua is elaborating a Factorization Table of the above list of military matters.

Fourth: In conformity with the Message of Panama, the Government of Nicaragua appeals to the countries of the Contadora Group to take the necessary steps to "establish appropriate conditions for the signing of the Peace Act", for which it is urgent to promote dialogue between the United States and Nicaraguan Governments, support the creation of Mixed Commissions for the solution of frontier problems, favour dialogue and to agree upon pacts of non-aggression between the Central American Governments.

Fifth: We also comply with the Message of Panama, in that to go forward in the Process of Contadora as a final Peace objective, it is imperative to accept three kinds of obligations:

(a) To prevent the use of the national territory for aggression against another country by military or logistic support to irregular forces or subversive groups.
(b) No country must form membership of any military or political alliance that directly or indirectly threatens the peace and the security of the region by plunging it into the East-West conflict.
(c) That no super power militarily or logistically support the irregular forces or subversive groups that act or could act in the countries of the region, or that uses or threatens to use force as a means to overthrow a government in the area.

In this way Nicaragua is taking fresh steps in favour of the peace and stability in the Central American region.

Finally, Minister, I convey to you the sincere gratitude of the people and Government of Nicaragua for those efforts of the Contadora and Support Groups towards peace and security in our long-suffering Central American region, ratifying once more, our total backing to the Latin Americanist action of the Contadora and Support Groups.

We are convinced that the unity of the Latin American peoples can tame those regressive forces that try to deny our sacred right to self-determination and independence, and that counting upon the political will of other Central American countries and that of the Government of the United States, it will be possible to successfully conclude the negotiating process of Contadora.

I convey to you, Minister, this testimony of my highest consideration and personal regard.

(Signed) Miguel d'ESCOTO BROCKMANN,
Minister of Foreign Affairs.

The Right Honorable Enrique Iglesias,
Minister of Foreign Affairs of the Republic of Uruguay.

Annex 19

RESPONSE OF HONDURAS TO CONTADORA, 13 JUNE 1986[1]

[Spanish text not reproduced]

(Translation)

NOTE FROM THE PERMANENT REPRESENTATIVE AMBASSADOR OF HONDURAS ANNEXING THE PRESS COMMUNIQUÉ RELEASED BY HIS GOVERNMENT ON JUNE 13, 1986, IN RELATION TO THE JOINT MEETING OF MINISTERS OF FOREIGN AFFAIRS IN PANAMA

June 16, 1986.

Mr. President:

I have the honor to address Your Excellency in order to inform you and, through your offices, the States Members of the Permanent Council, of the Press Communiqué No. 038-86 of June 13, 1986, released by the Government of Honduras in relation to the Joint Meeting of Ministers of Foreign Affairs held in Panama City on June 6 last.

I avail myself of this opportunity in order to reiterate to Your Excellency the assurances of my highest consideration.

(Signed) Hernán ANTONIO BERMÚDEZ,
Ambassador, Permanent Representative.

His Excellency Mr. Fernando Andrade Diaz-Duran,
President of the Permanent Council,
Organization of American States,
Washington, D.C.

PRESS COMMUNIQUÉ NO. 038-86

The Secretariat of Foreign Relations, after analysing the documents that were given to the Government of Honduras by the Contadora Group, in the Joint Meeting of Ministers of Foreign Affairs, held in Panama City on June 6 last, makes the following announcement for the national opinion:

1. The last project for an instrument ("acta") proposed by Contadora does not constitute, in the opinion of the Government of Honduras, a document that establishes reasonable and sufficient obligations for guaranteeing its security.

[1] See **II**, Correspondence, Nos. 44, 51, 71, 73 and 74.

2. The Contadora Group stated in that meeting that the project in reference exhausted its mediation efforts with relation to the substantive elements of the "acta", but that notwithstanding they were available for collaborating in the negotiation of the operative and practical elements of the "acta".

3. The Government of Honduras reiterates its willingness to continue exploring new formulas that effectively guarantee the legitimate interests of all the States and to contribute in any other efforts, destined to achieving the internal pacification and national reconciliation of certain States, the maintenance of peace and the consolidation of democracy in Central America.

Tegucigalpa, D.C., June 13, 1986.

Information and Press Office,
Secretariat of Foreign Relations.

Annex 20

LETTER OF HONDURAN FOREIGN MINISTER CONTRERAS

[Spanish text not reproduced]

MINISTRY OF FOREIGN AFFAIRS
OF THE REPUBLIC OF HONDURAS

Ref. No. 249/86-DSM

Tegucigalpa, D.C.,
21 June 1986.

Dear Ministers and Friends,

I have the honour to acknowledge receipt of your kind letter dated June the 6th, in which you informed me that on that date the Chancellors of Colombia, Mexico, Panama and Venezuela had met in Panama City in order to conclude the negotiations of the Contadora Act for Peace and Co-operation in Central America; and that they shared their conclusions with the Chancellors of Argentina, Brazil, Peru and Uruguay.

On the occasion of the joint meeting of the Chancellors of Contadora, of the support Group and of Central America, held in Panama on June the 6th 1986, the Contadora Group formally handed over to the Central American Chancellors what on its own judgment, should constitute the last draft of the Act of Contadora for Peace and Co-operation for Central America.

As announced on that solemn session, I am pleased today to be able to offer you the answer of the Government of Honduras, based on the calm and fraternal study of the documents given to me, that is to say, the speech of the Chancellor of Panama, the letter from the Contadora Chancellors to the Central American Chancellors, draft of the Act of Contadora and the Message of Panama.

I reiterate to all and each of you, the respect of the Government of Honduras, for the enormous collective effort you have demonstrated, distinguished by the noblest of political wills, investment of human and material resources, in that fraternal eagerness to achieve through political negotiation, a legal outline capable of guaranteeing a sustained democratic peace inside the Central American States and between the States of the region.

Despite the persistent effort to achieve the desired objectives, I fulfil my duty to inform you, as did the Honduran Chancellery in its Statement of 13th of this month, that, "The last draft of the Act proposed by Contadora, does not constitute, in the opinion of the Government of Honduras, a document that establishes reasonable and sufficient obligations to guarantee its security."

In fact, on the subject of disarmament, that is, to the limitation, reduction and the control of arms and military personnel, the Contadora proposal defers to a later stage to the coming into force of the Act, the negotiation of the limits and agendas of arms reduction and military personnel. The position of Honduras to this fundamental aspect of the Act, is that the obligations relative to it, must be enacted with precision and clarity in the text itself of the Act.

The system proposed by Contadora requests a negotiation on disarmament at a later stage, that implies uncertain results and that would bring about the abolition of other commitments on the matter of security, jeopardizing in time, the principles of reciprocity and simultaneity that have prevailed during the negotiation. On the other hand, to accept a hazardous and uncertain situation on the matter of disarmament, would be the same as to recognize and ratify a situation that in fact already exists: the military supremacy of one of the Central American States over the others.

I also would like to state, that the Contadora Project does not reflect adequately the criteria accepted by four Central American Governments in relation to the use of the "Basic Table of Factors, in order to establish the Maximum Levels of Military Development" and, on the contrary, attempts to apply subjective criteria of difficult multilateral evaluations that would make impossible an agreement on limitation, reduction and control of armament and military personnel.

I would also like to point out that in Chapter III a new section 23 tries to reintroduce points which were already discarded in negotiation with plenipotentiaries, because they affected constitutional arrangements in four countries.

On the matter of military manœuvres, I observe an unacceptable return to that version of Contadora of November 1985, that implied erroneously into a supposed equivalence between military manœuvres, armaments and military development.

As I already stated orally at our joint meeting in Panama, the Government of Honduras notes what the Contadora Group has expressed in the sense that the last draft of the Act exhausts its action of intercession on the substantive aspects of the Act but, that the Group would remain ready to collaborate in the negotiation of its operative and practical aspects. In the same way, we note the fraternal intention that the negotiation of all practical and operative aspects of the Acta be concluded before the signing of such an instrument. However, as it is rightly pointed out by the honorable Ministers in their notice of 6th of June last, it would only be possible to systematically approach these matters in so far as the agreement dealing with the substantive aspects of the Act, would have been clearly established and accepted.

Despite the above-mentioned difficulties, I could not finish without making clear, once more, the deep acknowledgment of the Government of Honduras for the enormous and persevering efforts achieved by the Contadora Group to attain a long lasting Peace in Central America. I can certify to the exhausting working days you kept over a period of more than three years, proving at all times, such a physical strength and such a conciliatory intellectual will, worthy of the noble cause that brought them into existence. If Contadora has not obtained the total success we wish, it has been due to causes not attributed to the Group. History will record these efforts as the most beautiful proof of American solidarity, more than an intangible ideal, it is a real fact, that exists and brightens the future of our continent.

With the confidence that Honduras will continue to participate in a constructive way in all that would tend to encourage Peace in the region, I beg you to accept the repeated testimony of my highest regard and personal respect.

(Signed) Carlos LÓPEZ CONTRERAS,
Secretary for Foreign Affairs.

The Right Honorable Dr. Augusto Ramirez Ocampo,
Minister of Foreign Affairs of Colombia.

The Right Honorable Lic. Bernardo Sepúlveda Amor,
Minister of Foreign Affairs of Mexico.

The Right Honorable Dr. Jorge Abadia Arias,
Minister of Foreign Affairs of Panama.

The Right Honorable Dr. Simon Alberto Consalvi,
Minister of Foreign Affairs of Venezuela.

Annex 21

"FLIGHT CREW LOG TRIP AND EXPENSE RECORD", OBTAINED BY GOVERNMENT OF NICARAGUA FROM C-123 PLANE THAT WAS SHOT DOWN OVER NICARAGUA ON 5 OCTOBER 1986 AND WHOSE CREW INCLUDED EUGENE HASENFUS

[Not reproduced]

Annex 22

NOTE FROM THE GOVERNMENT OF NICARAGUA TO THE ORGANIZATION OF AMERICAN STATES CONCERNING HONDURAS'S "NEW DECLARATION" OF 26 MAY 1986[1]

[Spanish text not reproduced]

(Translation)

May 18, 1987.

Excellency:

I have the honor to address Your Excellency on the occasion of communicating the letter dated May 15, 1987, which the Minister of the Exterior of the Republic of Nicaragua is sending in relation to your communication of June 30, 1986, enclosing letter DSM-206/86 of May 26, 1986, of the Ministry of Foreign Relations of the Republic of Honduras.

Please accept, Excellency, the assurances of my highest consideration.

(Signed) Carlos TUNNERMAN B.,
Ambassador.

His Excellency Mr. João Clemente Baena Soares,
Secretary General,
Organization of American States,
Washington, D.C.

Managua, May 15, 1987.

Mr. Secretary General:

I have the honor to address Your Excellency with reference to your letter of June 30, 1986, in which you communicate document DSM-206/86 of May 26, 1986, of the Ministry of Foreign Relations of Honduras, informing of the "modifications introduced to the acceptance of the Jurisdiction of the International Court of Justice, since the contents of said declaration of modification are equally applicable to article XXXI of the American Treaty on Pacific Settlement".

With relation to this matter, I inform the Secretary General of the following:

1. Honduras ratified the American Treaty on Pacific Settlement on February 7, 1950, that is to say, thirty-seven years ago without making any reservations.

[1] See II, Correspondence, Nos. 44, 51, 71, 73 and 74.

2. In accordance with the Law of Treaties, States may only make reservations at the moment of subscription, ratification or adherence to an international instrument.

3. Article XXXI of the Pact of Bogotá establishes a fundamental conventional obligation by which all the States party to the American Treaty of Pacific Settlement recognize, in relation to the other States party, and for the duration of the treaty, as compulsory, *ipso facto* and without any conditions, the jurisdiction of the International Court of Justice.

4. The attempt by Honduras of introducing a reservation to an article of the Pact of Bogotá, that is, to the Pact of Bogotá, is inadmissible and ineffective.

5. Consequently, Nicaragua considers inadmissible the modification presented by Honduras, which does not have any legal validity and constitutes a grave violation of the American Treaty on Pacific Settlement.

At the same time as requesting that Your Excellency make known the position of Nicaragua to the other States members of the Organization of American States, I take this opportunity in reiterating the assurances of my highest consideration.

(Signed) Miguel d'ESCOTO BROCKMANN,
Minister of the Exterior.

His Excellency Mr. João Baena Soares,
Secretary General,
Organization of American States.

Annex 23

OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE AMERICAN TREATY ON PACIFIC SETTLEMENT (PACT OF BOGOTÁ), ORGANIZATION OF AMERICAN STATES DOC. OEA/SER.G, CP/DOC. 1603/85, 3 SEPTEMBER 1985

September 3, 1985.

Excellency:

I have the honor to convey to Your Excellency the opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá) as well as the Report of the Rapporteur for this topic and the papers some of the members of the Committee prepared to explain their votes on this topic.

That opinion was transmitted to me with a note from the Chairman of the Committee, dated August 29, 1985. Therein he requests that the document be transmitted to the Permanent Council so that it may consider it via its Committee on Juridical and Political Affairs, at the meetings that that Committee will hold on Thursday, August 5, and Friday, August 6, with the Chairman of the Inter-American Juridical Committee in attendance.

Accept, Excellency, the renewed assurances of my highest consideration.

João Clemente BAENA SOARES,
Secretary General.

His Excellency Ambassador Pablo Mauricio Alvergue,
Chairman of the Permanent Council
of the Organization of American States,
Washington, D.C.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

CJI/0/87 Rio de Janeiro, August 29, 1985.

My dear Mr. Secretary General:

I have the honor to inform you that in response to a decision taken by the Permanent Council on August 7 of this year, to request the Inter-American Juridical Committee to examine the American Treaty on Pacific Settlement (Pact of Bogotá), taking into account the reservations made by the signatory States, as well as the reasons that some States might have for not ratifying it, in order to determine whether amendments need to be made to that instrument to ensure its viability, the Committee completed its work today, with the opinion

that I have the pleasure to attach hereto. I am also sending you the Report that I submitted to the Committee as Rapporteur for this topic, as well as the Explanations of Votes provided by some of the members of the Committee: Dr. Roberto MacLean Ugarteche, Dr. Luis Herrera Marcano and Dr. Manuel A. Vieira.

The Inter-American Juridical Committee devoted a significant portion of its August session to this undertaking. It made it a priority, in view of the fact that the entire Organization is now committed to a process of amending the Charter of the OAS and other inter-American instruments, including the American Treaty on Pacific Settlement itself.

I would be most grateful if you would be kind enough to transmit the documentation in question to the Permanent Council and, through it, to the governments of the member States, and order that it be included among the Committee's other documents pertaining to this session, which will be published in the volume "Informes y Recomendaciones del Comité Jurídico Interamericano" for 1985.

Sincerely,

Galo LEORO F.,
Chairman, Inter-American Juridical Committee.

His Excellency Ambassador João Clemente Baena Soares,
Secretary General,
Organization of American States,
Washington, D.C.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

CJI/RES-II-13/1985

OPINION

ANALYSIS OF THE AMERICAN TREATY ON PACIFIC SETTLEMENT (PACT OF BOGOTÁ) TAKING INTO ACCOUNT THE RESERVATIONS MADE BY THE SIGNATORY STATES AS WELL AS THE REASONS THAT SOME STATES MIGHT HAVE FOR NOT RATIFYING IT, SO AS TO DETERMINE WHETHER AMENDMENTS NEED TO BE MADE TO THAT INSTRUMENT TO ENSURE ITS VIABILITY

I. BACKGROUND

Bearing in mind the special interest that the Organization of American States has in conducting studies of the major inter-American legal instruments with a view to their amendment, as stated in resolution AG/RES.745 (XIV-0/84), adopted by the General Assembly of the OAS in Brasilia in November of 1984, and in response to the express request made of it by the Permanent Council of the Organization, the Inter-American Juridical Committee undertook an examination of the American Treaty on Pacific Settlement (Pact of Bogotá) taking into account the reservations made by the signatory States as well as the reasons that some member States might have for not rati-

fying it, so as to determine whether amendments need to be made to that instrument to ensure its viability. The text itself also dovetails with what the Committee itself suggested in its resolution of August 21, 1984, titled "A study on the procedures provided in the Charter of the Organization for the peaceful settlement of disputes and further steps that might be taken to promote, modernize, or expand such procedures".

The Chairman of the Committee conveyed the request verbally. He had been present at a meeting held by the Committee on Juridical and Political Affairs of the Permanent Council in late July, where the idea had taken shape. Later, through a cable dated August 16, 1985, the Chairman of the Permanent Council of the OAS confirmed for the Committee that at its meeting of August 7, that body had in effect decided to make that request of the Inter-American Juridical Committee.

At its meeting of August 5, the Committee appointed Ambassador Galo Leoro F. as Rapporteur for the subject. He made various statements at a number of meetings, analysing in detail the Pact of Bogotá and its technical problems and other problems, examining how these bear upon its viability. At the meeting held on August 20, he also presented a report, dated August 19 (CJI-SO/11, attached hereto) containing an analysis of the various aspects of the Pact which, in his view, are questionable and point up problems with respect to the applicability of the Pact if the parties had to resort to its procedures. The Committee decided to use the Report of the Rapporteur as a working paper and to continue with the analysis of the Pact, which began on and continued at the meetings held on August 6, 8, 10, 12, 13, 15, 20, 21, 22, 23, 24, 28 and 29.

II. Reform of the Inter-American System

At various points in time, the member States of the OAS have sought reforms in the inter-American system.

The system developed within a legal framework established by resolutions passed by the International Conferences of American States. Many of the declarations from those conferences contain principles that point up a constant effort to surmount problems. The most significant reform made in the system was the signing of the Charter of the OAS in 1948 when an organization that had developed over the course of several decades was contractually instituted. That contractual transformation was the climax of an essential undertaking that began with the Inter-American Treaty of Reciprocal Assistance, adopted in Rio de Janeiro in 1947, and culminated with the American Treaty on Pacific Settlement or "Pact of Bogotá" and the other invaluable inter-American instruments that address social rights, human rights, economic relations, all on a substantive and structural scale that was without precedent. After 1945, in order to survive the regional system had to be instituted contractually and adapt itself to the highest international standards of the United Nations Charter.

Here in Rio de Janeiro in 1965, the Second Special Inter-American Conference would begin efforts to redirect the inter-American system toward more ambitious goals for the economic and social development of its American States. It would also adopt resolution XIII to "strengthen the capacity of the Organization to give the member States effective aid in the peaceful settlement of their disputes", giving the Council of the Organization the necessary powers. The Protocol of Buenos Aires, signed in 1967 as a result of

the new direction adopted in Rio, brought certain normative and structural changes to the Organization. It makes the Councils equal from the legal standpoint and changes the name of some of the organs. But it does not alter the basic principles. The economic and social standards were enlarged upon, as were those concerning education, science and culture, with the emphasis on development. The Permanent Council was given the same powers as those given to the Inter-American Peace Committee in its 1956 Statutes, in effect at that time.

In 1973, another reform movement would lead to the establishment of CEESI, a special committee charged with studying the inter-American system and proposing amendments to its instruments in order to modernize the Organization and find the means to give it a better internal political balance and to increase the opportunities for co-operation among its members, under the general banner of a Third-World approach and détente in international affairs, evident at that time both on the world scene and on the inter-American scene. CEESI produced a considerable number of volumes. It developed draft amendments to the Charter and to the Rio Treaty and proposed two new draft conventions on co-operation for integral development and collective economic security. The only draft ultimately enacted was the amendment of the Rio Treaty. The Protocol in question was signed in San José, Costa Rica, in 1975, but has not yet entered into force.

The dormant intention to reform the inter-American system resurfaced again at the General Assembly held in Brasilia, the foundation being the work that CEESI had produced. The brief time frame allowed for this major undertaking means that the bodies responsible for this vast project have to prepare their drafts quickly.

There is, therefore, an ever-present concern to adapt and improve the instruments of the OAS to suit increasing political, social and economic needs in the countries of the hemisphere and to be in step with the changing international scene.

The idea of strengthening the Organization at its very foundation also signifies a desire to make it a more effective means of achieving its major objectives, which range from maintenance of peace through collective security and peaceful settlement of disputes, to observance of human rights and inter-American co-operation in all fields.

This effort to renew the system comes at a time when the most serious economic-financial crisis endangers social tranquillity and threatens to paralyse the development of most American countries.

The situation of the Pact of Bogotá has been a source of concern for the Organization since 1954; at that time the International Conference of American States held in Caracas adopted resolution XCIX whereby it ordered the then Council to conduct an inquiry among the member States to "ascertain the suitability of, and the appropriate opportunity for proceeding to revise the American Treaty on Pacific Settlement"; if the results were positive, the Inter-American Council of Jurists and the Inter-American Juridical Committee were to study the possibility of amending the Pact of Bogotá. The outcome would not have favored amendment of the Treaty.

Later, at the first regular session of the General Assembly held in San José, Costa Rica, in 1970, the General Assembly adopted resolution 54 wherein the Inter-American Juridical Committee is requested, based on the provisions of Article 26 of the Charter, to conduct a study of the experience acquired from application of the instruments for peaceful settlements of disputes, in order to strengthen the inter-American system for the maintenance

of peace. In its opinion of September 8, 1971, the Committee said that the best means to strengthen the system would be for those States that had not yet ratified the Pact of Bogotá to do so.

The advisability of amending the Pact of Bogotá was raised at CEESI in 1973. Although no position materialized in this respect, CEESI decided that the matter should be examined on some future occasion.

Today the Committee has been entrusted with studying the Pact of Bogotá; the Committee had suggested that very thing in its own opinion of August 21, 1984. The fundamental purpose would be to facilitate a general consideration of the measures that should be taken to modernize the inter-American system overall, with a view to strengthening it and endeavoring, by every means possible, to make inter-American co-operation more effective, in this specific case in the field of peaceful settlement of disputes.

The Pact of Bogotá and the Inter-American Treaty of Reciprocal Assistance — Instruments for the Maintenance of Peace

The Pact of Bogotá and the Inter-American Treaty of Reciprocal Assistance are the instrumental means for carrying out the objectives set forth in the Charter with respect to maintenance of the peace. The first is the Organization's response to the need to settle international disputes between its members peacefully; the second is a collective response to aggression and other attempts against the territorial integrity, sovereignty and independence of the member States, under the terms and according to the characteristics that those instruments establish for each one of their respective spheres of action.

The fact that the Charter of the OAS makes reference to those two special treaties, which differ in their nature and sphere of application but are the same in terms of purpose — that being the maintenance of peace —, naturally prompts me to examine how they are applied, which is frequent and wide-ranging in the case of the Rio Treaty, and non-existent in the case of the Pact of Bogotá. The Rio Treaty has been ratified by the vast majority of the member States, while the Pact of Bogotá has been ratified by an obvious minority. While the Rio Treaty was amended by the Protocol of San José, in 1975, the Pact of Bogotá has remained unchanged.

Naturally, the most striking fact of all is that the Pact has never been invoked by its parties to settle their disputes peacefully. If Honduras and Nicaragua resorted to its procedures in 1957, it was only because the Permanent Council, acting provisionally as organ of consultation, had recommended that measure and the two member States took their dispute to the International Court of Justice to resolve the controversy over the 1906 Award.

Thus, there has been no balance between the two fundamental sides of the maintenance of peace within the OAS, those being collective security and peaceful settlement of disputes. In practice, the Organization's main objective with respect to peaceful settlement of disputes has not been served. This may be because resolution has been sought through Article 7 of the Inter-American Treaty of Reciprocal Assistance, which provides the following:

> "In the case of a conflict between two or more American States, without prejudice to the right of self-defense in conformity with Article 51 of the Charter of the United Nations, the High Contracting Parties, meeting in consultation, shall call upon the contending States to suspend hostilities and restore matters to the *status quo ante bellum*, and shall take in

addition all other necessary measures to reestablish or maintain inter-American peace and security *and for the solution of the conflict by peaceful means*. The rejection of the pacifying action will be considered in the determination of the aggressor and in the application of the measures which the consultative meeting may agree upon."

