MEMORIAL OF NICARAGUA (QUESTIONS OF JURISDICTION AND ADMISSIBILITY)

MÉMOIRE DU NICARAGUA (QUESTIONS DE LA COMPÉTENCE ET DE LA RECEVABILITÉ)

INTRODUCTION

1. Nicaragua initiated this proceeding against the United States of America by filing its Application with the Court on 9 April 1984. The Application sets forth massive violations on the part of the United States of its 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 the United States has violated its international legal obligations to Nicaragua by using armed force against it; by organizing, training, supporting and directing a 10,000-man mercenary army operating against Nicaragua from bases in Honduras; by mining Nicaraguan ports, invading its airspace and attacking major economic installations, all in violation of Nicaragua's sovereignty; and by seeking to overthrow the Government of Nicaragua, thus intervening in its internal affairs.

2. The jurisdiction of the Court was invoked on the basis of declarations of the United States and Nicaragua under Article 36 of the Statute of the Court accepting the compulsory jurisdiction of the Court (Application, p. 6, *supra*, para. 13).

3. Nicaragua asked the Court to adjudge the United States actions to be in violation of its international legal obligations to Nicaragua, to declare that the United States should cease and desist from such actions and to determine the reparations owing to Nicaragua in consequence of such transgressions (Application, pp. 9-10, *supra*, para. 26).

4. Accompanying the Application was a Request for Provisional Measures of Interim Protection in accordance with Article 41 of the Statute of the Court. After an oral hearing on 25 and 27 April 1984, the Court issued an Order indicating certain provisional measures (Order of 10 May 1984, *I.C.J. Reports 1984*, pp. 186-187, para. 41). The Order also decided

> "that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application" (*id.*, p. 187, para. 41 (D)).

The present Memorial is submitted pursuant to this decision of the Court.

5. It is the position of Nicaragua that the jurisdiction of the Court is fully established by the matching declarations of the Applicant and the Respondent invoked in paragraph 13 of the Application. The texts of the declarations are cast in the language, respectively, of Article 36 of the Statute of the Permanent Court of International Justice (for Nicaragua) and of Article 36 (2) of the Statute of the International Court of Justice (for the United States). They clearly embrace the legal dispute presented by the Application.

6. Part One of the Memorial demonstrates:

A. That Nicaragua's declaration of 24 September 1929 is in force as a valid and binding acceptance of the compulsory jurisdiction of this Court under the terms of Article 36 (5) of the Statute of the Court; and that this is the case notwithstanding Nicaragua's apparent failure to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice (Part One, I, pp. 363-388, *infra*).

B. That the attempt by the United States to vary or terminate its declaration

of 14 August 1946 by a letter dated 6 April 1984 from Secretary of State George Shultz to the Secretary-General of the United Nations was ineffective to accomplish either result (Part One, II, pp. 389-402, *infra*).

C. In addition, under Nicaragua's reserved right to amend its Application (Application, p. 9, *supra*, para. 26), the Memorial shows that the Court has jurisdiction under the compromissory clause, Article XXIV (2), of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States of America of 24 May 1958, as to the claims presented in the Application that fall within the scope of that Treaty (Part One, III, pp. 403-405, *infra*).

7. Part Two of the Memorial demonstrates the admissibility of the Application. In particular, it shows that the Application is admissible because:

A. The fact that Nicaragua's legal claims are part of a more general political controversy does not bar adjudication of those claims (Part Two, I, pp. 408-413, *infra*).

B. The consideration of the political aspects of the situation in Central America by the political organs of the United Nations and the Organization of American States and by the Contadora Group does not bar the Court from adjudicating the legal claims asserted in the Application (Part Two, II, pp. 414-422, *infra*).

C. All of the parties necessary for adjudication of the dispute presented by the Application are before the Court (Part Two, III, pp. 423-431, *infra*).

8. In the normal procedure of the Court, questions of jurisdiction and admissibility would be addressed at the stage of Preliminary Objections, after the Respondent had fully specified and defined its objections, if any. This sequence is of considerable importance because, as the Court knows, in view of the consensual nature of the Court's jurisdiction, any objections to jurisdiction (and perhaps to admissibility) not expressly asserted by the Respondent are taken as waived. The failure to assert such an objection is taken as a consent to jurisdiction, despite the putative objection (see S. Rosenne, *The International Court of Justice*, 1961 ed., Leyden, pp. 284, 296-300).

9. Nicaragua understands the considerations of convenience and efficiency that have led the Court to adopt the present procedure, and fully endorses that action. In consequence, however, Nicaragua, in sustaining the jurisdiction of the Court and the admissibility of the Application, must do so at large, so to speak, and without knowing the precise nature and scope of any objection that might be advanced by the Respondent. Nicaragua has had to divine as best it could the character of such objections from the observations and written material submitted by the United States at the oral hearing on provisional measures. In these circumstances, the Court will understand that Nicaragua must reserve the right to supplement the present Memorial after it has had the opportunity to study the Counter-Memorial of the United States on this phase of the case.

PART ONE. THE JURISDICTION OF THE COURT TO ENTERTAIN THE DISPUTE

I. NICARAGUA HAS ACCEPTED THE COMPULSORY JURISDICTION OF THE COURT

A. Nicaragua Is Bound by the Compulsory Jurisdiction of the Court under the Terms of Article 36 (5) of the Statute of the Court

10. It may be convenient to set forth the text of Article 36 (5) at the outset:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

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

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

1. Textual Analysis

13. The subject of Article 36 (5) is "*declarations* made under Article 36 of the Statute of the Permanent Court . . .". Thus, although it may be true that Nicaragua did not deposit an instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, that fact has no relevance in the present context. Article 36 (5) does not speak of parties to the Statute of the Permanent Court but of declarations accepting its jurisdiction. Such a declaration made by a State not a party to the Statute and that by its terms had not expired was a declaration "in force". In Judge Schwebel's words, it "remained in an imperfect but not invalid state; . . ." (*I.C.J. Reports 1984*, p. 203 (dissenting opinion)). It could have been activated at any time, at least until the dissolution of the Permanent Court, by ratification of the Statute of that Court. The effect of Article 36 (5), in the case of Nicaragua, was to make its ratification of the Statute of this Court (which occurred before the dissolution of the Permanent

Court) the equivalent of ratification of the old Statute — the act that perfected the declaration.

14. That is the significance of the use of the language "*deemed* . . . to be acceptances of the compulsory jurisdiction of the International Court of Justice . . .". This function is explained in the joint dissenting opinion in the *Aerial Incident* case by Judges Lauterpacht, Wellington Koo and Spender.

> "The unqualified language of paragraph 5 suggests that any real or apparent legal difficulty ensuing from the fact that the declarations were annexed to the Statute of the Permanent Court and any other legal difficulties, real or apparent, which did or did not occur to the authors of paragraph 5 were met by the comprehensive provision laying down that these declarations shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the new Court. It is exactly some such obstacles which the authors of Article 36 wished to neutralize. This was the purpose of paragraph 5. They said in effect: Whatever legal obstacles there may be, these declarations, provided their period of validity has not expired — that is provided that they are still in force on the day of the entry of the Charter into force or on the day on which the declarant State becomes a party to the Statute — shall continue in respect of the International Court of Justice.
>
> The intention of paragraph 5 which used the words 'shall be deemed . . . to be acceptances' is to cut clear through any cobweb of legal complications and problems which might arise in this connection." (Case concerning the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Preliminary Objections, I.C.J. Reports 1959*, p. 127 at 167-168 (joint dissenting opinion by Judges Lauterpacht, Wellington Koo and Spender).)

The failure to deposit an instrument of ratification of the Statute of the old Court is just such a "legal obstacle", a "cobweb of legal complications", and of the kind that could very appropriately be swept away by the ratification of the new Statute.

15. Article 36 (5) "was first formulated in the French language" (*Aerial Incident, I.C.J. Reports 1959*, pp. 161-162 (joint dissenting opinion)), and as Judge Schwebel showed in his dissenting opinion on provisional measures (Order of 10 May 1984, p. 203), the meaning emerges even more clearly from the French text of the Article. There, the decisive words are:

> "*Les déclarations faites* en application de l'article 36 du Statut de la Cour permanente de Justice internationale *pour une durée qui n'est pas encore expirée* . . ." (Emphasis added.)

The focus is unmistakably on the duration of the declaration, that is, the time during which according to its terms it was to remain effective. In Nicaragua's case, of course, that time was indefinite, so that at the moment when Nicaragua became a member of the United Nations, it had, literally and undeniably, made a declaration whose duration had not expired.

16. In the *Aerial Incident* case, Bulgaria made much of the English terminology, "Declarations . . . which are still in force . . ." and linked it with the penultimate draft of the French text of Article 36 (5) where the words *"en vigueur"* were used. The three dissenting judges disposed of that argument with characteristic force:

> "There was no change in the substance of the paragraph for the reason that the clear and unambiguous meaning of the French amendment [from

> *"en vigueur"* to *"pour une durée qui n'est pas encore expirée"*] was understood by the whole Committee as conveying the true sense of the English text as well. The Rapporteur of the First Committee, who made his report in the English language, stated, after referring to the question of Article 36, as follows: 'A new paragraph 4 [now paragraph 5] was inserted to preserve declarations made under Article 36 of the old Statute *for periods of time which have not yet expired* and to make these declarations applicable to the jurisdiction of the new Court.' There seems to have been no doubt in the minds of the members of the First Committee as to the meaning of the words 'still in force' in the English text. The French amendment was made indeed not with a view to any change in substance but only for the purpose of clarification." (*Aerial Incident, I.C.J. Reports 1959*, p. 162 (joint dissenting opinion) (emphasis in original).)

17. The traditional clarity of French draftsmanship achieved by the amendment is evidenced by a comparison of the French text of Article 36 (5) with that of Article 37, dealing with jurisdictional clauses in treaties and conventions. There the French text retains the wording *"en vigueur"*, the characteristic way of describing multilateral and bilateral agreements that are binding on the parties. Declarations, however, are unilateral acts. And to describe precisely the category of declarations to which Article 36 (5) refers, the French draftsmen amended the original text to read "for a duration that has not yet expired". The choice of language further emphasizes that it is the unilateral declaration on which paragraph 5 operates, not the multilateral agreement embodied in the Statute of the Court.

18. The penultimate version of Article 36 (5) contains one further piece of evidence for the construction of the Article here advanced. The text reads:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute *to have been made under this Article* and shall continue to apply, in accordance with their terms." (*Documents of the United Nations Conference on International Organization* (hereafter "*UNCIO Documents*"), Vol. XIII, pp. 557, 558 (1945) (emphasis added).)

This language, which was itself adopted by the Committee *(id.)*, shows how the Committee envisioned the process of transfer of jurisdiction from the old Court to the new. Existing *declarations* would operate as declarations under the new Statute, and would be brought into effect as acceptances of the compulsory jurisdiction when the declarants ratified the new Statute. This two-step process was condensed in the final version of the Article resulting from the French amendment: "shall be deemed, as between parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice . . .". But, as with the other elements of the French amendment, no change of substance was intended (*id.*, pp. 282, 284; *Aerial Incident, I.C.J. Reports 1959*, p. 162 (joint dissenting opinion)).

2. The Purpose of Article 36 (5) in the Context of the Establishment of the International Court of Justice

19. It is well established that the Court, in construing Article 36 (5), may and indeed should seek guidance from the purposes that animated the draftsmen (see *Aerial Incident, I.C.J. Reports 1959*, p. 127; *Barcelona Traction, Light and Power*

Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 6). The interpretation of Article 36 (5) here put forward is consistent with — indeed gives effect to — the important purposes that gave rise to Articles 36 (5) and 37 of the Statute.

20. The background and history of these Articles is well known and has been canvassed extensively in the jurisprudence of the Court (see *Barcelona Traction, I.C.J. Reports 1964*, pp. 26-39; *Aerial Incident, I.C.J. Reports 1959*, pp. 136-146; *id.*, pp. 157-188 (joint dissenting opinion)). In brief, these Articles represent a compromise in the establishment of the International Court of Justice, between those who favoured a true compulsory jurisdiction and those who thought that the principle of consensual jurisdiction required the new Court's jurisdiction to be founded on *ad hoc* consent or on instruments referring specifically to it.

21. The draftsmen of the Statute, being international jurists, were naturally enough mostly of the first party. But it became apparent that the political conditions for the establishment of a true compulsory jurisdiction were not present. The Proceedings of Committee IV and its sub-committees are replete with statements endorsing compulsory jurisdiction in principle, but regretting that it was unattainable in practice (e.g., *UNCIO Documents*, Vol. XIII, pp. 246-251, 557-559).

22. In response to this dilemma, the scheme of Articles 36 (5) and 37 was devised to salvage for the new Court as much as possible of the compulsory jurisdiction of the old. As stated succinctly by the Court in *Barcelona Traction*, "It was a natural element of this compromise that the maximum, and not some merely quasi optimum preservation of this field should be aimed at." (*I.C.J. Reports 1964*, p. 32.) The language echoes that of the joint dissenters in the *Aerial Incident* case, referring specifically to Article 36 (5): "Their intention . . . was to maintain the maximum — not the minimum — of existing declarations." (*I.C.J. Reports 1959*, p. 184.) And again, in *Barcelona Traction*, the Court, speaking of Article 37, expanded on the point:

> "[its] governing concept evidently was to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the Permanent Court; and moreover, to do this by a process which would automatically substitute the new Court for the Permanent Court in the jurisdictional treaty relations between all Members of the United Nations and other parties to the Statute, thus avoiding the necessity for piecemeal action by special agreement between the parties to the various instruments" (*I.C.J. Reports 1964*, p. 31).

Since Articles 36 (5) and 37 were both parts of an integral scheme to preserve the jurisdiction of the Permanent Court, they are to be construed *in pari materia*. Thus, Article 36 (5), equally with Article 37, must be taken as designed to preserve as many declarations as possible from becoming inoperative by reason of the dissolution of the Permanent Court, and to do so automatically, without need for piecemeal actions by the various declarants.

23. In this context, the technical function of the words "which are still in force" is simple and is strictly limited:

> "We consider that the words 'which are still in force', when read in the context of the whole paragraph, can only mean, and are intended to mean, the exclusion of some fourteen declarations of acceptance of the compulsory jurisdiction of the Permanent Court which had already expired and the inclusion, irrespective of the continuance or dissolution of the Permanent

Court, of all the declarations the duration of which has not expired." (*Aerial Incident, I.J.C. Reports 1959*, p. 161 (joint dissenting opinion).)

The operation of the words should therefore be construed narrowly so as not to expand their exclusionary function beyond the absolutely necessary minimum indicated in the quoted passage.

24. In addition to maximizing the jurisdiction transferred from the old Court to the new, the other dominating theme of the draftsmen of the present Statute was to maintain continuity between the two Courts. This objective, also, was given extended treatment in the *Aerial Incident* case joint dissent. On the basis of a meticulous review of the relevant materials, the dissenting judges concluded that the new Court "was to be in substance a continuation of the Permanent Court" (*I.C.J. Reports 1959*, p. 159 (joint dissenting opinion)).

> "While various considerations urged the dissolution of the Permanent Court and the creation of the International Court of Justice, there was general agreement as to the substantial identity of those two organs. In particular, every effort was made to secure continuity in the administration of international justice." (*Id.*, p. 158.)
>
> "In fact, a study of the records of the Conference shows that the determination to secure the continuity of the two Courts was closely linked with the question of the compulsory jurisdiction of the new Court in a manner which is directly relevant to the interpretation of paragraph 5 of Article 36." (*Id.*, p. 159.)

25. Indeed, as pointed out in that opinion, the last meeting of the Permanent Court did not take place until the day after the inaugural meeting of the International Court of Justice. And this overlap was by design — to ensure that nothing of the old Court that was still viable would fall into a legal limbo in a momentary gap between the two bodies.

26. The interpretation of Article 36 (5) here advanced comports equally well with this second purpose of continuity as with the first of maximizing the transfer of jurisdiction. The situation as it stood with regard to the compulsory jurisdiction of the Permanent Court was to be preserved intact, in so far as this could be done, for the new Court. Indeed, this purpose was recognized by the majority as well as the dissent in the *Aerial Incident* case:

> "The clear intention which inspired Article 36, paragraph 5, was to continue in being something that was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved . . ." (*I.C.J. Reports 1959*, p. 145.)

27. What was the existing situation as respects Nicaragua? What was it that was "in existence"? At the time of the dissolution of the old Court, Nicaragua had on the books, so to speak, a declaration accepting the jurisdiction of that Court without conditions and without limit of time. That declaration, as Judge Schwebel pointed out in his dissenting opinion on provisional measures, could have been activated at any moment up to the dissolution of the Permanent Court by depositing an instrument of ratification to the Protocol of Signature of the Statute (*I.C.J. Reports 1984*, pp. 202-203 (dissenting opinion)). The declaration was alive and subsisting, needing only the ratification of the Statute to bring it fully into effect. Before the old Court was extinct, Nicaragua did ratify a Statute — but it was the Statute of the new Court. Does it make any sense, in light of the language of Article 36 (5) and the "determination to secure continuity", to insist that in order to accomplish an acceptance of the compulsory jurisdiction

of the new Court, Nicaragua was required to ratify the Statute of the expiring one as well? As the dissenters said in *Aerial Incident*:

> "the requirement of consent cannot be allowed to degenerate into a negation of consent or, what is the same thing, into a requirement of double consent, namely of confirmation of consent already given" (*id.*, p. 187).

3. The Jurisprudence of the Court

28. The Court has twice had the opportunity to consider exhaustively the operation of Articles 36 (5) and 37 of the Statute of the Court in effectuating the transition from the Permanent Court of International Justice to the present Court (*Aerial Incident, I.C.J. Reports 1961*, p. 17; *Barcelona Traction, I.C.J. Reports 1964*, p. 6). Neither of these cases, of course, dealt with the precise situation presented here. Nevertheless, the Judgments of the Court in those cases and the numerous separate and dissenting opinions are exceptionally illuminating of the principles involved in the present case. Nicaragua submits that the position it advances here is wholly consistent with those principles if not indeed compelled by them.

29. To start with the most recent of those cases, *Barcelona Traction*, it presents a situation strikingly similar to the one now before the Court. The title to jurisdiction advanced by Belgium was a clause in the Hispano-Belgian Treaty of 1927 providing for the reference of disputes to the Permanent Court of International Justice. Belgium contended that, by virtue of Article 37, the clause became operative, "as between the parties to the present Statute" to confer jurisdiction on this Court when Spain became a member of the United Nations in December 1955. This position was accepted by the Court. It necessarily followed that the jurisdictional clause relied on had remained in abeyance for almost a decade between the dissolution of the Permanent Court and the admission of Spain to the United Nations. The clause had no operational force during that period, because Spain was not a member of the United Nations or otherwise a "part[y] to the present Statute". When it finally joined the United Nations its adherence to the Statute, under the terms of Article 93 (1) of the Charter, satisfied the requirement and activated the jurisdictional clauses.

30. Spain argued that the asserted construction created an anomalous situation

> "in which the jurisdictional clause concerned, even if in existence, is necessarily inoperative and cannot be invoked by the other party to the treaty containing it; and then, after the gap of years, suddenly it becomes operative again, and can be invoked as a clause of compulsory jurisdiction to found proceedings before the Court" (*Barcelona Traction, I.C.J. Reports 1964*, p. 35).

The Court treated this objection with equanimity: "the notion of rights and obligations that are in abeyance, but not extinguished, is perfectly familiar to the law and represents a common feature of certain fields" (*id.*, p. 36). Spain's admission to membership in the United Nations activated the obligation.

31. So here, Nicaragua's declaration was "in existence", although "inoperative" or "in abeyance" because of its failure to perfect the ratification of the Statute of the Permanent Court. Like Spain, by becoming a party to the present Statute and accepting all its provisions, including Article 36 (5), Nicaragua activated its declaration.