Perhaps several instances where the Rio Treaty was invoked can be better explained if one considers that the Organization did not have an organ that, at the request of one of the parties or on its own initiative (as happened with the Inter-American Peace Committee, before it was changed in May 1956), could recommend to the contending States suitable measures or means for finding a solution to their dispute.

Thus, under certain circumstances, the American States have had to invoke the Inter-American Treaty of Reciprocal Assistance, an instrument whose organ acts at the request of one of the parties and, in certain cases, when convoked by the Chairman of the Permanent Council (Article 63 of the Charter). Under Article 7, cited earlier, it is called upon to play an important role in achieving pacification and even to finding a solution to the conflict via peaceful means. Naturally, the best thing for the member States and for the inter-American system would be for the methods of peaceful settlement to be as effective as the Rio Treaty's methods, even more so if possible.

A desire to achieve that parity, or at least some balance in the use of the two means for maintaining peace within the inter-American system, is what doubtless has prompted the member States to try to alter those aspects of the fundamental instruments that, experience has shown, do not function or have not functioned in the past. In the Committee's judgment, the situation noted in the case of the Pact of Bogotá holds true in the case of the OAS Charter as well, since the task assigned to the Permanent Council and to the Inter-American Committee on Peaceful Settlement, under Articles 82 through 90, is just as difficult since it cannot, at the request of only one of the parties or on its own initiative, lend its good offices to bring the parties together and suggest means for settling disputes between member States. In its opinion of August 21, 1984, the Committee suggested amendments to the Charter to correct that problem.

The Pact of Bogotá

This instrument is provided in Article 26 of the Charter so that it will

"establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period".

The Pact of Bogotá was to be a codification of those treaties on peaceful settlement existing within the inter-American system and listed in Article LVIII thereof. That Article provides that once the Treaty comes into effect, the earlier conventions shall cease to be in force with respect to the Parties thereto.

The American Treaty on Peaceful Settlement went beyond just codifying those conventions, as said before; an effort was made to co-ordinate it with the provisions of the United Nations Charter and significant restrictive standards were introduced vis-à-vis its application and others such as the sequence of steps the parties would be compelled to follow if the procedure of conciliation was invoked from the outset.

Thus, the Pact of Bogotá could be described as an inter-American treaty

for peaceful settlement of disputes that contains restrictive general standards concerning its application; that describes, one by one, the procedures of good offices, mediation, investigation and conciliation, both judicial and arbitral, that are available to the parties; that does not establish the pre-eminence of any one method over another or any obligation to initiate the procedures; instead, if either of the parties invokes the procedure of "investigation and conciliation" (Article XVI) and any party may request the Permanent Council of the Organization of American States to convoke the Commission of Investigation and Conciliation. If the Commission's efforts are unable to produce a solution, this entitles either of the parties, if they have not agreed upon an arbitral procedure, to have recourse to the International Court of Justice. In this case, the Court shall have compulsory jurisdiction, in accordance with Article 36, paragraph 1, of its Statute (Article XXXII). If the Court, which has the right to decide on its own jurisdiction (Article XXXIII), should declare itself without jurisdiction to hear the controversy, for the general reasons mentioned in Articles V, VI and VII of the Treaty, the controversy shall be declared ended (Article XXXIV); but if the Court for any other reason declares itself to be without jurisdiction to hear and adjudge the controversy, the contracting parties are obligated to submit it to arbitration in accordance with the provisions of the pertinent Chapter of the Pact (Article XXXV). In any event, recourse to the International Court of Justice is available to the parties inasmuch as they declare that they recognize the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the Treaty may be in effect, in all disputes of a juridical nature that are specified in the text of the Pact itself (Article XXXI).

This is the system set up under the Pact of Bogotá with respect to the automatic sequence of procedures. When matters reach the point of compulsory arbitration, should one of the parties fail to designate its arbiter and/or fail to present its list of candidates within a period of two months, the other party shall have the right to request the Permanent Council of the Organization to establish the Arbitral Tribunal, in accordance with the manner established in the Pact itself (Article XLV). If, moreover, the parties fail to draw up an agreement clearly defining the specific matter that is the subject of the controversy within three months as of the date the Tribunal is installed, that agreement "shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties" (Article XLIII).

The latter sequence and the legal possibility that arbitration could be done without one of the States parties to the dispute participating is what has come to be called the automatism of the Treaty and arbitration by default, respectively.

Examination of the Pact

The Committee conducted its examination bearing in mind the sense of the Permanent Council's request of the Inter-American Juridical Committee and the advisability of trying to make the Pact of Bogotá more viable. Nonetheless, it was fully aware that the time limitation was such that it would not be able to look into the possible reasons why so many member States of the OAS have not ratified the Pact. This would have meant contacting several government and non-government sources to supply suitable information on this subject. To do this, an adequate time frame would have been necessary, as would the willingness of those sources to supply concrete information, if that information is available. The Committee did not go into that aspect of the topic for that reason.

Although the Committee examined each one of the procedures in their entirety, to substantiate the Committee's position as clearly as possible, it has made specific reference to those articles for which the Committee is recommending amendments.

CHAPTER ONE

Article II: The first paragraph of this article is poorly worded, inasmuch as it is not possible to *recognize the obligation to settle* international controversies by regional pacific procedures before referring them to the Security Council of the United Nations since, if those controversies were resolved, there would be nothing to bring to the Security Council. This point ought to be corrected for this reason, and in order to co-ordinate the texts of the inter-American instruments. Therefore, the Committee feels that this article could be worded in a manner similar to that used in the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance in the amendment of Article 2 thereof. In the Protocol, it is now clear that it is not compulsory to exhaust regional remedies before going to the UN Security Council or to the General Assembly, in accordance with Article 52, paragraph 4, of the United Nations Charter. That point is also addressed in the Committee's opinion of August 21, 1984. Dr. Roberto MacLean felt that that paragraph need not be included at all.

Furthermore, the Committee approved a draft amendment to this article, presented by Dr. Emilio Rabasa. The purpose was to make the Pact more precise and broader on two points: *(a)* the special procedures, that the parties may elect to find a solution: and *(b)* that the provision — and ultimately the Pact — encourage and embrace certain initiatives that the member States of the Organization of American States may undertake for the peaceful settlement of disputes.

The draft amendment approved means that the final part of the second paragraph of Article II would be deleted. That part reads as follows: "or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution". This would be replaced by two separate paragraphs, to follow immediately after the second paragraph, and to read as follows:

> "In addition to the procedures established in this Pact, the parties to a controversy may, by common agreement, opt for any other suitable and expeditious means.
>
> Furthermore, any Member State or group of Member States of the Organization of American States, with the prior and express consent of all parties to a given dispute, may assist in the manner they deem appropriate, in resolving the dispute peacefully."

When continuing with the examination, the Rapporteur recalled that in the draft amendments to the Charter produced by CEESI and reviewed by the Permanent Council, and in the current draft in process in its Committee on Juridical and Political Affairs, those articles that discuss peaceful settlement of disputes make reference to "existing" controversies rather than those that "arise or may arise" between States parties.

The Rapporteur also pointed out that in inter-American treaties such as the one on Conciliation or the one on Arbitration (1929), reference is made to controversies that "have arisen or may arise". Article XXXVIII of the Pact itself calls arbitration a procedure for differences of any kind that "have arisen or may arise" in the future between the parties. This text leaves no

doubt whatever that the provision embraces not just potential future controversies but rather all controversies. The corresponding article of the Protocol of Amendments to the Inter-American Treaty of Reciprocal Assistance also took this approach when it amended the current wording of Article 2 of the Rio Treaty to read as follows:

> "As a consequence of the principles set forth in the preceding article, the High Contracting Parties undertake to settle their disputes with one another by peaceful means. The High Contracting Parties shall make every effort to achieve the peaceful settlement of disputes through procedures and mechanisms provided for in the inter-American system before submitting them to the Security Council of the United Nations. This provision shall not be interpreted as an impairment of the rights and obligations of the states parties under articles 34 and 35 of the Charter of the United Nations."

When paragraph 2 was put to a vote, with the amendment suggested by the Rapporteur, it was approved by seven votes. Dr. MacLean indicated that he preferred the present wording of the text of the Pact. The text so approved is the following:

> "Consequently, should there be a controversy between two or more signatory States which . . .", etc.

The text of paragraph 2 of Article II was also reviewed with respect to the discrepancy created by the fact that the Pact makes reference to the fact that in the event that a controversy arises between two or more signatory States which, "*in the opinion of the parties*", cannot be settled by direct negotiation, the parties bind themselves to use the procedures established in the Treaty. On the other hand, Article 25 of the OAS Charter provides that in such a circumstance it would suffice to have the "opinion *of one* of them" that the controversy cannot be settled through the usual diplomatic channels, thus allowing recourse to any of the means the Pact provides.

Here the Rapporteur himself added to his own information on this point by citing an explanatory note that appears in a study prepared by Dr. Juan Carlos Puig, entitled "The Inter-American Treaty of Reciprocal Assistance and the Contemporary International System", published in the 1983 edition of the *Anuario Jurídico* of the Organization of American States, page 173. That note and the documentation cited therein contend that the change in the Spanish version of the Pact of Bogotá was due to a typing error. The note goes on to say that the French text is consistent with that of the Charter of the Organization and is equally authentic. It was established that the French text follows the text of the draft prepared by the Inter-American Juridical Committee in 1947 and that of Article 25 of the OAS Charter.

Although there was a motion by the Rapporteur that an adjustment in the text be recommended to make it consistent with the French version, which was in complete agreement with Article 25, the amendment voted on for that particular phrase of the second paragraph of Article II was that it read "in the opinion of one of the parties". That amendment carried the votes of Drs. Leoro, Vieira, Callejas Bonilla, Rabasa and Waaldijk.

Dr. Herrera Marcano motioned that the phrase in question "in the opinion of the parties" be deleted. When a vote was taken, only two favorable votes were cast, that of the proponent and that of the Chairman who said that he voted for this second draft amendment as an alternative that would have at least improved the text of the article.

Hence, the Committee is suggesting that Article II of the Pact read as follows:

> "*Article II:* The High Contracting Parties shall make every effort to achieve the peaceful settlement of international disputes among themselves through regional peaceful procedures, before submitting them to the General Assembly or to the Security Council of the United Nations.
>
> This provision shall not be interpreted as an impairment of the rights and obligations of the States parties under Article 52, paragraph 4, of the Charter of the United Nations.
>
> Consequently, should there be a controversy between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles.
>
> In addition to the procedures established in this Pact, the parties to a controversy may, by common agreement, opt for any other suitable and expeditious means.
>
> Moreover, any Member State or group of Member States of the Organization of American States, with the prior and express consent of all parties to a controversy, may assist in the manner they deem appropriate in resolving the controversy peacefully."

Article V: With respect to this article, which provides that the procedures of the Pact may not be applied to matters "which, by their nature, are within the domestic jurisdiction of the State", it was agreed to leave the text as is, even though a member of the Committee, Dr. Luis Herrera Marcano, submitted a draft amendment worded as follows:

> "The present Treaty shall not be applied to matters that, by their nature, are within the domestic jurisdiction of the State. Upon ratifying this Treaty, or at any time thereafter, each State may declare that it accepts the compulsory jurisdiction of the International Court of Justice to settle any dispute as to whether or not a matter is, by its nature, within the domestic jurisdiction of a State."

A subamendment proposed by Dr. MacLean added the words "on the basis of reciprocity" so that the amendment would read: ". . . may declare that it accepts, on the basis of reciprocity, the compulsory jurisdiction . . .", etc.

Two votes were cast in favor of that draft amendment. The other members voted against it.

Article VI: With respect to this article, which provides that

> "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty",

the Committee agreed to make the clarification suggested by the Rapporteur. Under international law and as embodied in instruments such as the "Vienna Convention on the Law of Treaties", when circumstances such as those described under Chapter V of that Convention obtain, this paves the way for legitimate action on the part of the State vis-à-vis treaties being void or valid,

which is a point that is entirely different from the provision contained in Article VI of the Pact. In effect, a treaty neither resolves nor can it resolve the question of whether or not it is valid. These questions would have to be resolved, but never resolved by the treaties themselves. Hence, the principle *pacta sunt servanda* does not apply to them and they are not included under the provision of the Pact of Bogotá in question. In this respect, Dr. MacLean felt that the clarification was redundant.

Dr. Herrera Marcano, for his part, proposed that the phrase "the aforesaid procedures . . . may not be applied" be replaced by "the present Treaty shall not be applicable . . .". This wording received one vote.

Article VII: There was an interesting discussion concerning a well-entrenched Latin American principle dating back to the Calvo and Drago doctrines. The conclusion reached was that under the present circumstances the provision was a very important step toward preventing any diplomatic representation from protecting a national and from referring a controversy to a court of international jurisdiction for that purpose when said national has been afforded the means to place his case before the competent domestic courts of the respective State.

Dr. Herrera Marcano was of the view that it would be best to delete that article, in order to avert any tacit recognition of diplomatic protection.

He emphasized that the underlying assumption of diplomatic protection was the denial of justice and that the provisions of the American Convention on Human Rights in this respect ought to be taken into account. He submitted a draft to replace Article VII, which reads as follows: "Any controversy between the parties that concerns the existence or nonexistence of a case of denial of justice, shall be governed by the provisions of the American Convention on Human Rights." The proposal received only one vote.

Article VIII: When the text of this article was discussed, two of the members concurred that the provision could easily be deleted since it seemed to them superfluous. The Committee felt that it would be best to retain the article as it is presently worded.

CHAPTER TWO

Procedures of Good Offices and Mediation

Chapter Two, which covers the "Procedures of Good Offices and Mediation", was the subject of minor observations.

The Committee decided that Articles IX and XI ought to be amended so that the eminent citizens that provide their good offices or mediation should be citizens of not just "any American State", but rather "eminent individuals" of any nationality. The Committee agreed on that point and recommended that the amendment be introduced in Articles IX and XI.

As a result of the amendment recommended for Article IX, Article X was changed to read "the individuals" rather than "the citizens".

The articles in question would be worded as follows:

> "*Article IX:* The procedure of good offices consists in the attempt by one or more American Governments or one or more eminent individuals not a party to the controversy, to bring parties together, so as to make it possible to reach an adequate solution between themselves.
>
> *Article X:* Once the parties have been brought together and have resumed direct negotiations, no further action is to be taken by the State

or individuals that have offered their good offices or have accepted an invitation to offer them; they may, however, by agreement between the parties, be present at the negotiations.

Article XI: The procedure of mediation consists in the submission of the controversy to one or more American Governments not parties to the controversy, or to one or more eminent individuals not a party to the controversy. In either case, the mediator or mediators shall be chosen by mutual agreement between the parties."

Article XIII: During the discussion of this article, it was noted that the deadline given to the parties to reach an agreement on the choice of the mediator or mediators (two months) and that given for mediation to begin and to reach a solution (five months), would seem to be very short, particularly the latter. The circumstances of a given controversy ought to be taken into account so as to extend those deadlines, whenever necessary.

CHAPTER THREE

Procedure of Investigation and Conciliation

The entire chapter on this procedure was examined. The view was that the method for setting up a Commission of Investigation and Conciliation ought to be simplified. Under the terms of the Pact of Bogotá, a series of bilateral notes between the States Parties and a large number of conciliators are required, over and above the Permanent Panel of American Conciliators.

Dr. Herrera Marcano adhered to the position reflected in the following draft amendment for Article XV, which he presented to the Committee for its consideration:

"Upon ratifying this Treaty or at any time thereafter, each State may declare that it accepts, on the basis of reciprocity, the obligation to submit to conciliation, based on the terms of the present Treaty, any controversy that may arise between it and any other State Party."

When voted on, the proposed amendment did not win a majority of the votes.

For his part, the Chairman said that as he had said in his rapporteur's report, he was submitting a draft amendment to the Committee which he suggested be the first paragraph of what is now Article XV.

He went on to say that in his view, in the event of a controversy, conciliation ought to be binding upon the parties. The precedent was Article 1 of the General Convention on Inter-American Conciliation (1929), and Article 4 of the European Convention for Peaceful Settlement of Disputes (1957), and another article in the Revised Act for the Peaceful Settlement of Disputes of the United Nations (1949). He said that a Treaty of this nature ought to foster fulfillment of the principles on peaceful settlement, reflecting practical acceptance of those principles by an agreement to submit to a compulsory procedure, one such as the procedure in question, conciliation, which was so flexible and so useful. He added that to complement this draft amendment, he would in due course present another to the effect that if a controversy was not settled by conciliation, this ought not necessarily lead to a case before the International Court of Justice or to arbitration, this being something optionally agreed upon by the parties. In this way, conciliation would clearly be a compulsory recourse that would not necessarily be automatic and that could serve its functions without further problems were it binding upon the parties.

The draft amendment that he submitted to this effect read as follows: "The High Contracting Parties shall submit all controversies that exist between them to conciliation."

Five Committee members voted in favor of this proposal: Dr. Leoro, Dr. Callejas Bonilla, Dr. Rabasa, Dr. Vieira and Dr. Ortiz Martín.

As for Articles XVII, XVIII and XIX and with the view to simplifying the method for setting up the Commission of Investigation and Conciliation to serve in the controversy concerned, the Committee approved the amendments suggested by a working group made up of Drs. Leoro, Vieira and Herrera Marcano. These were based on others originally drawn up by the Representative of the General Secretariat and then adjusted by that working group.

The texts that the Committee agreed upon for these articles are as follows:

> "*Article XVII:* Each of the High Contracting Parties may appoint four individuals held in high regard for their impartiality, competence, and sense of honor and willing to accept the functions of conciliator. Only two of these shall be nationals of that State Party.
>
> Any of the Contracting Parties may replace the individuals they designate.
>
> The appointments and replacements shall be registered with the General Secretariat of the Organization of American States.
>
> In the absence of such appointments, it shall be understood that the State is appointing the members of its national group from the Permanent Court of Arbitration of The Hague.
>
> *Article XVIII:* Using the list of individuals referred to in the preceding paragraph, the General Secretariat shall form a Permanent Panel of American Conciliators.
>
> *Article XIX:* In establishing the Commission of Investigation and Conciliation referred to in Article XVI, the following procedures shall be followed:
>
> *(a)* each Party may designate one or two members from the Permanent Panel of American Conciliators, who shall not be nationals of the appointing State;
> *(b)* these two or four members shall in turn select, from the Permanent Panel, a third or fifth conciliator, as the case may be, who shall not be a national of either of the parties;
> *(c)* if within thirty days of having been notified of their selection, the members referred to in subparagraph *(a)* are unable to reach an agreement on the choice of the third or fifth member, each one shall separately draw up a list of conciliators, drawing from the Permanent Panel and listed in the order of preference; after comparing the lists so prepared, that member who first receives a majority of votes shall be declared selected. The individual so selected shall serve as Chairman of the Commission."

CHAPTER FOUR

Judicial Procedure

One of the features of the Pact has been recognition of the compulsory jurisdiction of the International Court of Justice for controversies considered to be of a legal nature under the terms of Article XXXI. To amend this important point, Dr. Herrera Marcano proposed that the article read as follows:

"When ratifying the present Treaty or at any time thereafter, each State may declare that it recognizes, on the basis of reciprocity, with respect to any other American States . . ., etc."; the rest of the text would remain the same.

The proposal did not receive the votes needed to be approved and therefore the text of Article XXXI of the Pact would remain as is.

In reference to Article XXXII, which institutes the automatic procedure when a controversy has not been solved by means of conciliation, Dr. Herrera Marcano proposed an amendment, worded as follows:

> "When ratifying the present Treaty or at any time thereafter, each State may declare that it accepts, on the basis of reciprocity, as binding *ipso facto*, the jurisdiction of the Inter-American Court of Justice with respect to any controversy that has been submitted to conciliation under the terms of this Treaty and that has not been resolved, without the need for any special intervention so long as this Treaty remains in effect."

This proposal received one vote.

For his part, Dr. Vieira said that a different approach might be to word the text as follows: "If a conciliated agreement is not reached, any of the other procedures for peaceful settlement established in this Treaty shall be instituted without delay."

The Chairman said that either way, the amendments suggested would put an end to any form of automatism within the Pact; he went on to say that perhaps some consideration ought to be given to finding some method, as he had suggested as Rapporteur for the topic, that would allow any State that so desired to opt for the automatic procedure.

With that in mind, he submitted a draft amendment to Article XXXII for consideration. That amendment was approved by a vote of six in favor and one against. The text is as follows:

> "When the procedure of conciliation established in accordance with this Treaty does not lead to a solution, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of said Statute."

Drs. Herrera Marcano and Vieira then proposed the deletion of Articles XXXIII, XXXIV and XXXV, in the view that these were the articles that led to the next step of arbitration by default which, in their judgment, was an unworkable means of settlement. They went on to say that the other articles in this chapter were redundant, since they simply repeated the content of the Statute of the International Court of Justice.

In regard to that proposal, the Chairman said that this would mean an end to compulsory arbitration and arbitration by default in the Pact, which would still be an option, even with the new wording adopted by the Committee for Article XXXII. He said that if the Committee favored deletion of that type of arbitration, which was one of the possibilities he had pointed up in his report, he would vote in favor of deletion of those articles if a motion were made to that effect.

A motion was made and when put to a vote deletion of Articles XXXIII, XXXIV, XXXV, XXXVI and XXXVII was approved by the Committee.

At the request of Dr. Ortiz Martín, it should be noted here that he voted against deletion of Article XXXIII. Deletion of the other articles was approved by a consensus.

Therefore, under the Pact's Judicial Procedure, the Committee's recommendation would leave only Article XXXI, as it is now worded, and Article XXXII, in its amended version shown above.

CHAPTER FIVE

Procedure of Arbitration

When discussion began on this Chapter, which concerns the Pact's Procedure of Arbitration, the Chairman proposed the following draft amendment, bearing in mind the draft amendments adopted by the Committee for Chapter Four to simplify and co-ordinate the text of Article XXXVIII and to remove from it the inappropriate concept whereby, under the terms of the Pact, the parties may, if they so agree, submit to arbitration differences of any kind: "The High Contracting Parties, if they so agree, shall submit to arbitration differences of any kind that may exist between them."

The above proposal received four votes. Dr. MacLean said that he did not vote in favor of that proposal because he had abstained on the earlier articles.

A vote was then taken on a formula proposed by Dr. Herrera Marcano. Its text read as follows:

> "When ratifying the present Treaty or at any time thereafter, each State Party may declare that it accepts, on the basis of reciprocity, the obligation to submit to arbitration, in accordance with the following provisions, any controversy to which the present Treaty applies."

That draft received one vote.

When neither of the two amendments proposed for Article XXXVIII carried, the Chairman said that it would seem absolutely essential that at least the opening phrase of this provision be dropped; with deletion of Articles XXXIII through XXXVIII of the Pact, it would no longer make sense. He submitted the following text to the Committee's consideration, which was approved by a consensus:

> "*Article XXXVIII:* The High Contracting Parties may, if they so agree, submit to arbitration differences of any kind, whether juridical or not, that have arisen or may arise in the future between them."

There was also a consensus in favor of an amendment proposed for Article XXXIX, consisting of the deletion of the words "in the cases contemplated in Articles XXXV and XXXVIII of the present Treaty", since any reference to Article XXXV was particularly pointless now that the Committee had recommended its deletion. Therefore, the text agreed upon was as follows:

> "*Article XXXIX:* The Arbitral Tribunal to which a controversy is to be submitted shall be constituted in the following manner, unless there exists an agreement to the contrary."

Following an exchange of views and in response to a motion made by Dr. Emilio Rabasa, a Working Group was established, made up of Drs. Leoro, Vieira and Herrera, to present a working paper containing suggested amendments for the remaining articles, bearing in mind the progress made thus far by way of amendments to the Pact. Any members that so desired could join the Group.

The Working Group presented a document, dated August 24, containing its recommendations. That document is attached.

Having examined that document and having heard the reasons why the Working Group had suggested the amendments in question, the Committee as a whole, at odds with the Working Group's position but with the consent of its members, recommended the deletion of Article XXXIX, since in effect the provision contained therein was not necessary, not even with the amendment introduced by the Working Group.

Following the group's recommendation, the Committee agreed to make what is now Article XLI, Article XL and to make Article XL Article XLI, since this would seem to be the more logical order for those provisions.

At the same time, since present Article XL (XLI in the Committee's recommended version) makes reference to a two-month time period from the time of "notification of the Court's decision in the case provided for in Article XXXV", and since the opportunity for the Court to render judgment was eliminated when deletion of Article XXXV was recommended, the Committee decided, by a consensus, to approve the amendment proposed by the Group, so that the two-month time period be counted as "of the date of the agreement" between the parties to submit a controversy to arbitration. Further, the Group recommended that at the beginning of the article, specific reference be made to the preceding article in the Pact. Therefore, the Committee recommended that the article be worded as follows:

> "*Article XLI:* If the procedure set forth in the preceding article is not carried out within two months of the date of the agreement, each party shall name one arbiter of recognized competence in questions of international law and of the highest integrity, and shall transmit the designation to the Permanent Council of the Organization of American States. At the same time . . ."

In connection with Article XLIII, paragraph two, the Group suggested the following wording:

> "If the special agreement cannot be drawn up within three months after the date of the *installation* of the Tribunal (as the article is now worded), it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the Parties, *unless the Parties instruct the Tribunal to draw up said agreement.*"

The Committee felt that it would be better to substitute the word "installation" with "formation" since the membership of the Tribunal would be determined before it was installed; installation is, in all likelihood, something that would have to be determined in the agreement to which this article refers.

The consensus on the Committee was to approve the phrase italicized above at the end of the second paragraph of Article XLIII, so that the Parties could also go to the Tribunal itself to have that agreement drawn up. There is a similar provision in Article IV, paragraph two, of the General Treaty of Inter-American Arbitration, which is in force with respect to a number of member States of the Organization of American States.

Thus, there being no amendment to the first paragraph, the Committee recommended the following wording for the second paragraph of Article XLIII:

> "If the special agreement cannot be drawn up within three months of the date of the formation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the Parties, unless the Parties instruct the Tribunal to draw up said agreement."

The consensus on the Committee was to delete Article XLV, as the Working Group had recommended, since Article XXXV had already been deleted, which was one of those that had led to arbitration by default. Having deleted that provision, the Committee was of the view that this obligatory procedure ought not to be retained, one whereby the Permanent Council would have to intervene to establish the Tribunal of Arbitration if any Party failed to designate the arbiter.

The Committee had no observations with respect to Articles XLVI, XLVII and XLVIII of the Pact.

Following the Working Group's suggestion, it was decided to delete from Article XLIX the stipulation to the effect that if the parties do not agree on the amount of financial remuneration, the Permanent Council of the Organization shall determine said remuneration. If arbitration is conducted in accordance with the amendments being suggested, i.e., only by mutual agreement of the parties, then said parties should have no difficulty in agreeing upon those expenses. With arbitration by default, which the Committee decided to delete, the possibility of such a problem was not so remote. The article in question was so approved, by consensus, to read as follows:

> "*Article XLIX:* Every member of the Tribunal shall receive financial remuneration, the amount of which shall be fixed by agreement between the Parties. Each Government shall pay its own expenses and an equal share of the common expenses of the Tribunal, including the aforementioned remunerations."

CHAPTER SIX

Fulfillment of Decisions

Although a question arose when the Committee discussed Article L — which is the only one in this chapter —, concerning what measures the Meeting of Consultation could agree upon should one of the parties fail to comply with the obligations imposed upon it by a decision of the International Court of Justice or an arbitral award, the Committee was in favor of retaining the article as it appears in the Pact. It felt that it was a potential means of resolving within the inter-American system the problem that the article itself poses, before it goes to the United Nations Security Council.

The conclusion reached was that, in any event, if any of the parties involved in a case of the kind provided for in Article 50 of the Pact wished to bring it to the Security Council, it would be free to do so under Article II of the Pact itself, if amended in the manner suggested by the Committee and, of course, in accordance with the provisions of Article 52, paragraph 4, of the United Nations Charter.

CHAPTER SEVEN

Advisory Opinions

Endorsing an amendment proposed for Article LI, suggested by Dr. Rabasa, the Committee decided, by a majority, that that article should also include the Inter-American Juridical Committee as one of the organs from which an advisory opinion could be requested.

The agreed upon text was as follows:

> "*Article LI:* The parties concerned in the solution of a controversy

may, by agreement, petition the General Assembly or the Security Council of the United Nations to request an advisory opinion of the International Court of Justice on any juridical question. They may also request one of the Inter-American Juridical Committee.

In both cases, the petition shall be made through the Permanent Council of the Organization of American States."

CHAPTER EIGHT

Final Provisions

The Committee had no observations with respect to Articles LII, LIII, LIV, LV, LVI, LVII, LVIII, LIX and LX of the Pact.

Dr. Herrera Marcano proposed an amendment, by way of an additional article to be included among the final provisions. The text would read as follows: "Nothing in the present Treaty may be interpreted as impairing or replacing the provisions of the American Convention on Human Rights, signed in San José, Costa Rica, in 1969."

In connection with this proposal, views were expressed to the effect that it would be inadvisable to introduce such a provision, since the Committee had in no way recommended any amendment to the articles of the Pact that could be interpreted to impair the provisions of the American Convention on Human Rights.

Overall, the Committee was in favor of amending, throughout the Pact, the references to the Council of the Organization and to the Pan American Union, to replace them, respectively, with references to the Permanent Council and to the General Secretariat of the Organization of American States.

Having compiled the suggested amendments that the Inter-American Juridical Committee agreed upon, a chart was drawn up comparing the provisions, juxtaposing the recommended changes to the present text of the Pact. That chart is attached.

The Inter-American Juridical Committee examined the Pact of Bogotá and rendered its opinion on possible amendments with the obvious purpose of co-operating in the effort to make that instrument as viable as possible, since it ought to be applied extensively and constructively within the inter-American system.

If the suggested amendments are adopted, they would give the American Treaty of Pacific Settlement a new aspect.

It would become an inter-American instrument for the peaceful settlement of disputes, which would contain general restrictive standards concerning its applicability; it would outline, one by one, the procedures of good offices, mediation, investigation and conciliation, the judicial procedure and the arbitral procedure that the parties would have available to them; it would not establish any order with respect to the use of those methods, nor make recourse to them compulsory; however, if any party should resort to the procedure of "investigation and conciliation" provided for therein and if at the outset of this procedure the parties so agree, if no solution to the controversy is found by means of that procedure, any of the parties shall be entitled to recourse to the International Court of Justice in which case the jurisdiction of the Court shall be binding, in accordance with the first paragraph of Article 36 of its Statute (Article XXXII, as amended).

Moreover, under this new instrument, recourse to the International Court of Justice would be open to the parties through recognition of the binding

jurisdiction *ipso facto* without a need for any special convention so long as this Treaty is in effect, for all controversies of a juridical nature specified in the Treaty itself (Article XXXI).

If by agreement of the parties to a dispute for which no solution has been found by means of the procedure of Conciliation provided for in the Treaty, that controversy is to go to the International Court of Justice, then the case would go to that Court, in which case its jurisdiction would be binding for controversies of any kind, in accordance with Article 36, paragraph 1, of its Statute (Article XXXII, as amended). The procedures of Good Offices, Mediation and Arbitration will be agreed upon by the parties and, in the case of Conciliation, each party, separately, shall be entitled to turn to the Permanent Council for it to convoke a Commission of Investigation and Conciliation (Article XV).

Furthermore, it would allow for a wide range of possible friendly measures on the part of a State or group of member States to settle a controversy peacefully, whenever the parties to the controversy so consent. All of this is a clear recognition of the relevance of that kind of participation on the part of the States, which is observed in the Pact now in force.

Finally, in response to a motion made by Dr. Herrera Marcano, the Inter-American Juridical Committee agreed to make a general recommendation to the effect that the text of the amendments suggested in this document be duly co-ordinated with the texts of amendments adopted for the Charter of the OAS and other inter-American instruments.

It should be pointed out that at the start of the meetings held to examine the Pact of Bogotá, all of the members of the Committee were present until August 17; Drs. Rubin and Vanossi were not present after August 20, and Dr. Rabasa did not participate from August 26 and thereafter. All these individuals had to leave Rio de Janeiro.

The Committee wishes to point out that Dr. Emilio Rabasa cast his vote for the adoption of all the recommendations made by the Committee, and also voted in favor of other draft amendments. Dr. Rabasa himself said in one of the meetings that had he been able to be present, he would have signed this report as well, and fully concurred with its recommendations.

Consequently, after having approved the recommended amendments discussed in this report and by the votes indicated therein, the Inter-American Juridical Committee presents below, in consecutive order, the draft amendments to the Pact of Bogotá:

CHAPTER ONE

GENERAL OBLIGATION TO SETTLE DISPUTES BY PACIFIC MEANS

Article I

The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures.

Article II

The High Contracting Parties shall make every effort to achieve the peace-

ful settlement of international disputes among themselves through regional peaceful procedures, before submitting them to the General Assembly or to the Security Council of the United Nations.

This provision shall not be interpreted as an impairment of the rights and obligations of the States parties under Article 52, paragraph 4, of the Charter of the United Nations.

Consequently, should there be a controversy between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles.

In addition to the procedures established in this Pact, the parties to a controversy may, by common agreement, opt for any other suitable and expeditious means.

Moreover, any member State or group of member States of the Organization of American States, with the prior and express consent of all parties to a controversy, may assist in the manner they deem appropriate in resolving the controversy peacefully.

Article III

The order of the pacific procedures established in the present Treaty does not signify that the parties may not have recourse to the procedure which they consider most appropriate in each case, or that they should use all these procedures, or that any of them have preference over others except as expressly provided.

Article IV

Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded.

Article V

The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties.

Article VI

The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.

Article VII

The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals

have had available the means to place their case before competent domestic courts of the respective State.

Article VIII

Neither recourse to pacific means for the solution of controversies, nor the recommendation of their use, shall, in the case of an armed attack, be ground for delaying the exercise of the right of individual or collective self-defense, as provided for in the Charter of the United Nations.

CHAPTER TWO

PROCEDURES OF GOOD OFFICES AND MEDIATION

Article IX

The procedure of good offices consists in the attempt by one or more American Governments or one or more eminent individuals not a party to the controversy, to bring the parties together, so as to make it possible to reach an adequate solution between themselves.

Article X

Once the parties have been brought together and have resumed direct negotiations, no further action is to be taken by the State or individuals that have offered their good offices or have accepted an invitation to offer them; they may, however, by agreement between the parties, be present at the negotiations.

Article XI

The procedure of mediation consists in the submission of the controversy to one or more American Governments not parties to the controversy, or to one or more eminent individuals not a party to the controversy. In either case, the mediator or mediators shall be chosen by mutual agreement between the parties.

Article XII

The functions of the mediator or mediators shall be to assist the parties in the settlement of controversies in the simplest and most direct manner, avoiding formalities and seeking an acceptable solution. No report shall be made by the mediator and, so far as he is concerned, the proceedings shall be wholly confidential.

Article XIII

In the event that the High Contracting Parties have agreed to the procedure of mediation but are unable to reach an agreement within two months on the selection of the mediator or mediators, or no solution to the controversy has been reached within five months after mediation has begun, the

parties shall have recourse without delay to any one of the other procedures of peaceful settlement established in the present Treaty.

Article XIV

The High Contracting Parties may offer their mediation, either individually or jointly, but they agree not to do so while the controversy is in process of settlement by any of the other procedures established in the present Treaty.

CHAPTER THREE

PROCEDURE OF INVESTIGATION AND CONCILIATION

Article XV

The procedure of investigation and conciliation consists in the submission of the controversy to a Commission of Investigation and Conciliation, which shall be established in accordance with the provisions established in subsequent articles of the present Treaty, and which shall function within the limitations prescribed therein.

Article XVI

The party initiating the procedure of investigation and conciliation shall request the Council of the Organization of American States to convoke the Commission of Investigation and Conciliation. The Council for its part shall take immediate steps to convoke it.

Once the request to convoke the Commission has been received, the controversy between the parties shall immediately be suspended, and the parties shall refrain from any act that might make conciliation more difficult. To that end, at the request of one of the parties, the Council of the Organization of American States may, pending the convocation of the Commission, make appropriate recommendations to the parties.

Article XVII

Each of the High Contracting Parties may appoint four individuals held in high regard as to their impartiality, competence, and sense of honor and willing to accept the functions of conciliator. Only two of these shall be nationals of that State Party.

Any of the Contracting Parties may replace the individuals they designate.

The appointments and replacements shall be registered with the General Secretariat of the Organization of American States.

In the absence of such appointments, it shall be understood that the State is appointing the members of its national group from the Permanent Court of Arbitration of The Hague.

Article XVIII

Using the list of individuals referred to in the preceding paragraph, the General Secretariat shall form a Permanent Panel of American Conciliators.

Article XIX

In establishing the Commission of Investigation and Conciliation referred to in Article XVI, the following procedures shall be followed:

(a) Each party may designate one or two members from the Permanent Panel of American Conciliators, who shall not be nationals of the appointing State;

(b) These two or four members shall in turn select, from the Permanent Panel, a third or fifth conciliator, as the case may be, who shall not be a national of either of the parties;

(c) If within thirty days of having been notified of their selection, the members referred to in subparagraph *(a)* are unable to reach an agreement on the choice of the third or fifth member, each one shall separately draw up a list of conciliators, drawing from the Permanent Panel and listed in the order of preference; after comparing the lists so prepared, that member who first receives a majority of votes shall be declared selected. The individual so selected shall serve as Chairman of the Commission.

Article XX

In convening the Commission of Investigation and Conciliation, the Council of the Organization of American States shall determine the place where the Commission shall meet. Thereafter, the Commission may determine the place or places in which it is to function, taking into account the best facilities for the performance of its work.

Article XXI

When more than two States are involved in the same controversy, the States that hold similar points of view shall be considered as a single party. If they have different interests they shall be entitled to increase the number of conciliators in order that all parties may have equal representation. The chairman shall be elected in the manner set forth in Article XIX.

Article XXII

It shall be the duty of the Commission of Investigation and Conciliation to clarify the points in dispute between the parties and to endeavor to bring about an agreement between them upon mutually acceptable terms. The Commission shall institute such investigations of the facts involved in the controversy as it may deem necessary for the purpose of proposing acceptable bases of settlement.

Article XXIII

It shall be the duty of the parties to facilitate the work of the Commission and to supply it, to the fullest extent possible, with all useful documents and information, and also to use the means at their disposal to enable the Commission to summon and hear witnesses or experts and perform other tasks in the territories of the parties, in conformity with their laws.

Article XXIV

During the proceedings before the Commission, the parties shall be represented by plenipotentiary delegates or by agents, who shall serve as intermediaries between them and the Commission. The parties and the Commission may use the services of technical advisers and experts.

Article XXV

The Commission shall conclude its work within a period of six months from the date of its installation; but the parties may, by mutual agreement, extend the period.

Article XXVI

If, in the opinion of the parties, the controversy relates exclusively to questions of fact, the Commission shall limit itself to investigating such questions, and shall conclude its activities with an appropriate report.

Article XXVII

If an agreement is reached by conciliation, the final report of the Commission shall be limited to the text of the agreement and shall be published after its transmittal to the parties, unless the parties decide otherwise. If no agreement is reached, the final report shall contain a summary of the work of the Commission; it shall be delivered to the parties, and shall be published after the expiration of six months unless the parties decide otherwise. In both cases, the final report shall be adopted by a majority vote.

Article XXVIII

The reports and conclusions of the Commission of Investigation and Conciliation shall not be binding upon the parties, either with respect to the statement of facts or in regard to questions of law, and they shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate a friendly settlement of the controversy.

Article XXIX

The Commission of Investigation and Conciliation shall transmit to each of the parties, as well as to the Pan American Union, certified copies of the minutes of its proceedings. These minutes shall not be published unless the parties so decide.

Article XXX

Each member of the Commission shall receive financial remuneration, the amount of which shall be fixed by agreement between the parties. If the parties do not agree thereon, the Council of the Organization shall determine the remuneration. Each government shall pay its own expenses and an equal share of the common expenses of the Commission, including the aforementioned remunerations.

CHAPTER FOUR

JUDICIAL PROCEDURE

Article XXXI

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

Article XXXII

When the procedure of conciliation established in accordance with this Treaty does not lead to a solution, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of said Statute.

Article XXXIII

(Deleted)

Article XXXIV

(Deleted)

Article XXXV

(Deleted)

Article XXXVI

(Deleted)

Article XXXVII

(Deleted)

CHAPTER FIVE

PROCEDURE OF ARBITRATION

Article XXXVIII

The High Contracting Parties may, if they so agree, submit to arbitration

differences of any kind, whether juridical or not, that have arisen or may arise in the future between them.

Article XXXIX

(Deleted)

Article XL

The parties may by mutual agreement establish the Tribunal in the manner they deem most appropriate; they may even select a single arbiter, designating in such case a chief of state, an eminent jurist, or any court of justice in which the parties have mutual confidence.

Article XLI

If the procedure set forth in the preceding article is not carried out within two months of the date of the agreement, each party shall name one arbiter of recognized competence in questions of international law and of the highest integrity, and shall transmit the designation to the Permanent Council of the Organization of American States. At the same time each party shall present to the Council a list of ten jurists chosen from among those on the general panel of members of the Permanent Court of Arbitration of The Hague who do not belong to its national group and who are willing to be members of the Arbitral Tribunal.

The Council of the Organization shall, within the month following the presentation of the lists, proceed to establish the Arbitral Tribunal in the following manner:

(a) If the lists presented by the parties contain three names in common, such persons, together with the two directly named by the parties, shall constitute the Arbitral Tribunal;

(b) In case these lists contain more than three names in common, the three arbiters needed to complete the Tribunal shall be selected by lot;

(c) In the circumstances envisaged in the two preceding clauses, the five arbiters designated shall choose one of their number as presiding officer;

(d) If the lists contain only two names in common, such candidates and the two arbiters directly selected by the parties shall by common agreement choose the fifth arbiter, who shall preside over the Tribunal. The choice shall devolve upon a jurist on the aforesaid general panel of the Permanent Court of Arbitration of The Hague who has not been included in the lists drawn up by the parties;

(e) If the lists contain only one name in common, that person shall be a member of the Tribunal, and another name shall be chosen by lot from among the eighteen jurists remaining on the above-mentioned lists. The presiding officer shall be elected in accordance with the procedure established in the preceding clause;

(f) If the lists contain no names in common, one arbiter shall be chosen by lot from each of the lists; and the fifth arbiter, who shall act as presiding officer, shall be chosen in the manner previously indicated;

(g) If the four arbiters cannot agree upon a fifth arbiter within one month after the Council of the Organization has notified them of their appointment, each of them shall separately arrange the list of jurists in the order

of their preference and, after comparison of the lists so formed, the person who first obtains a majority vote shall be declared elected.

Article XLII

When more than two States are involved in the same controversy, the States defending the same interests shall be considered as a single party. If they have opposing interests they shall have the right to increase the number of arbiters so that all parties may have equal representation. The presiding officer shall be selected by the method established in Article XL.

Article XLIII

The parties shall in each case draw up a special agreement clearly defining the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, the period within which the award is to be handed down, and such other conditions as they may agree upon among themselves.

If the special agreement cannot be drawn up within three months of the date of the formation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties, unless the parties instruct the Tribunal to draw up said agreement.

Article XLIV

The parties may be represented before the Arbitral Tribunal by such persons as they may designate.

Article XLV

(Deleted)

Article XLVI

The award shall be accompanied by a supporting opinion, shall be adopted by a majority vote, and shall be published after notification thereof has been given to the parties. The dissenting arbiter or arbiters shall have the right to state the grounds for their dissent.

The award, once it is duly handed down and made known to the parties, shall settle the controversy definitively, shall not be subject to appeal, and shall be carried out immediately.

Article XLVII

Any differences that arise in regard to the interpretation or execution of the award shall be submitted to the decision of the Arbitral Tribunal that rendered the award.

Article XLVIII

Within a year after notification thereof, the award shall be subject to review by the same Tribunal at the request of one of the parties, provided a previously existing fact is discovered unknown to the Tribunal and to the party

requesting the review, and provided the Tribunal is of the opinion that such fact might have a decisive influence on the award.

Article XLIX

Every member of the Tribunal shall receive financial remuneration, the amount of which shall be fixed by agreement between the parties. Each Government shall pay its own expenses and an equal share of the common expenses of the Tribunal, including the aforementioned remunerations.

CHAPTER SIX

FULFILLMENT OF DECISIONS

Article L

If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or arbitral award.

CHAPTER SEVEN

ADVISORY OPINIONS

Article LI

The parties concerned in the solution of a controversy may, by agreement, petition the General Assembly or the Security Council of the United Nations to request an advisory opinion of the International Court of Justice on any juridical question. They may also request one of the Inter-American Juridical Committee.

In both cases, the petition shall be made through the Permanent Council of the Organization of American States.

CHAPTER EIGHT

FINAL PROVISIONS

Article LII

The present Treaty shall be ratified by the High Contracting Parties in accordance with their constitutional procedures. The original instrument shall be deposited in the Pan American Union, which shall transmit an authentic certified copy to each Government for the purpose of ratification. The instruments of ratification shall be deposited in the archives of the Pan American Union, which shall notify the signatory governments of the deposit. Such notification shall be considered as an exchange of ratifications.

Article LIII

This Treaty shall come into effect between the High Contracting Parties in the order in which they deposit their respective ratification.

Article LIV

Any American State which is not a signatory to the present Treaty, or which has made reservations thereto, may adhere to it, or may withdraw its reservations in whole or in part, by transmitting an official instrument to the Pan American Union, which shall notify the other High Contracting Parties in the manner herein established.

Article LV

Should any of the High Contracting Parties make reservations concerning the present Treaty, such reservations shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity.

Article LVI

The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.

The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.

Article LVII

The present Treaty shall be registered with the Secretariat of the United Nations through the Pan American Union.

Article LVIII

As this Treaty comes into effect through the successive ratifications of the High Contracting Parties, the following treaties, conventions and protocols shall cease to be in force with respect to such parties:

1. Treaty to Avoid or Prevent Conflicts between the American States, of May 3, 1923;
2. General Convention of Inter-American Conciliation, of January 5, 1929;
3. General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration, of January 5, 1929;
4. Additional Protocol to the General Convention of Inter-American Conciliation, of December 26, 1933;
5. Anti-War Treaty of Non-Aggression and Conciliation, of October 10, 1933;
6. Convention to Co-ordinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States, of December 23, 1936;
7. Inter-American Treaty on Good Offices and Mediation, of December 23, 1936;
8. Treaty on the Prevention of Controversies, of December 23, 1936.

Article LIX

The provisions of the foregoing Article shall not apply to procedures already initiated or agreed upon in accordance with any of the above-mentioned international instruments.

Article LX

The present Treaty shall be called the "PACT OF BOGOTÁ".

Rio de Janeiro, August 29, 1985.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

EXPLANATION OF THE VOTE OF DR. MANUEL A. VIEIRA

I have voted in favor of the Committee's suggested amendments to the Pact of Bogotá. I wish, however, to make certain comments on them.

First, the limited amount of time the Committee had to study that important subject and the delay with the respective documentation, particularly the comments of the Secretariat, essential to our studies, are factors that should be taken into account. It must also be considered that our Committee has to deal with other topics on our agenda.

With regard to the content of the document approved by the Committee, I would like to address certain points specifically. Although these have been mentioned in the minutes, in my opinion they warrant an explanation at this time.

First, I wish to point to Article V, which I would end with "internal jurisdiction".

Second, in Article VII, on diplomatic protection, I would have preferred an alternative formula, such as the following:

"(A) claims of nationals may be subject to the mechanism of this Treaty:
  (i) in the event of the denial or delay of justice by the respective States;
  (ii) when they have not had access to the respective courts;
(B) claims by nationals shall be governed by international law;
(C) the Contracting Parties shall consider the possibility of establishing appropriate means to settle these disputes and determine the pertinent procedures for dealing with them lawfully."