32. The dissenters in the *Aerial Incident* case thought that they were vindicated by the reasoning of *Barcelona Traction*. (See separate opinion of Vice-President

Wellington Koo, *Barcelona Traction, I.C.J. Reports 1964*, p. 51 ; separate opinion of Judge Tanaka, *id.*, p. 65.) Their position was that Bulgaria, too, had a jurisdictional declaration accepting the compulsory jurisdiction of the Permanent Court that was in existence and unexpired because by its terms of indefinite duration, and needing only to be activated, through the operation of Article 36 (5), by Bulgaria becoming a party to the present Statute. This reading of Article 36 (5) is perfectly parallel to the *Barcelona Traction* analysis of Article 37 and equally supports Nicaragua's position.

33. The majority in *Aerial Incident*, of course, did not accept this view. But the point of difference between the majority and the dissent had nothing to do with the proposition that an existing jurisdictional instrument, for some reason in abeyance, could be activated by the subsequent ratification of the Statute. Otherwise the *Aerial Incident* majority could not have accepted *Barcelona Traction*. The point of difference was the majority's view that the Bulgarian declaration had expired with the dissolution of the Permanent Court and therefore was no longer "in force" when Bulgaria ratified the Statute. (See *Aerial Incident, I.C.J. Reports 1959*, p. 143.) The case was otherwise for declarants that were Original Members of the United Nations and had become parties to the Statute before the dissolution of the Permanent Court *(id.)*.

34. The crucial point for the Court was that, for States that had accepted the compulsory jurisdiction of the Permanent Court but not yet joined the United Nations, "the dissolution of the Permanent Court freed them from that obligation" (*id.*, p. 138). In those circumstances, to accept the jurisdiction of the new Court required a new manifestation of consent, which "can validly be given by Bulgaria only in accordance with Article 36, paragraph 2" (*id.*, p. 145). The fundamental premise is that the old declaration, once "lapsed" or "extinguished", can never be "revived" *(id.)*.

35. Whatever the merits of that analysis, it has no application to the situation at bar. Nicaragua *was* an Original Member of the United Nations. It was a party to the Statute of this Court before the dissolution of the Permanent Court. Indeed, it had first expressed its approval of Article 36 (5) by voting for it as a member of Committee IV/1 at the San Francisco Conference (*UNCIO Documents*, Vol. XIII, p. 251). Its declaration, therefore, did not "lapse" or "become extinguished" because it was "devoid of object" (*Aerial Incident, I.C.J. Reports 1959*, p. 143).

36. Nor was there any period or moment of time when Nicaragua was released from its declaration, even though the obligations under it may not have been perfected. Thus, the problem that the Court perceived with respect to Bulgaria does not exist with respect to Nicaragua. For Nicaragua, Article 36 (5) had the effect that the Court in *Aerial Incident* attributed to it:

> "to introduce a modification in the declarations to which it refers by substituting the International Court of Justice for the Permanent Court of International Justice, the latter alone being mentioned in those declarations, and by thus transferring the legal effect of those declarations from one Court to the other" (*id.*, p. 136).

"The legal effect" of Nicaragua's declaration at that moment was that it was capable of being perfected by ratification of the Statute of the Permanent Court. It was this "legal effect" that was transferred, thus permitting Nicaragua's declaration to be perfected when it ratified the new Statute.

37. It seems to have been common ground that the decision of the Court left Nicaragua's status intact. This was explicitly recognized by the dissenters in their response to Judge Badawi's separate opinion, which proposed a narrower scope

of operation for Article 36 (5) than had the majority (*id.*, p. 148). The dissenters pointed out that "if the interpretation contended for had been adopted . . . its result would be to invalidate . . . the existing declarations of a number of States — such as . . . Nicaragua" (*id.*, p. 193).

38. The Court in *Aerial Incident* described its position in precise and categorical terms:

> "Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears." (*Id.*, p. 142.)

39. Nicaragua fits that description in every particular. Therefore, as between the parties to the Statute, its declaration must be "deemed to be [an] acceptance[] of the compulsory jurisdiction of the International Court of Justice".

4. The Practice of the Court, the Parties and Other States, and the Opinions of Jurists

40. According to the text and purposes of Article 36 (5) as the relevant decisions of the Court, the Article should be interpreted as operating to activate Nicaragua's declaration of 24 September 1929 so as to make it a fully effective and binding acceptance of the compulsory jurisdiction of the Court. This interpretation is confirmed and reenforced by the uniform practice of the interested States and international organizations for the past 38 years. This Section of the Memorial examines the practice of the Court itself, of Nicaragua and the United States, the Parties to the present action, of other States party to the Statute of the Court, and the opinions of jurists and publicists expert in international law.

(a) *The first* Yearbook *of the Court*

41. The first *Yearbook* of the present Court, that of 1946-1947 states unequivocally that Nicaragua's "Declaration made under Article 36 of the Statute of the Permanent Court" is "deemed to be still in force" by virtue of Article 36 (5) of the Statute of the present Court (*I.C.J. Yearbook 1946-1947*, p. 111, n. 1). This statement represents a deliberate action substantially contemporaneous with the adoption of the Statute, when many of those who participated in drawing up the Statute were still at hand, and when the understanding of the intended meaning and purpose of the Article was still fresh and vivid in their minds.

42. In three separate places, the *Yearbook 1946-1947* included Nicaragua among the States with effective declarations of acceptance of the Court's compulsory jurisdiction. At pages 110-112, there is a table entitled: "*Members of the United Nations, other States parties to the Statute and States to which the Court is open.* (An asterisk denotes a State bound by the compulsory jurisdiction clause.)" (*Id.*, p. 110 (footnotes omitted).) A caption of the table reads:

"Deposit of declaration accepting compulsory jurisdiction		
State.	Date.	Conditions."

Nicaragua is listed thereunder as follows:

"*Nicaragua	24 IX 1929 [1]	Unconditional."

Footnote 1 reads: "Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, 5, of Statute of the present Court)." (*Id.*, p. 111.) The identical footnote also appears with reference to Australia, Canada, Colombia, Dominican Republic, El Salvador, Haiti, India, Iran, Luxembourg, New Zealand, Panama, Paraguay, Siam, Union of South Africa, United Kingdom and Uruguay (*id.*, pp. 110-112). The declarations of all of these States, like that of Nicaragua, were either for an indefinite duration or for a duration that had not yet expired, and were either unconditional or subject to conditions that had been fulfilled. Hence, they were all "deemed to be still in force" under Article 36 (5).

43. Later in the *Yearbook 1946-1947* at pages 207-220, there is a table of "Communications and declarations of States which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court of International Justice." (*Id.*, p. 207 (footnote omitted).) The declarations of such States are then set out in full. One of them is that of Nicaragua:

> "Nicaragua [1].
>
> Au nom de la République de Nicaragua, je déclare reconnaître comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale.
>
> Genève, le 24 septembre 1929.
>
> *(Signé)* T. F. MEDINA."

(*Id.*, p. 210.) Footnote 1 reads:

> "According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry." *(Id.)*

44. The footnote shows that Nicaragua's failure to deposit its instrument of ratification of the Protocol of Signature of the Permanent Court was well known. Nevertheless, Nicaragua's declaration under the Optional Clause was "deemed to be still in force" under Article 36 (5). This treatment can only reflect a contemporaneous understanding that, for States like Nicaragua, whose declarations were unconditional and unexpired and which has duly ratified the United Nations Charter, the ratification of the Statute of this Court sufficed to give those declarations binding force. Completion of the formal ratification process of the Statute of the Permanent Court was unnecessary.

45. Finally, the *Yearbook 1946-1947* contains, at pages 221-228, a "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)." Nicaragua is listed as bound "unconditionally" (*id.*, p. 226).

46. The consistent treatment of Nicaragua in the Court's first *Yearbook* as a State bound "unconditionally" by its acceptance of the Court's compulsory jurisdiction was not an accident. This is demonstrated, in particular, by the fact that Nicaragua received precisely the opposite treatment in the final *Yearbook* of the Permanent Court of International Justice, that of 1939-1945. In the Permanent

Court's last *Yearbook*, as in earlier publications of that Court, Nicaragua is listed among those States *not* bound by the Court's compulsory jurisdiction. (See *P.C.I.J. Yearbook 1939-1945*, p. 50.) That classification follows from Nicaragua's failure to have deposited its instrument of ratification of the Protocol of Signature of the former Court. Thus, in preparing the first *Yearbook* of the new Court, a conscious decision was made to transfer Nicaragua from the list of States *not* bound by the Court's compulsory jurisdiction to the list of States that were bound.

47. The logical explanation for this reversal in treatment is that Nicaragua's declaration of 1929, although unexpired and in force, was insufficient in itself to establish a binding acceptance of compulsory jurisdiction. For that purpose, it was necessary that Nicaragua should complete the ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, unless by operation of Article 36 (5), Nicaragua's ratification of the United Nations Charter (and thereby the Statute of the present Court) was to be taken as the equivalent. Since Nicaragua never completed ratification of the old Protocol of Signature, the classification in the *Yearbook* of the present Court must have been based on the second alternative. Its declaration "was deemed" an acceptance of the compulsory jurisdiction when it completed ratification of the Charter, and the Charter and Statute came into force on 24 October 1945.

48. The care and deliberation of the compilers of the *Yearbook* is confirmed by a detailed comparison of the treatment given in the last *Yearbook* of the Permanent Court and the first *Yearbook* of the present Court to other States that had made declarations under the Optional Clause. The last *Yearbook* of the Permanent Court listed ten States, including Nicaragua, that had made declarations but were not considered bound by that Court's compulsory jurisdiction (*P.C.I.J. Yearbook 1939-1945*, pp. 49-50). Of these ten States, seven had made declarations that by their own terms were conditioned on ratification, but were never ratified (Argentina, Czechoslovakia, Egypt, Guatemala, Iraq, Liberia and Poland) (*P.C.I.J. Yearbook 1939-1945*, p. 49). Thus, their declarations never came into effect. Three other States are listed as having made declarations under the Optional Clause but as having never completed ratification of the Protocol of Signature (Turkey, Costa Rica and Nicaragua) (*P.C.I.J. Yearbook 1939-1945*, p. 50). The declaration of Turkey, for a definite duration, had expired; that of Costa Rica was considered extinguished when Costa Rica withdrew from the League of Nations and renounced its obligations thereunder, including its declaration under the Optional Clause (*P.C.I.J. Yearbook 1939-1945*, p. 361 and pp. 348-349, n. 4). Thus, the only State on the list with a declaration that was effective (it was not conditioned on ratification or anything else) and unexpired (it was for an indefinite duration) that still was considered not to be bound by the compulsory jurisdiction of the old Court was Nicaragua.

49. With the advent of the new Court, and with ratification of the United Nations Charter, Nicaragua — alone among these ten States — was deemed bound by the compulsory jurisdiction of the new Court because it alone had an effective and unexpired declaration. Thus, in the first *Yearbook* of the new Court Nicaragua was shifted to the group of States — there were 16 others — with declarations under the old Optional Clause that were still effective and unexpired. Nicaragua was the only State in the group of 17 that had not completed ratification of the Protocol of Signature of the Permanent Court. But, obviously, that was not considered determinative, since Nicaragua had completed ratification of the United Nations Charter and thereafter the old Court had passed out of existence. The dispositive facts were: (1) Nicaragua's declaration was still effective in accordance with its own terms; and (2) Nicaragua ratified the Charter as an

Original Member. Thus, by virtue of Article 36 (5) Nicaragua's declaration of 1929, like the effective and unexpired declarations of the other 16 States, was "deemed to be still in force" and therefore sufficient to bind Nicaragua and the other States to the compulsory jurisdiction of the Court.

50. This is precisely the conclusion reached by Professor Hudson, whose authority in these matters was noted by the dissenters in *Aerial Incident* (*I.C.J. Reports 1959*, pp. 127, 174 (joint dissenting opinion)):

> "It is of direct interest to the issue here examined to note the manner in which, at the beginning of 1947, a writer, who is regarded as the most authoritative commentator on the Statute, who was a Judge of the Permanent Court and who was present on behalf of that Court both in the Committee of Jurists at Washington and in the relevant Committee of the Conference of San Francisco, understood the operation of paragraph 5 of Article 36. Professor Manley Hudson stated, at that time, without alluding to any exception, that 'under paragraph 5 of Article 36 previous declarations under Article 36 are to be deemed to be still in force, to the extent that they have not expired according to their terms, "as between the parties to the present Statute"' (*American Journal of International Law*, Vol. 41 (1947), p. 10)."

In his next sentence, immediately following the one quoted by the joint dissenters, Professor Hudson wrote:

> "In consequence the previous declarations made by Australia, Brazil, Canada, Colombia, Dominican Republic, Great Britain, Haiti, India, Iran, Luxembourg, New Zealand, *Nicaragua*, Panama, El Salvador, Siam, South Africa and Uruguay were in force down to the end of 1946." (*American Journal of International Law*, Vol. 41 (1947), p. 10 (emphasis added).)

51. It will be noted that Professor Hudson's list of those States whose still-effective and unexpired declarations under the old Optional Clause were "deemed to be still in force" by virtue of Article 36 (5) coincides almost exactly with the list of States treated as such in the Court's *Yearbook 1946-1947*. The only exceptions are Brazil, which was included in Professor Hudson's list but excluded from the *Yearbook*'s, and Paraguay, which was included in the *Yearbook*'s list but excluded from Professor Hudson's. These are easily explained. Brazil's declaration expired by its own terms in 1947. Thus it was "still in force" at "the end of 1946", as Professor Hudson states, but had expired by the time of publication of the *Yearbook*. In the case of Paraguay, Professor Hudson apparently deferred to that State's purported withdrawal of its declaration in 1938, while the *Yearbook* includes Paraguay subject to a footnote describing the purported withdrawal.

52. Professor Hudson had expressed the same conclusion with respect to the effectiveness of Nicaragua's declaration under Article 36 (5) the previous year, in "The Twenty-Fourth Year of the World Court", *American Journal of International Law*, Volume 40 (1946):

> "The new paragraph 5 was inserted with the purpose of preserving some of the jurisdiction of the Permanent Court for the new Court. For the States which had deposited ratifications on October 24, 1945, the date on which the Statute entered into force, that provision must operate as of that date. At that time, declarations made by the following States under Article 36 were in force, and as 'between the parties to the Statute' the provision applies to them: . . . Nicaragua . . ." (*Id.*, p. 34.)

53. From the correspondence submitted by the United States and Exhibits I and II at the oral hearing on provisional measures, it is clear that Professor Hudson was fully aware, as early as 1942, that Nicaragua had never deposited its instrument of ratification of the Protocol of Signature. Thus, his consistent and unequivocal treatment of Nicaragua as bound by the compulsory jurisdiction of the Court under Article 36 (5) is particularly significant.

(b) *Pertinent public documents*

(i) *The* Yearbooks *of the Court, 1946 to 1983*

54. The most authentic public record of the acceptances of the compulsory jurisdiction of the Court is the *Yearbook* of the Court, published by the Registry. The source of the information would also be authentic, given the duties of the Registrar described in Article 26 of the Rules of Court. The appearance of a declaration in the *Yearbook* puts the States concerned, and particularly other declarant States, on notice of the legal status quo as perceived by the Registry.

55. Every *Yearbook* of the Court, beginning with the first one in 1946-1947, has listed Nicaragua among those States that are subject to the compulsory jurisdiction of the Court, and has included Nicaragua's declaration of 1929 as the instrument by which Nicaragua accepted jurisdiction. In the words of Judge Schwebel in his dissenting opinion to the Order of 10 May 1984:

> "the Registry of the International Court of Justice and the Secretariat of the United Nations from the outset of the life of the Court and the Organization did treat Nicaragua, which became automatically party to the Statute as an original member of the United Nations, as a State bound to this Court's compulsory jurisdiction by reason of its 1929 declaration being deemed to be still in force" (Order of 10 May 1984, *I.C.J. Reports 1984*, p. 202 (dissenting opinion)).

56. In the current *Yearbook*, for 1982-1983, the section of "Declarations Recognizing as Compulsory the Jurisdiction of the Court" is preceded by an introduction (p. 56) that includes the following passage:

> "In view of the provisions of Article 36, paragraph 5, of the Statute of the International Court of Justice, the present section also contains the texts of declarations made under the Statute of the *Permanent Court of International Justice* which have not lapsed or been withdrawn. There are now eight such declarations."

The eight are: Colombia, Dominican Republic, El Salvador, Haiti, Luxembourg, *Nicaragua*, Panama and Uruguay.

57. The footnote appearing in the *Yearbook 1946-1947* (at p. 210) and reciting Nicaragua's failure to deposit its instrument of ratification of the Protocol of Signature is not repeated in subsequent issues until the *Yearbook 1955-1956*. The *Yearbooks* from 1947-1948 through 1955-1956 do not include the texts of the declarations of States that appeared in earlier *Yearbooks*. Since Nicaragua's full declaration was printed in the *Yearbook 1946-1947*, the subsequent *Yearbooks* during the period either list Nicaragua by name among those States with effective declarations accepting the compulsory jurisdiction of the Court, and refer for the full text back to the *Yearbook 1946-1947* (p. 210), where the footnote appears, or, as in 1955-1956, set forth the footnote in full. The format was changed in 1956-1957, and commencing with that *Yearbook*, the full text of each declaration

was reprinted [1]. The *Yearbook 1956-1957* contains the following footnote under Nicaragua's declaration (p. 218):

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

58. The *Yearbooks* since 1956-1957 have contained Nicaragua's declaration verbatim in the text with this version of the footnote in the lower margin. The footnote draws no legal conclusions. Indeed, the implication of the listing which is set forth verbatim, is that the declaration continues in force: hence its inclusion in the *Yearbook*. Moreover, the relevant section of each issue of the *Yearbook* is introduced by a passage, quoted above, that clearly assumes the continuance in force of the declarations included.

(ii) *Reports of the International Court of Justice to the United Nations General Assembly*

59. The Reports *of the International Court of Justice* to the United Nations General Assembly begin with the Report for 1967-1968. This Report and subsequent Reports for each session until the latest available edition (for 1982-1983), without exception, include Nicaragua in the list of "States recognizing the jurisdiction of the Court as compulsory". There is no reference to the question of ratification of Nicaragua's declaration. The list of documents is as follows: General Assembly, *Official Records*, 23rd session, Suppl. No. 17, A/7217 (Report of the International Court of Justice, 1967-1968); 24th session, Suppl. No. 5, A/7605 (Report, 1968-1969); 25th session, Suppl. No. 5, A/8005 (Report, 1969-1970); 26th session, Suppl. No. 5, A/8405 (Report, 1970-1971); 27th session, Suppl. No. 5, A/8705 (Report, 1971-1972) (no list of names — just "46 States accept jurisdiction"); 28th session, Suppl. No. 5, A/9005 (Report, 1972-1973); 29th session, Suppl. No. 5, A/9605 (Report, 1973-1974); 30th and 31st sessions, Suppl. No. 5, A/31/5 (Report, 1974-1976); 32nd session, Suppl. No. 5, A/32/5 (Report, 1976-1977); 33rd session, Suppl. No. 4, A/33/4 (Report, 1977-1978); 34th session, Suppl. No. 4, A/34/4 (Report, 1978-1979); 35th session, Suppl. No. 4, A/35/4 (Report, 1979-1980); 36th session Suppl. No. 4, A/36/4 (Report, 1980-1981); 37th session, Suppl. No. 4, A/37/4 (Report, 1981-1982); 38th session, Suppl. No. 4, A/38/4 (Report, 1982-1983).

60. In 1979 a substantial description of the work of the Court was published with the imprint "I.C.J.: The Hague: 1979". This publication bears the title *The International Court of Justice* and includes a list of "States accepting the compul-

[1] During the oral hearing on provisional measures, the Agent of the United States insinuated that Nicaragua had deliberately provoked the reappearance of the footnote in order to create a pretext for avoiding the compulsory jurisdiction of the Court in the event of an Application by Honduras against Nicaragua. The short and dispositive answer to this charge is that when Honduras ultimately brought suit against Nicaragua, alleging, *inter alia*, that jurisdiction was established by the application of Article 36 (5) to Nicaragua's declaration of 1929, Nicaragua did not object. In any event, the United States insinuation — unsupported by any evidence whatsoever — is refuted by the change in format of the *Yearbook*, which fully explains the reappearance of the text of the footnote in 1956-1957 and thereafter.

sory jurisdiction of the Court in 1979". (*Id.*, p. 40.) Nicaragua is included without any footnote.