In Article XII, I proposed eliminating the confidentiality of the procedures, since on several occasions, publicity of certain actions has had some benefit, as in certain cases that have arisen in the United Nations.

Finally, I should note that I opposed inclusion of the Committee in Article LI, which empowers it to issue advisory opinions. This is one of the powers granted to the International Court of Justice, an organ made up of judges, or if you wish, with a specific judiciary function — both judicial and advisory — while the Committee is made up of jurists, its functions are far from being judicial.

Rio de Janeiro, August 29, 1985.

Manuel A. VIEIRA.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

EXPLANATION OF THE VOTE OF DR. LUIS HERRERA MARCANO, FROM VENEZUELA

I have voted in favor of the preceding Opinion because I consider that, on the whole, it makes useful proposals for amendment of the American Treaty on Pacific Settlement (Pact of Bogotá). Nevertheless, I dissent from that document in respect of the articles shown below, in which I have italicized the wording that I propose:

Article II

First paragraph: same as the Committee's wording.
Second paragraph: same as the Committee's wording.
Third paragraph: Consequently, in the event that a controversy arises between two or more signatory States that cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles.
Fourth paragraph: same as the Committee's wording.
Fifth paragraph: same as the Committee's wording.

Article V

The present Treaty shall not be applied to matters that, by their nature, are within the domestic jurisdiction of the State. *Upon ratifying this Treaty, or at any time thereafter, each State may declare that it accepts the compulsory jurisdiction of the International Court of Justice to decide whether or not a matter is, by its nature, within the domestic jurisdiction of a State.*

Article VI

The present Treaty shall not apply to matters already settled by arrangement between the parties, or by arbitral award, or by decision of an international court, or which are governed by agreements or treaties in force on the date *of the conclusion* of the present Treaty.

Article VII

Any controversy between the parties that concerns the existence or nonexistence of a case of denial of justice, shall be governed by the provisions of the Inter-American Convention on Human Rights.

Article XIII

(Deleted)

Article XV

First paragraph: same as the wording proposed by the Committee.

Second paragraph: *Upon ratifying the present Treaty or at any time thereafter, each State may declare that it accepts, on the basis of reciprocity, the obligation to submit to conciliation, based on the terms of the present Treaty, any controversy that may arise between it and any other State Party.*

Article XXXI

Upon ratifying the present Treaty or at any time thereafter, each State may declare that it accepts, on the basis of reciprocity, as binding *ipso facto*, the jurisdiction of the Inter-American Court of Justice with respect to any controversy that has been submitted to conciliation under the terms of this Treaty and that has not been resolved, without the need for any special intervention so long as this Treaty remains in effect:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

Article XXXII

Upon ratifying the present Treaty or at any time thereafter, each State Party may declare that it accepts, on the basis of reciprocity, as binding ipso facto, *the jurisdiction of the International Court of Justice without the need for any special intervention so long as this Treaty remains in effect, with respect to any controversy that, having been submitted to conciliation under the terms of this Treaty, has not been resolved.*

Article XXXVIII

Upon ratifying the present Treaty or at any time thereafter, each State Party may declare that it accepts, on the basis of reciprocity, the obligation to submit to arbitration, in accordance with the following provisions, any controversy to which the present Treaty applies.

Article XLI

To insert, following the phrase "of the date of the agreement", the following text: "*or from the time which a Contracting Party that has previously accepted the obligation to submit a dispute to arbitration informs the other Party, that has accepted the same obligation, in writing, of its formal decision to proceed to arbitration*".

Additional Article

Nothing contained in the present Treaty may be interpreted as a limitation on or replacement of the provisions of the American Convention on Human Rights, signed at San José, Costa Rica, in 1969.

The reasons why I differ from the majority opinion on the points indicated were expressed in detail at the Committee's session, and appear in the summary minutes. They may be summarized as follows:

I. The Committee's draft retains acceptance of the compulsory nature of recourse to conciliation and to the International Court of Justice as the only solution. I think that if the purpose of this effort is to obtain widespread ratification by the American States, in so far as possible without reservations, it is not possible to ignore the fact that it is precisely that obligatory character that was the subject of various reservations and the reason why some countries have not ratified the Treaty. For this reason, I consider it very doubtful that the amendment proposed by the Committee will substantially change the unsatisfactory status of the Treaty, which is precisely the reason adduced for the amendment.

In contrast, the Committee's proposal eliminates any possibility that a State Party may accept in a prior and general way the obligation to resort to arbitration, and thus would undermine the system now in effect among many States.

For these reasons, I have proposed a system of optional clauses regarding the obligation to resort to conciliation, the International Court of Justice, and arbitration. The system proposed would make possible:

(a) Ratification without substantial reservations by all the member States of the Organization of American States;

(b) The establishment of a network of acceptances among the parties that would achieve, in each bilateral relationship, the maximum degree of compulsory application that the States are in fact willing to accept at present; and

(c) The prospect that in the future the number of acceptances of that compulsory application would gradually increase, until some day the *desideratum* of the airtight system of pacific settlement that the authors of the Bogotá Pact proposed, with more idealism than realism, may be attained.

In this regard, I consider the Inter-American Court of Human Rights a good example. An optional clause on its jurisdiction has been gaining acceptance by the States Parties to the Pact of Bogotá.

II. I have proposed the deletion of Article VII from the present text because I consider that the institution of diplomatic protection, a source of so many abuses in the past, is completely obsolete in general international law currently, and that it should not be recognized in an inter-American treaty, even if only to limit it. The ostensible justification for this juridical exception, i.e., the protection of a State's nationals when their fundamental rights are violated and they are denied justice by another State, lost its rationale in this hemisphere when the system of the American Convention on Human Rights (Pact of San José) was established, since it provides an effective system for the settlement of any dispute that might arise over such matters.

Rio de Janeiro, August 29, 1985.

Luis HERRERA MARCANO.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

EXPLANATION OF THE VOTE OF DR. ROBERTO MACLEAN UGARTECHE

I would have preferred, as reflected in the Opinion of the Committee and the corresponding minutes, not to include the new second paragraph to Ar-

ticle II that reads: "This provision shall not be interpreted as an impairment of the rights and obligations of the States Parties under Article 52, paragraph 4, of the Charter of the United Nations." I think it would have been wiser to refer simply to Article 52, although I consider the mere inclusion of it unnecessary, because it is redundant and may give rise to interpretations with which I have already expressed my disagreement in the explanation of my dissenting vote in August 1984.

I also think, as indicated in the corresponding minutes and the Opinion approved, that, to be consistent with Article 25 of the Charter of the OAS, the word "arises" should not have been replaced by "exists" or "there is". This latter term is vague and imprecise and could conflict with other articles of the Charter.

I also consider the explanation given regarding Article VI inappropriate and unnecessary. It is merely a comment and does not examine or discuss as it should a matter that already has been examined and discussed in international law, especially in the Vienna Convention on the Law of Treaties. Furthermore, it does not propose any amendment to the article, which in the unanimous view of the members of the Committee, should remain as is.

However, my chief concern, consistent with the Committee's decision adopted at its session in August 1971, and reflected in its discussions and the corresponding minutes, is the viability of the Pact. In my opinion, the approved amendments are cosmetic and stylistic, and without diminishing their importance, I think that most could be avoided by a statement of reservations or by interpretation. The principal impediment to the full functioning of the Pact of Bogotá must be sought by other means, in the political will of the parties. Otherwise, any attempt at logic or style is pointless. The social force and effectiveness of Law does not lie in the grammatical correctness of a text or in the clarity and lucidity of the logical structure of a rule, but rather in the collective political will to accept a set of rules in an ongoing search for peace based on respect for the Law.

Rio de Janeiro, August 29, 1985.

Roberto MACLEAN UGARTECHE.

Inter-American Juridical Committee,
Rio de Janeiro,
Brazil.

ANALYSIS OF THE AMERICAN TREATY ON PACIFIC SETTLEMENT ("PACT OF BOGOTÁ"), TAKING INTO ACCOUNT THE RESERVATIONS MADE BY THE SIGNATORY STATES AS WELL AS THE REASONS SOME STATES MIGHT HAVE FOR NOT RATIFYING IT, IN ORDER TO DETERMINE WHETHER AMENDMENTS NEED TO BE MADE TO THAT INSTRUMENT TO ENSURE ITS VIABILITY

Rapporteur: Dr. Galo Leoro F.

The Inter-American Juridical Committee, at its meeting on August 5, decided to place the study of the Pact of Bogotá, within the guidelines indicated above, as the first topic on its agenda, in order to respond, in so far as possible, to the request made of it in this respect by the Permanent Council of

the OAS. All this is part of an undertaking of the highest importance, one that the General Assembly reinstituted through resolution AG/RES.745, adopted in November 1984, at its fourteenth regular session. The Committee also decided to appoint the undersigned as Rapporteur on the topic. In view of what little time the Committee had for meeting the Council's request, it also decided that the Rapporteur would begin and develop his work through oral statements during the meetings, as in fact he did, beginning on August 6. The summary of those statements appears in the corresponding minutes.

Given the special significance of the topic within the vast program of changes in the inter-American system that the Organization has outlined and so as to put the material in more systematic order, the Rapporteur felt that this summary report should be drafted. It brings together the ideas that were expressed at those meetings. Important discussions were held about the various topics under study, which will be an additional and more considerable source of reference for the study of the Pact of Bogotá, with a view to determining its viability and the advisability of amending it.

General Background

At various points in time, the member States of the OAS have sought reforms in the inter-American system.

The system developed within a legal framework established by resolutions passed by the International Conferences of American States. Many of the declarations from those conferences contain principles that point up a constant effort to surmount problems. The most significant reform made in the system was the signing of the Charter of the OAS in 1948 when an organization that had developed over the course of several decades was contractually instituted. That contractual transformation was the climax of an essential undertaking that began with the Inter-American Treaty of Reciprocal Assistance, adopted in Rio de Janeiro in 1947, and culminated with the American Treaty on Pacific Settlement or "Pact of Bogotá" and the other invaluable inter-American instruments that address social rights, human rights, economic relations, all on a substantive and structural scale that was without precedent. After 1945 in order to survive the regional system had to be instituted contractually and adapt itself to the highest international standards of the United Nations Charter.

Here in Rio de Janeiro in 1965, the Second Special Inter-American Conference would begin efforts to redirect the inter-American system toward more ambitious goals for the economic and social development of its American States. It would also adopt resolution XIII to "strengthen the capacity of the Organization to give the member States effective aid in the peaceful settlement of their disputes", giving the Council of the Organization the necessary powers. The Protocol of Buenos Aires, signed in 1967 as a result of the new direction adopted in Rio, brought certain normative and structural changes to the Organization. It makes the Councils equal from the legal standpoint and changes the name of some of the organs. But it does not alter the basic principles. The economic and social standards were enlarged upon, as were those concerning education, science and culture, with the emphasis on development. The Permanent Council was given the same powers as those given to the Inter-American Peace Committee in its 1956 Statutes, in effect at that time.

In 1973, another reform movement would lead to the establishment of CEESI, a special committee charged with studying the inter-American system and proposing amendments to its instruments in order to modernize the Orga-

nization and find the means to give it a better internal political balance and to increase the opportunities for co-operation among its members, under the general banner of a Third-World approach and détente in international affairs, evident at that time both on the world scene and on the inter-American scene. CEESI produced a considerable number of volumes. It developed draft amendments to the Charter and to the Rio Treaty and proposed two new draft conventions on co-operation for integral development and collective economic security. The only draft ultimately enacted was the amendment of the Rio Treaty. The Protocol in question was signed in San José, Costa Rica, in 1975, but has not yet entered into force.

The dormant intention to reform the inter-American system resurfaced again at the General Assembly held in Brasilia, the foundation being the work that CEESI had produced. The brief time frame allowed for this major undertaking means that the bodies responsible for this vast project have to prepare their drafts quickly.

There is, therefore, an ever-present concern to adapt and improve the instruments of the OAS to suit increasing political, social and economic needs in the countries of the hemisphere and to be in step with the changing international scene.

The idea of strengthening the Organization at its very foundation also signifies a desire to make it a more effective means of achieving its major objectives, which range from maintenance of peace through collective security and peaceful settlement of disputes, to observance of human rights and inter-American co-operation in all fields.

This effort to renew the system comes at a time when the most serious economic-financial crisis endangers social tranquillity and threatens to paralyse the development of most American countries.

The situation of the Pact of Bogotá has been a source of concern for the Organization since 1954; at that time the International Conference of American States held in Caracas adopted resolution XCIX whereby it ordered the then Council to conduct an inquiry among the member States to "ascertain the suitability of, and the appropriate opportunity for proceeding to revise the American Treaty on Pacific Settlement"; if the results were positive, the Inter-American Council of Jurists and the Inter-American Juridical Committee were to study the possibility of amending the Pact of Bogotá. The outcome would not have favored amendment of the Treaty.

Later, at the first regular session of the General Assembly held in San José, Costa Rica, in 1970, the General Assembly adopted resolution 54 wherein the Inter-American Juridical Committee is requested, based on the provisions of Article 26 of the Charter, to conduct a study of the experience acquired from application of the instruments for peaceful settlement of disputes, in order to strengthen the inter-American system for the maintenance of peace. In its opinion of September 8, 1971, the Committee said that the best means to strengthen the system would be for those States that had not yet ratified the Pact of Bogotá to do so.

The advisability of amending the Pact of Bogotá was raised at CEESI in 1973. Although no position materialized in this respect, CEESI decided that the matter should be examined on some future occasion.

Today the Committee has been entrusted with studying the Pact of Bogotá; the Committee had suggested that very thing in its own opinion of August 21, 1984. The fundamental purpose would be to facilitate a general consideration of the measures that should be taken to modernize the inter-American system overall, with a view to strengthening it and endeavoring, by

every means possible, to make inter-American co-operation more effective, in this specific case in the field of peaceful settlement of disputes

The Pact of Bogotá and the Inter-American Treaty of Reciprocal Assistance — Instruments for the Maintenance of Peace

The Pact of Bogotá and the Inter-American Treaty of Reciprocal Assistance are the instrumental means for carrying out the objectives set forth in the Charter with respect to maintenance of the peace. The first is the Organization's response to the need to settle international disputes between its members peacefully; the second is a collective response to aggression and other attempts against the territorial integrity, sovereignty and independence of the member States, under the terms and according to the characteristics that those instruments establish for each one of their respective spheres of action.

The fact that the Charter of the OAS makes reference to those two special treaties, which differ in their nature and sphere of application but are the same in terms of purpose — that being the maintenance of peace —, naturally prompts me to examine how they are applied, which is frequent and wide-ranging in the case of the Rio Treaty, and non-existent in the case of the Pact of Bogotá. The Rio Treaty has been ratified by the vast majority of the member States, while the Pact of Bogotá has been ratified by an obvious minority. While the Rio Treaty was amended by the Protocol of San José, in 1975, the Pact of Bogotá has remained unchanged.

Naturally, the most striking fact of all is that the Pact has never been invoked by its parties to settle their disputes peacefully. If Honduras and Nicaragua resorted to its procedures in 1957, it was only because the Permanent Council, acting provisionally as organ of consultation, had recommended that measure and the two member States took their dispute to the International Court of Justice to resolve the controversy over the 1906 Award.

Thus, there has been no balance between the two fundamental sides of the maintenance of peace within the OAS, those being collective security and peaceful settlement of disputes. In practice, the Organization's main objective with respect to peaceful settlement of disputes has not been served. This may be because resolution has been sought through Article 7 of the Inter-American Treaty of Reciprocal Assistance, which provides the following:

> "In the case of a conflict between two or more American States, without prejudice to the right of self-defense in conformity with Article 51 of the Charter of the United Nations, the High Contracting Parties, meeting in consultation, shall call upon the contending States to suspend hostilities and restore matters to the *status quo ante bellum*, and shall take in addition all other necessary measures to reestablish or maintain inter-American peace and security *and for the solution of the conflict by peaceful means*. The rejection of the pacifying action will be considered in the determination of the aggressor and in the application of the measures which the consultative meeting may agree upon."

Perhaps several instances where the Rio Treaty was invoked can be better explained if one considers that the Organization did not have an organ that, at the request of one of the parties or on its own initiative (as happened with the Inter-American Peace Committee, before it was changed in May 1956), could recommend to the contending States suitable measures or means for finding a solution to their dispute.

Thus, under certain circumstances, the American States have had to invoke the Inter-American Treaty of Reciprocal Assistance, an instrument whose organ acts at the request of one of the parties and, in certain cases, when convoked by the Chairman of the Permanent Council (Article 63 of the Charter). Under Article 7, cited earlier, it is called upon to play an important role in achieving pacification and even to finding a solution to the conflict via peaceful means. Naturally, the best thing for the member States and for the inter-American system would be for the methods of peaceful settlement to be as effective as the Rio Treaty's methods, even more so if possible.

A desire to achieve that parity, or at least some balance in the use of the two means for maintaining peace within the inter-American system, is what doubtless has prompted the member States to try to alter those aspects of the fundamental instruments that, experience has shown, do not function or have not functioned in the past. In the Committee's judgment, the situation noted in the case of the Pact of Bogotá holds true in the case of the OAS Charter, as well, since the task assigned to the Permanent Council and to the Inter-American Committee on Peaceful Settlement, under Articles 82 through 90, is just as difficult since it cannot, at the request of only one of the parties or on its own initiative, lend its good offices to bring the parties together and suggest means for settling disputes between member States. In its opinion of August 21, 1984, the Committee suggested amendments to the Charter to correct that problem.

The Pact of Bogotá

This instrument is provided in Article 26 of the Charter so that it will

> "establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period".

The Pact of Bogotá was to be a codification of those treaties on peaceful settlement existing within the Inter-American system and listed in Article LVIII thereof. That Article provides that once the Treaty comes into effect, the earlier conventions shall cease to be in force with respect to the parties thereto.

The American Treaty on Peaceful Settlement went beyond just codifying those conventions, as said before; an effort was made to co-ordinate it with the provisions of the United Nations Charter and significant restrictive standards were introduced vis-à-vis its application and others such as the sequence of steps the parties would be compelled to follow if the procedure of conciliation was invoked from the outset.

Thus, the Pact of Bogotá could be described as an Inter-American Treaty, for peaceful settlement of disputes that contains restrictive general standards concerning its application; that describes, one by one, the procedures of good offices, mediation, investigation and conciliation, both judicial and arbitral, that are available to the parties; that does not establish the preeminence of any one method over another or any obligation to initiate the procedures; instead, if either of the parties invokes the procedure of "investigation and conciliation" (Article XVI) any party may request the Permanent Council of the Organization of American States to convoke the Commission of Investigation and Conciliation. If the Commission's efforts are unable to produce a solution, this entitles either of the parties, if they have not agreed upon an arbitral proce-

dure, to have recourse to the International Court of Justice. In this case, the Court shall have compulsory jurisdiction, in accordance with Article 36, paragraph 1, of its Statute (Article XXXII). If the Court, which has the right to decide on its own jurisdiction (Article XXXIII), should declare itself without jurisdiction to hear the controversy, for the general reasons mentioned in Articles V, VI and VII of the Treaty, the controversy shall be declared ended (Article XXXIV); but if the Court for any other reason declares itself to be without jurisdiction to hear and adjudge the controversy, the contracting parties are obligated to submit it to arbitration in accordance with the provisions of the pertinent Chapter of the Pact (Article XXXV). In any event, recourse to the International Court of Justice is available to the parties inasmuch as they declare that they recognized the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the Treaty may be in effect, in all disputes of a juridical nature that are specified in the text of the Pact itself (Article XXXI).

This is the system set up under the Pact of Bogotá with respect to the automatic sequence of procedures. When matters reach the point of compulsory arbitration, should one of the parties fail to designate its arbiter and/or fail to present its list of candidates within a period of two months, the other party shall have the right to request the Permanent Council of the Organization to establish the Arbitral Tribunal, in accordance with the manner established in the Pact itself (Article XLV). If, moreover, the parties fail to draw up an agreement clearly defining the specific matter that is the subject of the controversy within three months as of the date the Tribunal is installed, that agreement "shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties" (Article XLIII).

The latter sequence and the legal possibility that arbitration could be done without one of the States parties to the dispute participating is what has come to be called the automatism of the Treaty and arbitration by default, respectively.

Viability of the Pact

The viability of an instrument depends upon how quickly and effectively it serves the purpose for which it was signed. So long as it is difficult to resort to its procedures, so long as its application depends on a co-ordinated group of political wills and not only on the pressing need that a State may have to seek the peaceful settlement of a dispute under the protection of a specific treaty on the subject, the viability of the instrument will be questionable. And this happens with the Pact of Bogotá, beyond a general impression that it might be better, in the broadness of its standards, to suggest suitable application consistent with the varied nature of the disputes and of the circumstances that may surround them.

The possibility of its invocation: Neither party is legally in a position to invoke the Pact at the time when, in its individual judgment, a controversy can no longer be settled by diplomatic means.

In fact, the second paragraph of Article II establishes that

> "Consequently, in the event that a controversy arises between two or more signatory States which, *in the opinion of the parties*, cannot be settled through direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty," etc.

That provision prevents any party, after having made a reasonable attempt

to reach an agreement through diplomatic means, to resort to the procedures of the Pact, unless it has the consent of the other party or parties. To prevent recourse to the methods of peaceful settlement in this way certainly reduces the viability of the Pact.

That rule is, moreover, at odds with Article 25 of the Charter, which establishes that

> "In the event that a dispute arises between two or more American States which, *in the opinion of one of them*, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution."

The proposal by the Inter-American Juridical Committee dated November 18, 1947, contained a version completely in accord with this provision of the Charter; the Pact should also be in agreement with it.

Another factor that also affects the viability of the Pact is the wording of the provisions on a controversy that arises (Article II, second paragraph) or disputes that arise (Article XXXI) among the member States, thus giving them a sense of application for future disputes. This is not an accident that should be overlooked, since the General Treaty of Inter-American Arbitration and the General Convention of Inter-American Conciliation (1929), each in its Article I, both indicate that they apply to controversies "that have arisen or may arise" among States parties.

If the Pact, in speaking only of the disputes that arise, did not depart from the texts of the conventions that it was to codify so as to restrict application of its provisions, that departure from the texts of the other conventions in question would not make sense. It is strange, however, that the Pact on Arbitration (Article XXXVIII) states that it applies to controversies of any nature "that have arisen or may arise in the future" among the parties.

In a general way, then, the Pact should refer to the existing disputes among the member States. This argument was accepted by CEESI and by the Permanent Council, to the extent that they proposed draft amendments to the Charter that reflect the principle that peaceful settlement is a commitment of the States vis-à-vis existing disputes.

This principle has been adopted by Working Group "A" of the Committee on Juridical and Political Affairs of the Permanent Council, which is in charge of the review of those principles and standards of the Charter, as part of the present undertaking for which that Council is responsible under resolution AG/Res.745, adopted by the General Assembly of the OAS at its session in Brasilia. The text recommended by that Group would be worded as follows:

> "International disputes between member States should be submitted to the peaceful procedures set forth in this Charter. Nevertheless, any member State has the right to resort, in the first place or at any time, to the Security Council or to the General Assembly of the United Nations, in accordance with the provisions of Articles 34, 35, and 52 of the Charter of the United Nations."

The text transcribed above, as may be seen, places the situation of the member States of the OAS in relation to the United Nations in its true perspective and differs, therefore, from the first paragraph of Article II of the Pact, which reads as follows: "The High Contracting Parties *recognize the obligation to settle international controversies* by regional pacific procedures before referring them to the Security Council of the United Nations."

It is evident that if controversies must necessarily be *settled* within the pro-

ceedings of the regional agency, nothing would remain of them that should be referred to the United Nations.

Because of lack of agreement with the provisions of paragraph 4 of Article 52 of the United Nations Charter, a similar difficulty is found in the present text of Article 2 of the Inter-American Treaty of Reciprocal Assistance. It has already been amended in the Protocol of Amendment to the Rio Treaty, San José, 1975, precisely in order to reconcile it with the provisions of that Charter, with the following text:

> "*Article 2:* As a consequence of the principle set forth in the preceding article, the High Contracting Parties undertake to settle their disputes with one another by peaceful means.
>
> The High Contracting Parties shall make every effort to achieve the peaceful settlement of their disputes through the procedures and mechanisms provided for in the inter-American system before submitting them to the Security Council of the United Nations.
>
> This provision shall not be interpreted as an impairment of the rights and obligations of the States Parties under Articles 34 and 35 of the Charter of the United Nations."

For revision of Article II of the Pact, the above text could well be followed; even better, the article could make express reference to Article 52, paragraph 4, of the Charter of the United Nations, which is the one that recognizes the complete right of the States belonging to regional arrangements to resort, at any time, to the Security Council, in accordance with the provisions of Articles 34 and 35, despite the recommendation to the States to make every effort to achieve peaceful settlement of disputes through the regional arrangements, when they belong to them.

The automatic operation of the Pact

We could not fail to point out here, in relation to the viability of the Pact, the fact that this instrument has the so-called automatic operation of its procedures and arbitration by default. From one point of view, this means that a sequence of procedures are available, procedures that become practically obligatory for the High Contracting Parties when conciliation fails and the way is thus opened for any of the parties to have the right to resort to the International Court of Justice. Under certain conditions, the Court may have to declare itself to be without jurisdiction. This may lead to arbitration, in which the membership of the Tribunal and even the drafting of the agreement would be automatic.

The problem this automatic operation creates is that the parties may feel obliged to subject a dispute to methods or procedures that, perhaps, may not be the most appropriate ones. A relatively minor dispute, suitable for settlement through conciliation done by much simpler means than those provided for in the Pact, could end up before the Court. All this might involve remedies and standards that might not be the most suitable for that particular dispute. And if the Court should declare itself to be without jurisdiction, on grounds other than those given in Articles V, VI and VII of the Pact, the dispute would finally fall into arbitration.

All this is theoretically possible. In practice, it would not be out of place to suppose that this system is one of the reasons why the Pact has not been ratified by other member States of the OAS. And the most serious thing about this matter is that even conciliation that does not resort to the provisions for

this procedure in the Pact, if it fails, will open the obligatory sequence of that instrument.

The Rapporteur feels that one possible way to make the Pact more viable would be a revision intended to offer the States Parties the option of accepting that obligatory method, making allowance for arbitration by default; or one that, when conciliation ends without reaching a settlement of the dispute, would not make the States Parties see themselves impelled, by that fact, toward that automatic operation.

The reservations that have been made to the American Treaty on Pacific Settlement have the effect of removing some of the States Parties from that sequence, at various moments, and affecting it in such a way that it would be suspended upon reaching the Court and preventing it from deciding whether it has jurisdiction, attributing that power to the State making the reservation, or upon refusal to accept arbitration in which one of the parties does not participate.

If, for the same reason, this singular characteristic of the Pact could be maintained as an option for the States, in a manner that would not keep them away from conciliation in view of the condition legally established in the treaty that, if that remedy fails, would lead them to the two judicial procedures, perhaps that would help to make the Pact viable without affecting the positions of the States that have ratified it without reservation, even though they have never resorted to its procedures.

This last circumstance leads us to the most disturbing question: Why have the States Parties not made use of the Pact? What is happening with such an important treaty, one that up to now is no more than a juridical curiosity of the system and not the vital instrument actively working for the peaceful settlement of disputes between the member States, as might have been hoped? Because the Treaty has simply never been applied, we could well say that the safeguards and restriction vis-à-vis its application, as they appear in some provisions of Chapter I, turn out to be elements that, when they should have limited the cases of application, in the end have not been able to contribute anything, because the treaty as a whole has not been applied. The truth is that the parties act as if the Pact were an instrument foreign or unsuitable to them.

The lack of viability of the Pact because of its lack of application is well known in the inter-American system. It is true that the treaty lacks an organ to which the parties could resort to help them in deciding on the one procedure best suited to the dispute presented. It is also true that this gap continues to be felt in the Charter of the OAS, upon not giving the Permanent Council or the Inter-American Committee on Peaceful Settlement the legal means to bring the parties together and provide its good offices, which could mean a recommendation as to which procedure provided for in the Pact (for the parties) should be used if those good offices should prove to be insufficient. In the end, the problem with the general viability of the system of peaceful settlement is also shown by the fact that the inter-American system does not have an organ that could act as the Inter-American Peace Committee so successfully did on so many occasions when the member States of the OAS were involved in disputes.

The Rapporteur must go on record to say that in its Opinion of August 21, 1984, the Committee has already recommended amending Article 84 and those following it, of the Charter. The problems are, in fact, interrelated and cannot be looked at in isolation, the ones apart from the others. That interrelationship is so clear that the Rio Treaty, and not the Charter or the Pact of Bogotá, has been the instrument to which the member States of the OAS have had to

resort, as the only possible recourse for peacemaking, in the full sense of the word, as has been said before. Only that instrument may be invoked unilaterally, something not allowed in the specific case where the Permanent Council might offer its good offices in the same manner foreseen in the Charter, for which the consent of the parties involved in the dispute is now required. Since the Rio Treaty must act when acts of aggression or others foreseen in that instrument occur, its pacification mechanism is triggered when collective security has been affected, although Article 7 provides for the search for peaceful solutions, as has happened.

Aspects restricting the application of the Pact

The American Treaty on Pacific Settlement, unlike other instruments that deal with the same subject, such as the European Convention for the Pacific Settlement of Disputes, Strasbourg, 1957, or the Revised General Act for the Pacific Settlement of Disputes, of the United Nations, April 28, 1949, or the proposals prepared by the Inter-American Juridical Committee, contains some provisions in Chapter I that restrict its application and concern diverse subjects.

Thus Article IV constitutes a measure suspending action, since it provides that, once any pacific procedure has been initiated, in accordance with the Treaty, or a previous pact, or by agreement between the parties, "no other procedure may be commenced until that procedure is concluded".

The provision thereby averts a possible build-up of pacific procedures which is entirely reasonable.

Article V states that the pacific procedures may not be applied to matters that, by their nature, are within the domestic jurisdiction of the State. It adds that

> "If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties."

This article mirrors Article 2, paragraph 7, of the United Nations Charter. That paragraph has been criticized for not stipulating which matters are the domestic jurisdiction of the State. Those matters were specified in Article 15, paragraph 8, of the Pact of the League of Nations, which said that international law would determine whether a matter was one of domestic jurisdiction.

The text of Article V makes no reference to international law either. However, should there be any disagreement on the matter, any of the parties can go to the International Court of Justice to have this preliminary question resolved. To decide the question, the Court will obviously apply international law in the manner established in its Statute. The problem, of course, is that there have been reservations to this article concerning the jurisdiction that the Court would otherwise have to decide problems of this type.

Article VI states the following:

> "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

This article embodies the principle of observance of treaties *(pacta sunt ser-*

vanda) and the principle of *res judicata*, both being equally valid and recognized principles.

Had there been any questions resolved in the manner prescribed by the Treaty, these would obviously be questions where a procedure of peaceful settlement neither is nor would be in order.

It should be pointed out that under international law, as embodied in instruments such as the Vienna Convention on the Law of Treaties, when circumstances such as those described under Chapter V of that Convention obtain, the road is open for legitimate actions on the part of the State vis-à-vis a treaty's being null or valid. This is something entirely different from the content of Article VI of the Pact, which we will discuss.

Indeed, a treaty neither resolves nor can it resolve questions concerning its own validity. These questions would have to be settled, but never by the treaties themselves. Therefore, they are not embraced by the principle of *pacta sunt servanda* and are not covered under that provision of the Pact of Bogotá.

Article VII states that

> "The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State."

This provision is a legitimate reaction on the part of the American States particularly the Latin American States, to the indiscriminate diplomatic representations to which they have been subjected, even by means of the use of force when those claims have not been settled in a manner satisfactory to the State making the claim.

At this point in the development of law in this hemisphere, it seems that a provision as clear as Article 15 of the Charter of the OAS would more than suffice. That article provides that "The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens". Why would an alien who is subject to the jurisdiction of the State in which he is located, have to claim privileges? Article VII of the Pact is an attempt to prevent such claims from succeeding. There have been situations where the ultimate recourse was not the national judge; instead the State claiming the injustice of a sentence or a delay in the settlement of a case brought before the courts of a country or similar claims has tried to make itself the ultimate recourse, by creating some additional instance.

The first reactions against situations of this kind were the Calvo Clause and the Drago Doctrine. Article VII leaves room for diplomatic representations if nationals of some other country have not been afforded the means to place their case before the competent domestic courts of the respective State. The article presupposes that there may still be a State or States in this hemisphere that might not allow a given alien access to its courts. The hypothesis would be at odds with the constitutions and this would have to be regarded as a potential *de facto* situation that could occur.

The way the article makes reference to the problem is interesting. In effect it provides that the parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts. There are two possible courses of action that the parties could use to protect their nationals: Diplomatic representation, which would be done

directly by the claimant State to the State being claimed, and recourse to a "court of international jurisdiction", which in this particular case would be understood to be recourse to the International Court of Justice. The second of these actions would require that both parties have signed the Pact without any reservation to Article XXXI and that the issue in question be juridical in nature. Recourse to an arbitral tribunal (although jurisdictional) would not be easy, since the consent of the party with whom the representation is being made would be required.

Ultimately such matters are procedural in nature. The interesting point is that if nationals have had "available the means to place their case before competent domestic courts" this one circumstance would suffice to allege that justice has been denied.

The procedures under the Pact

We will not attempt any study of the methods of the Pact. The General Secretariat has presented a document (OEA/Ser.G/CP/doc.1560/85 (Part III)), of April 9, 1985, for the purposes set forth in General Assembly resolution AG/Res.745 (XIV-0/84). That document was based on two other documents that the Juridical Committee had occasion to review at its January 1985 session. That document details those procedures, although the Rapporteur is unable to concur with some of the arguments that the General Secretariat makes in this regard and that were explained at some of the Committee's meetings.

We will, therefore, take an overall look at the situation of the procedures established in the Pact:

The Obligatory Element: The Pact has no obligatory procedures. In other words, in the event of a controversy, the States Parties have not undertaken any obligation to resort to any of the procedures in particular, except in the case of the difficult compulsory arbitration triggered by the automatic procedure in the Pact (Article XXXV), as will be seen further on.

The Pact has had to make allowance for a situation whereby if a State Party wishes to invoke a given procedure (without its being that State's obligation to do so), it may do so. If the controversy in question is of a juridical nature, it does this by recourse to the International Court of Justice, in which case jurisdiction is compulsory *ipso facto* for the parties (Article XXXI). If the controversy is of any other nature, the State may invoke the Pact by means of recourse to conciliation, in which case it has the right to request that the Permanent Council convoke the Commission of Investigation and Conciliation to obtain from this body certain recommendations to the effect that the parties avoid acts that may impair the conciliation. But the Council cannot form that Commission if one of the parties fails to appoint two of the members (Articles XVII and XIX).

In any event, there is no clause in the American Treaty on Pacific Settlement that binds the States Parties, in the event of a controversy, to submit said controversy to a given procedure. An obligation of that kind does exist, for example, in the European Convention for the Pacific Settlement of Disputes, Strasbourg, April 29, 1957. Under Article 1 of this Convention, the High Contracting Parties are obliged to submit to the International Court of Justice any controversy of a juridical nature that is related to the situations listed in the Statute of the Court, Article 36.2. By the same token, under Article 4, the parties shall submit to conciliation any controversy that may arise between them and that is not covered under Article 1.

Let us clarify this point: By not making it binding upon the Parties to resort to any given procedure, the Pact provides an option whereby if one of them wishes to use conciliation, that party may unilaterally request of the Permanent Council, the organ that is empowered to convoke the Commission of Investigation and Conciliation (Article XVI), that it do so. However, with this procedure, the installation of that Commission is still contingent upon whether the States Parties have first appointed the two members of the Commission, by a simple exchange of notes (Article XVII) or, if not, after compiling the names, by appointing them at the start of the conciliation procedure, in accordance with Article XIX. The Pact does not address the possibility that a State might refuse to appoint its members on the Commission. Nonetheless, it is clear that the Permanent Council does not have the power to make that appointment by default, as happens when the Arbitral Tribunal is constituted (Article XLV).

The other option the Pact provides is that if a party decides to go to the International Court of Justice (without this being its obligation) to settle any controversy of a legal nature, it will then have the compulsory jurisdiction, *ipso facto*, of that Court in respect of the other party (Article XXXI).

Naturally everything said here is a function of the text of the Pact, reservations notwithstanding.

This direct recourse to the International Court of Justice, which comes about when a party voluntarily brings the matter to that court of international jurisdiction, is entirely different from the recourse that a party has by law as a result of the automatic element of the Pact. In the latter case, jurisdiction is not based on Article XXXI, but rather Article XXXII, which provides that if conciliation leads to no solution, either party *shall be entitled* to have recourse to the International Court of Justice, which shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of its Statute.

If a controversy that might be described as not being juridical in nature, is initially submitted to the conciliation procedure, and if that procedure fails and the parties fail to agree to submit it to a procedure of arbitration, either of the parties (again, if it so desires) may take the controversy to the Court. Once its jurisdiction is established in accordance with Article 36.1 of its Statute, the Court then has general jurisdiction, not confined to controversies of a juridical nature. Paragraph 1 of that article states that: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." In the Pact of Bogotá, provision has been made for the fact that the Court has: *(a)* compulsory jurisdiction for the controversies of a juridical nature as listed in Article XXXI, which it recognizes; and *(b)* compulsory jurisdiction for any controversy that comes to it as a result of unsuccessful conciliation (conciliation of any type of controversy) and for which the parties have not agreed upon an arbitral procedure, based on Article XXXII. Only the Court's general jurisdiction recognized in Article XXXII triggers the automatic element of the Pact; otherwise, its jurisdiction would have been confined to controversies of a juridical nature, which would be at odds with the purpose of that automatic procedure and with the Pact's clear-cut recognition of the Court's dual jurisdiction in the case of controversies of a juridical nature and all controversies in general.

Article 36.1 of the Statute is very clear on the point that the Court has jurisdiction in respect of *any matter* that the parties may bring to it or that is included under treaties. The General Secretariat (p. 19 of document OEA/Ser.G/CP/doc.1560/85 (Part III) of April 1985) is of the view that the Court would only have jurisdiction in the case of juridical controversy; on this point

it incorrectly cites paragraph 2 of Article 36 of the Court's Statute, when the Pact of Bogotá, in Article XXXII, makes specific reference to Article 36.1 of the Statute, which means the Court has general jurisdiction for any controversy and not just in respect of controversies of a juridical nature, according to paragraph 2 of Article 36 of the Statute. This is why the Rapporteur has dwelled so much on this point, in order to make his position very clear.

That the Court, according to the Pact, has jurisdiction to hear controversies of a juridical and political nature is also in evidence in the reply received from the Government of the United States to a survey that the Council of the Organization conducted between June 16, 1954, and February 4, 1957, concerning the advisability of amending the Pact of Bogotá. Briefly, the United States position, which favored amendment of the Pact of Bogotá, states that the major defects of the Pact are: *(a)* the requirement that political as well as juridical differences be resolved by means of judicial procedures, such as the provision on compulsory arbitration; and *(b)* abandonment of the principles of international law concerning diplomatic protection. The complete text of the note in question appears in "Acts and Documents of the Second Special Inter-American Conference, Rio de Janeiro, Brazil, 1965", Volume IV, pages 18-22, document 5.

From the foregoing, we can say that the Pact of Bogotá provides a system of procedures whereby once a controversy is submitted to conciliation, following the sequence established in Article XXXII, if the parties do not then agree to arbitration, either of them may bring the controversy to the International Court of Justice for settlement.

If the parties do not agree as to whether the Court has jurisdiction, the Court itself shall first decide that question (Article XXXIII). Any reservation to this article will prevent the Court from participating and discontinue the automatic working of the Pact since the Court would be deprived of two important options: (1) to declare itself without jurisdiction to hear the controversy for the reasons set out in Articles V, VI or VII of the Treaty, in which event the controversy shall be declared ended (Article XXXIV); and (2) to declare itself to be without jurisdiction on any other grounds, in which event the parties shall be obligated to submit the controversy to arbitration (Article XXXV).

One point that should be noted is that, since Articles V, VI and VII constitute general exceptions to the application of the Treaty's procedures, it is very unusual that the parties in a controversy would not have noticed any of those important impediments by the time they submit the controversy to conciliation and only then, when they appear before the Court, would the Court itself use the impediments to declare itself to be without jurisdiction, meaning that such a controversy would not have been the subject of some peaceful settlement. It is odd that none of the States would have recognized this situation, but we realize that this is possible.

Furthermore, determining when the Court may declare itself to be without jurisdiction for reasons other than those of Articles V, VI or VII (the Pact says . . . VI and VII as if it were dealing with an accumulation of reasons) continues to pose problems. We rule out that the Court can declare itself to be without the jurisdiction because the controversy that it has taken up as a result of failed conciliation could have been juridical in nature. On this point, the Pact does not confine the Court's binding jurisdiction to juridical controversies. To the contrary, in the first hearing of a controversy of any nature following a conciliation that was unable to resolve it, the controversy is submitted to the Court independently of that condition, especially because in the

Court's own Statute, Article 36.1 recognizes that this jurisdiction covers all cases that parties submit to it and all matters specifically provided for in the United Nations Charter or in treaties and conventions in force. Obviously, a treaty may then recognize that general jurisdiction and such is the case with the provisions of Article XXXII of the Pact.

We should note that for Article XXXV to apply, the Court must declare itself *to be without jurisdiction* for some other reason and not simply *refrain* from hearing the dispute, the premise being that once the Court's non-jurisdiction has been declared, the High Contracting Parties are *obligated* to submit the controversy to arbitration.

It appears that in the situation posed by Article XXXIV, the only alternative left — and this is increasingly more difficult to come about — would be for the Court to be able to declare itself to be without jurisdiction on the grounds that there is no applicable law, that is, a case of *non liquet*.

The one certain point is that only through this complex and extremely difficult process can *compulsory* arbitration be reached (Article XXXV). The Pact is silent here, unlike its dealings with other procedures, for example, the procedure under Article XXXII, in which any *party would be entitled* to have recourse to arbitration. By arriving at this point provided for in the Pact, the parties "*are obligated*" to the arbitration. There are reservations made with respect to this aspect of the Pact, thereby making more unlikely its possible practical use in this sense. We know, also, that the Pact has virtually never been invoked by its parties in cases of controversies.

It is interesting to note that the Pact itself has strong doubts that the parties, even though they might not have formulated a reservation to this aspect of the instrument, will avail themselves of that obligatory arbitration. The doubt that the Pact asserts is reflected in its provisions on obligatory establishment, even in default by one of the parties, of the Arbitral Tribunal (Article XLVIII) which, under this premise, is to be established by the Permanent Council. It is also reflected in the formulation of a binding *special agreement*. Even following default, when one of the parties does not agree to the special agreement that defines the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, etc., the agreement shall be drawn up by the International Court of Justice and shall be binding upon the parties (Article XLIII).

We now reach the most difficult part of the Pact, Arbitration in Default. Let us see what happens: If the parties voluntarily agree to submit to arbitration differences of any kind, whether juridical or not (Article XXXVIII), or if the parties go to arbitration through the obligatory route (Article XXXV), the result would still be the same in the sense that if one of the parties does not follow through on designating members of the Tribunal, the Tribunal can be established by the Permanent Council because the Pact does not make any distinction between the two ways in which the parties can submit to arbitration. The same is true with respect to the special agreement since, once arbitration is accepted and if the special agreement is not concluded, the parties cannot prevent the agreement from being formulated obligatorily by the Court.

To the foregoing should be added the unusual circumstances that arise in the event of binding arbitration (Article XXXV), for which the Court itself, after having declared itself to be without jurisdiction in the controversy (Article XXXIV), has to formulate the special agreement that is binding on the parties (Article XLIII). Thus, the Court that has declared itself to be without jurisdiction is obligated to assume jurisdiction at least for this matter, the most delicate part of an arbitration, of drawing up the special agreement. The

fitness of such a procedure is a point that deserves the Committee's consideration.

And, will there be eminent persons who wish to be part of a Tribunal that is acting by default? Who knows?

Also, will a court that has declared itself to be without jurisdiction over a controversy be inhibited when it is required to formulate a special agreement concerning the very controversy for which it declared itself to be without jurisdiction? Are these viable procedures for the Pact?

And if the court has declared itself without jurisdiction due to a lack of applicable law, could the Arbitral Tribunal formed to hear the same controversy be expected to find that applicable law or does this mean that the Tribunal might rule on the basis of equity or, if not, be unable to settle the case because there is no applicable law? Also, the idea that the Tribunal might rule on the basis of equity under such a difficult circumstance is not so unorthodox in the light of the Pact itself since neither Article XXXVIII of the Pact, which begins Chapter Five on the Procedure of Arbitration, nor any other article defines whether the Tribunal will issue the ruling in "application of the principles of law", as, for example, Article I of the "General Treaty on Inter-American Arbitration" establishes, or how this will be done?

Does the fact that the Pact is silent on this matter mean that the ruling can be oriented by the judgment of the Tribunal? Or is there something missing in the Pact? This is another ambiguity of this instrument.

These aspects, in fact, give some idea of the great difficulties the States Parties would face if they had to turn to the Pact for conciliation and thus fall under its automatic procedures. Therefore, the Committee has to consider this type of problem and to give its opinion about it. The viability of the Pact rests heavily on all these problems.

The *Good Offices* procedure (Articles IX and X) turns out to be a procedure that the parties should accept. The Pact is not explicit on this matter. This procedure normally comes about when there are "offers" of good offices to the parties in a controversy and the parties accept them. The nature of the procedure appears to indicate this.

Mediation is a method by which the parties choose the mediators by mutual agreement (Article XI).

Neither of these two methods can lead by action or right of one of the parties to another procedure, as occurs when conciliation fails, as seen before.

These, then, are closed procedures, not linked in sequence to another procedure.

Direct recourse to the International Court of Justice if one of the parties resolves to submit to its jurisdiction a controversy of a juridical nature, even if such jurisdiction proves to be binding on the other party (Article XXXI), does not necessarily lead to continuation in another if it fails. We should say the same about Arbitration, when agreed to by the parties (Article XXXVIII).

The foregoing notwithstanding, if the parties agree on mediation and encounter difficulties in choosing the mediators or fail to choose them within five months after the procedure has been started, the parties shall have recourse without delay to any one of the other procedures on peaceful settlement established in the Pact (Article XIII). This is a duty but not an obligation. In any event, the sense of general commitment of Article II of the Treaty would infer that the parties ought to have recourse to another procedure when any procedure to which they may already have had recourse fails. This does not mean that they may not go to the General Assembly or to the Security Council of the United Nations, as Article 52, paragraph 4, of the San

Francisco Charter provides, or as has been definitively clarified in the Protocol of Amendments to the Inter-American Treaty of Reciprocal Assistance, San José, 1975, Article II of which now leaves no doubt that the member States of the inter-American regional arrangement do have this right.

Reservations to the Pact

The reservations to the Pact affect Article V (Peru), VI (Bolivia and Ecuador), VII (Argentina and the United States) and XXXI to XXXVII (Argentina). From the contents of the reservation formulated by the United States, one concludes that it would affect Articles XXXI, XXXII, XXXIII and XXXV. Peru's reservations affect Articles XXXIII, XXXIV and XXXV. One should understand that Paraguay makes a partial reservation to Articles XXXV, XLIII and XLV to the extent that the binding arbitration might apply to non-juridical controversies. Also, the reservation of Peru affects Article XLV and the reservation of Chile, Article LV.