(iii) *Secretary-General of the United Nations: Report and Compendium of Conventions and Agreements*

61. In his second Annual Report to the General Assembly, also substantially contemporaneous with the establishment of the present Court, the Secretary-General of the United Nations included Nicaragua in a list introduced by the following caption:

> "The following States, having under Article 36 of the Statute of the Permanent Court of International Justice, made declarations which have not yet expired accepting the compulsory jurisdiction of that Court, are deemed, in accordance with Article 36 of the Statute of the International Court of Justice, to have accepted the compulsory jurisdiction of the International Court of Justice under the same conditions." (General Assembly, *Official Records*, 1947, Suppl. No. 1, A/315.)

(It may be noted that the Secretary-General uses a form of words approximating the French text rather than the English text of Article 36 (5)).

62. Since 1949 the Secretary-General has published annually a volume entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in Respect of Which the Secretary-General Acts as Depositary.* The first issue, for 1949, contains a table of States under the heading "States Whose Declarations Were Made under Article 36 of the Statute of the Permanent Court of International Justice and Deemed to Be Still in Force." (*Id.*, p. 22.) Nicaragua is included in the list. There is no footnote to the listing. The information is stated to be derived from the *Yearbook* of the Court for 1947-1948. This treatment of the declaration of Nicaragua continued until the issue for 1959, when a footnote (as in the *Yearbook* of the Court) became a regular appearance. See the volume for the period ending 31 December 1982 (St/LEG/Ser.E/2, New York, 1983, pp. 24-25). There has been no change, however, in Nicaragua's listing among States whose declarations are "Deemed to be Still in Force".

(iv) Yearbooks *of the United Nations*

63. For 38 years the *Yearbook* of the United Nations has listed Nicaragua as a State accepting the compulsory jurisdiction of the Court. The *Yearbook* for 1946-1947 (p. 611), under the heading of "States accepting Compulsory Jurisdiction", includes Nicaragua, and states that the

> "declaration took effect on November 29, 1939, when the Nicaraguan Government notified the Secretary-General of the League of Nations of Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court".

This statement does not appear in subsequent issues. In the *Yearbook* for 1948-1949 (p. 151), Nicaragua is included in the list of States accepting compulsory jurisdiction, with a footnote referring to the application of Article 36 (5). The same treatment appears in the following *Yearbook* for 1950 (pp. 123-124). The *Yearbooks* from 1951 through the most recent edition in 1980 include Nicaragua in the list of acceptances without any footnote (see *Yearbook*, 1951, p. 106; 1952, p. 150; 1953, pp. 42-43; 1954, p. 567; 1955, p. 473; 1956, p. 507;

1957, p. 522; 1958, pp. 528-529; 1959, p. 576; 1960, p. 731; 1961, p. 723; 1962, p. 695; 1963, pp. 723-724; 1964, pp. 621-622; 1965, pp. 854-855; 1966, pp. 1123-1124; 1967, pp. 988-989; 1968, p. 1097; 1969, p. 1015; 1970, p. 1062; 1971, p. 809; 1972, p. 872; 1973, pp. 1028-1029; 1974, p. 1100; 1975, p. 1152; 1976, pp. 1088-1089; 1977, p. 1229; 1978, p. 1230; 1979, p. 1387; 1980, p. 1398).

(v) *Other United Nations publications*

64. The inclusion of Nicaragua as a State accepting the compulsory jurisdiction of the Court is to be seen in a number of ancillary official publications of the United Nations. Thus the publication entitled *Everyman's United Nations* includes Nicaragua in the relevant listing. (See, for example, the sixth edition, 1959, pp. 380-381.) This is also a characteristic of the standard United Nations *Information Book* on the Court, copies of which are available in the foyer of the Peace Palace.

65. The persistent and unvaried recognition, by Nicaragua and other States, of the application of Article 36 (5) to the declaration of Nicaragua is established beyond any reasonable doubt by the total silence of such States in the face of the continuous treatment in the *Yearbooks* of the Court and other public documents for 38 years, of Nicaragua as bound by the Court's compulsory jurisdiction. Had any of the other States subject to the Court's jurisdiction objected to Nicaragua's inclusion in the list, it would have been bound to register such objection. Indeed, the presence of the footnote in the *Yearbook* of the Court and elsewhere over a very long period makes the silence of States parties to the Statute all the more eloquent. On all sides the information contained in the footnote was not thought to have any legal consequences that could affect the validity of Nicaragua's acceptance of compulsory jurisdiction.

(c) *Authoritative opinions of leading publicists*

66. In assessing the continuance in force of a treaty or equivalent consensual obligation, the general opinion on the status of the instrument concerned has probative value. This was affirmed in the joint dissenting opinion of five Judges in *Nuclear Tests (Australia* v. *France), Judgment* (*I.C.J. Reports 1974*, p. 253, pp. 340-344). In that opinion it is stated:

> "Accordingly, France was doing no more than conform to *the general opinion* when in 1956 and 1957 she made the 1928 Act one of the bases of her claim against Norway before this Court in the *Certain Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9)." (*I.C.J. Reports 1974*, p. 341 (emphasis added).)

67. It is submitted that such general opinion is reflected in and confirmed by the expression of authoritative expert opinion in the literature of international law. The opinion of Professor Hudson has already been discussed. The following additional sources treat Nicaragua as having accepted the compulsory jurisdiction of the International Court of Justice (the sequence follows the date of publication):

Hambro, E., *British Year Book of International Law*, Vol. 25 (1948), p. 133, pp. 136 (note 6), 140 (note 10), 152-153.

Lissitzyn, O. J., *The International Court of Justice*, New York, 1951, p. 66.

Farmanfarma, A. N., *The Declared Jurisdiction of the International Court of Justice*, Montreux, 1952, pp. 26 (note 32), 180.

Sohn, Louis B. (ed.), *Basic Documents of the United Nations*, New York, 1956, p. 213.

Jenks, C. W., "Rapport provisoire", *Annuaire de l'Institut de droit international*, Vol. 47 (1957, I), p. 34, p. 50.
Anand, P. R., *Compulsory Jurisdiction of the International Court of Justice*, London, 1961, pp. 54 (note 61), 173 (note 71).
Dubisson, M., *La Cour internationale de Justice*, Paris, 1964, p. 160 (n. 55).
Van Panhuys, H. F., Brinkhorst, L. J., and Maas, H. H., *International Organization and Integration*, Deventer: Leyden, 1968, p. 618.
Mosler, H., and Bernhardt, R., *Judicial Settlement of International Disputes*, Berlin, 1974, pp. 214-215.
Castel, J. G., *International Law Chiefly as Interpreted and Applied in Canada*, 3rd ed., Toronto, 1976, p. 1248.
Sweeney, J. M., Oliver, Covey T., and Leech, Noyes E., *Cases and Materials on the International Legal System*, 2nd ed., New York, 1981, p. 59.
Rousseau, *Droit international public*, t. V, Paris, 1983, p. 455.
Bowman, M. J., and Harris, D. J., *Multilateral Treaties: Index and Current Status*, London, 1984, p. 114 (Treaty 181).

68. None of these sources expresses any doubt concerning the acceptance by Nicaragua of the compulsory jurisdiction of the Court, and no reference is made to the footnote in the *Yearbook* of the Court. Hambro makes the following emphatic statement:

> "it is open to any State to accept the jurisdiction of the Court without any reservation and in respect to any other State regardless of whether such other State has or has not assumed the same obligation. Haiti and Nicaragua seem, indeed, to have done this. Since these two States made the declarations under the regime of the Permanent Court, and since they are both Members of the United Nations, there can be no doubt as to the validity of the declarations." (*Op. cit.*, pp. 152-153.)

69. The only writer to indicate doubt is Engle, *Georgetown Law Journal*, Vol. 40 (1951), page 41, page 53, and yet in a footnote he points out that the *Yearbook* of the Court and Professor Hudson list the declaration of Nicaragua "as effective" (*id.*, p. 53, note 56). Thus, the dominant, indeed, the virtually exclusive approach is to recognize the validity of Nicaragua's declaration. In one of the most recent works of authority, that of Rousseau, Nicaragua is listed as a declaration *"en vigueur"* (*op. cit.*, p. 455).

70. The picture of the general opinion on the matter would not be complete without reference to the studies by Dr. Rosenne, relating to the functioning of the Court. In a series of works this distinguished publicist has not thought fit to question the validity of Nicaragua's acceptance of compulsory jurisdiction. In the first of the publications, Dr. Rosenne reports that "seventeen declarations made before 1946 were recorded, in *Yearbook* 1946-7 as being in force . . .". (See *The International Court of Justice*, Leyden, 1957, p. 310.) As shown above, Nicaragua was one of the seventeen.

71. The next work to be published by Dr. Rosenne was *The World Court: What It Is and How It Works*, Leyden, New York, 1962. Nicaragua is included in a list of States prefaced by the words: "In addition, declarations by the following States made in relation to the Permanent Court of International Justice are believed to be in force: . . ." (*Id.*, p. 96, note 21.) In the third revised edition, published in 1973, a new wording appears: "In addition, declarations made by the following States in relation to the Permanent Court are still recorded as in force: . . ." (*Id.*, p. 233, note 21.) Nicaragua continues to be included among those States.

72. In his major study, *The Law and Practice of the International Court*, Leyden, 1965, Dr. Rosenne states unequivocally:

> "The *Yearbook* for 1963-4 indicates that the acceptances of the following countries are still in force under Article 36 (5): Canada, Colombia, Dominican Republic, El Salvador, Haiti, Luxembourg, New Zealand, Nicaragua, Panama, and Uruguay." (*Id.*, Vol. I, p. 378.)

In Volume II there is a compendium of "declarations accepting the compulsory jurisdiction" (Appendix 10, p. 880). The introduction to this compilation reads as follows:

> "This Appendix contains the texts or English translations and other relevant particulars of declarations accepting the compulsory jurisdiction of the Court made by virtue of Article 36 (4) of the Statute and declarations accepting the compulsory jurisdiction of the Permanent Court the effect of which has been transferred to the present Court by virtue of Article 36 (5) of the Statute (as interpreted by the Court). All of the texts mentioned are referred to in the *Yearbooks*. The texts and other particulars have been taken from the League of Nations and United Nations *Treaty Series*, except where otherwise indicated. Inclusion or exclusion of any declaration in this Appendix is not to be considered as an expression of the author's views of any question connected with the status of that declaration."

The declaration of Nicaragua is included in the collection with a footnote as follows:

> "Original French. 88 L.N.T.S., p. 283. For the parliamentary instruments approving ratification, see *Arbitral Award* case, Pleadings, Vol. I, pp. 128, 129. A ratification said to have been made on 29 November 1939 is not notified in the League of Nations *Treaty Series*. See *Yearbook*, 1946-7, p. 210. In the 21st List of Signatures, Ratifications and Accessions in respect of Agreements and Conventions concluded under the auspices of the League of Nations, it is stated that Nicaragua's signature of the Optional Clause is 'not yet perfected by ratification', L.N., O.J., Sp. Sup. No. 193, p. 43. Invoked in *Arbitral Award* case." (*Id.*, p. 899.)

73. It may be noted that Dr. Rosenne does not *exclude* the declaration, with an appropriate explanation. Instead, he chooses to *include* the declaration, with the footnote, which does not contain any conclusion inimical to the continuance in force of the declaration by virtue of Article 36 (5). An identical presentation of the declaration, together with the same footnote, appears in the publication edited by Dr. Rosenne, *Documents on the International Court of Justice* (Leyden, 1974, p. 291; second edition, Alphen aan den Rijn, 1979, p. 392).

(d) *The practice of Nicaragua*

74. The practice of Nicaragua provides compelling support for the proposition that its declaration of 1929 came into force as a result of Article 36 (5) and that Nicaragua has been subject to the compulsory jurisdiction of the Court continuously since its conduct during the past 38 years manifests an unequivocal understanding that it has been and is bound by the Court's compulsory jurisdiction.

75. Nicaragua was present at San Francisco. It had a representative on Committee IV/1 and voted for Article 36 (5) there. Of course, it voted to approve the Charter and Statute, as presented to the plenary Conference. And as has

been stated, it ratified the Charter and Statute on 6 September 1945, becoming an Original Member of the United Nations when these instruments came into force on 24 October 1945.

76. In 1960 Nicaragua was the Respondent State in proceedings begun by Application of Honduras. One of the bases for jurisdiction asserted by Honduras was that both parties had accepted the compulsory jurisdiction of the Court. Honduras asserted that, by application of Article 36 (5) to Nicaragua's declaration of 1929, Nicaragua became subject to the Court's compulsory jurisdiction. Nicaragua did not contest this assertion in any way. The case was, of course, the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment* (*I.C.J. Reports 1960*, p. 192). The conduct of Honduras in initiating the proceedings in the *Arbitral Award* case is highly relevant and may be said to be a fair sample of the views of other declarant States in the era of the post-war Court. The material passages of the Honduran Application are as follows:

> "Furthermore, the Parties to the present dispute have recognized, on the basis of Article 36, para. 2, of the Statute of the International Court of Justice, the compulsory jurisdiction of the Court, *ipso facto* and without special agreement, in all legal disputes concerning, *inter alia*, the interpretation of a treaty and any question of international law, and the existence of any fact which, if established, would constitute a breach of an international obligation.
>
> On 24 May 1954, *Honduras* renewed the declaration which it made on 10 February 1948, accepting the compulsory jurisdiction of the Court, in accordance with Article 36, para. 2, of the Statute, for a period of six years, on the sole condition of reciprocity.
>
> *Nicaragua* has also declared that she recognized the compulsory jurisdiction of the Permanent Court of International Justice. This declaration was dated 24 September 1929. By a Decree dated 14 February 1935, the Senate of Nicaragua ratified the Statute and the Protocol of the Permanent Court of International Justice. On 11 July 1935, a similar decision was taken by the Chamber of Deputies (*Official Gazette*, Organ of the Government of Nicaragua. Year 39, No. 130, page 1033, and No. 207, page 1674). On 29 November 1939, the Secretary-General of the League of Nations received a telegram signed 'Relaciones', notifying him of the ratification by Nicaragua of the Statute and Protocol of the Court. Having regard to these facts, the declaration of 1929 entered into force and continues to be valid by virtue of Article 36, para. 5, of the Statute of the International Court of Justice.
>
> 5. In the circumstances, the Government of the Republic of Honduras considers that the jurisdiction of the Court is established for the purposes of resolving the dispute arising from failure to give effect to the arbitral award made by His Majesty the King of Spain on 23 December 1906. This failure constitutes a breach of an international obligation which is referable to the Court, either by virtue of the concurring declarations of acceptance of the compulsory jurisdiction by the two States, or by virtue of the Agreement solemnly concluded on 21 July 1957 by the Foreign Ministers of Honduras and Nicaragua, with regard to the procedure to be followed in presenting to the International Court of Justice the dispute between Honduras and Nicaragua concerning the arbitral award made on 23 December 1906 by His Majesty the King of Spain.
>
> From each of these two undertakings, and from either of them independently of the other, it follows that the Court has jurisdiction to adjudicate

> upon the submissions presented by the Government of Honduras in the present Application. (*Application, I.C.J. Pleadings, 1960, Arbitral Award* case, Vol. 1, pp. 8-9 (footnotes omitted).)

The substance of these assertions is repeated in the Memorial (*id.*, paras. 36-40, pp. 59-60).

77. Nicaragua did not dispute the existence of jurisdiction and was concerned only to point out that certain matters of procedure and evidence were to be regulated in the light of understandings between the parties (Counter-Memorial, *I.C.J. Pleadings, Arbitral Award* case, Vol. I, pp. 131-132; Rejoinder, *id.*, p. 748). The Court recognized the bases of jurisdiction asserted by Honduras with the following recital in the Judgment:

> "The Application relies on the Washington Agreement of 21 July 1957 between the Parties with regard to the procedure to be followed in submitting the dispute to the Court; the Application states, furthermore, *that the Parties have recognized the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of its Statute.*" (*I.C.J. Reports 1960*, p. 192 at p. 194 (emphasis added).)

78. The reference to Article 36 (2) of the Statute here is, it would appear, a shorthand reference to the existence of two valid declarations. The Court would be aware that Honduras had referred to Article 36 (5) both in its Application (para. 4) and in its Memorial (para. 39).

79. The absence of any objection by Nicaragua, either in the *Arbitral Award* case or elsewhere to the continued assertion that it was bound by the compulsory jurisdiction of the Court represents a clear expression of its belief that it was so bound and of its intention to remain so.

(e) *The practice of the United States*

80. For at least 36 years, the United States has *expressly* recognized the application of Article 36 (5) to Nicaragua's declaration of 1929. The United States official publication, *Treaties in Force*, is the authoritative text on all treaties and other consensual agreements by which the United States considers itself bound, and the parties to such agreements. Among the agreements listed is the United States declaration of 14 August 1946 accepting the compulsory jurisdiction of the Court. Also listed are the other States which, in the view of the United States, are subject to the Court's compulsory jurisdiction. Nicaragua is included in the list of States bound, in the United States view, by the compulsory jurisdiction of the Court without any reservation, qualification or footnote, in every edition of *Treaties in Force* from the first post-war edition in 1955 to the most recent edition, in 1983. (See *Treaties in Force*, 1 January 1983, p. 247; 1 January 1982, p. 247; 1 January 1981, p. 302; 1 January 1980, p. 309; 1 January 1979, p. 292; 1 January 1978, p. 318; 1 January 1977, p. 313; 1 January 1976, p. 375; 1 January 1975, p. 364; 1 January 1974, p. 346; 1 January 1973, p. 338; 1 January 1972, p. 325; 1 January 1971, p. 317; 1 January 1970, p. 311; 1 January 1969, p. 302; 1 January 1968, p. 284; 1 January 1967, p. 270; 1 January 1966, p. 259; 1 January 1965, p. 255; 1 January 1964, p. 252; 1 January 1963, p. 289; 1 January 1962, p. 252; 1 January 1961, p. 289; 1 January 1960, p. 229; 1 January 1959, p. 218; 1 January 1958, p. 210; (no issue published in 1957); 31 October 1956, p. 189; 31 October 1955, p. 173.)

81. The origin of this entry is a compilation of valid declarations assembled after a careful study by Denys P. Myers, Office of the Legal Adviser, Department

of State, first published in the June 1948 issue of *Documents and State Papers*, Vol. I, No. 3, Department of State Publication 3142. Nicaragua is included in a table entitled "Status of Declarations Accepting Compulsory Jurisdiction" as having made a declaration "currently effective" from 29 November 1939. The full text of the Nicaraguan declaration is published on page 201 of the compilation with a reference to the footnote on page 210 of the *Yearbook 1946-1947*.

82. This compilation was reprinted, with revisions taking account of new declarations and multilateral instruments since 31 March 1951, in the 23 April 1951 issue of the *Department of State Bulletin*, Vol. XXIV, No. 616. The table on page 192 of the 1948 compilation is reprinted verbatim, except for the addition of asterisks indicating "declarations made before October 24, 1945, which continue in force" (*id.*, p. 665). The entry for Nicaragua is asterisked. The 1951 version omits the full text of the Nicaraguan declaration and the accompanying footnote.

83. The United States recognition that Article 36 (5) applies Nicaragua's declaration of 1929 is further confirmed by the failure of the United States to object in any way to the inclusion of Nicaragua in the list of States having accepted the compulsory jurisdiction of the Court, set forth in the *Yearbooks* of the Court for 38 years, and in the other public documents described above. By virtue of the footnote concerning Nicaragua's declaration, set forth in full in the *Yearbooks* of 1946-1947, 1955-1956 and every subsequent edition, the United States has been on notice for 38 years of Nicaragua's incomplete ratification of the Protocol of Signature of the Statute of the Permanent Court. Nevertheless, the United States never objected or raised any question as to Nicaragua's treatment as subject to the compulsory jurisdiction of the Court — never, that is, until *after* the present Application was filed. Indeed, not even the letter of Secretary of State Shultz dated 6 April 1984 objects to or challenges Nicaragua's status as a State subject to the compulsory jurisdiction of the Court.