The reservation of Nicaragua to the effect that no provision of the Treaty

> "may prejudice any position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law, which clearly permit arbitral decisions to be attacked when they are adjudged to be null or invalidated",

would not have any effect now on the Pact since the situation to which it referred was the subject of a specific settlement several years ago.

In all, reservations were made to thirteen articles. Some of these, as noted above, are objected to by two or three States.

Of the States that formulated reservations when they signed the Pact, Argentina, Bolivia, Ecuador and the United States have not ratified it.

One point that deserves special mention is that most of the reservations concern non-acceptance of the Court's competence to decide on its own jurisdiction and non-acceptance of binding arbitration and arbitration in default. These all, in turn, detract from the automatic working of the Pact since reservations such as these interrupt the sequence of events and thereby suspend it once the conciliation fails or any of the parties invokes its reservation to prevent the Court from entering the case.

The provisions that establish general exceptions in Chapter I, which correspond to Articles V, VI and VII, have also been the subject of reservations. One of them, the provision contained in Article VII, is the subject of contradictory reasons invoked by the two States that formulated reservations concerning it.

Ecuador's reservation to Article VI is not accompanied by an explanation of the reasons for it. Also, its reservations to every position that is in conflict with or not in harmony with the proclaimed principles or the stipulations contained in the United Nations Charter, or the OAS Charter, can be considered to constitute reservations to Article II, paragraphs 1 and 2, of the Pact. They would be reservations to paragraph 1 because it is at odds with the provisions of the San Francisco Charter which we have seen in a general way earlier on, and to the second of these, because it is inconsistent with Article 25 of the OAS Charter. In effect, while paragraph 2 of Article II requires concurring opinions of the parties in the sense that before any of the Pact's procedures can be invoked, all should agree that their direct negotiations did not produce results, Article 25 of the Charter provides that only one of the parties has to be of such opinion so

that recourse to the Pact can be had, which is as it should be. The reservation concerning lack of harmony between the provisions of the Pact and the constitution would have to be examined in a comparative study.

Bolivia's reservation to Article VI is self-explanatory.

Since the reservations, pursuant to Article LV, must apply to all the States parties because of reciprocity, those that have been formulated suggest the elimination of important provisions in respect of all the parties.

El Salvador, which was a party to the Pact, denounced it on November 26, 1973.

Lack of ratification by other States

No other State has ratified the Pact since Chile did in 1974. This means that only slightly more than one-third of the OAS member States are parties to the American Treaty on Pacific Settlement.

There was not sufficient time to conduct certain inquiries to in some way shed light on the basic reasons why the great majority of OAS member States did not ratify the Pact.

In view of the circumstances, the Rapporteur wished to point out aspects of a technical nature that make application of the Pact difficult, as well as aspects that involve or could involve political difficulties for its acceptance by other States and are related to the automatic working of the Treaty and the binding jurisdiction provided for the International Court of Justice, particularly where the Pact gives the Court the jurisdiction to hear any type of controversy that could be brought before it when conciliation has failed to solve it. Another aspect, more political than juridical in nature, is retaining the reference to diplomatic protection in the Pact, even if it is as the Pact now has it.

Perhaps the Pact has stumbled over its own complexity into juridical technicalities that are difficult to solve and into serious problems with actual application.

Conclusions

At the end of this presentation, the Rapporteur cannot help but conclude that the Pact has a number of technical problems and contains difficult juridical policy that could be amended with a view toward its effective application and for the purpose of having, to the extent possible, the majority of the member States of the OAS become parties to it, as they are to the Rio Treaty.

Changing these aspects presupposes amending the instrument. At times it has been proposed that the Organization develop for itself a similar treaty (Brazil, the United States and Ecuador made proposals of this nature in 1965) that is more simple, and leaves out the general exceptions to its application and the sequence of procedures that the Pact now contains since to this time the Pact has not been invoked directly by its parties even though there have been controversies between them.

Also clearly missing is an organ that could bring the parties together, offer them their good offices and assist them in choosing some method from the Pact of Bogotá itself. In its opinion of August 21, 1984, the Inter-American Juridical Committee suggested that powers such as these be given to the Permanent Council. This could be done by amending Articles 84 *et seq.* of the OAS Charter, which concern the so-called good offices. The Council is not able to do this now unless it has the consent of all the parties. This organ also lacks the ability to act on its own initiative or at the request of only one party.

This possibility of reinstating the powers that the former Inter-American Peace Committee had before its Statute was amended in May 1956 would be very helpful, with or without an amended Pact of Bogotá; but in fact, both things should be done. The Secretary General's study, mentioned above, contains a very enlightening report on the work done by the Inter-American Peace Committee and also leans toward giving the Permanent Council that Committee's former functions in the future.

The principles of peaceful settlement

Before speaking about possible amendment of the American Treaty on Pacific Settlement, perhaps it would be well to formulate some opinion of what a treaty of this type should be and what it represents so that it has, if not full viability, the greatest possible viability.

First of all, let us turn to the principles of peaceful settlement of disputes. Through the Charter, the Rio Treaty and the Pact of Bogotá itself, the Organization has proscribed the use of threat or use of force, it allows force only in the exercise of the inherent right to self-defense and in the cases provided for specifically in the United Nations Charter. The inevitable consequence of this proscription is to have recourse to peaceful settlement procedures in the event of a controversy between States.

Article 2 of the OAS Charter states that one of the essential purposes of the Organization is: "*(b)* to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member States". Article 3 *(g)* states, "Controversies of an international character arising between two or more American States shall be settled by peaceful procedures".

Article 25 is clear in maintaining as a standard that,

> "In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution."

And Article 26 says

> "A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period."

The reform work done by CEESI and by the Permanent Council in 1977, and the work now being done (see the document on Chapter V of the Charter, prepared in late July 1985 by Group A of the Committee on Juridical and Political Affairs) has all been geared to have the articles quoted above establish clearly that the parties shall have recourse to peaceful settlement of their controversies, not only new ones but also existing controversies between member States.

And, in terms of principles, we must not fail to recall Article 1.1 of the United Nations Charter which states that one of its purposes is:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or

> other breaches of the peace; *and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*"

Furthermore, the same Charter states in Article 2.3, "All members *shall settle their international disputes by peaceful means* in such a manner that international peace and security, and justice are not endangered."

And, since the OAS is a regional organ, Article 52 of the Charter is a fundamental norm for governing its relations with the United Nations in the field of collective security and peaceful settlement of disputes. This standard should be observed in the sense of guaranteeing that, although the member States of a regional arrangement should make all possible efforts to achieve peaceful settlement of local controversies through regional agreements before submitting them to the Security Council, Article 52 in no way impairs application of Articles 34 and 35 of the United Nations Charter. Therefore, the member States of the OAS shall always be entitled to have recourse to the Security Council or to the General Assembly whenever they consider it necessary.

It is appropriate and important to note that Article 52.3 of the United Nations Charter states

> "The Security Council shall encourage the development of pacific settlement of local disputes through regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council."

This provision means that a regional arrangement should have adequate rules and mechanisms to respond to efforts toward pacific settlement of a local controversy that may be referred to it by the Security Council. The OAS, under this assumption, should have the means to proceed, either upon instructions or its own initiative, to undertake such a mandate. But the OAS, we repeat, does not have an organ that can, by itself, take up the pacific settlement of that controversy on its own initiative or under the terms of any instructions it may receive. If the Permanent Council were given such a mandate and if any of the parties did not accept the Council and its offers of good offices for this purpose, there would be nothing it could do to carry out the mandate. This aspect is of greatest consequence in terms of allowing the Security Council to carry out this mandate. The legal inability of a regional organ to carry out the objectives of Article 52.3 of the United Nations Charter could imply serious problems of incompatibility with that Charter, which is the highest legal instrument.

How an amended Pact could be designed

Under the principles discussed above, the amended Pact of Bogotá could be regarded as an instrument fully co-ordinated with the OAS Charter and the United Nations Charter to which the States parties could have direct recourse, without fear of becoming subject to an obligatory procedure that exceeds its purposes and its ideas as to what would be the most adequate procedure under the Pact itself. This instrument could well have, on one hand, simpler procedures to constitute the Commission or Commissions of Investigation and Conciliation, such as a general panel having two members designated by each State Party, rather than the present multiple system which has never been implemented by the parties.

This would mean that good offices and mediation would continue to be procedures that require mutual consent or agreement. The International Court of Justice would continue to offer the possibility of acting, with binding jurisdiction, in controversies of a juridical nature when only one party resorts to it. It would mean that arbitration was a conventional recourse for all types of controversies, under the commitment "to reach agreement", and the only obligation of the parties would be to have recourse to conciliation as a method whose solution, while also not being binding on the parties, would not lead, because of failure or non-acceptance to a continuation of the automatic procedures of the current system.

A treaty such as the amended Pact should provide a method to which all the parties would have binding recourse. We have already seen how the European Convention for Pacific Settlement of Controversies provides, for this purpose, a binding method for non-juridical controversies, conciliation, and for controversies of a juridical nature, the International Court of Justice. The Revised Act for Pacific Settlement of Disputes (United Nations, 1949) provided a similar feature. Why could not the same be done with the American Treaty on Pacific Settlement? What is there to fear?

If there were no procedures to which the parties would have binding recourse, such as conciliation, if the amended Pact had only recourses of which the parties could avail themselves when they wished, it would not correspond to the principles set forth or to Article 26 of the Charter. It would be a procedural guide and not an "American Treaty on Pacific Settlement". It could well be called, "Treaty-Guide for Pacific Settlement Procedures". The position the Rapporteur suggests is a middle road which would not constitute any groundbreaking initiative, but would help to make the Pact viable.

Obviously, a *variation* is possible. Since there are American States that have ratified the Pact without reservation and recognize, thereby, the automatic working of the Treaty in its full scope and consequences, such a variation would consist of stipulating that when conciliation has failed to settle a dispute, the States have two options:

> "*(a)* by prior agreement between the parties, in the event the conciliation failed, the controversy would continue with the sequence of the automatic procedures set out in the current Pact; and,
> *(b)* lacking such prior agreement between the parties, if the conciliation fails, the controversy would not be subject to the sequence of automatic procedures."

Then, when mediation fails the parties could seek another settlement procedure similar to that contained in Article XIII.

Such an amendment would only require adding one article to the third chapter, on investigation and conciliation, or signing an additional protocol.

A parallel treaty: A treaty to parallel the Pact of Bogotá could be agreed upon. This would be a simplified form, following the style of the so-called Pact of Quito, formulated by Dr. Charles Fenwick several years ago, or the European Convention or some other similar instrument. This is not a contradictory possibility. Its purpose would be to offer a new alternative to the States which might find merit in it.

A support body: Always, under any supposition, a body to aid the States to find a pacific settlement either within or outside the Pact would be most useful. Perhaps for this reason the Rio Treaty has been able, through the Organ of Consultation and the peacemaking action provided for in Article 7, to serve the cause of pacific settlement by taking a very useful route, which,

while criticized, is an example beyond all shadow of doubt of the need for a body of less severe consequences, which would revive real possibilities of the reign of peace in the Americas.

Rio de Janeiro, August 19, 1985.

(Signed) Galo LEORO F.,
Rapporteur.

Annex 24

ACT OF CONTADORA FOR PEACE AND CO-OPERATION IN CENTRAL AMERICA (REVISED VERSION)[1]

[Spanish text not reproduced]

OEA/Ser.G
CP/INF.2222
24 October 1984
Original: Spanish.

October 24, 1984.

Excellency:

In accordance with instructions from our Foreign Ministries, we are sending Your Excellency a copy of the "Act of Contadora for Peace and Co-operation in Central America", with the request that it be made known to the missions of the member States.

Accept, Excellency, the renewed assurances of our highest consideration.

(Signed):

Rafael LA COLINA,
Mexico.

Roberto LEYTON,
Panama.

Francisco POSADA DE LA PEÑA,
Colombia.

Edilberto MORENO,
Venezuela.

Her Excellency Mónica Madariaga,
Chairman of the Permanent Council
of the Organization of American States,
Washington, D.C.

ACT OF CONTADORA FOR PEACE AND CO-OPERATION IN CENTRAL AMERICA

(REVISED VERSION)

PREAMBLE

The Governments of the Republics of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua:

1. *Aware* of the urgent need for strengthening peace and co-operation among the nations of the region through the observance of principles and

[1] See **II**, Correspondence, Nos. 44, 51, 71, 73 and 74.

methods that will make possible greater understanding among the Central American Governments;

2. *Concerned* over the situation prevailing in Central America, characterized by a serious erosion of public confidence, by border incidents, the arms race, the traffic in arms, the presence of foreign advisers and other forms of foreign military presence, as well as the use of the territory of some States by irregular forces to carry out destabilizing actions against other States of the region.

Convinced:

3. That the tensions and current conflicts could become more serious and lead to a general outbreak of war;

4. That the objective of re-establishing peace and confidence in the area can be achieved only through full respect for the principles of international law, particularly the principle concerning the right of nations to choose, freely and without outside interference, the form of political, economic, and social organization that best suits their interests, through institutions that represent the will of the people, freely expressed;

5. Of the importance of establishing, developing, and strengthening democratic systems in all the countries of the region;

6. Of the need to establish political conditions designed to guarantee the security, integrity and sovereignty of the States of the region;

7. That the achievement of genuine regional stability lies in the adoption of agreements on matters of security and disarmament;

8. That, for the adoption of measures intended to halt the arms race in all its forms, the national security interests of the States of the region must be taken into account;

9. That military superiority as a political objective of the States of the region, the presence of foreign advisers and other foreign personnel, and the arms traffic endanger regional security and constitute destabilizing factors in the area;

10. That the agreements on regional security should be subject to an effective system of verification and control;

11. That the destabilization of Governments in the area, usually expressed through the promotion of or aid to irregular groups or forces, acts of terrorism, subversion or sabotage, and the use of one State's territory for actions that adversely affect the security of another State, is contrary to the basic rules of international law and of peaceful coexistence among the States;

12. That the establishment of ceilings on military development, in keeping with the needs for stability and security in the region, is highly advisable; and

13. That the establishment of instruments that will make possible application of a policy of détente should be based on the existence of a political confidence among the States that will tend to reduce the political and military tensions among them effectively;

14. *Recalling* the provisions adopted by the United Nations in regard to the definition of aggression, especially in resolution 3314 (XXIX) of the United Nations General Assembly, as well as the pertinent resolutions of the Organization of American States;

15. *Taking into Account* the Declaration on the Strengthening of International Security, adopted by the United Nations General Assembly in its resolution 2734 (XXV), as well as the corresponding relevant legal instruments of the inter-American system;

16. *Reaffirming* the need, in those cases in which deep divisions have been caused within the society, for promoting actions of national reconciliation that will enable the people to participate, in accordance with the law, in democratic political processes.

Considering:

17. That, beginning with the Charter of the United Nations in 1945 and the Universal Declaration of Human Rights in 1948, various international organizations and conferences have prepared and adopted declarations, covenants, protocols, conventions, and statutes aimed at providing effective protection to human rights in general, or to some of them specifically;

18. That not all the Central American States have accepted all existing international instruments in matters of human rights, and that it would be desirable that they do so in order to have a more complete system in this field that would make possible respect for a guarantee of human, political, civil, economic, social, religious, and cultural rights;

19. That in many cases the shortcomings of an antiquated or inadequate domestic legislation interfere with effective exercise of human rights as they have been defined in declarations and other international instruments;

20. That it should be a concern of each State to modernize and adapt its legislation so that it will be appropriate for guaranteeing the real enjoyment of human rights;

21. That one of the most effective ways of bringing about the human rights set forth in international instruments, the political constitutions, and the laws of the various States, is for the judiciary to enjoy sufficient authority and autonomy to put a stop to violations of those rights;

22. That, for this purpose, the absolute independence of the judiciary should be guaranteed; and

23. That such guarantee will be achieved only if the officers of the judiciary enjoy stability in their offices and the judicial branch has budgetary stability, so that its independence from other branches will be absolute and indisputable.

Convinced of:

24. The need to introduce fair economic and social structures that will build an authentic democratic system and allow their people to exercise fully the right to work, education, health, and culture;

25. The high degree of interdependence of the Central American countries, as well as the opportunities the process of economic integration offers to small countries;

26. The fact that the magnitude of the economic and social crisis that is affecting the region has made evident the need for making changes in the economic and social structures that will make it possible to reduce the dependence and promote the regional self-sufficiency of the Central American countries, reaffirming their own identity;

27. The fact that the process of Central American economic integration should constitute an effective instrument of economic and social development, based on justice, solidarity, and mutual benefit;

28. The fact that it is necessary to reactivate, improve, and restructure the process of Central American Economic Integration, with the active and institutional participation of all the States of the region;

29. The fact that the Central American institutions and authorities are

called upon to assume primary responsibility for reforming the existing economic and social structures and for strengthening the process of regional integration;

30. The need for an advisability of undertaking jointly economic and social development programmes that will contribute to the process of economic integration in Central America in the context of the development plans and priorities sovereignly adopted by those countries;

31. The extensive needs for investment essential to the development and economic recovery of the Central American countries and the efforts these countries have undertaken jointly to obtain financing for specific priority projects, and considering the need for expanding and strengthening the international, regional and subregional financial institutions; and

32. The fact that the regional crisis has caused massive flows of refugees and that this situation deserves urgent attention;

33. *Concerned* over the constant worsening of social conditions, including the situation of employment, education, health and housing in the Central American countries;

34. *Reaffirming*, without prejudice to the right to resort to competent international forums, their willingness to settle their disputes in the framework of the negotiation process sponsored by the Contadora Group;

35. *Recalling* the support given to the Contadora Group by resolutions 530 of the Security Council and 38-10 of the General Assembly of the United Nations, as well as resolution AG/RES.675 (XIII-0/83) of the General Assembly of the Organization of American States; and

36. *Prepared* to give full implementation to the Document on Objectives and to the Standards for Execution of the Commitments Assumed in that Document, adopted by their Ministers of Foreign Affairs in Panama on 9 September 1983, and on 8 January 1984, respectively, under the auspices of the Governments of Colombia, Mexico, Panama, and Venezuela, which constitute the Contadora Group,

Have agreed on the following:

ACT OF CONTADORA FOR PEACE AND CO-OPERATION IN CENTRAL AMERICA

PART I

COMMITMENTS

CHAPTER I

GENERAL COMMITMENTS

Sole Section. Principles

The PARTIES undertake, in conformity with the obligations they have contracted in accordance with international law:

1. To respect the following principles:

(a) Renunciation of the threat or the use of force against the territorial integrity or the political independence of States.

(b) Peaceful settlement of disputes.
(c) Non-interference in the internal affairs of other States.
(d) Co-operation among the States in the solution of international problems.
(e) Equality of rights, self-determination of nations, and promotion of respect for human rights.
(f) Sovereign equality and respect for the rights inherent in sovereignty.
(g) Refraining from conducting discriminatory practices in economic relations among States, respecting their systems of political, economic and social organization.
(h) Fulfillment in good faith of obligations contracted in accordance with international law.

2. In compliance with those principles:

(a) They shall abstain from any action incompatible with the purposes and principles of the Charter of the United Nations and of the Charter of the Organization of American States, against the territorial integrity, political independence, or unity of any of the States, and particularly from any similar action that would constitute a threat or use of force.
(b) They shall settle their disputes by peaceful means in observance of the fundamental principles of international law contained in the Charter of the United Nations and in the Charter of the Organization of American States.
(c) They shall respect existing international boundaries between States.
(d) They shall abstain from militarily occupying territory of any other State in the region;
(e) They shall abstain from any act of military, political, economic, or any other type of coercion intended to subordinate to their own interest exercise by the other States of the rights inherent in their sovereignty.
(f) They shall take the actions necessary to guarantee the inviolability of their borders by irregular groups or forces that seek to destabilize the Government of a neighbouring State from their own territory.
(g) They shall not permit their territory to be used to carry out acts that would be contrary to the sovereign rights of other States, and they shall keep watch so that conditions prevailing therein will not threaten international peace and security.
(h) They shall respect the principle that no State or group of States has the right to interfere directly or indirectly by armed force or by any other form of interference in the internal or external affairs of another State.
(i) They shall respect the right to self-determination of nations, without external intervention or coercion, avoiding the threat or the direct or covert use of force to break the national unity or territorial integrity of any other State.

CHAPTER II

COMMITMENTS ON POLITICAL MATTERS

Section 1. Commitments in Regard to Regional Détente and Building of Confidence

The PARTIES undertake:

3. To promote mutual confidence by every means available and avoid any

action capable of breaking the peace and security in the Central American area.

4. To abstain from issuing or promoting propaganda in favour of violence or war, as well as hostile propaganda against any Central American Government, and to comply with and disseminate the principles of peaceful coexistence and friendly co-operation.

5. For that purpose, their respective government authorities:

(a) Shall avoid any oral or written statement that may aggravate the situation of conflict the area is experiencing.

(b) Shall urge the mass media to contribute to understanding and co-operation among the peoples of the region.

(c) Shall promote greater contact and knowledge among their peoples through co-operation in all areas related to education, science, technology, and culture.

(d) Shall jointly consider future actions and mechanisms that will contribute to the attainment and strengthening of a climate of stable and lasting peace.

6. To seek jointly a regional solution that will eliminate the causes of tension in Central America, affirming the inalienable rights of the nations in the face of foreign pressures and interests.

Section 2. Commitments in Regard to National Reconciliation

Each of the PARTIES acknowledges to the other Central American States the commitment assumed with its own people to guarantee the preservation of domestic peace as a contribution to the peace of the region, and for that purpose resolves:

7. To adopt measures aimed at the establishment or, where appropriate, the improvement of representative and pluralistic democratic systems that will guarantee the effective participation of the people, politically organized, in decision making and that will assure free access by the diverse currents of opinion to honest elections held at regular intervals, based on full observance of the rights of citizens.

8. In those cases in which deep divisions have been caused within the society, to promote on an urgent basis actions of national reconciliation that will enable the people to participate, with full guarantee, in authentic democratic political processes based on justice, freedom, and democracy; and, for that purpose, to establish mechanisms that will permit, in accordance with law, dialogue with the opposing groups.

9. To issue, and where appropriate to authenticate, expand, and improve legal standards that would offer a genuine amnesty that would permit its citizens to be fully reincorporated into its political, economic, and social life.

In the same way, to guarantee the inviolability of the life, freedom, and personal safety of persons granted amnesty.

Section 3. Commitments in Regard to Human Rights

The PARTIES undertake, in conformity with their respective domestic laws and with the obligations they have contracted in accordance with international law:

10. To guarantee full respect for human rights and, for that purpose, to comply with the obligations contained in the international legal instruments and the constitutional provisions on the subject.

11. To begin their respective constitutional procedures to become parties to the following international instruments:

(a) International Covenant on Economic, Social and Cultural Rights, of 1966.
(b) International Covenant on Civil and Political Rights, of 1966.
(c) Optional Protocol to the International Covenant on Civil and Political Rights, of 1966.
(d) International Covenant on the Elimination of All Forms of Racial Discrimination, of 1965.
(e) Convention on the Status of Refugees, of 1951.
(f) Protocol relating to the Status of Refugees, of 1967.
(g) Inter-American Convention on the Granting of Political Rights to Women, of 1952.
(h) Convention on the Elimination of all Forms of Discrimination against Women, of 1979.
(i) Protocol Amending the Convention on the Abolition of Slavery, of 1926.
(j) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 1956.
(k) Convention on the Political Rights of Women, 1953.
(l) American Convention on Human Rights, 1969, taking note of its Articles 45 and 62.

12. To prepare and submit to their competent internal organs the necessary legislative initiatives for the purpose of expediting the process of revising and updating their laws so that they will be better suited to foster and guarantee due respect for human rights.

13. To prepare and submit to the competent internal organs legislative initiatives aimed at:

(a) Guaranteeing the stability of officials in the judicial branch so that they can operate without political pressure and can themselves guarantee the stability of subordinate officials.
(b) Guaranteeing the budgetary stability of the judicial branch so that its independence from the other branches will be absolute and unquestionable.

Section 4. Commitments in Regard to Electoral Processes and Legislative Co-operation

Each of the PARTIES acknowledges to the other Central American States the commitment assumed with its own nation to guarantee the preservation of domestic peace as a contribution to peace in the region, and to this end resolves:

14. To take the appropriate measures that will guarantee under equal circumstances the participation of political parties in the electoral processes, ensuring their access to the mass communication media and their freedom of assembly and expression.

15. They also undertake:

(a) To put the following measures into practice:

1. To promulgate or review laws on election in order to hold elections that will guarantee effective participation by the people.
2. To establish independent electoral bodies that will prepare a reliable

list of registered voters and that will ensure that the process will be impartial and democratic.
3. To issue or, when appropriate, to update the rules that will guarantee the existence and participation of political parties representing the various currents of opinion.
4. To establish an election schedule and to take measures that will ensure participation by the political parties under equal circumstances.

(b) To propose to their respective legislative bodies:

1. That they hold regular meetings at alternate sites that will make it possible to exchange experiences, to contribute to détente and to foster better communication for closer relations among the countries of the area.
2. That they take measures to maintain relations with the Latin American parliament and the respective working committees.
3. That they exchange information and experience on matters of their competence and that, for purposes of a comparative study, they compile the election laws in effect in each country, as well as related provisions.
4. That they be present as observers at the various stages in the electoral processes carried out in the region. For this purpose, it will be indispensable to have an express invitation from the Central American State engaged in the electoral process.
5. That they hold technical meetings at regular intervals in the place and with the agency determined by consensus at each preceding meeting. The nature of the first meeting shall be determined through consultation with the Central American foreign ministries.

CHAPTER III

COMMITMENTS ON SECURITY MATTERS

In accordance with the obligations they have undertaken in accordance with international law, the PARTIES assume the following commitments:

Section 1. Commitments in Regard to Military Manœuvres

16. To abide by the following provisions in holding military manœuvres:

(a) In the event national or joint military manœuvres are held in areas within thirty (30) kilometres of the border, the corresponding advance notice shall be made to the bordering countries and to the Commission for Verification and Control referred to in Part II of this Act, at least thirty (30) days in advance.

(b) The notification shall contain the following items:

1. Designation
2. Purpose
3. Participating forces
4. Geographic locations
5. Schedule
6. Equipment and weapons to be used.

An invitation must be extended to observers from bordering countries.

17. To proscribe the holding of international military manœuvres in their corresponding territories. Any manœuvre of this kind which is under way shall be suspended within thirty days after this Act is signed.

Section 2. Commitments in Regard to Weapons

18. To stop all aspects of the arms race and immediately to begin negotiations on the control and reduction of the current weapons inventory and on the number of troops under arms.

19. Not to introduce new weapons systems that will qualitatively and quantitatively change current inventories of war matériel.

20. Not to introduce, possess or make use of chemical, biological, radiological or other weapons that can be considered excessively noxious or as having indiscriminate effects.

21. To send the Commission for Verification and Control their respective current inventories of weapons, installations and troops under arms within thirty (30) days following the date on which this act is signed. The inventories shall be prepared in accordance with the basic definitions and standards decided upon in the Appendix and in item 22 of this section. Upon receiving the inventories, the Commission shall within thirty days carry out the technical studies that will serve to establish ceilings on the military development of the region's States, taking into account their national security interests, and to stop the arms race.

Based on the foregoing, the PARTIES agree to the following stages of implementation:

First stage: Once they have delivered their respective inventories, the PARTIES are to cease all acquisition of war matériel. The moratorium shall be in effect until they decide upon ceilings in the second stage.

Second stage: The PARTIES shall establish ceilings within thirty days for weapons of the following kinds: combat aircraft and helicopters, tanks and armoured vehicles, artillery pieces, short-, medium-, and long-range rockets and guided missiles and launchers, military ships or vessels and ships or vessels that can be used for military purposes.

Third stage: After conclusion of the preceding stage and within thirty days, the PARTIES shall establish ceilings on troops and on installations that can be used in military activities.

Fourth stage: The PARTIES may initiate negotiations on matters whose discussion is considered indispensable. Despite this, the PARTIES may by mutual agreement change the deadlines set for the negotiation and establishment of ceilings.

22. The following basic standards shall determine the Central American States' military development ceilings, in accordance with the requirements of stability and security in the region:

(a) No armed institution shall have the political objective of seeking hegemony over the other forces considered individually.

(b) The definition of national security must consider the economic and social development existing at a specific time and the development sought.

(c) For its determination, studies covering the following aspects in general must be made:

1. Appreciation of the State's domestic and external security requirements
2. Territorial extension
3. Population

4. Distribution of economic resources, infrastructure and population in the national territory
5. Length and nature of land and maritime borders
6. Military expenditures with relation to gross domestic product (GDP)
7. Military budget with relation to public expenditures and in comparison with other social indicators
8. Geographical features and situation and geopolitical position
9. Highest level of military technology suitable for the region.

23. To initiate the constitutional procedures so that, in the event they have not already done so, they will be in a position to sign and ratify or accede to treaties and other international disarmament agreements.

Section 3. Commitments in Regard to Foreign Military Bases

24. Not to authorize the installation in their respective territories of foreign military bases or schools.

25. To eliminate the foreign military bases or schools existing in their respective territories within six months from the date this Act is signed.

Section 4. Commitments in Regard to Foreign Military Advisers

26. To deliver to the Commission for Verification and Control a list of foreign military advisers and of other foreign personnel participating in military and security activities in their territory within thirty days following the signing of this Act. The definitions contained in the Appendix shall be taken into account in preparing the list.

27. To establish a schedule for gradual withdrawal with a view to elimination of the foreign military advisers and other foreign personnel, which will include the immediate withdrawal of those advisers who are performing duties in operational and training areas. For this purpose, the studies and recommendations of the Commission for Verification and Control shall be taken into account.

28. A control registry shall be maintained concerning the advisers who perform technical duties related to the installation and maintenance of military equipment, in accordance with the terms established in the corresponding contracts or agreements. Based on this registry, the Commission for Verification and Control shall attempt to establish reasonable limits on the number of advisers of this kind.

Section 5. Commitments in Regard to Arms Traffic

29. To eliminate the intraregional and extraregional traffic in weapons consigned to individuals, organizations, irregular forces or armed bands that intend to destabilize the Governments of the States Parties.

30. To establish for this purpose internal control systems at airports, landing strips, ports, terminals, border passes, land, air, ocean and river routes, and at any other point or area that can be used for arms traffic.

31. To denounce violations in this matter based on presumption, or on verified facts to the Commission for Verification and Control, with sufficient terms of reference to enable it to carry out the necessary investigations and to present whatever conclusions and recommendations it may deem advisable. When pertinent, and for purposes of verification, the following criteria, among others, shall be taken into account:

(a) Origin of the arms traffic.
(b) Personnel involved.
(c) Type of weapons, munitions, equipment and other kinds of military supplies.
(d) Extraregional means of transportation.
(e) Extraregional transportation routes.
(f) Storage bases for weapons, munitions, equipment and other kinds of military supplies.
(g) Intraregional traffic areas and routes.
(h) International means of transportation.
(i) Receiving units.

Section 6. Commitments in Regard to Prohibition of Support to Irregular Forces

32. To refrain from providing any political, military or financial support or support of any other kind to individuals, groups, irregular forces or armed bands that advocate the overthrow or destabilization of other Governments, and to prevent with all means within their reach utilization of their territory for the purpose of attacking or organizing attacks, acts of sabotage, abductions or criminal acts in the territory of another State.

33. To exercise close surveillance over their respective borders for the purpose of preventing their own territory from being used to carry out any armed action against a neighbouring State.

34. To disarm and withdraw from the border area any irregular group or force that has been identified as being responsible for actions against a neighbouring State.

35. To dismantle and deny the use of installations, means and facilities for logistical and operational support in their territory when it is being used to undertake actions against neighbouring Governments.

Section 7. Commitments in Regard to Terrorism, Subversion or Sabotage

36. To refrain from providing political, military or financial support or support of any other kind to subversive, terrorist or sabotage activities designed to destabilize Governments of the region.

37. To refrain from organizing, encouraging or participating in acts of terrorism, subversion or sabotage in another State or from allowing activities organized within their territory aimed at the commission of such acts.

38. To comply with the following international treaties and conventions:

(a) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft.
(b) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance.
(c) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
(d) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.
(e) International Convention against the Taking of Hostages.

39. To initiate constitutional procedures so that, in the event they have not already done so, they will be in a position to sign and ratify or accede to

the international treaties and agreements mentioned in the preceding paragraph.

40. To respect the commitments set forth in this section, without prejudice to compliance with the international treaties and other agreements concerning diplomatic and territorial asylum.

41. To prevent in their corresponding territories participation in criminal acts by individuals belonging to foreign terrorist groups or organizations. For this purpose, they shall strengthen the co-operation of the responsible offices in migratory and political matters and co-operation among the corresponding civil authorities.

Section 8. Commitments in Regard to Direct Communication Systems

42. To establish a regional communication system that will guarantee immediate and timely connection between the competent governmental and military authorities, for the purpose of preventing incidents.

43. To establish mixed security commissions for the purpose of preventing and settling conflicts between neighbouring States.

CHAPTER IV

COMMITMENTS ON ECONOMIC AND SOCIAL MATTERS

Section 1. Commitments in the Economic and Social Area

To strengthen the process of Central American economic integration and the institutions which constitute and support it, the PARTIES undertake to do the following:

44. To revitalize, improve and reorganize the process of Central American economic integration, harmonizing it with the various forms of political, economic and social organization of the area's countries.

45. To ratify resolution 1/84 of the XXXth Meeting of Ministers Responsible for Central American Economic Integration, of 27 July 1984, aimed at re-establishment of the institutional nature of the Central American integration process.

46. To support and encourage the adoption of agreements aimed at strengthening intra-Central American trade in the legal framework and spirit of integration.

47. Not to adopt or support coercive or discriminatory measures detrimental to the economy of any of the Central American countries.

48. To adopt measures aimed at strengthening the area's financial agencies, including, among others, the Central American Bank for Economic Integration, supporting their efforts toward obtaining resources and the diversification of their operations, preserving the decisive power and the interests of all the Central American countries.

49. To strengthen the multilateral payment systems of the Central American Fund of the Common Market and to revitalize those which are accomplished through the Central American Clearing House. Available international financial assistance may be sought to support these aims.

50. To undertake sectoral co-operative projects in the area, such as the electric energy production and distribution system, the regional food security sys-

tem, the plan for priority health requirements in Central America and Panama and others that will contribute to Central American economic integration.

51. To examine jointly the Central American external debt problem based on an evaluation that will take into account each country's domestic situation, its ability to pay, the area's critical economic situation, and the inflow of additional resources necessary to cover its economic and social development.

52. To support the process of preparation and subsequent application of a new Central American tariff and customs system.

53. To adopt joint measures for the defence and promotion of their exports, integrating in so far as possible the stages of processing, marketing, and transportation of their products.

54. To adopt the necessary measures to grant juridical personality to the Central American Monetary Council.

55. To support at the highest level the efforts made by CADESCA, in co-ordination with subregional agencies, to obtain from the international community the necessary financial resources for Central America's economic recovery.

56. To apply international labour standards and adapt their internal legislations to them, with co-operation from the ILO, in particular those that contribute to the recovery of Central American societies and economies. In addition, also with ILO's co-operation, to develop programmes for employment generation, labour training and instruction, and the application of appropriate technologies that will include greater use of each country's manpower and natural resources.

57. To ask the Pan American Health Organization and UNICEF, as well as other development agencies and the international financial community, for their support in financing the Priority Health Needs Plan for Central America and Panama approved by the Ministers of Health of the Central American Isthmus in San José on 16 March 1984.

Section 2. Commitments in Regard to Refugees

The PARTIES undertake to make every effort aimed at the following:

58. If they have not done so yet, to take all steps required under the Constitution to accede to the 1951 Convention on the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

59. To adopt the terminology established in the Convention and in the Protocol referred to above in order to distinguish refugees from other categories of immigrants.

60. To establish the necessary internal mechanisms to apply the provisions of the Convention and Protocol referred to in paragraph 58 at the time of accession.

61. To establish mechanisms for consultation among the Central American countries with representatives from government offices responsible for dealing with the problem of refugees in each State.

62. To support the work of the United Nations High Commissioner for Refugees (UNHCR) in Central America and to set up direct co-ordination mechanisms to facilitate carrying out its mandate.

63. To ensure that any repatriation of refugees shall be voluntary, personally attested to and with the co-operation of the UNHCR.

64. In order to facilitate the repatriation of refugees, to set up tripartite committees made up of representatives of the State of origin, the receiving State, and the UNHCR.

65. To strengthen the programmes for protection of and assistance to refugees, particularly regarding health, education, work, and security.

66. To establish programmes and projects aimed at the self-sufficiency of refugees.

67. To train the officials responsible in each State for refugee protection and assistance, in co-operation with the UNHCR or other international agencies.

68. To appeal to the international community for immediate aid for Central American refugees, both directly through bilateral or multilateral agreements and through the UNHCR and other organizations and agencies.

69. Working in co-operation with the UNHCR, to seek out other countries that may be willing to receive Central American refugees. In no case shall a refugee be taken to a third country against his will.

70. That the area Governments make every effort to eradicate the causes behind the refugee problem.

71. That once the bases for voluntary and individual repatriation have been agreed upon, with full guarantees for refugees, receiving countries allow official delegations from the country of origin to visit refugee camps, in the company of representatives of the UNHCR and of the receiving country.

72. That, in co-ordination with the UNHCR, receiving countries facilitate the procedures involved in the departure of refugees when they are voluntarily and individually repatriated.

73. To establish measures in receiving countries that will help avert refugee participation in activities directed against the country of origin, while observing at all times the human rights of the refugees.

PART II

COMMITMENTS IN REGARD TO EXECUTION AND FOLLOW-UP

The PARTIES agree to establish the following mechanisms for execution and follow-up of the commitments undertaken herein:

1. Ad hoc *Committee for Evaluation of and Follow-up on Commitments on Political Matters and in Regard to Refugees*

(a) Composition

The Committee shall be composed of five (5) persons of recognized competence and impartiality proposed by the States who make up the Contadora Group and accepted of common accord by the PARTIES. The nationalities of the members of the Committee shall be distinct from those of the PARTIES.

(b) Functions

The Committee shall receive and evaluate the reports the PARTIES undertake to submit on how they have complied with the commitments regarding national reconciliation, human rights, electoral processes, and refugees.

In addition, the Committee shall be open to communications on these matters sent to it for information by organizations or persons that may provide useful elements for the evaluation.

With those elements, the Committee shall prepare a periodic report

that, in addition to the evaluation, shall include proposals and recommendations on how best to comply with the commitments. The report shall be sent to the PARTIES and to the Governments of the Contadora Group.

(c) Rules of Procedure

The Committee shall prepare its own rules of procedure and shall transmit them to the PARTIES.

2. *Commission for Verification and Control in Security Matters*

(a) Composition

The Commission shall be composed of:

— Four commissioners, representing States of known impartiality that have a genuine interest in helping to settle the Central American crisis. They shall be proposed by the Contadora Group and accepted by the PARTIES and shall have voice and vote in the Commission's decisions. Co-ordination of the Commission's work shall rotate among the members.
— A Latin American Executive Secretary appointed by the Contadora Group in common accord with the PARTIES, who shall have voice and vote in the decisions of the Commission and who shall see to it that it functions continuously.
— A representative of the Secretary-General of the United Nations and another of the Secretary General of the OAS, as observers.

(b) Establishment

The Commission shall be established no later than thirty (30) days after this document is signed.

(c) Functions

— To receive from the PARTIES updated inventories of weapons, installations, and troops under arms drawn up in accordance with the terms set forth in the Appendix.
— To carry out technical studies for use in setting ceilings on the military development of the PARTIES in the region in accordance with the basic criteria established in commitment 22 of this document.
— To verify that no new weapons that would qualitatively and quantitatively modify present inventories have been introduced and that no weapons prohibited by this Act have been used.
— To establish a registry of all commercial transfers of weapons carried out between the PARTIES, including donations and other transactions carried out within the framework of military aid agreements with other Governments.
— To verify the dismantling of foreign military installations, as established in this Act.
— To receive the census of foreign military advisers and to verify the withdrawal of such advisers in accordance with the schedule agreed upon.
— To verify compliance with this Act in the field of weapons traffic and to look into all denunciations made in this regard. For this purpose, the following criteria should be considered:

(1) Origin of weapons traffic: The air or seaport used to ship the weapons, munitions, equipment and other types of military supplies going to the Central American region should be specified under this criterion.
(2) Personnel involved: Persons, groups or organizations involved in arranging or carrying out weapons traffic, including the participation of Governments or their representatives.
(3) Types of weapons, munitions, equipment and other types of military supplies: A description will be provided under this category as to the type and calibre of weapons, the country of manufacture, whether the country of origin is other than the country of manufacture, as well as the quantities of each type of weapon, munition, equipment and other types of military supplies.
(4) Extraregional means of transport: The means of land, sea or air transport should be indicated, including nationality of same.
(5) *Extraregional transportation routes: Definition of the traffic routes* that have been utilized prior to reaching Central American territory, including stopovers or intermediate destination points.
(6) Bases where weapons, munitions, equipment and other types of military supplies are stored.
(7) Areas and routes of intraregional traffic: Description of the areas and routes and the involvement or acquiescence of Governments or of governmental or political sectors in carrying out weapons traffic. Inclusion of the frequency of utilization of such areas and routes.
(8) Means of international transport: Determination of the means of transport utilized, to whom they belong and the measures taken by Governments, political or governmental sectors to facilitate such transport, indicating whether it involves clandestine flights landing and unloading war matériel or dropping it off by parachute, and the utilization of small motor boats loaded on the high seas.
(9) Receiving unit: Determination of the identity of persons, groups and organizations to whom weapons are shipped.

— To verify compliance with this Act in so far as concerns irregular forces and the non-utilization of a State's own territory in a destabilizing action against another State, as well as looking into any denunciation in this regard.
— To verify compliance with the procedures for reporting national or joint military manœuvres covered under this Act.

(d) Standards and Procedures

— The Commission shall hear any well-founded denunciation of violations of the security commitments undertaken in this Act, shall inform the PARTIES involved and shall initiate any investigations it may deem appropriate.
— The Commission shall conduct its investigations by means of on site inspection, the taking of testimony and any other procedure it may deem necessary for carrying out its functions.
— The Commission shall draw up, in the case of denunciations of violations or failure to comply with the commitments undertaken in this Act in security matters, a report containing recommendations addressed to the PARTIES involved.

— The Commission shall forward all its reports to the Ministers of Foreign Affairs of Central America.
— The PARTIES shall extend full co-operation to the Commission, providing it with prompt and broad assistance to enable it to adequately carry out its functions. The Commission shall ensure the confidentiality of all information requested or received in the course of its investigations.

(e) Rules of Procedure

Once established, the Commission shall draw up its own Rules of Procedure and shall inform the PARTIES thereof.

3. Ad Hoc *Committee for Evaluation of and Follow-up on Commitments in the Economic and Social Area*

(a) Integration

For purposes of this Act, the Meeting of Ministers Responsible for Central American Economic Integration shall become the *Ad Hoc* Committee for Evaluation of and Follow-up on Commitments in the Economic and Social Area.

(b) The Committee shall receive the reports of the PARTIES with regard to progress in carrying out commitments in the economic and social area.

The Committee shall regularly conduct evaluations on progress made in carrying out commitments in the economic and social area, for which purpose it will have available the information gathered by the PARTIES and by the competent international and regional organizations.

The Committee shall present, in its regular reports, proposals for strengthening regional co-operation and furthering development plans, with particular emphasis on the aspects pointed out in the commitments in this Act.

PART III

FINAL PROVISIONS

1. The commitments undertaken by the PARTIES in this Act are juridical in nature, and therefore, binding.

2. This Act shall be ratified in accordance with the constitutional procedures established in each of the Central American States. The instruments of ratification shall be deposited with the Governments of the States making up the Contadora Group.

3. This Act shall go into effect when the five Central American signatory States have deposited their instruments of ratification.

4. The PARTIES, as of the date of signature, shall abstain from any actions whereby the objective and purpose of this Act may be defeated.

5. The mechanisms referred to in Part II shall come into provisional operation thirty (30) days after the date of signature of this Act.

The PARTIES shall take the necessary measures, prior to this deadline, to ensure such provisional operation.

6. Any dispute regarding the interpretation or application of this Act that has not been resolved through the mechanisms envisaged in Part II shall be submitted to the Ministers of Foreign Affairs of the PARTIES for their consideration and decision, which will require the affirmative vote of all the PARTIES.

7. In the event the dispute persists, it shall be submitted to the Ministers of Foreign Affairs of the Contadora Group, who shall meet at the request of any of the PARTIES.

8. The Ministers of Foreign Affairs of the States making up the Contadora Group shall use their good offices in order that the PARTIES involved may be able to resolve the specific situation submitted to them for consideration. If the problem is not solved through this procedure, they may suggest another means of peacefully resolving the dispute, in accordance with Article 33 of the Charter of the United Nations and Article 24 of the Charter of the Organization of American States.

9. This Act does not allow for any reservations.

10. This Act shall be recorded by the PARTIES with the Secretary-General of the United Nations and the Secretary General of the Organization of American States, in accordance with Article 102 of the Charter of the United Nations and Article 118 of the Charter of the Organization of American States.

Done in the Spanish language in nine original copies, in the city of on , 1984.

Appendix

The PARTIES agree on the following definitions of military terms:

1. Registry: Numerical or graphic data on military, paramilitary and security personnel, as well as military installations.

2. Inventory: Detailed list of weapons and military equipment of national or foreign ownership, with the largest possible number of specifications.

3. Census: Numerical data on foreign military or civilian personnel carrying out advisory functions in matters of defence and/or security.

4. Military installation: Establishment or infrastructure including airports, barracks, forts, encampments, and air, naval or similar installations under military jurisdiction, including their geographical location.

5. Organization and equipment chart (OEC): A document stating the mission, organization, equipment, capacities and limitations of a standard military unit at its various levels.

6. Military equipment: Individual and combined material of national or foreign ownership used by a military force in order to sustain itself and conduct operations, not including weapons.

7. Classification of weapons:

(a) By kind:

1. Conventional
2. Chemical
3. Biological
4. Radiological.

(b) By range:

1. Short-range: Portable individual and collective weapons
2. Medium-range: Non-portable support weapons (mortars, howitzers and artillery pieces)
3. Long-range: Rockets and guided missiles, which in turn are divided into:

(a) Short-range rockets: maximum range under twenty (20) kms
(b) Long-range rockets: range of twenty (20) kms or more
(c) Short-range guided missiles: maximum range is up to one hundred (100) kms
(d) Medium-range guided missiles: range from one hundred (100) kms to five hundred (500) kms
(e) Long-range guided missiles: range from five hundred (500) kms and up.

(c) By calibre and weight:

1. Light: one hundred and twenty (120) millimetres or less
2. Medium: over one hundred and twenty (120) millimetres and less than one hundred and sixty (160)
3. Heavy: over one hundred and sixty (160) millimetres and less than two hundred and ten (210) millimetres
4. Very heavy: over two hundred and ten (210) millimetres.

(d) By trajectory:

1. Flat trajectory weapons
2. Curved trajectory weapons

(a) Mortars
(b) Howitzers
(c) Artillery pieces
(d) Rockets.

(e) By means of transportation:

1. On foot
2. By horse
3. Towed or drawn
4. Self-propelled
5. All weapons that can be transported by road, railroad, boat or air
6. Those transported by air are classified as follows:

(a) Helicopter-borne
(b) Air-borne.

8. Features to take into account in the different types of airplanes and helicopters:

(a) Model
(b) Number
(c) Crew
(d) Make
(e) Speed
(f) Capacity
(g) Propulsion system
(h) With or without guns
(i) Type of armament
(j) Operational range
(k) Navigation system
(l) Communications system
(m) Type of mission performed.