B. Nicaragua's Conduct and the Acquiescence of the United States, as Well as Other States, Provides a Second and Independent Basis for the Effectiveness of the Declaration of 24 September 1929

84. It is Nicaragua's principal contention that Article 36 (5) immediately transformed Nicaragua's Declaration of 1929 into a binding acceptance of the compulsory jurisdiction of the Court, since that declaration, at the time of Nicaragua's ratification of the United Nations Charter, was unconditional and unlimited in duration and therefore "still in force". As demonstrated above, the United States contention that application of Article 36 (5) was precluded by Nicaragua's failure to perfect ratification of the Protocol of Signature of the Statute of the Permanent Court is entirely without merit.

85. However, the declaration of Nicaragua is effective to confer jurisdiction on the Court in the present proceeding for an entirely separate and independent reason. This independent basis, which is discussed in this Section of the Memorial, is established by two interrelated propositions:

(i) Nicaragua's conduct over the past 38 years unequivocally manifests its consent to be bound by the Court's compulsory jurisdiction. Such an expression of consent overcomes any formal defect in Nicaragua's ratification of the Protocol of Signature.

(ii) The conduct of the United States during the past 38 years, like the conduct of the other States that have declared their acceptance of the Court's compulsory

jurisdiction, constitutes an acceptance of and acquiescence in the effectiveness of Nicaragua's 1929 declaration and a waiver of any formal defect in Nicaragua's ratification of the Protocol of Signature.

1. Any Defect in the Process of Adherence to the Statute of the Permanent Court of International Justice Was Entirely a Matter of Form and Did Not Raise Any Question of Essential Validity

86. The details of Nicaragua's deposit of its declaration accepting jurisdiction under the Optional Clause and its efforts to ratify the Protocol of Signature are set forth in Annex I to this Memorial. The instrument of ratification of the Protocol of Signature appears not to have been deposited.

87. There can be no question but that this constitutes a defect of form and not a matter affecting essential validity. In the Vienna Convention on the Law of Treaties the issue of ratification appears exclusively in the context of the "means of expressing consent to be bound by a treaty" (Arts. 2, 11, 14 and 16). It is of significance that the question of the "invalidity of treaties" is not usually related to the problem of the form in which consent is expressed but to very different issues such as fraud or error or fundamental want of authority. (Vienna Convention, Arts. 42 to 53). This critical distinction is confirmed by a number of authorities, including the following: President Elias, *Recueil des cours*, Vol. 134 (1971-III), pp. 341-411; Fitzmaurice, *Yearbook of the International Law Commission*, 1956, II, pp. 104-128; *ibid.*, 1957, II, pp. 16-70; *ibid.*, 1958, II, pp. 20-46 (and see especially at p. 29); Report of the International Law Commission to the General Assembly, *ibid.*, 1959, II, p. 87 at p. 97; Report of the International Law Commission to the General Assembly, *ibid.*, 1966, II, pp. 191-201, 237-249; Rousseau, *Droit international public*, Vol. I, Paris, 1971, pp. 134-149; Waldock, *ibid.*, 1962, II, pp. 27-68; *ibid.*, 1963, II, pp. 36-94.

88. These authorities confirm that the conclusion of treaties is a matter of formal validity (see, for example, *Yearbook of the International Law Commission*, 1959, II, p. 97 (draft Art. 3)). The same sources, together with the text of the Vienna Convention on the Law of Treaties, confirm that the process of ratification is an aspect of the means of expressing consent to be bound by a treaty (see Vienna Convention, Art. 11). A defect of form arising from an absence of ratification is a matter entirely of the mechanics of expressing consent and the expression of consent can readily be perfected by other means, providing that no evidence of a contrary intention is forthcoming.

2. In the Context of Jurisdictional Instruments the Criterion Is that of the Reality of Consent

89. In approaching the legal significance of the formal defect in Nicaragua's ratification of the Protocol of Signature, the views of the Court on "the question of forms and formalities" with reference to jurisdictional instruments are of obvious relevance. In the case concerning the *Temple of Preah Vihear* (*I.C.J. Reports 1961*, p. 17), the Judgment contains the following important observations on the significance of form:

> "Next, there was also discussion as to the question of error and its possible effects. Thailand's position, it might be said, is that in 1950 she had a mistaken view of the status of her 1940 Declaration, and for that reason she used in her Declaration of 1950 language which the decision of the Court in the *Israel* v. *Bulgaria* case showed to be inadequate to achieve the

purpose for which that Declaration was made. Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given. The Court cannot however see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give in 1950. There was in any case a real consent in 1950, whether or not it was embodied in a legally effective instrument — and it could not have been consent to the compulsory jurisdiction of the Permanent Court, which Thailand well knew no longer existed." (*Id.*, p. 30.)

"The real case for Thailand lies in the contention that her 1950 Declaration was vitiated despite her clear intentions, because, as she maintains, this Declaration was expressed in terms which rendered it legally ineffective for want of an object. Evidently no defect could be more fundamental than to renew a declaration lacking in an object. But to reach an immediate conclusion on that basis would be gratuitous, for in the light of the reasoning that has been set out above, the effect of the 1950 Declaration can only be established by an independent examination of that Declaration, considered as a whole and in the light of its known purpose.

. . .

As regards the question of forms and formalities, as distinct from intentions, the Court considers that, to cite examples drawn from the field of private law, there are cases where, for the protection of the interested parties, or for reasons of public policy, or on other grounds, the law prescribes as mandatory certain formalities which, hence, become essential for the validity of certain transactions, such as for instance testamentary dispositions; and another example, amongst many possible ones, would be that of a marriage ceremony. But the position in the cases just mentioned (wills, marriage, etc.) arises because of the existence in those cases of mandatory requirements of law as to forms and formalities. Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*Id.*, p. 31.)

"On 20 May 1950, Thailand knew that her Declaration of 1940 had expired in accordance with its terms and that in so far as this was material, Article 36, paragraph 5, had, on any interpretation, exhausted itself. Thailand knew she was free of any obligation to submit to the Court's jurisdiction except by virtue of a new and independent, voluntary, act of submission on her part. The only way in which she could, at that stage, take action under Article 36 was pursuant to paragraph 2 thereof; and the declaration which she then made was pursuant to that paragraph, as is clearly shown by the terms of the Declaration itself in its reference to Article 36, paragraph 4, and *via* that to paragraph 2.

If, however, there should appear to be a contradiction between, on the one hand, this reference to paragraph 4 of Article 36, and *via* that to paragraph 2, indicating acceptance of the compulsory jurisdiction of the present Court; and, on the other hand, the references to the 'untransformed' Declarations of 1929 and 1940, from which an apparent acceptance of the jurisdiction of the former Permanent Court might be inferred — that is to

say a nullity — then, according to a long-established jurisprudence, the Court becomes entitled to go outside the terms of the Declaration in order to resolve this contradiction and, *inter alia*, can have regard to other relevant circumstances; and when these circumstances are considered, there cannot remain any doubt as to what meaning and effect should be attributed to Thailand's Declaration. In this connection, it is scarcely necessary to do more than refer to the history of Thailand's consistent attitude to the compulsory jurisdiction, first of the Permanent Court, and later of the present Court, as set out in an earlier paragraph of this Judgment. To ignore this would indeed be to honour the letter rather than the spirit; but the Court considers that, for the reasons which have been indicated, even the letter does not bear out the view Thailand seeks to maintain concerning the effect of her 1950 Declaration." (*Id.*, pp. 33-34.)

"To sum up, when a country has evinced as clearly as Thailand did in 1950, and indeed by its consistent attitude over many years, an intention to submit itself to the compulsory jurisdiction of what constituted at the time the principal international tribunal, the Court could not accept the plea that this intention had been defeated and nullified by some defect not involving any flaw in the consent given, unless it could be shown that this defect was so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement. The Court does not consider that this was the case and it is the duty of the Court not to allow the clear purpose of a party to be defeated by reason of possible defects which, in the general context, in no way affected the substance of the matter, and did not cause the instrument to run counter to any mandatory requirement of law." (*Id.*, p. 34.)

90. These passages related to the particular questions raised in the *Temple of Preah Vihear* case, but they are addressed to the questions of the significance of form and the reality of consent to jurisdiction as important issues of general principle. Moreover, the Court in its Judgment clearly regarded declarations as being analogous to treaties (*I.C.J. Reports 1961*, pp. 14-15). It was on the basis of this analysis that the Court affirmed the existence of jurisdiction in the *Temple of Preah Vihear* case.

3. Nicaragua Has Demonstrated by Its Consistent Conduct for 38 Years that It Has Fully Consented to the Compulsory Jurisdiction of the Court

91. Nicaragua, an Original Member of the United Nations, was represented at the San Francisco Conference and, in particular, on Committee IV/1, which drafted the provisions that later became Article 36 (5). Nicaragua's representative participated in the discussions of the draft provision, and voted in favour of it. Nicaragua ratified the United Nations Charter on 6 September 1945. As the Court observed in the *Aerial Incident of 27 July 1955* case

"Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears." (*I.C.J. Reports 1959*, p. 127 at p. 142.)

92. As shown above, when Honduras began proceedings by Application against Nicaragua in 1960, Nicaragua did not contest the assertion by Honduras that Article 36 (5) applied to the declaration of Nicaragua (see the *Arbitral*

Award case, *I.C.J. Reports 1960*, p. 192). Indeed, in face of the inclusion of the declaration in the *Yearbook* of the Court for some 38 years, Nicaragua made no protest or reservation of rights.

93. In these circumstances, Nicaragua has fully manifested its consent to be bound by the compulsory jurisdiction of the Court and this manifestation of consent is sufficient to overcome any formal defect owing to its failure to deposit an instrument of ratification of the old Protocol of Signature.[2]

---

[2] Nicaragua's continuing willingness to submit itself to the compulsory jurisdiction of the Court is further evidenced by its adherence in 1950 to the American Treaty on Pacific Settlement (the "Pact of Bogotá"), 30 *UNTS* 55, containing provisions for such jurisdiction in Articles XXXI and XXXII. Article XXXI of the Pact of Bogotá 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."

Article XXXI specifically cites Article 36 (2) of the Statute of the Court as the legal ground for the effectiveness of its own terms. The terms set forth in Article XXXI are specifically those required by Article 36 (2) of the Statute. The use of the performative term "declare" indicates that the drafters of the Pact understood very clearly that this section of the Pact was not to be effective through Article 36 (1) or Article 37 of the Statute, pursuant to which the treaty itself — not the unilateral act of the declaring party — provides the basis for the jurisdiction of the Court.

The declarative function of Article XXXI is critical in yet another respect: the declaration made by each ratifying State, through this Article, is effective beyond the High Contracting Parties to the Treaty. Unlike each of the other mechanisms for peaceful dispute resolution set forth in the Pact, Article XXXI refers to disputes that may involve an American, non-party State — each "High Contracting Party" declares "in relation to any other American State". This extra-treaty effect is only possible because the Pact incorporates the function and effect of Article 36 (2) of the Statute.

Unless Article XXXI of the Pact is understood as constituting an Article 36 (2) declaration, it has no function in the Pact. Article XXXII provides that *as between the parties to the Pact*, the Court shall have compulsory jurisdiction pursuant to Article 36 (1) over *all controversies* not settled through the conciliation procedure. This provision is all inclusive — i.e., as between the parties it covers both legal and non-legal disputes. Therefore, as between the parties there is no reason for an Article 36 (2) declaration, and accordingly no reason for Article XXXI of the Pact. Unless Article XXXI is to be rendered mere surplusage, it must be interpreted as what it purports to be: a declaration by each High Contracting Party of recognition of compulsory jurisdiction with respect to legal disputes with any other American State, including non-party States.

The Pact was signed on 30 April 1948. It first appeared in the *I.C.J. Yearbook 1947-1948*. It was carried in that *Yearbook* in an entirely new section, apparently invented just for it — at least, it was the only entry.

The *Yearbook* contained a three-part annex. Part I consisted of the constitutional texts of organizations that provided for the jurisdiction of the Court. Part II was entitled "Instruments for the Pacific Settlement of Disputes and Concerning the Jurisdiction of the Court". Part III was entitled "Various Instruments Providing for the Jurisdiction of the Court". Part III listed those treaties that provide Court jurisdiction pursuant to Article 36 (1). Part II, on the other hand, consisted of a lengthy Part A, listing all declarations pursuant to Article 36 (2), and a short Part B, entitled "Other Instruments". The only item in Part B was the Pact of Bogotá. In sum, the Pact is listed in the same part of the

4. The United States, by Accepting the Effectiveness of Nicaragua's Declaration for 38 Years, Has Waived any Objection to the Formal Defect in Ratification of the Protocol of Signature

94. As set forth above, the United States has not only remained silent with respect to Nicaragua's declaration, in the face of the inclusion of the declaration in the *Yearbooks* of the Court and other public documents, and the opinions of other States and recognized authorities, but it has expressly recognized the validity and effectiveness of that declaration, *inter alia*, by continuous publication in its official annual compilation, *Treaties in Force*. The legal consequence of such conduct is that the United States is precluded from raising any question as to the application of Article 36 (5) to Nicaragua's declaration.

95. It may be noted that Nicaragua is not invoking the concept of estoppel. The relevance of the conduct of the parties has three aspects, none of which involves the concept of estoppel.

96. (i) As a matter of international law, the subsequent conduct of the parties to the consensual or contractual obligations resulting from the system of declarations of Article 36 (5) provides a basis for deciding both questions of interpretation and questions concerning the continuance in force of these legal instruments. This role has been recognized in the literature (see McNair, *Law of Treaties*, Oxford, 1961, pp. 424-429; Charles De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, pp. 121-124; Rousseau, *Droit international public*, t. I, Paris, 1971, pp. 279-281; Cot, *Revue générale de droit international public*, Vol. 70 (1966), pp. 22-35).

97. The same function has also been recognized in jurisprudence. In *Nuclear Tests (Australia* v. *France), Judgment* (*I.C.J. Reports 1974*, pp. 253, 340-345), the joint dissenting opinion (by Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock) relied extensively upon the practice of the parties as evidence of the continuance in force of the General Act of 1928. (*I.C.J. Reports 1974*, pp. 340-345.) The opinion is of particular relevance since the context was the continuance in force of a jurisdictional instrument.

98. (ii) Alternatively, or cumulatively, the United States, as well as the other declarant States, have by their conduct accepted or recognized the continuance in force of the declaration of Nicaragua independently of the principles of the law of treaties. (See Cahier, *En hommage à Paul Guggenheim*, Geneva, 1968, pp. 237-265, on the general principle.)

99. In the case concerning the *Temple of Preah Vihear, Merits* (*I.C.J. Reports 1962*, p. 6), considerable reliance was placed by the Court upon the conduct of Thailand over a period of 50 years. The Court stated the principle in the following passages:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise,

---

Annex as the declarations accepting compulsory jurisdiction; it is listed separately from those treaties providing jurisdiction pursuant to Article 36 (1).

This method of listing jurisdictional instruments continued until the 1961-1962 *Yearbook*, when Part B was dropped entirely in favour of a single listing of all bilateral and multilateral instruments providing for jurisdiction of the Court. By the time of the 1960-1961 *Yearbook* — the last in which it appeared — Part B listed a number of other multilateral and bilateral treaties that also contained provisions purporting to establish the Court's jurisdiction by referring, directly or indirectly, to Article 36 (2) of the Statute.

it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*" (*Id.*, p. 23.)

"The Court however considers that Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to negative this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line." (*Id.*, pp. 32-33.)

100. The *Temple of Preah Vihear* case is helpful in several respects. First, the instrument concerned — the Annex I map — was, on the basis of Thailand's conduct, given a significance, in spite of its original (in 1908) lack of formal status and in spite of the alignment shown being based on error. In other words, conduct was relied upon in a context of questions going well beyond formal validity. Second, the Court took the view that, once Thailand had notice of the map, some reaction was called for "within a reasonable period".

101. Similarly, in the present case, the failure of the United States to react within a reasonable period to the treatment of Nicaragua's declaration as "in force" under Article 36 (5) precludes the United States, 38 years after the fact, from challenging the effectiveness of that declaration.

II. THE LETTER OF 6 APRIL 1984 FROM SECRETARY OF STATE SHULTZ CANNOT MODIFY OR TERMINATE THE UNITED STATES DECLARATION OF 14 AUGUST 1946

A. The United States Letter of 6 April 1984: Its Effect as a Purported Modification of the United States Declaration

102. The United States letter of 6 April 1984 can be characterized in two ways:

(i) as an attempt to modify the declaration of 14 August 1946 (the text of the letter seems to support this characterization); or

(ii) alternatively, as an attempt to terminate the 1946 declaration and substitute a new one, excluding for a period of two years disputes with any Central American State.

103. Whichever characterization is adopted, the letter is ineffective to accomplish its end. This Section of the Memorial considers the letter in its aspect as an attempted modification. Section B, below, addresses the ineffectiveness of the letter as an attempted termination.

1. The Legal Nature of the Obligations Resulting from Declarations of Acceptance of Jurisdiction under the Optional Clause

104. On 6 April 1984 the United States sent a letter to the United Nations Secretary-General that was clearly intended to prevent Nicaragua from having this case adjudicated by the Court. The text of the letter is as follows:

> "I have the honor on behalf of the Government of the United States of America to refer to the Declaration of my Government of August 26, 1946, concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and to state that the aforesaid Declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America." (Ann. II hereto, Exhibit B.)

105. In the view of Nicaragua, this letter cannot have the legal effect contended for by the United States in the oral hearings on provisional measures (pp. 105-108, *supra*), namely, that of modifying or varying the terms of the United States declaration of 1946 in such a way as to exclude the jurisdiction of the Court in the present case.

106. In order to address the question whether the law allows such *ad hoc* modification in the absence of a reservation of a power of modification in the terms of the original declaration, it is necessary to consider the nature of the legal obligations that arise from the existence of matching declarations under the Optional Clause.

107. By way of preface and as a logical priority, it is to be emphasized that

the *legal* nature of the relationship or relationships which are created has never been doubted. The wording of Article 36 (2) of the Statute is incompatible with any other view:

> "The States parties to the present Statute may at any time *declare* that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other State accepting the same obligation*, the jurisdiction of the Court in all legal disputes." (Emphasis added.)

108. The view generally adopted, both judicially and in the literature, is that the interlocking declarations generate obligations which do not have a treaty character as such, but constitute, nonetheless, obligations of a "bilateral" or consensual character governed by international law and subject to principles of treaty interpretation which must be applied with necessary modifications (see the *Anglo-Iranian Oil Co.* case, *Judgment, I.C.J. Reports 1952*, p. 93, at p. 105; and the case concerning the *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 17, pp. 32-33).

109. The Court clearly accepts this approach. In the Judgment the Court in the case concerning *Right of Passage over Indian Territory, Preliminary Objections, Judgment* (*I.C.J. Reports 1957*, p. 146), the following analysis appears:

> "The Court 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 jurisdication of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned. When India made its Declaration of Acceptance of February 28th, 1940, it stated that it accepted the jurisdiction of the Court for a specified period 'from to-day's date'."

110. The legal character of the relation created by coincident declarations as a "consensual" or "contractual" relation is widely recognized in the literature of the law. The late President Waldock referred to "the consensual nature of the juridical bond established between States by their declarations" (*British Year Book of International Law*, Vol. 32 (1955-1956), at p. 254). Sir Gerald Fitzmaurice described the declarations as "unilateral in form" but "contractual in substance" and as "basically contractual in nature" (*id.*, Vol. 33 (1957), pp. 230-232). In another context the same writer stated that "These declarations are not treaties, but they give rise to a quasitreaty situation by creating a network of bilateral relationships between the various declarants" (*British Year Book of International Law*, Vol. 34 (1958) p. 75).

111. Essentially similar assessments are to be found in the work of leading exponents of the doctrine of international law, with only insignificant variations.

In his substantial study of the Court, Dr. Rosenne concludes his examination of declarations thus:

> "It is therefore more appropriate to regard participation in the system of the compulsory jurisdiction as a *sui generis* international engagement, a *sui generis* assumption of legal obligation under particular rules of international law; and while that obligation may possess some affinities with the types of obligations regulated by the law of treaties, it is not on all fours with them." (*The Law and Practice of the International Court*, Leyden, 1965, Vol. I, p. 414.)