9. Features to consider in the various ships or boats:

(a) Type of ship
(b) Shipyard and year built
(c) Tonnage
(d) Displacement capacity
(e) Draft
(f) Length
(g) Propulsion system
(h) Type of armament and aiming system
(i) Crew.

10. Services: Logistic and administrative services for general support to military, paramilitary, and security forces.

11. Military educational centres: Facilities for training and development of military personnel at the various levels and areas of specialization.

12. Military base: Land, sea, and air space including military installations, personnel and military equipment under a military command. The definition of foreign military base shall take into account the following factors:

— Administration and control
— Sources of financing
— Percentage of local and foreign personnel
— Bilateral agreements
— Location and geographical area
— Conveyance of part of the territory to another State
— Number of troops.

13. Foreign military installations: Those that have been built for use by foreign units for manœuvres, training or other military purposes. Pursuant to covenants or bilateral agreements, such installations may be temporary or permanent.

14. Foreign military advisers: Military and security advisers are foreign military or civilian personnel carrying out technical, training, or advisory duties in the following areas of operation: tactics, logistics, strategy, organization, and security in land, sea, air, or security forces in the Central American States pursuant to agreements with one or various Governments.

15. Arms traffic: Arms traffic means all kinds of transfers by Governments, persons, or regional or extraregional groups of arms consigned to groups, irregular forces or armed bands seeking to destabilize Governments of the region. This also includes transit of such traffic through the territory of a third State, with or without consent, on its way to those groups in another State.

16. National military manœuvres: Training exercises or mock combat or war that troops carry out in time of peace. The armed forces of the country participate in their own territory, and they may include land, sea and air units, for the purpose of increasing their operational capability.

17. International military manœuvres:

All those operations carried out by the armed forces of two or more countries in the territory of one of them or in an international area, including land, sea and air units in order to increase their operational capability and develop joint co-ordination measures.

18. Inventories prepared in each State separately, for each of its armed forces including the troops, weapons and munitions, equipment and installations of forces listed below and according to their own systems of organization:

(a) Security forces

1. Border guards
2. Urban and rural guards
3. Military forces attached to other ministries
4. Public security forces
5. Training and development centre
6. Others.

(b) Naval forces

1. Location
2. Type of base
3. Number and features of the naval fleet. Type of weapons
4. Defence system. Type of weapons
5. Communications systems
6. War matériel services
7. Air or land transportation services
8. Health services
9. Maintenance services
10. Quartermaster services
11. Recruitment and length of service
12. Training and development centre
13. Others.

(c) Air forces

1. Location
2. Runway capability
3. Number and features of the air fleet. Type of weapons
4. Defence system. Type of weapons
5. Communications systems
6. War matériel services
7. Health services
8. Land transportation services
9. Training and development centres
10. Maintenance services
11. Quartermaster services
12. Recruitment and length of service
13. Others.

(d) Army forces

1. Infantry
2. Motorized infantry
3. Airborne infantry
4. Cavalry
5. Artillery
6. Armoured
7. Communications
8. Engineers
9. Special forces
10. Reconnaissance troops
11. Health services
12. Transportation services
13. War matériel services

14. Maintenance services
15. Quartermaster services
16. Military police
17. Training and development centre
18. This document should include precise information on the system of induction, recruitment, and length of service
19. Others.

(e) Paramilitary forces

(f) Information requirements for airports: Existing airfields

1. Precise location and category
2. Location of installations
3. Dimensions of the takeoff, taxiing, and maintenance runways
4. Facilities: buildings, maintenance installations, fuel supplies, navigational aids, communications systems.

(g) Information requirement for terminals and ports:

1. Location and general features
2. Entry and access channels
3. Jetties
4. Capacity of the terminal.

(h) Personnel: From the standpoint of personnel, it is necessary to have the number of troops in active service, in the reserves, in the security forces, and in paramilitary organizations. Moreover, the information on advisers should include the number, immigration status, specialization, nationality, and length of stay in the country, as well as agreements or contracts, as the case may be.

(i) In relation to armament, munitions of all kinds should be included, as well as explosives, ammunition for portable weapons, artillery, bombs and torpedos, rockets, hand and rifle grenades, depth charges, land and sea mines, fuses, grenades for mortars and howitzers, etc.

(j) In national and foreign military installations, include military and hospitals' aid stations, naval bases, airports and landing strips.

ADDITIONAL PROTOCOL TO THE ACT OF CONTADORA FOR PEACE AND CO-OPERATION IN CENTRAL AMERICA

The undersigned plenipotentiaries, fully empowered by their respective Governments,

Convinced that it is necessary to have the effective co-operation of the international community in order to ensure the full force, effectiveness, and viability of the Act of Contadora for Peace and Co-operation in Central America, adopted by the countries of that region,

Have agreed as follows:

1. To abstain from any act whereby the objective and purpose of the Act would be defeated.

2. To co-operate with the Central American States in the terms in which they so request by common agreement, for attainment of the objective and purpose of the Act.

3. To provide their full support to the Commission for Verification and Control in Security Matters in the performance of its duties, when so requested by the PARTIES.

4. This Protocol shall be open to signature by all States that desire to contribute to peace and co-operation in Central America. Such signature shall be made before any of the Governments depositories of the Act.

5. This Protocol shall enter into force for each signatory State on the date of its signature by each of them.

6. This Protocol shall be deposited with the Governments of the States that make up the Contadora Group.

7. This Protocol does not allow for any reservations.

8. This Protocol shall be recorded with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

Done in the Spanish language in four original copies in the city of on 1984.

For the Government of Colombia. For the Government of Mexico.

For the Government of Venezuela. For the Government of Panama.

Annex 25

NOTE FROM HONDURAS TO THE UNITED NATIONS, 18 APRIL 1984

[Spanish text not reproduced]

Tegucigalpa, D.C., April 18, 1984.

His Excellency Javier Pérez de Cuéllar,
Secretary-General of the United Nations,
New York, New York.

Mr. Secretary-General:

I have the honor to express to Your Excellency[1] the deep concern of the Government of Honduras regarding the new international-level initiative undertaken by the Government of Nicaragua. The purpose of this initiative is to remove from the jurisdiction of the group seeking a peaceful settlement, the Contadora Group (Colombia, Mexico, Panama, and Venezuela), the discussion of the political, economic, social, and security crisis which is affecting the Central American region and which, because of its complex nature, requires a comprehensive, multilateral solution.

Your Excellency is aware that this crisis is the result of internal conflicts in certain countries of the area, a lack of respect for human rights, economic and social underdevelopment, and, most especially, the arms race and the inordinate build-up of the Nicaraguan Armed Forces. The Government of Nicaragua is engaged in the destabilization of neighbouring governments by providing encouragement, financing, training, and logistical and communications assistance to groups of insurgents from other Central American countries with a view to establishing sympathetic governments within those countries.

It was precisely in order to seek a comprehensive solution to the Central American crisis that the Contadora Group proposed direct negotiations between the nations of the region. That proposal was accepted by the Government of Honduras, which, from the start, supported it fully and participated actively in all meetings convened by the Contadora Group.

On April 4, 1983, the Government of Honduras submitted to the Permanent Council of the Organization of American States a draft resolution aimed at restoring peace to the Central American region. On the request of the Contadora Group, submitted to the Permanent Council through the permanent representative of Colombia, Honduras agreed to suspend discussion of its draft resolution so that the direct negotiations sponsored by this group of OAS member countries would have a chance to achieve positive results. In this respect, His Excellency Bernardo Sepúlveda, Secretary of Foreign Relations of Mexico, acknowledged at a press conference in Mexico City on April 13, 1983, that the conciliatory attitude of Honduras within the OAS was what had made the fraternal effort of the Contadora Group possible.

[1] See **II**, Correspondence, Nos. 46, 51, 71, 73 and 74.

Referring to the Panama meeting of the Contadora Group ministers, during which this effort was decided upon, the Mexican Foreign Minister said:

> "First of all, it was realized that the immediate concern was to ensure that the OAS Permanent Council would not hamper the Foreign Ministers of the Contadora Group in their efforts to find solutions for Central America. This was an urgent issue inasmuch as the OAS Permanent Council was scheduled to consider a draft resolution submitted by Honduras that same Monday afternoon. Fortunately, through a series of conversations we had with other parties concerned, an agreement was reached to postpone consideration of the draft resolution in the OAS Permanent Council, and this relieved the pressure so that the issue could be shifted from the regional forum to the Panama forum — that is to say, to the Foreign Ministers of the Contadora Group. At the same time, it was clear that it would also be necessary to take steps to prevent duplication in the United Nations system of efforts that had just begun in Panama on the previous Monday.
>
> The parties concerned welcomed our proposal enthusiastically and decided to ask the OAS Permanent Council to postpone its consideration of the issue. This was the first action taken on the matter [stated Minister Sepúlveda] and as I said before, it freed us by making it possible for us to exercise direct jurisdiction over the problem."

In more than a year of delicate multilateral negotiations, the Contadora Group has had the full support of the Organization of American States (AG/RES.675-XIII-0/83) and the United Nations General Assembly (res. 38/10) and Security Council (res. 530-1983), as well as the international community in general, regardless of ideological, political, economic, and legal systems.

That is why the Government of Honduras considers it necessary and in the best interests of the nations of the Central American region and of other peace-loving nations for the Contadora Group to continue its efforts to achieve a lasting and stable peace in the region without this process being hampered by some country seeking recourse to other means of peaceful solution.

In accordance with this viewpoint, which is shared by the majority of the Central American countries and by the Contadora Group, the Government of Honduras wishes to point out the dangers of discussing the Central American crisis in various international forums simultaneously, as the Government of Nicaragua has requested, when direct negotiations are already in progress. This viewpoint has also been corroborated by the fact that the United Nations Security Council and General Assembly, and the OAS General Assembly, have sent the Central American issue back to the Contadora Group, to which they give their unconditional support.

Once again the Government of Nicaragua is seeking to flout the Contadora negotiation process by attempting to bring the Central American crisis, essentially a political issue, under the jurisdiction of the International Court of Justice. This is detrimental to the negotiations in progress and fails to recognize the resolutions of the United Nations and the Organization of American States or the full international endorsement that the Contadora peace process has so deservedly received.

Needless to say, the negotiations conducted by the Central American countries within the Contadora Group are expressly authorized by Article 52 of the United Nations Charter and Article 23 of the OAS Charter, which provide for regional settlement of disputes.

The Government of Honduras, without participating or seeking to inter-

vene in any way in the proceedings initiated by Nicaragua against the United States of America in the International Court of Justice, views with concern the possibility that a decision by the Court could affect the security of the people and the State of Honduras, which depends to a large extent on the bilateral and multilateral agreements on international co-operation that are in force, published, and duly registered with the Office of the Secretary-General of the United Nations, if such a decision attempted to limit these agreements indirectly and unilaterally and thereby left my country defenseless.

The Government of Honduras also considers that since the Contadora Group unanimously approved the "document of objectives" of September 9, 1983, which encompasses all the problems related to various aspects of the regional crisis, and since negotiations are in progress between the five Central American countries in the three working commissions created for this purpose, these negotiations must continue without disruption by removal of the matter from this jurisdiction.

In view of the reasons stated above and in consideration of Nicaragua's petition that the Court impose precautionary measures in the proceedings initiated by Nicaragua against the United States of America, I respectfully request that Your Excellency transmit with due urgency to the clerk of the International Court of Justice the text of this note expressing the Honduran Government's concerns about the impact such measures could have on the negotiations in progress and the international security of the State of Honduras.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Annex 26

"THE SITUATION IN CENTRAL AMERICA", NOTE BY THE SECRETARY-GENERAL, UNITED NATIONS DOC. S/16041, 18 OCTOBER 1983

1. Since the Security Council adopted resolution 530 (1983), on 19 May 1983, I have endeavoured to keep in contact with the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, as well as with the Governments of Colombia, Mexico, Panama and Venezuela, which comprise the Contadora Group, in order to keep informed of the efforts made to find a negotiated political solution to the problems in the Central American region and of the developments in the area. On two occasions, on 28 June and 13 July 1983, I reported orally on the situation to the members of the Council.

2. Within the framework of the Declaration adopted at Isla de Contadora on 9 January 1983[1], there was an initial phase of official contacts and visits by the Ministers for Foreign Affairs of the Contadora Group to the countries directly concerned, on 12 and 13 April[2]. As a result of the consultations held, it was agreed to initiate a new phase of joint meetings of the Ministers for Foreign Affairs of the Group with the Ministers for Foreign Affairs of the five Central American countries. The first three meetings were held in Panama City on 20 and 21 April[2], from 28 to 30 May[3] and from 28 to 30 July 1983[4], respectively.

3. On 17 July 1983, the Presidents of Colombia, Mexico, Panama and Venezuela met in Cancún, Mexico. The Declaration issued on that occasion proposed guidelines for the negotiating process as well as specific commitments the implementation of which would ensure peace in the region[5].

4. On the basis of the Cancún Declaration, the Ministers for Foreign Affairs of the Contadora Group and of the five Central American countries met again in Panama City, from 7 to 9 September 1983, and adopted a Document of Objectives[6]. On 6 October, I received a visit from the Minister for Foreign Affairs of Mexico and the Permanent Representatives of Colombia, Panama and Venezuela to the United Nations, who handed me the Document, which, I was informed, had been approved by the Heads of State of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua[7]. At the request of the Contadora Group, the Document is transmitted to the Security Council as an annex[8] to this note.

5. On that occasion, the Minister for Foreign Affairs of Mexico pointed out that the Document of Objectives is a single consensus text, which sets out the positions and the concerns of the Governments directly concerned and the proposals of the Contadora Group, and which contains the principles on which the

[1] A/38/68.
[2] S/15727.
[3] S/15809.
[4] S/15900.
[5] S/15877.
[6] S/15982.
[7] The texts of the communications from the Governments of Nicaragua and Honduras on this subject were circulated to the Security Council as documents S/16006 and S/16021 respectively.
[8] Not reproduced. *[Note by the Registry.]*

eventual solution of the Central American problems will have to be based. The Document also contains a definition of the specific areas of negotiation and the terms of reference for the formulation of the legal instruments and the machinery which would be essential in order to ensure harmonious coexistence in the region. I expressed to the Minister for Foreign Affairs of Mexico my fervent hope that the Group's activities would soon achieve substantive and concrete results. I also emphasized on that occasion that any attempt at a solution should take into account the profound economic and social imbalances with which the Central American peoples have always struggled.

6. In transmitting the Document of Objectives to the Security Council, I consider it my duty to express my profound concern at the grave and prolonged tension which persists in the area. In view of the nature and possible ramifications of the convulsive situation currently prevailing in the Central American region, the unavoidable conclusion is that it threatens international peace and security.

7. In communications addressed to the President of the Council and to the Secretary-General, there have been frequent accusations and counteraccusations of foreign interference in the region and complaints of numerous border incidents as well as incursions by sea and by air, causing deplorable loss of life and material damage[1]. In the view of some Governments, the military and naval manœuvres now in progress add to tensions in the region. It has also been pointed out that the presence of military advisers and training centres, the traffic in arms and the activities of armed groups, and the unprecedented build-up of arms and of military and paramilitary forces constitute further factors of tension. On 13 September, the Security Council met at the urgent request of a Government of the region, which complained of what it described as a further escalation of acts of aggression against its country[2]. Although the Secretary-General has no way of reliably verifying each and every one of the components of this situation and is therefore unable to make definite judgments, there is no doubt that an alarming picture is emerging in the area.

8. The five Governments of Central America have assured me on a number of occasions of their firm commitment to contribute in good faith to the search for peaceful solutions. In that connection, they have also reiterated their determination to co-operate with the Governments of the Contadora Group in their efforts for peace. The Governments of Colombia, Mexico, Panama and Venezuela are motivated by an earnest desire to find solutions adapted to the realities of the region, without any intrusion derived from the East-West conflict. That is why they have the manifest support of the international community as a whole.

9. In accordance with the terms of resolution 530 (1983), I shall continue to keep the Council informed as and when necessary.

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[1] Documents S/15780, S/15787, S/15806, S/15808, S/15813, S/15816, S/15817, S/15835, S/15836, S/15837, S/15838, S/15839, S/15840, S/15855, S/15857, S/15858, S/15879, S/15893, S/15899, S/15930, S/15952, S/15973, S/15979, S/15980, S/15986, S/15993, S/15995, S/16007, S/16011, S/16012, S/16013, S/16016, S/16018, S/16020, S/16022, S/16024, S/16025, S/16026, S/16030, S/16031, S/16032.

[2] Document S/PV.2477.

Annex 27

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 38/10, ADOPTED 11 NOVEMBER 1983

Abstaining: Australia, Bahamas, Barbados, Chile, Colombia, Fiji, Guatemala, Haiti, Ivory Coast, Jamaica, Malawi, Paraguay.

Absent: Antigua and Barbuda, Belize, Botswana, Burma, Costa Rica, Dominica, Dominican Republic, Equatorial Guinea, Honduras, Iran[1], Liberia, Nigeria, Saint Lucia, Saint Vincent, Seychelles[1], St. Christopher and Nevis, Suriname, Swaziland, Vanuatu, Zaire.

38/10. *The Situation in Central America: Threats to International Security and Peace Initiatives*

Date: 11 November 1983 Meeting: 53
Adopted without a vote Draft: A/38/L.13/Rev.1

The General Assembly,

Recalling Security Council resolution 530 (1983) of 19 May 1983 in which the Council encouraged the efforts of the Contadora Group and appealed urgently to all interested States in and outside the region to co-operate fully with the Group, through a frank and constructive dialogue, so as to resolve their differences,

Reaffirming the purposes and principles of the Charter of the United Nations relating to the duty of all States to refrain from the threat or use of force against the sovereignty, territorial integrity or political independence of any State,

Also reaffirming the inalienable right of all peoples to decide on their own form of government and to choose their own economic, political and social system free from all foreign intervention, coercion or limitation,

Considering that the internal conflicts in the countries of Central America stem from the economic, political and social conditions obtaining in each of those countries and that they should not, therefore, be placed in the context of East-West confrontation,

Deeply concerned at the worsening of tensions and conflicts in Central America and the increase in outside interference and acts of aggression against the countries of the region, which endanger international peace and security,

Mindful of the necessity of promoting the achievement of peace on a sound basis, which would make possible a genuine democratic process, respect for human rights, and economic and social development,

Noting with deep concern that in recent weeks armed incidents, border clashes, acts of terrorism and sabotage, traffic in arms and destabilizing actions in and against countries of the region have increased in number and intensity,

[1] Later advised the secretariat it had intended to vote in favour.

Noting with great concern the military presence of countries from outside the region, the carrying out of overt and covert actions, and the use of neighbouring territories to engage in destabilizing actions, which have served to heighten tensions in the region,

Deeply concerned at the prolongation of the armed conflict in countries of Central America, which has been aggravated by increasing foreign intervention,

Bearing in mind the progress achieved in the meetings that the Ministers for Foreign Affairs of the Contadora Group have held with the Foreign Ministers of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua in identifying issues of concern and proposing appropriate procedures for the consideration of those issues,

Recalling the Cancún Declaration on Peace in Central America issued by the Presidents of Colombia, Mexico, Panama and Venezuela on 17 July 1983[1], which contains an appeal for political commitments on the part of countries situated in and outside the region with the aim of achieving lasting peace in the area,

Bearing in mind the Cancún Declaration and the endorsement by the States of Central America of a Document of Objectives, which provides a basis for an agreement on the negotiations, that should be initiated at the earliest possible date with the aim of drawing up agreements and adopting the necessary procedures for formalizing the commitments and ensuring appropriate systems of control and verification,

Appreciating the broad international support expressed for the efforts of the Contadora Group to secure a peaceful and negotiated settlement of the conflicts affecting the region,

1. *Reaffirms* the right of all the countries of the region to live in peace and to decide their own future, free from all outside interference or intervention, whatever pretext may be adduced or whatever the circumstances in which they may be committed;

2. *Affirms* that respect for the sovereignty and independence of all States of the region is essential to ensure the security and peaceful coexistence of the Central American States;

3. *Condemns* the acts of aggression against the sovereignty, independence and territorial integrity of the States of the region, which have caused losses in human life and irreparable damage to their economies, thereby preventing them from meeting the economic and social development needs of their peoples; especially serious in this context are:

(a) The attacks launched from outside Nicaragua against that country's strategic installations, such as airports and seaports, energy storage facilities and other targets whose destruction seriously affects the country's economic life and endangers densely populated areas;

(b) The continued losses in human life in El Salvador and Honduras, the destruction of important public works and losses in production;

(c) The increase in the number of refugees in several countries of the region;

4. *Urges* the States of the region and other States to desist from or to refrain

[1] A/38/303-S/15877, Annex.

from initiating, military operations intended to exert political pressure, which aggravate the situation in the region and hamper the efforts to promote negotiations that the Contadora Group is undertaking with the agreement of the Governments of Central America;

5. *Notes with satisfaction* that the countries of the region have agreed to take measures leading to the establishment and, where appropriate, the improvement of democratic, representative and pluralistic systems which will guarantee effective popular participation in decision-making and ensure the free access of various currents of opinion to honest and periodic electoral processes based on the full observance of civil rights, emphasizing that the strengthening of democratic institutions is closely linked to evolution and advances achieved in the sphere of economic development and social justice;

6. *Expresses its firmest support* for the Contadora Group and urges it to persevere in its efforts, which enjoy the effective support of the international community and the forthright co-operation of the interested countries in or outside the region;

7. *Welcomes with satisfaction* the Cancún Declaration of the Presidents of Colombia, Mexico, Panama and Venezuela and the Document of Objectives endorsed by the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, which contains the basis for the start of negotiations to ensure harmonious coexistence in Central America;

8. *Requests* the Secretary-General, in pursuance of Security Council resolution 530 (1983), to keep the Council regularly informed of the development of the situation and of the implementation of that resolution;

9. *Requests* the Secretary-General to submit a report to the General Assembly at its thirty-ninth session on the implementation of the present resolution;

10. *Decides* to keep under review the situation in Central America, threats to security which may occur in the region and the progress of peace initiatives.

Annex 28

UNITED NATIONS SECURITY COUNCIL RESOLUTION 530 (1983), ADOPTED 19 MAY 1983

The Security Council,

Having heard the statement of the Foreign Minister of the Republic of Nicaragua,

Having also heard the statements of various States Members of the United Nations in the course of the debate,

Deeply concerned, on the one hand, at the situation prevailing on and inside the northern border of Nicaragua and, on the other hand, at the consequent danger of a military confrontation between Honduras and Nicaragua, which could further aggravate the existing crisis situation in Central America,

Recalling all the relevant principles of the Charter of the United Nations, particularly the obligation of States to settle their disputes exclusively by peaceful means, not to resort to the threat or use of force and to respect the self-determination of peoples and the sovereign independence of all States,

Noting the widespread desire expressed by the States concerned to achieve solutions to the differences between them,

Commending the appeal of the Contadora group of countries, Colombia, Mexico, Panama and Venezuela, in its 12 May 1983 communiqué (S/15762) that the deliberations of the Council should strengthen the principles of self-determination and non-interference in the affairs of other States, the obligation not to allow the territory of a State to be used for committing acts of aggression against other States, the peaceful settlement of disputes and the prohibition of the threat or use of force to resolve conflict,

Considering the broad support expressed for the efforts of the Contadora Group to achieve solutions to the problems that affect Central American countries and to secure a stable and lasting peace in the region,

1. *Reaffirms* the right of Nicaragua and of all the other countries of the area to live in peace and security, free from outside interferences;
2. *Commends* the efforts of the Contadora Group and urges the pursuit of those efforts;
3. *Appeals* urgently to the interested States to co-operate fully with the Contadora Group, through a frank and constructive dialogue, so as to resolve their differences;
4. *Urges* the Contadora Group to spare no effort to find solutions to the problems of the region and to keep the Security Council informed of the results of these efforts;
5. *Requests* the Secretary-General to keep the Security Council informed of the development of the situation and of the implementation of the present resolution.