112. In his work entitled *Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, Charles De Visscher explains the position fully and decisively in the following passages:

> "La déclaration prévue au parag. 2 de l'article 36 du Statut de la Cour est un acte unilatéral générateur d'effets contractuels [affaire des *Phosphates du Maroc, arrêt, 1938, C.P.J.I. série A/B n° 74*, p. 23; *affaire de la Compagnie d'Electricité de Sofia et de Bulgarie, arrêt, 1939, C.P.J.I. série A/B n° 76*, p. 64; affaire de l'*Anglo-Iranian Oil Co., arrêt, C.I.J. Recueil 1952*, p. 105]. Elle est un acte unilateral, en ce sens qu'elle est, dans son élaboration et dans son énoncé l'œuvre exclusive de l'Etat qui la souscrit. Elle est génératrice d'effets contractuels, du fait qu'elle s'insère dans un cadre institutionnel dont une norme spéciale lui confère la valeur d'un engagement international à l'égard de tout autre Etat ayant accepté ou acceptant, par la suite, la même obligation. C'est de ce double aspect de la déclaration qu'il faut tenir compte dans l'examen des difficultés d'interprétation auxquelles son application a donné naissance.
>
> Le système de la clause facultative s'analyse en un complexe de conventions bilatérales issues de déclarations unilatérales qui se rencontrent, cette recontre ayant pour effet de faire naître successivement un lien consensuel entre les Etats déclarants à compter du jour du dépôt de leurs déclarations respectives. C'est ce que la Cour internationale de Justice a fait ressortir en exposant que tout Etat déclarant est censé tenir compte du fait qu'en vertu du Statut il peut se trouver à tout moment tenu des obligations découlant de la disposition facultative vis-à-vis d'un nouveau signataire du fait du dépôt de la déclaration d'acceptation de ce dernier [affaire du *Droit de passage sur territoire indien, exceptions préliminaires, C.I.J. Recueil 1957*, p. 146].
>
> L'intention de s'engager est décisive; son expression n'est subordonnée à aucune forme particulière. 'La forme et les termes précis adoptés par les Etats pour cela sont abandonnés à leur discrétion et rien n'indique qu'une forme particulière soit prescrite ni qu'une déclaration faite sous une autre forme serait nulle . . . la seule question pertinente est de savoir si la rédaction employée dans une déclaration donnée révèle clairement l'intention, pour reprendre les termes du parag. 2 de l'art. 36 du Statut, 'de reconnaître comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, la juridiction de la Cour sur tous les différends d'ordre juridique' relatifs aux catégories de questions énumerées dans ce paragraphe [affaire du *Temple de Préah Vihéar, exceptions préliminaires, arrêt, C.I.J. Recueil 1961*, p. 32]."

113. Paul Guggenheim's view appears in his *Traité de droit international public*, (Vol. II, Geneva, 1954, p. 120). In his words:

> "La signature de la clause facultative par une pluralité d'Etats entraîne la

constitution d'une nouvelle communauté conventionnelle, différente de celle que le Statut a créée et qui reconnaît la juridiction obligatoire de la Cour de La Haye sous condition de réciprocité."

In his work entitled *Les actes juridiques unilatéraux en droit international public* (Paris, 1962, pp. 142-147), Eric Suy adopts a view similar to that of Guggenheim.

114. Further expressions of view on the same theme and further references may be found in the work of Suy cited above, in the article by José Luis Iglesias Buigues, *Österreichische Zeitschrift für öffentliches Recht* (Vol. 23 (1972), pp. 255-288), and in the lectures of Eduardo Jiménez de Aréchaga (*Recueil des cours*, Vol. 159 (1978-1), p. 154).

2. The Inferences to Be Drawn from the Contractual Nature of the Legal Bond Resulting from Interlocking Declarations

115. The overwhelming opinion is that the obligations created by interlocking declarations under the Optional Clause are "contractual" or "consensual": that is to say they are legal agreements, governed by international law, but not falling within the category of treaties as such. And indeed, as noted below, this is the characterization adopted by the United States itself. The United States contention that there is a right to unilateral modification of declarations is to be weighed against this background.

116. In the view of Nicaragua the following inferences may be drawn from the contractual nature of the legal bond created by declarations under the Optional Clause: (i) A primary (but not an exclusive) approach to the interpretation of individual declarations is to seek evidence of the intention of the declarant at the time of making the declaration, which may be established by reference to evidence outside the terms of the declaration (see the *Anglo-Iranian Oil Co.* case, *Judgment, I.C.J. Reports 1952*, p. 93; the case concerning the *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 30-34).

117. (ii) The general principles of treaty interpretation are applicable, though with some necessary modification in light of the unilateral nature of the individual instruments (see *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 105).

118. (iii) The expression of consent has its own integrity and consequently it can only be varied either in accordance with its own terms or as a consequence of some applicable rule of law.

119. (iv) In principle, questions of modification, invalidity termination, are to be determined on grounds substantially similar to those found in the law of treaties, that is to say, either as expressly provided for in the instrument or on legal grounds external to the terms of the declaration, such as fundamental change of circumstances.

120. (v) In resolving questions of the interpretation and validity of reservations (and it may be assumed other issues of a contractual character), the conduct of the parties is of considerable significance (see the *Certain Norwegian Loans* case, *Judgment, I.C.J. Reports 1957*, p. 27; *Temple of Preah Vihear* case, *Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 30, 34; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 337-338, 340-342, pp. 343-344 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock)).

121. These inferences are based upon the jurisprudence of the Court, general principles of law, and ordinary considerations of legal policy. Both individually and in combination, the propositions advanced militate decisively against the

legality of a right of unilateral modification of the United States declaration of 1946.

3. The Intention of the Declarant State Excludes Unilateral Modification in the Present Case

122. The principal criterion of the legality of a purported modification of a declaration must consist of the intention of the declarant State at the time of making the declaration. The declaration of the United States makes no provision for variation but does provide in clear terms for termination on expiration of six months' notice of termination. If a power of modification had been sought it would have been expressly provided for and the normal principle of interpretation is applicable: *expressio unius est exclusio alterius* (see Fitzmaurice, *British Year Book of International Law*, Vol. 28 (1951), p. 25; McNair, *Law of Treaties*, Oxford, 1961, pp. 399-410; Rousseau, *Droit international public*, I, Paris, 1971, pp. 278-279).

123. It is to be noted that the text of the United States letter of April 1984 implicitly recognizes the incompatibility of the concept of modification with the terms of the United States declaration when it employs the phrase "notwithstanding the terms of the aforesaid Declaration".

124. The view that the United States had no intention, when making its declaration in 1946, of reserving a power of modification or variation is clear from the circumstances in which the United States Senate gave its advice and consent to the United States declaration. The declaration was subject to the appropriate treaty-making procedures within the United States Congress. In the Report of the Senate Committee on Foreign Relations on the pertinent Senate resolution, the declaration is described as:

> "a unilateral Declaration having the force and effect of a treaty as between the United States and each of the other States which accept the same obligations" (Report of the Committee on Foreign Relations of the United States Senate, 79th Cong., 2d Sess., S. Doc. No. 259 (1946), p. 12. (Ann. II hereto, Exhibit D)).

125. The Report of the Senate Committee recommending approval of the advice and consent resolution also contains the following emphatically clear statement:

> "The resolution provides that the declaration should remain in force for a period of five years or thereafter until 6 months following notice of termination. The declaration might, therefore, remain in force indefinitely. The provision for 6 months' notice of termination after the 5-year period has the effect of *a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding.*" (*Id.*, p. 7 (emphasis added).)

As the United States "Departmental Statement" of 8 April 1984 (Ann. II hereto, Exhibit C) makes abundantly clear, and as also appears from the contents of the letter of 6 April 1984, the very purpose of the attempted modification was "to withdraw [the United States] obligation in the face of a threatened legal proceeding" and to avoid the possibility that the particular issues of law and fact presented by Nicaragua's Application should be subjected to judicial scrutiny.

126. The evidence points ineluctably to the conclusion that the attempted modification of the United States declaration can have no legal effect. This is the necessary consequence of the principle that an expression of consent or will has its own integrity and can only be varied as a consequence of some applicable

rule of law. The letter of 6 April 1984 is incompatible with the clear terms of the United States declaration of 1946.

4. The Position in the Doctrine

127. The literature of international law gives little or no support to the view that unilateral modification of declarations is permitted in the absence of a reservation of a power of modification or variation. At the outset it must be pointed out that in the oral hearings on provisional measures, the Deputy-Agent of the United States only referred to two authorizations. One of these is Professor Anand in his work entitled *Compulsory Jurisdiction of the International Court*. The passage from this work (at p. 147) quoted by Mr. McGovern (p. 108, *supra*, does not in fact support the proposition, and in a later passage (at p. 180) Professor Anand states that "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".

128. The work of Dr. Rosenne, *The Law and Practice of the International Court* (Vol. I, 1965, pp. 410-411), is remarkable in being the only authority which supports a power of unilateral modification. However, the statement concerned is made more or less in passing, with no supporting reasoning and a lack of cited authorities.

129. The following authorities reject the view that there is a right of unilateral modification:

Waldock, *British Year Book of International Law*, Vol. 32 (1955-1956), pp. 263-265.

Murty, in Sørensen (ed.), *Manual of Public International Law*, London, 1968, p. 706.

Anand, *Compulsory Jurisdiction of the International Court*, London, 1962, p. 180.

Stone, *Legal Controls of International Conflict*, London, 1954, p. 127 (and note 127).

130. A number of authorities discuss the question of the terminability of declarations and make no express reference to unilateral modification. However, the views these writers express on the question of termination are applicable equally to that of modification. Thus in the seventh edition of *Oppenheim's International Law*, edited by Hersch Lauterpacht (London, 1952, Vol. II, p. 61, note 2), it is stated that "in general, unilateral termination of the obligations of the Optional Clause must be regarded as subject to conditions governing the termination of treaties". Such a view is obviously incompatible with an alleged right of unilateral modification. Bowett observes that "once the declaration is made for a fixed period, it cannot be unilaterally terminated prior to the conclusion of the period, for this would undermine the whole purpose of the Optional Clause" (*The Law of International Institutions*, 4th ed., London 1982, p. 271). A similar opinion is expressed in Sørensen (ed.), *Manual of Public International Law*, London, 1968, p. 706.

131. The considerations of principle which lie behind such expressions of opinion would seem to be as follows. The Court has allowed considerable flexibility in the making of declarations and countenanced the Portuguese reservation of a right to modify on notice (with immediate effect) in the *Right of Passage over Indian Territory* case, *Preliminary Objections, Judgment* (*I.C.J. Reports 1957*, p. 125). At the same time, a declaration is a *legal* instrument and must be "true to itself". If there were a universal right of unilateral termination or modification, irrespective of the terms of declarations, such instruments would

cease to have any contractual effect. In short, they would not create a *compulsory* jurisdiction. The scheme of the Statute allows a State to file a valid declaration and use it as the basis for an immediate filing of an Application. That is compatible with the system of the Optional Clause (see the *Right of Passage over Indian Territory* case, *Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 145-147). However, the sudden rupturing of the legal bond created by interlocking declarations is contrary both to the contractual nature of the relation between declarations and to the system of the Optional Clause under the Statute, if that rupturing is not in accordance with the terms of the relevant declaration or is not otherwise justified by some legal rule. If unilateral termination were to be permitted in principle, the consequence would be the recognition of termination (and modification) with retroactive effects, since such a freedom to terminate prior to seisin of the Court is logically no different in nature when it operates subsequent to seisin. In either case the *compulsory* nature of the jurisdiction would have been substantially destroyed.

5. The Position in State Practice

132. The practice of States provides no support for the view that declarations can be terminated or modified at will (see Waldock, *British Year Book of International Law*, Vol. 32 (1955-1956), pp. 263-265; Hudson, *The Permanent Court of International Justice 1920-1942*, New York, 1943, p. 476, para. 461; Oppenheim, *International Law*, 7th ed., ed. by Hersch Lauterpacht, London, 1952, Vol. II, p. 61, note 2; Merrills, *British Year Book of International Law*, Vol. 50 (1979), pp. 94-96. The same view of the practice may be found in Shihata, *The Power of the International Court to Determine its own Jurisdiction*, The Hague, 1965, pp. 164-167 (although this author tends to support Dr. Rosenne on the issue of principle).

6. Conclusion

133. Considerations of principle, legal policy, and the evidence of State practice, lead to a single necessary conclusion. The United States letter of 6 April 1984 has no legal effect and cannot constitute a modification of the terms of the United States declaration of 1946, which remains in force and in its original form.

B. The United States Letter of 6 April 1984: Its Effect as a Termination of the United States Declaration of 1946

134. In the previous section of this Memorial the legal significance of the United States letter of 6 April 1984 was examined on the basis that the letter purported to be a modification of the United States declaration of 1946. As the relevant materials indicate, there is an alternative construction of the United States letter and the purpose of this section will be to explore this alternative view.

135. While the United States letter was probably not intended to be a termination of the declaration of 1946, there are certain elements in the situation which suggest that construction. A consideration of those elements will, in any case, assist in an appreciation of the eccentric aspects of the United States initiative of 6 April 1984. On the view that the letter did have the effect of terminating the original declaration on the terms expressed therein, such termination could only take effect six months after notice, and the declaration of 1946 thus remained in force at the date of the filing of Nicaragua's Application.

136. The view that the letter of 6 April 1984 constituted a termination of the United States declaration is supported by three considerations, which are as follows:

(i) The letter terminates the operation of the declaration *tout court* as against certain identifiable States and that is not a matter of modification. In relation to those States an existing acceptance of jurisdiction is not modified *ratione materiae*, but is terminated *ratione personae*.

(ii) In this context, the legal classification of the effect of the United States letter is not affected by the fact that it is to apply only for two years and thus might be described as a "suspension" of the acceptance of jurisdiction. For present purposes the effect would be the same: the extinction of jurisdiction *as between the United States and Nicaragua tout court*. In this respect the restriction of time makes no significant difference.

(iii) There is some evidence to the effect that the real intention, indicated by the Departmental Statement of 8 April 1984 (Ann. II, Exhibit C), was to withdraw the declaration of 1946 and to substitute a new one with effect from 6 April 1984, consisting of the original instrument together with the contents of the letter of that date. The evidence takes two forms. First, the precedents invoked by the Departmental Statement all involved withdrawal of a declaration followed by the making of a new declaration (Ann. II, Exhibit C). Secondly, a number of officials quoted in the press, making more or less contemporaneous comment upon the letter of 6 April, were to speak of a "withdrawal of jurisdiction", or were to emphasize that the acceptance of jurisdiction had been "suspended" (Ann. II, Exhibit C).

137. Nicaragua prefers the construction according to which the United States letter of 6 April 1984 was a purported modification, rather than a purported termination, of the United States declaration. In view of its invalidity in law, the choice of construction is rather an academic question. However, if the Court were to take the view that a termination had been effected, at least vis-à-vis Nicaragua, such a conclusion could not affect the existence of jurisdiction at the date of the Application on 9 April 1984, in view of the provision for termination only on expiration of six months after notice. The position of principle is explained clearly by the late President Waldock in his classical exposition in the *British Year Book of International Law* (Vol. 32 (1955-1956), p. 244). In his words:

> "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. This is borne out by the fact that when France, the United Kingdom, and other Commonwealth States notified the Secretary-General of the League in September 1939 that they would 'not regard their acceptances of the Optional Clause as covering disputes arising out of events occurring during the present hostilities', they formulated the grounds on which they justified their action in a manner strongly to imply that they were invoking the doctrine of *rebus sic stantibus* (*League of Nations Official Journal*, 1939, pp. 407-410; *ibid.*, 1940, p. 44. These States alleged that the conditions which prevailed at the time of their acceptance of the Optional Clause no longer existed). At the date in question the declarations of these States were valid for fixed periods which had not yet expired, and they clearly did not consider themselves to have the right unilaterally to terminate or vary their declarations except on principles analogous to those governing the termination or variation of treaties. Even so, a number of neutral States

made reservations in regard to the legal effect of the action taken by these States (Belgium, Brazil, Denmark, Estonia, Haiti, Netherlands, Norway, Peru, Sweden, Switzerland, and Thailand; *League of Nations Official Journal*, 1939, p. 410; *ibid.*, 1940, pp. 45-47).

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." (*Id.*, p. 265.)

138. The practice of the United States with regard to treaty termination or modification is fully in accord with this view of international law. Consensual obligations may be modified, suspended or terminated only in accordance with the terms of the instrument or by mutual consent of the parties, or, in the absence of any such provisions or consent, in accordance with general rules of international law governing treaties (Whiteman, *Digest of International Law*, Vol. 14, pp. 410, 427-431, 441).

C. The Principle of Reciprocity Does not Permit the United States to Modify or Terminate Its 1946 Declaration Less than Six Months after Notice

139. In the oral hearings on provisional measures, the Deputy-Agent of the United States asserted that the *ad hoc* modification of the United States declaration in the form of the letter of 6 April 1984 could be justified by the principle of reciprocity. The argument was expressed in these words:

> "Under the principle of reciprocity, the United States could only be bound by its six-month notice proviso in relation to Nicaragua if Nicaragua had a similar or greater notice period in its declaration . . . Nicaragua's declaration . . . is wider *ratione materiae*, but narrower *ratione temporis*, than the United States declaration. As the State making the wider temporal acceptance of the Court's jurisdiction, the United States was therefore also entitled to rely on Nicaragua's purported declaration to modify its own declaration with immediate effect." (P. 109, *supra*.)

140. The argument thus proceeds on the basis that Nicaragua's declaration is open to denunciation *without notice* and is consequently broader than the United States declaration, which can only be terminated upon six months' notice. The United States argument is invalidated by the following considerations:

(i) Even if the United States were correct in its view that the terminability of Nicaragua's declaration was subject to the operation of the condition of reciprocity, the legal consequences contended for would not follow since the assumption that Nicaragua's declaration is terminable or modifiable without notice is unfounded in the law relating to consensual legal obligations.

(ii) The principle of reciprocity is not applicable, within the system of the Optional Clause, to time-limits set by declarant States for the entry into force or termination of declarations, and in the same way, it is not applicable to the question of notice of termination. This proposition is valid independently of the principles of the law of treaties.

141. These questions will be examined at greater length in the paragraphs which follow.

1. The Principles of the Law of Treaties Contradict the United States Argument

142. Even if it were assumed, for the sake of argument, that the principle of reciprocity applied to the question of the termination and variation of consensual legal obligations, such as those created by the system of declarations under the Optional Clause, the United States view that Nicaragua's declaration is terminable or variable without notice is unfounded in law. The only bases on which a declaration that does not reserve a power of termination can be denounced are to be found within the principles of the law of treaties. The reaction of States to the Paraguayan act of denunciation in 1938 was based upon such principles (see Waldock, *British Year Book of International Law*, Vol. 32 (1955-1956), pp. 263-265), and this is highly significant.

143. There are well-known debates on the conditions under which treaties made for an indefinite period may be terminated. However, two propositions can be stated with confidence. In the first place, it is not the case that such legal instruments or treaties made for an indefinite period are, as contended by the United States, "immediately terminable" (p. 110, *supra*). Secondly, the normal presumption of the validity and continuance in force of a treaty applies with particular force to an instrument intended to operate for an indefinite period (see Vienna Convention on the Law of Treaties, Art. 42; *Yearbook of the International Law Commission*, 1963, II, p. 189; *ibid.*, 1966, II, pp. 236-237; McNair, *Law of Treaties*, Oxford, 1961, pp. 493-505). "There is a general presumption against the existence of any right of unilateral termination of a treaty." (McNair, *op. cit.*, p. 493.) Unless a right of denunciation is expressly reserved, the termination of a treaty must rest upon some supervening legal title recognized by international law (see the Vienna Convention, Arts. 42 to 64; Capotorti, *Recueil des cours*, Vol. 134 (1971-III), pp. 427-581). As Briggs observes:

> "There can be no question that the State may, in conformity with the Statute, accept the compulsory jurisdiction of the Court unconditionally in point of time, that is, for an indefinite period. The legal problem which arises from such acceptances is whether a State is permanently bound by such a declaration or whether it is terminable in certain circumstances . . . It would appear that rules of international law governing the termination of treaties are applicable; and that, in the absence of an express reservation of unilateral termination, the declaration remains in force indefinitely." (*Recueil des cours*, Vol. 93 (1958-I), pp. 272-273.)

144. In this respect the whole tenor of the United States argument is incompatible with prevailing legal policy concerning unilateral denunciation of treaties, as revealed in the Vienna Convention in other sources (see Briggs, *American Journal of International Law*, Vol. 68 (1974), pp. 51-68), and in its own practice (see Whiteman, *Digest of International Law*, Vol. 14, pp. 410, 425-431, 441).

2. The Principle of Reciprocity Is Inapplicable to the Time-Limits Expressed in Declarations Relating to Termination and Similar Matters

145. There is persuasive authority that the principle of reciprocity applies to reservations to declarations *ratione temporis*, but does not apply to time-limits set by States for the duration and termination of their declarations. This is the position adopted by Briggs in his careful study.

> "The Court's decision in the *Right of Passage* case may thus be regarded as holding, by implication, that the condition of reciprocity contained in

> Article 36 (2) of the Statute does not require an equal right to terminate Declarations. Reciprocity does not apply to the time-limits for which Declarations are made because it would result either in depriving the Court of jurisdiction validly acquired at the time of an Application or it would contravene the rule of international law that a state cannot unilaterally release itself from international engagements except in accordance with their terms." (*Recueil des cours*, Vol. 93 (1958-I), pp. 277-278; see also p. 268.)

146. As Briggs suggests, the attitude of the Court toward the general concept of reciprocity, revealed in the *Right of Passage over Indian Territory* case, (*Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125), is incompatible with the effect which the United States now seeks to give to the concept. In that case, India had made a preliminary objection challenging the validity of the reservation by Portugal of the right to vary its declaration on notice and with immediate effect. India argued that the reservation was invalid, *inter alia*, on the ground that it violated the condition of reciprocity. The Court emphatically rejected this argument:

> "Neither can the Court accept the view that the Third Condition is inconsistent with the principle of reciprocity inasmuch as it renders inoperative that part of paragraph 2 of Article 36, which refers to Declarations of Acceptance of the Optional Clause in relation to States accepting the 'same obligation'. It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding." (*Id.*, p. 144.)

147. The Court thus held that Portugal's reserved right to vary its declaration did not give rise to a reciprocal right on the part of other States adhering to the Optional Clause to vary their declarations. The régime of reciprocity is maintained, however, since any substantive reservations introduced by Portugal in the exercise of its reserved right to vary could be taken advantage of in the ordinary way by any other State. It is the substantive content of the declaration at any particular time that is the subject of the régime of reciprocity, and not the right to vary itself.

148. The views of the Court in the *Right of Passage over Indian Territory* case were expressed with direct reference to the Portuguese reservation of a right to vary the content of its declaration. But the same reasoning would apply to a right to terminate the declaration with immediate effect. It follows that no such right to terminate can accrue to a Respondent State on the basis of reciprocity, unless the Applicant State had exercised such a right vis-à-vis the Respondent before filing its Application. Since Nicaragua has not exercised its supposed right to terminate with immediate effect, no such right can accrue to the United States in this case by way of reciprocity.

149. The argument that the principle of reciprocity applies to the durational provisions of declarations fails on grounds of logic as well as authority. The point can be illustrated by a simple hypothetical example. Assume that State A accepts the compulsory jurisdiction of the Court for a period of ten years by a declaration dated 1 January 1980, and that State B accepts for a period of five years by a declaration dated 1 January 1985. State B files an Application naming State A as Respondent on 1 January 1986 — i.e., more than five years after the effective date of State A's declaration. To apply the principle of reciprocity would

mean that State A could treat its declaration as expired vis-à-vis State B, and could thus escape compulsory jurisdiction in the assumed case. But such a result is manifestly untenable. It follows that the principle of reciprocity must be considered inapplicable to durational limitations in the declaration.

D. The Letter of 6 April 1984 Is Invalid Both under United States Law and International Law, by Reason of Fundamental Absence of Authority and Is Thus Ineffective to Alter the United States Declaration Submitting to the Compulsory Jurisdiction of the Court

150. Whether regarded as an effort to terminate the original United States declaration under Article 36 (2) and substitute a new one or as an attempt to modify or suspend the original declaration, the letter of 6 April 1984 from Secretary Shultz to the Secretary-General is ineffective to accomplish the result. Acceptance of the compulsory jurisdiction of the Court, as shown above, is regarded in international law as establishing a consensual relationship, governed in many respects by the principles of treaty law. It is equally so regarded under the law of the United States. Such obligations cannot be contracted or varied by a mere letter from the Secretary of State. The problem is not simply one of a defect or imperfection in the procedure followed under municipal law. There is a total failure of authority in the Secretary to accomplish the intended result.

151. Under Article II, Section 2, of the Constitution of the United States, the President is empowered "by and with the Advice and Consent of the Senate, to make Treaties providing two-thirds of the Senators present concur . . .". The declaration of 14 August 1946, by which the United States accepted the compulsory jurisdiction of the Court was explicitly recognized by both the Senate and the President as subject to the Treaty Clause of the Constitution. The declaration was authorized by Senate resolution 196, adopted on 2 August 1946 (Ann. II hereto, Exhibit D). The Committee report to the Senate recommending adoption of the resolution stated:

> "Inasmuch as the declaration would involve important new obligations for the United States, the committee was of the opinion that it should be approved by the treaty process, with two-thirds of the Senators present concurring. The force and effect of the declaration is that of a treaty, binding the United States with respect to those States which have or which may in the future deposit similar declarations. Moreover, under our constitutional system the peaceful settlement of disputes has always been considered a proper subject for the use of the treaty procedure. While the declaration can hardly be considered a treaty in the strict sense of that term, the nature of the obligations assumed by the contracting parties are such that no action less solemn or less formal than that required for treaties should be contemplated." (Report of the Senate Committee on Foreign Relations relative to the Proposed Acceptance of Compulsory Jurisdiction of International Court of Justice by United States Government, Sen. Doc. No. 259, 79th Congress, 2d Sess. (1946), p. 12. Ann. II hereto, Exhibit D.)

152. The declaration of President Truman filed with the Secretary-General of the United Nations recites that it is "in accordance with the resolution of 2 August 1946 of the Senate of the United States of America (two-thirds of the Senators present concurring therein . . .)" (Ann. II hereto, Exhibit A).

153. As the Senate Committee notes, these actions reflect the uniform practice of the United States with respect to peaceful settlement of disputes through

arbitration or judicial settlement. In a Memorandum for Senator Vandenburg dated 23 July 1945, Hon. Green Hackworth, then the Legal Adviser to the United States State Department, in response to a question as to the method by which the United States could accept the compulsory jurisdiction of the Court, stated:

> "if no specific procedure were prescribed by statute, the proposal would be submitted to the Senate with request for its advice and consent to the filing of the necessary declaration with the Secretary General of the United Nations" (Whiteman, *Digest of International Law*, Vol. 12, p. 1267; see also Report of the Senate Committee on Foreign Relations, at 11. Ann. II hereto, Exhibit D).

154. Previous efforts to adhere to the compulsory jurisdiction of the Permanent Court and subsequent efforts to alter the terms of the declaration of 14 August 1946, were uniformly initiated by the introduction of a resolution in the Senate calling for advice and consent to the action. The efforts were abandoned when the proposed resolutions failed of adoption, despite the strong commitment of the Presidents then in office (Whiteman, *Digest of International Law*, Vol. 12, pp. 1279, 1308 ff., 1319 ff.).

155. In 1960, a resolution was introduced to delete the self-judging language in the second reservation to the United States declaration of 14 August 1946. Although the resolution was never reported to the full Senate for a vote, the hearings on it are especially illuminating because they explicitly address the question of the method by which the existing declaration could be altered. From these hearings it is clear that both the State Department and the Senate regarded the process as consisting of two steps: (1) the termination of the existing declaration, and (2) the filing of a new declaration omitting the self-judging language. It is equally clearly agreed that, although the first step could perhaps be taken by the President acting alone, the second would require a resolution of advice and consent of the Senate (*id.*, p. 1318). Thus even if the President could terminate on his own authority, he could not substitute a new declaration.

156. "Modification" of an existing obligation is equally beyond the power of the President acting alone. During hearings before the Senate Foreign Relations Committee in April 1979 concerning termination of the mutual security treaty with the Republic of China, a formal question on this matter was submitted in writing to the Department of State for an authoritative reply in writing:

> "Would you agree that the President is not able to alter the terms of an existing treaty in any significant way without the consent of the Senate?
>
> *Answer*. Yes. However, he may interpret a treaty and secure the agreement of the other party or parties for a particular interpretation or method of implementation."

The next question put to the Department was:

> "If the consent of the Senate is required in the case of a significant amendment to a treaty, why is it not required in the case of the most significant 'amendment' of all — complete termination of all its terms?
>
> *Answer*. Termination of a treaty, which ends an obligation of the United States, is not analogous to an amendment of a treaty, which changes, extends, or limits an obligation of the United States. Assuming a significant change in a legally binding obligation to another nation, it follows that the Senate should give its advice and consent to such a change. Normally a treaty is changed by another treaty, although the characterization of the

amendment may be different (e.g., Protocol)." (Hearings on "Treaty Termination", Senate Committee on Foreign Relations, 96th Cong., 1st Sess. (April 9, 10, 11, 1979), p. 214, Ann. II hereto, Exhibit E.)

157. It follows that, as a matter of United States law, the letter from Secretary Shultz is a nullity and can have no legal effect at all. Since a declaration under Article 36 (2) is not strictly speaking a treaty but in this aspect a unilateral act, the fact that it is made without legal authority of the declarant State should mean that it is equally without force or effect on the international plane. And any State is, in the absence of its consent or acquiescence, entitled to assert this fundamental absence of authority when the invalid declaration is asserted against it.

158. The Secretary's letter is equally invalid under the principles of the law of treaties, because it was issued in manifest violation of an internal rule of law of fundamental importance. Article 46 of the Vienna Convention on the Law of Treaties is entitled "Provisions of internal law regarding competence to conclude treaties". It provides:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith."

159. The requirement of Senate advice and consent to a treaty is clearly "a rule of internal law of fundamental importance". It is established by the Constitution of the United States as a basic aspect of the allocation of power as between the President and the Congress. It is not a mere formal or technical requirement. Moreover, the existence of this requirement is well known in the international community. From the Treaty of Versailles to SALT II, the refusal of the Senate to advise and consent to treaties negotiated and signed by the Executive — and the consequent failure of United States ratification of such treaties — have been international events of major historic importance.

160. In the present case, the absence of Senate advice and consent was objectively evident to anyone interested in the matter. There was absolutely no effort to submit the question to the Senate. The letter was delivered privately to the Secretary-General on Friday, 6 April 1984. No public announcement was made until two days later. The letter itself did not recite any Senate action, unlike the original United States declaration of 14 August 1946, made by President Truman. Nor was there any such reference in the official public announcement of the transmission of the letter (Annex II hereto, Exhibits B, C).

161. Thus, applying the law of treaties, this is the very sort of "violation of a provision of internal law regarding competence" that the declarant would be entitled to invoke under Article 46 of the Vienna Convention. If the declarant State is entitled to invoke the defect, surely the State against which the instrument is sought to be applied can do so, in the absence of acquiescence or consent.

162. The absence of Senate advice and consent vitiates the Shultz letter of 6 April 1984 *ab initio*.

III. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN NICARAGUA AND THE UNITED STATES PROVIDES AN INDEPENDENT BASIS FOR JURISDICTION UNDER ARTICLE 36 (1) OF THE STATUTE OF THE COURT AS TO VIOLATIONS OF THAT TREATY

163. As established above, the jurisdiction of the Court is firmly founded on the declarations made by Nicaragua and the United States accepting the compulsory jurisdiction of the Court under Articles 36 (5) and 36 (2) of the Statute of the Court. In addition, under Article 36 (1) of the Statute, jurisdiction is also based on the compromissory clause of the Treaty of Friendship, Commerce and Navigation, signed at Managua on 21 January 1956 by Nicaragua and the United States. This Treaty entered into force on 24 May 1958, after the two States exchanged instruments of ratification in conformance with the procedure set forth in Article XXV of the Treaty, and it remains in force today (367 *UNTS* 3).

164. According to the terms of Article XXIV (2) of the Treaty:

> "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

This Treaty, in force between the Parties, thus constitutes a complementary foundation for the jurisdiction of the Court, in conformance with Article 36 (1) of the Statute of the Court, in so far as the Application of Nicaragua implicates violations of provisions of the Treaty[3].

165. Nicaragua submits that this Treaty has been and is being violated, in several respects, by the military and paramilitary activities of the United States in and against Nicaragua, as described in Nicaragua's Application. Specifically, Nicaragua submits that these activities directly violate Articles XIX (1) and (3); XIV (2); XVII (3); XX; and I of this Treaty, as well as its Preamble. These violations of the Treaty quite obviously have not been "satisfactorily adjusted by diplomacy".

166. A discussion of the questions of the jurisdiction of the Court to entertain this dispute plainly does not require that Nicaragua establish beyond doubt that the United States has violated and is violating its obligations under the Treaty of Friendship, Commerce and Navigation. The proof of these violations must await the proceedings on the merits. At the present stage, it suffices simply to identify those provisions of the Treaty that are contravened by the activities of the United States as alleged by Nicaragua in its Application.

167. Thus, for example, Article XIX (1) provides: "1. Between the territories of the two Parties, there shall be freedom of commerce and navigation." The activities of the United States clearly violate this provision.

168. Although it is a larger concept, freedom of commerce includes freedom of trade. Both expressions have a unique French translation: "*liberté du commerce*" — which consists, as the Permanent Court pointed out, of

[3] When Nicaragua submitted its Application to the Court on 9 April 1984, it reserved the right to supplement or amend it. Consequently, Nicaragua respectfully requests the Court to consider that Nicaragua is exercising that right, in so far as it is necessary to do so, to invoke herein the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States.

"the right — in principle unrestricted — to engage in any commercial activity, whether it be concerned with a trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports with other countries" (*Oscar Chinn* case, *Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 84).

In the same Judgment, the Court pointed out that

"According to the conception universally accepted, the freedom of navigation . . . comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers." (*Id.*, p. 65.)

This definition conforms to the conventional and customary rules in force and, in particular, Article 4 of the Geneva Convention on the High Seas of 1958 and Article 90 of the Montego Bay Convention on the Law of the Sea, which express a very broad principle of *jus communicationis*.

169. These principles have never been challenged by the United States, which, on the contrary, has always expressed a strong conviction as to their importance (see Whiteman, *Digest of International Law*, Vol. 4, p. 507).

170. In consideration of these principles,

"The freedom of the high seas does not include the right to utilize the high seas in a manner which unreasonably prevents other States from enjoying that freedom." (François, *Yearbook of the International Law Commission*, 1956, p. 10.)

171. And, in the words of the United States Supreme Court,

"Upon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there." (*The Marianna Flora*, 1 Wheaton 1, 43 (1826).)

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

173. These activities of the United States also contravene Articles XIV (2); XVII (3); XIX (3); XX; and I of the Treaty. Nicaragua expressly reserves its right to demonstrate these breaches during the proceedings on the merits of this case. Suffice it here to identify the relevant clauses:

Article XIV (2):

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

Article XVII (3):

"3. Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either

country from obtaining marine insurance on such products in companies of either Party."

Article XIX (3):

"3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . ."

Article XX:

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

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

174. Moreover, Article I of the Treaty states:

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

The military and paramilitary activities carried on by the United States are clearly incompatible with this very comprehensive statement: armed attacks against Nicaragua by air, land and sea, resulting in the loss of human lives, severe human suffering and material damages, cannot be seen as "equitable treatment to the persons, property, enterprises and other interests" of Nicaraguan nationals and companies.

175. Further, it should be noted that, as its very title indicates, this Treaty — of "Friendship", "Commerce", and "Navigation" — is intended to achieve a certain broad purpose. This intention is confirmed by the fact that, in the Preamble, the Parties declare themselves "desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples". It goes without saying that the activities of the United States directly contradict these goals and objectives, and the entire spirit of the Treaty.

176. The compromissory clause contained in Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States thus constitutes a sound basis of jurisdiction in the present case in so far as breaches of the pertinent clauses of the Treaty are alleged.

177. Accordingly, while the fact remains that the principal basis for the Court's jurisdiction derives from the acceptance, by the two Parties, of the compulsory jurisdiction of the Court under Article 36 (2) and (5) of the Statute, the Treaty of 1956 provides a complementary ground for the Court's jurisdiction. And as the Permanent Court pointed out:

"The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain." (*Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 76.)

CONCLUSIONS ON JURISDICTION

178. Nicaragua presents the following as its conclusions on the question of jurisdiction:

A. Nicaragua is bound by the compulsory jurisdiction of the Court under the terms of Article 36 (5) of the Statute of the Court.

B. Article 36 (5) applies, by its express terms, to "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice which are still in force", and Nicaragua's unconditional declaration of 1929, which was for an indefinite term, was such a declaration when Nicaragua ratified the United Nations Charter.

C. The words "which are still in force", as they appear in the English version of Article 36 (5) have the same meaning as the corresponding French text which refers to declarations "*pour une durée qui n'est pas encore expirée . . .*". Nicaragua's declaration of 1929, for an indefinite duration, was, at the time Nicaragua ratified the Charter, "*pour une durée qui n'est pas encore expirée*".

D. Article 36 (5) was intended to preserve, to the maximum extent possible, the jurisdiction and potential jurisdiction of the Permanent Court of International Justice for the newly created International Court of Justice, and to maintain continuity between the two Courts. It was designed so as not to frustrate or retard progress already achieved in obtaining acceptances of the compulsory jurisdiction. It is to be construed in light of these purposes.

E. At the time immediately prior to Nicaragua's ratification of the United Nations Charter, its declaration was in a valid but unperfected state, requiring ratification either of the Statute of the Permanent Court or the Statute of the new Court (via ratification of the Charter) to give it binding force. By ratifying the Statute of the new Court as an original Member of the United Nations, before the Permanent Court was dissolved, Nicaragua perfected its declaration and gave it binding force.

F. The practice of the Court, the parties and other States, and the opinions of learned publicists confirm that Article 36 (5) operated with respect to Nicaragua's declaration so as to make it an acceptance of the compulsory jurisdiction of the International Court of Justice.

G. The first *Yearbook* of the Court, for 1946-1947, recognized Nicaragua as a State whose declaration was "deemed to be still in force" by virtue of Article 36 (5) and which, accordingly, was bound by the compulsory jurisdiction of the Court. Every subsequent *Yearbook* through the most recent one for 1982-1983, a period of almost 38 years, has included Nicaragua among the States recognizing the compulsory jurisdiction of the Court. Other pertinent public documents of the Court and the United Nations, without exception, have similarly recognized Nicaragua as accepting the compulsory jurisdiction of the Court.

H. The substantially uniform opinion of the leading publicists and commentators recognizes Nicaragua as having accepted the compulsory jurisdiction of the Court by virtue of the application of Article 36 (5) to its declaration of 1929.

I. The practice of Nicaragua in supporting the proposed draft of Article 36 (5) as a member of Committee IV/1 at San Francisco, in ratifying the Charter as an Original Member, in acquiescing in the jurisdictional assertions of Honduras in

the *Arbitral Award* case, and in not objecting to the inclusion of its declaration in the *Yearbook* of the Court and other pertinent public documents for 38 years, manifests an unequivocal understanding that it has been and is bound by the Court's compulsory jurisdiction.

J. By its practice the United States has expressly recognized the effectiveness of Nicaragua's declaration of 1929, by regularly listing Nicaragua as bound by the compulsory jurisdiction of the Court in the authoritative Department of State annual publication *Treaties in Force*. The United States has also implicitly recognized the effectiveness of Nicaragua's declaration by not objecting to it despite its inclusion in the *Yearbook* for 38 years and despite the fact that the United States was formally on notice, for the same period, of Nicaragua's failure to deposit an instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court.

K. Without prejudice to the foregoing conclusions, even if Nicaragua's declaration of 1929 were transferred to the Statute of the new Court in 1945 with a defect of form in the expression of consent to the compulsory jurisdiction of the former Permanent Court, such defect does not have the consequence that the Court lacks jurisdiction on the present case.

L. In the context of jurisdictional instruments, the overriding criterion is that of the reality of consent, and Nicaragua has always consented to the compulsory jurisdiction of the Court, such consent being evidenced by its consistent conduct for 38 years.

M. The United States, by its conduct for 38 years, has accepted and acquiesced in the effectiveness of Nicaragua's declaration of 1929, and cannot now challenge that declaration based on Nicaragua's failure to deposit an instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court.

N. With reference to the letter from Mr. Shultz to the United Nations Secretary-General dated 6 April 1984, this document bears two possible interpretations. In the first place it may be regarded as an invalid attempt to modify or vary the existing United States declaration which has thus been neither varied nor modified and remains in force. An alternative view is that the Shultz letter has the effect of terminating the original declaration but on the express terms that termination can only take effect six months after notice. In either case the Court has been properly seised of a legal dispute as a result of the Application of Nicaragua.

O. The view espoused by the United States to the effect that the declaration of Nicaragua is terminable without notice and that consequently the principle of reciprocity applies in order to permit unilateral modification of the United States declaration has no legal basis whatsoever.

P. The letter from Mr. Shultz did not constitute a valid modification of United States obligations for the additional reason that it did not conform to the constitutional requirements of United States internal law for the modification or denunciation of treaty instruments.

Q. The Court has jurisdiction under Article 36 (1) of the Statute of the Court over claims presented by the Application that fall within the scope of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 24 May 1958, by virtue of Article XXIV (2) of the Treaty.

PART TWO. THE ADMISSIBILITY OF NICARAGUA'S APPLICATION OF 9 APRIL 1984

179. In its observations at the oral hearing on provisional measures, the United States raised a number of objections to action by the Court that were unconnected with the status of Nicaragua's declaration accepting the compulsory jurisdiction or with the import of Secretary Shultz's letter of 6 April. Although these objections were not very sharply or clearly formulated, they relate in general to the political circumstances surrounding the actions of the United States in organizing and conducting armed intervention against Nicaragua.

180. At some points, the United States asserted that the legal claims of Nicaragua were part of a larger political context and therefore not meet for adjudication by the Court. Elsewhere, the United States point seemed to be that another forum had exclusive competence over the dispute, thus precluding the Court from hearing Nicaragua's claim. Sometimes this alternate forum was said to be the "Contadora process". But on other occasions it was suggested that the political organs of the United Nations or the Organization of American States have exclusive authority in the premises.

181. Finally, it was contended that "jurisdiction" is lacking here because of the absence of the other Central American States.

182. These objections were denominated as jurisdictional (e.g., pp. 83, 86, *supra*). It may be doubted whether, strictly speaking, this is a proper classification. We need not be detained by the intricacies of taxonomy, however (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 10). The Court's order, directing that this phase of the proceedings shall be "addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application", is broad enough so that these issues should properly be treated in this submission (Order of 10 May 1984, *I.C.J. Reports 1984*, p. 187).

183. It is the position of Nicaragua, that, however phrased and whether taken severally or cumulatively, these objections are patently without substance. Although we are at something of a disadvantage because the objections have not yet been precisely formulated, we shall address them *seriatim* at this point.

I. THE COURT IS NOT PRECLUDED FROM ADJUDICATING THE LEGAL DISPUTE BETWEEN NICARAGUA AND THE UNITED STATES BY REASON OF THE SURROUNDING POLITICAL CIRCUMSTANCES

184. In its broadest form, the thrust of the United States argument seems to be that because the dispute between Nicaragua and the United States has major political dimensions it is unsuitable for adjudication by this Court. Thus, the Agent of the United States near the beginning of his argument stated that:

> "this Court, under the international system of which it is but a part, is not institutionally designed under the circumstances of this case to remedy the regional conflict that is tragically engulfing Central America" (p. 83, *supra*).

"The United States does not believe", he said, "that this judicial forum is the appropriate place to address this issue . . ." (*id.*, p. 13). And the Deputy-Agent argued that "Nicaragua is confronting the Court with only a small segment of a much broader and interrelated conflict" (*id.*, p. 76).

185. The short answer to this contention is the Judgment of the Court in *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1980*, p. 3), adopted at the urging of the United States in that case. There Iran argued, just as the United States does here, that the claim presented to the Court

> "only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately . . .
>
> The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties on which the American Application is based, but results from an overall situation containing much more fundamental and complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years." (*Id.*, p. 19.)

The Court categorically rejected this argument, pointing out, as it had in its earlier Order on provisional measures that

> "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" *(id.)*.

The Judgment goes on to say that

> "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 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. 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." (*Id.*, p. 20.)

186. As the Court was at pains to state, its conclusion marked no novel departure, but was in accordance with its "settled jurisprudence". It is implicit

in the position of the Court under the United Nations Charter as "the principal judicial organ of the United Nations" (United Nations Charter, Art. 92), an organization whose first purpose is "To maintain international peace and security", among other ways by bringing about "by peaceful means, and in conformity with international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (United Nations Charter, Art. 1 (1)).

187. In fact, because of this feature of the Court's institutional architecture, Dr. Rosenne, at the very outset of his magisterial study, maintains that the entire dichotomy of "political" as opposed to "legal" questions is inapposite in relation to cases coming before the Court.

> "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." (*The Law and Practice of the International Court*, Leyden, 1965, Vol. I, p. 2.)

188. The submission of a claim to the Court, Dr. Rosenne says, represents a decision to seek a resolution of the issues tendered by the Application according to legal norms applied by judicial techniques, in contrast to resort to political procedures of settlement. To the extent that the parties have accepted the jurisdiction of the Court under the Optional Clause, such a choice is open to the Applicant and must be accepted by the Respondent (*id.*, pp. 2-4). Although the Court has properly held that it cannot be concerned with the motives underlying the decision to invoke the Court (*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. 57, 61), it must often be the case, as here, that the resort to the judicial forum comes when the modalities of political settlement have been distorted by disparities of power between the parties or corrupted by the readiness of the stronger to disregard, in its political conduct, the ordinary constraints of international law. It is especially important that the doors of the Court should remain open in just such cases.

189. In any event, although almost every case to come before the Court has been suffused with grave political implications, the Court has never declined to adjudicate because the question presented was "political". There is no "political question doctrine" in the jurisprudence of the International Court of Justice, in the sense of a principle requiring the Court to decline to adjudicate a legal dispute otherwise properly before it, because the dispute is enmeshed in a larger political controversy (see *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 23). On the contrary, the Court has repeatedly held that it "cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task . . ." (*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*, p. 61; see also *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, pp. 6 and 7). In *Certain Expenses*, the Court, in repeating this language, addressed the issue even more directly:

> "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. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, p. 155.)

190. The judgments just cited were all delivered in response to requests for advisory opinions. However, the Court itself has said that it, as well as its predecessor,

> "have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function" (*Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963*, p. 15, p. 30).

Dr. Rosenne also indicates that on this issue, advisory opinions are authoritative with respect to contentious cases as well (Rosenne, *supra*, Vol. II, p. 703, nn. 3 and 4). Indeed, it may be argued that the advisory opinions are even more compelling, since unlike in the contentious jurisdiction, the Court has a certain discretion under Article 65 of the Statute to decline to respond to a request for an advisory opinion. That the question involved grave political implications might very plausibly be advanced, as in *Certain Expenses* and *Competence of the General Assembly*, as a ground for exercising the discretion and declining to respond. Nevertheless, the Court refused to accept those suggestions.

191. *Status of Eastern Carelia* and *Northern Cameroons* are not to the contrary. In the first, the Permanent Court considered that in the circumstances it was being called upon to pronounce on questions actually in dispute between two States, one of which had not consented to the jurisdiction of the Court (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 7). In the second, the action of the General Assembly, after the case had been filed, in disposing of the territory of the Northern Cameroons in accordance with the results of a plebescite, rendered nugatory any pronouncement the Court might have made as to the legality of the earlier conduct of the trustee power. In effect, the case had become moot (*Northern Cameroons, I.C.J. Reports 1963*, p. 15.)

192. Nicaragua's Application presents a legal dispute in the classical sense of the term. Early in its history, the Permanent Court laid down the definition of a dispute in terms that neither it nor this Court has found it neccessary to modify: "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, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; see also *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at pp. 328, 343.) The definition echoes to a certain extent the categories of legal disputes listed in Article 36 (2) of the Statute of the Court. The dispute that is the basis of Nicaragua's claim qualifies under all four of those categories.

193. In the first place, there is a dispute over the interpretation of treaties (see Art. 36 (2) *(a)*). Nicaragua's fundamental contention is that the conduct of the United States, in organizing, supplying and directing a mercenary army in attacks on Nicaragua, is in violation of the prohibitions on the use of force in the Charters of the United Nations and the Organization of American States. The

claims of treaty violation are set forth explicitly in paragraphs 15-19 of the Application in this case (Application, pp. 7-8, *supra*). Although the United States has not yet pleaded to the merits of the case before the Court, its public position, as stated by President Reagan, is that it has a perfect right to do what it is doing (see Application, p. 5, *supra*, para. 7). Thus there is a direct clash between the parties about the obligations of the United States under the United Nations and Organization of American States Charters. The Court has already established conclusively that, for the purpose of its judicial functions, the United Nations Charter is a multilateral treaty, the interpretation of which presents a legal question (*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*, p. 61; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155). By parity of reasoning, the case is the same as to the OAS Charter.

194. At one point, the Agent of the United States complained that

> "Nicaragua's Application . . . improperly call[s] upon this Court in the circumstances of this case to make judgments . . . potentially impairing the inherent right of States to individual and collective self-defence under Article 51 of the United Nations Charter" (p. 86, *supra*).

Nicaragua, of course, believes that no such issue arises, for neither the United States nor any State with which it is associated in the region is under "armed attack" from Nicaragua, as would be required under Article 51 for the exercise of the inherent right of self-defence (United Nations Charter, Art. 51; see also the discussion of the Advocate for Nicaragua at pp. 61-65, *supra*). But that issue, if raised by appropriate factual pleadings before the Court, calls equally for an interpretation of the Charter, which the Agent of the United States invoked in his argument. The plea of self-defence is surely one of the oldest known to the law, municipal or international. The proceedings on the merits in this case will afford the United States the fullest opportunity to present that plea if it so desires, and for the Court to adjudicate upon it.

195. In the same way, Nicaragua's application presents a legal dispute concerning questions of international law, within the meaning of Article 36 (2) *(b)* of the Statute of the Court. It is Nicaragua's contention that norms of general international law, quite apart from treaty obligations, prohibit the use of force against it, the invasion of its sovereignty and interference in its internal affairs. It alleges that the conduct of the United States violates these norms. Its claims in this respect are set forth explicitly in paragraphs 20-24 of the Application (Application, p. 8, *supra*). Again it appears sufficiently from the statements of the President and other officials that the United States is acting under claim of right in the premises.

196. The United States has not yet deigned to answer Nicaragua's factual case in this Court. Thus it cannot be said definitely whether subsection *(c)* of Article 36 (2) will be implicated in this case. It hardly seems likely that the United States can or will deny the general character of the affirmative factual allegations of the Application. These are matters of common knowledge, and indeed they have been openly acknowledged, even vaunted by the United States in domestic and international public pronouncements. The Agent of the United States, however, has charged, although without benefit of supporting evidence, that conduct of Nicaragua justifies or excuses the use of force against it (e.g., p. 82, *supra*; see also dissenting opinion of Judge Schwebel, *I.C.J. Reports 1984*, pp. 191-193). If the United States brings forward evidence purporting to support these charges at the proceedings on the merits, there will assuredly be a dispute on the facts.

197. Finally, Nicaragua has demanded reparations from the United States for the loss of life and property, the latter already exceeding $200 million, caused by the illegal use of armed force against it by the United States (see Application, p. 10, *supra*, para. 26 *(h)*). There is thus a dispute between the Parties as to "the nature or extent of the reparation to be made for the breach of an international obligation", within the meaning of Article 36 (2) *(d)* of the Statute.

II. THE CONSIDERATION OF THE SITUATION IN CENTRAL AMERICA IN INTERNATIONAL POLITICAL BODIES DOES NOT PRECLUDE THE COURT FROM ADJUDICATING THE LEGAL DISPUTE BETWEEN NICARAGUA AND THE UNITED STATES

198. At various times, various aspects of the situation in Central America have been addressed by various international bodies, permanent and *ad hoc*. That is only to be expected, and indeed is just as it should be. It would hardly be possible for international political organizations to ignore a situation that has been of increasing concern to the international community over the past several years. But it is clear that such consideration cannot oust the Court of competence to hear this case. Were it otherwise, little would remain of the Court's function, as principal judicial organ of the United Nations, of contributing to the peaceful settlement of international disputes.

A. The Security Council, the General Assembly and the Organization of American States

199. Central American problems have been under consideration in the United Nations and the Organization of American States over the past several years. The records of the debates are voluminous. The principal actions taken by these bodies are Security Council resolution 530, 19 May 1983, S/RES/530 (1983); General Assembly resolution 38/10 on *The situation in Central America: threats to international security and peace initiatives*, 11 November 1983; *Resolution of the General Assembly of the Organization of American States on Peace Efforts in Central America*, 18 November 1983, AG/Res. 675 (XIII-0/83); in addition, on 4 April 1984, a draft Security Council resolution, S/16463, introduced by Nicaragua, was not adopted owing to the negative vote of the United States (S/PV.2529, 4 April 1984 (provisional), p. 111). For the convenience of the Court, the texts of these documents are provided in Annex III. As will be shown below, none of these actions purports to or does in fact or law have any effect in limiting the competence of the Court.

200. The Agent of the United States referred to "the primary responsibility" of the Security Council for maintenance of international peace and security and to the power of the Council to determine the existence of any "threats to the peace, breaches of the peace [or] acts of aggression" (see p. 113, *supra*). He also called attention to the provisions of the United Nations and the Organization of American States Charters calling for settlement of disputes through regional arrangements before referring them to the Security Council (see pp. 111, 113, *supra*).

201. Although these references are, of course, literally accurate, there is nothing in them — or in the practice of the United Nations or this Court — that gives them any pre-emptive significance whatsoever. In fact, as the Court itself has pointed out, adjudication is one of the peaceful means for the solution of international disputes enumerated in Article 33 of the United Nations Charter (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 23). Article 36 of the Charter, in dealing with possible recommendations of the Security Council, notes that "legal disputes should as a general rule be

referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court" (see *id.*, p. 22).

202. On this question also the recent Judgment of the Court in *United States Diplomatic and Consular Staff in Tehran* is dispositive. In that case, the Security Council, by the terms of its own resolution "remain[ed] actively seized of the matter" during the pendency of the Court proceedings (*id.*, p. 21). The Court, examining the question *proprio motu*, found that this had no impact on its competence to decide the case or on the admissibility of the proceeding, holding that there was "nothing irregular in the simultaneous exercise of their respective functions by the Court and the Security Council".

> "Nor is there in this any cause for surprise. Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its function in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be at issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute." (*Id.*, pp. 21-22.)

Needless to say, the Court's conclusion was in accord with the position taken by the United States in that case. It was consistent, as well, with the prior jurisprudence of the Court.

203. In the *South West Africa* case also, the Court saw no difficulty in dealing with a dispute that had been continuously on the agenda of the General Assembly since 1946 and was being debated in the Assembly while the case was pending before the Court. According to Dr. Rosenne, as a result of the Court's judgment in that case:

> "it is now clear that the fact that a dispute is simultaneously being dealt with by the General Assembly and by the Court is not in itself regarded in either organ as a bar to its further action" (Rosenne, *supra*, Vol. I, p. 87).

This necessarily follows because the two bodies deal with different aspects of the problem: "while in the General Assembly the political facets have priority, the Court may only decide the issues before it on the basis of law" (*id.*, p. 86).

204. In this approach, Dr. Rosenne points out, the Court is following the general lines marked out by the Permanent Court in *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15* and *Interpretation of the Statute of the Memel Territory, Preliminary Objection, Judgment, 1932, P.C.I.J., Series A/B, No. 47*, page 248. In each of these cases, the Court was construing a special convention vesting the Council of the League of Nations with powers over the subject-matter of the convention and providing for reference of legal disputes to the Permanent Court. In *Rights of Minorities in Upper Silesia (Minority Schools)*, the Court refused to find that a prior ruling of the Council on the matter in issue precluded the Court's consideration of the legal questions involved (*1928, P.C.I.J., Series A, No. 15, Judgment*, p. 29). And in the *Interpretation of the Statute of the Memel Territory* case, it held that submission of the matter to the Council was not a precondition to proceedings before the Court, nor could such an interpretation be given unless "the intention of the contracting Parties to stipulate such a condition [is] clearly established" (*Preliminary Objection, Judgment, P.C.I.J., Series A/B No. 47, 1932,*

p. 248). In each case, the Court pointed out that the purpose and nature of the Council's competence was different from that of the Court, which was confined to the resolution of legal questions (*Rights of Minorities in Upper Silesia (Minority Schools)*, p. 29; *Interpretation of the Statute of the Memel Territory*, p. 248). Although the conventions under consideration in those cases made special provision for the role of the League Council, the Court was applying general principles of the relation between judicial and political authority on the international plane in finding no presumptive objection to the concurrent exercise of these powers.

205. The Deputy-Agent of the United States referred to the Court's refusal to indicate interim measures of protection in the *Aegean Sea Continental Shelf* case when the Security Council had already called upon the parties to settle their differences by negotiation (p. 112, *supra*; *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3). It is not clear that the reasoning of the Court in that case has any application except to the question of interim measures then before it. In any event, it has no bearing on the admissibility of the present Application. The basis for the Court's refusal to indicate provisional measures was that the actions of Turkey did not threaten irreparable harm to the legal interests for which Greece was seeking protection. In those circumstances and in the context of a request for interim measures, the Court thought it was sufficient simply to call attention to the Security Council resolution (*id.*, pp. 12-13). But neither the Order nor any of the Judges who wrote separate opinions suggested that the Court was without power to indicate such measures because of the Security Council action. As Judge Tarazi said:

> "This was not an example of two parallel remedies, inasmuch as the Security Council, unlike the Court, is a political organ. The rule *electa una via* did not have to be applied." (*Id.*, p. 33 (separate opinion of Judge Tarazi).)

Indeed, several of the Judges thought that the Court should have exercised its undoubted independent authority to reinforce the Security Council recommendation (e.g., *id.*, pp. 20-21 (separate opinion of Judge Lachs); p. 29 (separate opinion of Judge Elias)).

206. The United States seems to think the present case is somehow different from the others because of the provision of Article 39 of the United Nations Charter that "the Security Council shall determine the existence of a threat to the peace, breach of the peace or act of aggression . . ." (see p. 113, *supra*). It is ironic, of course, that the United States should seek to confine Nicaragua to the Security Council, when the United States veto in that body has prevented it from taking action on the situation in Nicaragua and condemning United States policy there (Ann. III, Exhibit 4).

207. In any case, the suggestion of an exclusive competence for the Security Council, even in matters concerning peace and security, is groundless. Article 24 gives the Council primary responsibility in this field, but as the Court said in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* "the responsibility conferred is 'primary', not exclusive" (*I.C.J. Reports 1962*, p. 163). In that case the Court held that Article 24 was no bar to the General Assembly acting within its own competence on matters involving international peace and security. It is likewise no bar to the action of this Court, within its competence.

208. The argument with respect to the Security Council and the General Assembly applies *a fortiori* to the Organization of American States. That Organization certainly cannot occupy a position superior to the United Nations, as the provisions of Chapter VIII of the United Nations Charter clearly indicate

(see United Nations Charter, Arts. 52, 53). Although the OAS has weighty responsibilities for the preservation of peace in the hemisphere and for the peaceful adjustment of differences among its members, nothing in the OAS Charter suggests that it was to be the exclusive recourse for such purposes. The simultaneous consideration by the United Nations and the OAS of a number of matters within the purview of the OAS Charter, including the present situation in Central America, belies any such claim.

209. Indeed, the only priority established by the OAS Charter is in Article 20, which provides that

> "international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council".

The absence of a similar stipulation as regards the Court is noteworthy, as the Court remarked with respect to a comparable provision, Article 12 of the United Nations Charter, in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, p. 22). On the contrary, among the "peaceful procedures" to be resorted to before reference to the Security Council is "judicial settlement" (OAS Charter, Art. 21).

210. What Nicaragua is seeking in this proceeding is a legal resolution of a legal dispute. It asserts that the action of the United States violates its legal obligation to refrain in its international relations from the use of armed force, from violating the sovereignty of Nicaragua and from interfering in Nicaragua's internal affairs. Those legal obligations are established as a matter of positive law by the United Nations and OAS Charters and are also imposed by general principles of international law. Nicaragua is seeking an authoritative pronouncement on the lawfulness of the United States activity and on the legal rights and duties stemming from it. That is something neither the Security Council nor the General Assembly nor the OAS, but only this Court can give.

211. This proceeding goes forward on the legal plane, while the political organs of the United Nations and OAS are grappling with the political issues. Political organs cannot authoritatively establish legal relationships. But it is not unlikely that their search for a political settlement would be facilitated by a clear understanding of the legal situation. As the Court said in the *United States Diplomatic and Consular Staff in Tehran* case, "the resolution of such legal questions may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute" (*I.C.J. Reports 1980*, p. 22; see also, e.g., *Aegean Sea Continental Shelf, I.C.J. Reports 1976*, p. 3, pp. 20-21 (separate opinion of Judge Lachs), p. 29 (separate opinion of Judge Elias)).

212. In any case, it is Nicaragua's right, under the Statute of the Court and the declarations of the two parties submitting to the Court's jurisdiction under the Optional Clause, to receive such an authoritative statement of legal relationships upon its request.

B. The Contadora Process

213. By far the largest bulk of the United States observations at the oral hearing on interim measures was devoted to the Contadora process. The Court was presented with an elaborate, if distorted, history of Contadora (pp. 96-104, *supra*).

214. The Contadora process, as the Court knows, takes its name from the place in Panama where the Foreign Ministers of Colombia, Mexico, Panama

and Venezuela met in January 1983. The meeting was devoted to a general review of common problems, in which, naturally enough, the situation in Central America bulked large. The communiqué of 9 January 1983 (Ann. IV, Exhibit A), as it pertains to Central America, begins by expressing profound concern at the direct or indirect involvement of foreign forces in Central America. It calls urgently for a dialogue among the States of the region, reaffirms the obligation to refrain from the threat or use of force and calls on the States concerned to do nothing to aggravate the situation or increase the danger of a general war in the region.

215. Then, after reviewing other peace initiatives, the communiqué states that

> "respecting the principles of non-intervention and self-determination of peoples, the Foreign Ministers analyzed possible new actions and indicated the appropriateness of incorporating in those efforts the valuable contribution and necessary support of other states in the Latin American community".

216. From this beginning, the Contadora powers were successful in establishing arrangements, with the agreement of the five Central American States, for general negotiations about the problems of the region, in which Colombia, Mexico, Panama and Venezuela would continue to participate by way of good offices and mediation. This was an important step forward. Nicaragua agreed to the arrangements in July 1983 and has since been a full participant (see Ann. IV, Exhibit K).

217. The subsequent official statements of the Contadora process are collected in Annex IV. In reviewing them, the Court will be mindful of the statement of its predecessor in the *Interpretation of the Statute of the Memel Territory* case that for a process of negotiation agreed on among the parties to have a pre-emptive effect on the jurisdiction of the Court, "the intention of the Contracting Parties to stipulate such a condition must be clearly stated" (*1932, P.C.I.J., Series A/B, No. 47*, pp. 248-249; see also Rosenne, *The Law and Practice of the International Court*, Vol. I, p. 84). The Contadora documents contain no such clear statement of intention to oust the Court of jurisdiction. They contain absolutely no indication of an intention to exclude other methods of peaceful settlement, or of any intention whatsoever with respect to such methods.

218. Thus, the communiqué of 12 May 1983 (Ann. IV, Exhibit B), issued during the course of the Security Council debate on resolution 530, contains no suggestion that consideration by the Security Council is inimical to the Contadora effort. On the contrary it provides suggestions to the Security Council and the Organization of American States as to how their deliberations might facilitate the work of the Contadora Group. Moreover, the communiqué calls attention to the "essential purpose" of the Group "to fulfill a diplomatic role designed to seek the settlement of conflicts by *political* means . . ." and to its view that "its work should focus on the concentration of *political* efforts to promote political dialogue . . ." (emphasis added). By its stress on political methodology, the communiqué seems at pains to distinguish the crux of the work of Contadora from the legal disputes that are before the Court in this proceeding.

219. The Cancún Declaration of Peace in Central America (Ann. IV, Exhibit C), outlines in a general way the commitments that should be undertaken by the parties in order to achieve a resolution of the situation. None of these involves a rejection of judicial settlement of disputes or of any other machinery for peaceful settlement. It is noteworthy, however, that the discussion begins by stating: "The use of force is an approach that does not dissolve, but aggravates, the underlying tensions."

220. Finally, the Document of Objectives of 9 September 1983 (Ann. IV, Exhibit D), which established the 21 points that were to be the basis of negotiations among the parties, recites in its opening paragraph that the situation in Central America "requires for its solution, observance of the principles of international law governing the actions of States". The Document goes on to emphasize a number of specific norms deemed especially relevant. The first six of these are:

the self-determination of peoples;
non-intervention;
the sovereign equality of States;
the peaceful settlement of disputes;
refraining from the threat or use of force; and
respect for the territorial integrity of States.

These are the very norms that lie at the heart of Nicaragua's claims in this case. It is difficult to understand how the vindication of legal norms said to be fundamental to the Contadora process can interfere with that process.

221. The parties to the Contadora process as well as the United Nations and the OAS have indicated by their conduct that they do not regard the process as exclusive. As noted above, when Nicaragua, in the face of intensified mercenary attacks in 1983, had recourse to the United Nations and the OAS, the Contadora Group made no objection, but took account of these references in its communiqué (Ann. IV, Exhibit B). The resolutions adopted by those bodies naturally express strong support for the work of Contadora and urge the parties to participate wholeheartedly in it (Ann. III). But they do not hesitate to make dispositions of their own. In particular, Security Council resolution 530 pointedly "Reaffirms the right of *Nicaragua* and of all the other countries of the area to live in peace and security, free from outside interferences; . . ." (Ann. III, Exhibit A, operative para. 1 (emphasis added)). Equally explicitly, the General Assembly condemns as "especially serious"

> "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." (Ann. III, Exhibit B, operative para. 3 *(a)*.)

In each case, Nicaragua is singled out as an object of special concern, without any indication that this might improperly interfere with Contadora.

222. Finally, in April 1984, the week before the present case was filed, the Security Council again debated the situation in Nicaragua for three days. The debates show that the members of the Council were well aware of the work of the Contadora Group and approved and applauded it. But they saw in it no bar to the Security Council addressing the problem. Thirteen members of the Security Council saw no inconsistency with the Contadora process in voting for a resolution that

> "*Condemns and calls for* an immediate end to the mining of the main ports of Nicaragua, which has caused the loss of Nicaraguan lives and injuries to nationals of other countries as well as material damage, serious disruption to the economy and the hampering of free navigation and commerce, thereby violating international law." (S/16463, Ann. III, Exhibit D, operative para. 1 (emphasis in original).)

The resolution failed of adoption only because of the veto of the United States, which cast the only negative vote.

223. If the political actions of political organs of the United Nations and the OAS, addressed to the political issues that are the very heart of the Contadora effort, are not inimical to that effort, how can there be any incompatibility in the Court's judicial consideration of a legal dispute between Nicaragua and the United States, which, as discussed more fully below, is not even a participant in the Contadora process?

224. Again, the question of pre-emption is illuminated by the discussion of the Court in the *United States Diplomatic and Consular Staff in Tehran* case. The Court will recall that the Secretary-General had appointed a Commission "to undertake a fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States". The Court on its own motion examined whether the establishment of this Commission had any effect on "its competence to decide the present case or the admissibility of the present proceedings" (*I.C.J. Reports 1980*, p. 20).

225. The Court concluded there was no such effect. It first examined the mandate of the Commission and the understanding of its role evidenced by the parties and found

> "no traces of any understanding . . . that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission . . ." (*id.*, p. 23).

The Court then went on to observe:

> "[The Commission] was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes." *(Id.)*

And again the Court adverted to various examples in the jurisprudence of the Court "in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu*" *(id.)*.

226. As in that case, so here, the examination of the Contadora documents shows "no traces of any understanding" that the establishment of Contadora "might involve a postponement of all proceedings before the Court . . .". Contadora "was not set up . . . as a tribunal empowered to settle the matters of fact or of law in dispute between [Nicaragua] and the United States; nor was its setting up accepted by them on any such basis". Contadora was established "as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis . . .". And as with the Secretary-General's Commission in the Iran case, "this, clearly, was the basis on which [the participants] agreed to its being set up". Like the Commission then, Contadora "cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court".

227. Indeed, events since the Court's Order of 10 May 1984 demonstrate that the activity of the Court has had no adverse effect on Contadora. The Court will recall the apocalyptic predictions at the oral hearing that if the Court should dare to act in this matter, it would entail dire consequences for Contadora. The event has proved those predictions wrong. The Court proceeded in its normal course and indicated the interim measures that it found necessary. The heavens have not fallen. The Contadora process has not collapsed. In fact, it is proceeding as scheduled, with three working commissions continuing detailed technical work on implementing the 21 points agreed among the participants in their Statement of 9 September 1983. Indeed, on 15 May 1984, Nicaragua and Costa Rica, under the aegis of Contadora, entered into an agreement for the establishment of border supervision to suppress armed incursions across their common boundary (Ann. IV, Exhibits H, I).

228. These concrete facts should suffice to dispose of the United States argument that the present proceedings in this Court somehow interfere with or are inconsistent with or are pre-empted by the important work of the Contadora Group.

229. But there is a further reason why the operations of Contadora do not preclude the Court in this case. Nicaragua is a participant in the Contadora process[4]. It is an active member of the working commissions and drafting groups (see Ann. IV, Exhibit K). It has put forward its own proposals for agreements on all of the 21 points contained in the Document of Objectives, including provisions for verification of security arrangements. It was the first one of the five Central American States to have done so.

230. The United States, however, is not a participant in the Contadora process. The United States professes to support Contadora, and we may all hope that those professions can be taken at face value. But a process in which the United States does not participate cannot by its very nature resolve a legal dispute between Nicaragua and the United States. Yet as shown above, what Nicaragua has put before the Court is precisely such a legal dispute. Nicaragua is not asking the Court to develop a solution for the situation in Central America. The Court is being asked to pronounce on a legal question: the lawfulness of the use of military and paramilitary force by the United States in and against Nicaragua.

231. There is no way that a legal judgment concerning United States military and paramilitary actions in violation of its legal obligations can interfere with Contadora. The success of Contadora does not depend on the continuation of the illegal activities of the United States. On the contrary, every public communiqué issued by the Contadora Group, from its incipiency in January 1983 down to the present has called for an end to outside intervention in the area.

232. A review of these documents and the United Nations and OAS resolutions set forth above shows that they have repeatedly condemned the use of force by States from outside the region, violations of the sovereignty of States within the region, and interference in their internal affairs. Sometimes Nicaragua is mentioned by name as the target of the actions condemned by these resolutions. Even when on its face the language is "balanced" in the mode that is familiar in international political organizations, it is apparent that the reference is primarily to United States actions against Nicaragua.

233. Contadora itself could not refrain from stating publicly that "the mining of ports" was harmful to its work (Ann. IV, Exhibit F). The Foreign Minister of Mexico, a leading member of the Contadora Group, was blunter. He publicly

[4] The details of Nicaragua's co-operation with the Contadora process are presented in Annex IV, Exhibit K.

denounced the mining of Nicaragua's ports and called for "the total elimination of all armed violence, direct or indirect, against Nicaragua". Far from being concerned at the filing of Nicaragua's Application in the Court, he condemned the efforts of the United States to avoid its jurisdiction: "It is not valid", he said, "to decide in a unilateral, arbitrary and discriminatory form that the international judicial norms do not apply to a state because this same state has decided they are not applicable" (Ann. IV, Exhibit G).

234. The United States military and paramilitary activities in and against Nicaragua have also been condemned as contrary to the Contadora process by the Inter-American Dialogue, a private, non-partisan group of leading citizens from the Western Hemisphere chaired by Sol M. Linowitz, former United States Ambassador to the OAS, and Galo Plaza, former President of Ecuador and former Secretary-General of the OAS. The *Report of the Inter-American Dialogue*, published in May 1984, states the following:

> *"Although the U.S. Government has repeatedly voiced its backing for the Contadora process, Washington's practice has been at odds with major elements of the Contadora approach.* Support for the raids by armed insurgents (the *contras*) into Nicaragua and the mining of Nicaragua's harbors violate the basic principles of respect for national sovereignty, territorial integrity, and nonintervention emphasized by Contadora and traditionally espoused by the United States . . ." (*The Americas in 1984: A Year for Decisions*, pp. 2-6 (emphasis in original). Ann. IV, Exhibit J.)

235. The record is thus crystal clear. It is the United States, by its actions, and not the deliberations of this Court, that are interfering with the Contadora process. It stands to reason that this should be so. Outside efforts to coerce the sovereign will of a State by illegal use of force against it can have no beneficial influence on a process of negotiation designed to settle their differences. In assuming jurisdiction to adjudicate authoritatively on these activities, in the context of the concrete legal dispute between Nicaragua and the United States that is now before it, the Court will be making its intended contribution to the peaceful settlement of international disputes.

III. ALL THE PARTIES NECESSARY FOR ADJUDICATION OF THE DISPUTE PRESENTED BY THE APPLICATION ARE BEFORE THE COURT

236. Nicaragua's Application asserts that the United States has breached and continues to breach specific legal obligations under existing multilateral and bilateral treaties as well as general and customary international law. On this basis, Nicaragua seeks a judgment from the Court declaring that the United States is under a particular legal duty to cease its unlawful conduct and make reparation to Nicaragua for injuries suffered as a result of such conduct. The Application makes no claim of illegal conduct by any State other than the United States, and seeks no relief from or directed toward any other State. Nor is it necessary, in order for the Court to adjudicate the legal responsibilities of the United States, to review the lawfulness of any other State's conduct.

237. Nevertheless, the Agent for the United States, at the oral hearing on provisional measures, asserted that Nicaragua's Application

> "inevitably implicate[s] the rights and interests of the other Central American States. In their absence, jurisdiction here is lacking under the Court's jurisprudence as expressed in the *Monetary Gold Removed from Rome in 1943* Judgment." (P. 86, *supra*.)

Later he contended that

> "Nicaragua's claims are inextricably related to the claims of the other Central American States against Nicaragua. Those other States are indispensable parties and the case may not proceed in their absence." (P. 115, *supra*.)

238. The argument is devoid of merit, and misperceives the *Monetary Gold* case.

(i) The case of the *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, has no bearing on this case because Nicaragua's Application does not call upon the Court to adjudicate the "international legal responsibility of a third State". In *Monetary Gold*, the Court declined to adjudicate Italy's claim against the United Kingdom because it was impossible to do so without first determining that Albania, which was not before the Court and had not consented to the Court's jurisdiction, had committed an international legal wrong against Italy. Since the "vital issue to be settled" concerned the "international legal responsibility of a third State", the Court declined to exercise the jurisdiction conferred on it without the consent of the third State. By contrast, Nicaragua's claims against the United States do not depend on its claims against any third State; nor is the Court required to consider the international legal responsibility of any absent or non-consenting party.

(ii) All of the parties, the lawfulness of whose conduct is at issue in these proceedings, are present before the Court. As stated, Nicaragua has made claims only against the United States. The United States, without responding in any way to the factual allegations of the Application, has indicated that it may believe that its conduct could be justified by Nicaragua's alleged "armed attacks" against other States. If the United States in fact takes such a position at the merits phase, the lawfulness of Nicaragua's conduct would be at issue. Neither adjudication of Nicaragua's claims against the United States, nor the United States defence to those claims, would require the Court to consider the inter-

national legal responsibility of any State other than Nicaragua and the United States, both of which are present before the Court. Since there is no third State, the lawfulness of whose conduct would be at issue in these proceedings, *Monetary Gold* has no application.

(iii) Even if we were to assume, *arguendo*, that armed attacks by Nicaragua on third States might implicate their legal interests to such an extent that the Court could not proceed in their absence, the conditions requiring the presence of those States could not be established before the merits phase of the proceedings. Unless it were proved at the merits phase that Nicaragua had engaged in "armed attacks" against other States, then the argument that their presence was required would fail for want of the necessary factual predicate (as would the purported justification for the United States actions against Nicaragua). Thus, the Court could not terminate the proceedings now on the ground that, on some unspecified state of the pleadings or proof, third States might be implicated in some way. To do so would be to accept as proven the United States accusations against Nicaragua prior to the presentation of proof by the United States, and in the face of Nicaragua's solemn denial.

A. The *Monetary Gold Removed from Rome in 1943* Case Does not Support the United States Argument that there Are Third Parties in whose Absence this Case Cannot Go Forward

239. The facts giving rise to the *Monetary Gold* case may be summarized as follows: Under Part III of the Paris Agreement of 14 January 1946, all monetary gold looted by Germany during World War II was pooled for distribution as restitution to those countries from which it had been removed. Part of this monetary gold, removed from Rome in 1943, was claimed both by Albania and Italy. On 20 February 1953 an Arbitrator determined that the disputed gold belonged to Albania at the time it was removed from Rome. Thereafter, the Tripartite Commission established to implement the Paris Agreement (composed of France, the United Kingdom and the United States) distributed Albania's gold not to Albania, but to the United Kingdom, in partial satisfaction of the Court's Judgment against Albania in the *Corfu Channel* case, *Judgment* (*I.C.J. Reports 1949*, p. 4). Italy disputed this distribution, claiming a prior right to the Albanian gold as a result of Albania's allegedly unlawful nationalization of the National Bank of Albania, on 13 January 1945, without payment of compensation to the Italian Government, which owned 88.5 per cent of the bank.

240. On 19 May 1953, Italy filed suit against the three members of the Tripartite Commission. Italy submitted that: (1) the Albanian gold should be delivered to Italy in partial satisfaction for damage allegedly caused to Italy by the Albanian nationalization decree of 13 January 1945 and (2) Italy's right to receive this share of the gold must have priority over the claim of the United Kingdom. Albania was not a party to the suit.

241. The Court found that, although Italy and the three respondents had conferred jurisdiction upon the Court, it "cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy" (*I.C.J. Reports 1949*, p. 33). Finding that the second claim was entirely dependent on the first, the Court held that it "must refrain from examining the question of priority between the claim of Italy and that of the United Kingdom" *(id.)*. The Court's decision turned upon the fact that Italy's first claim — alleging an unlawful confiscation of Italian interests by Albania, and the right of Italy to compensation therefore — depended upon a finding that Albania, the *absent* party, had committed an

international legal wrong, and thus would have compelled the Court to adjudicate the international legal responsibility of Albania. The Court said:

> "The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. *In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her*; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. *To go into the merits of such questions would be to decide a dispute between Italy and Albania.*
>
> *The Court cannot decide such a dispute without the consent of Albania.* But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdication over a State with its consent." (*I.C.J. Reports 1954*, p. 32 (emphasis added).)

242. The key to the decision, as the Court made clear, was its finding that "in the present case, Albania's legal interest would not only be affected by a decision, but *would form the very subject-matter of the decision*" *(id.)*. Thus:

> "Where, as in the present case, *the vital issue to be settled concerns the international responsibility of a third State*, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it." *(Id.*, at p. 33 (emphasis added).)

243. In the present case, the vital issue to be settled concerns the international responsibility of the United States toward Nicaragua, or, at most, the international responsibility of Nicaragua for its own conduct. As stated above, Nicaragua's Application makes no claim against any third State; nor is Nicaragua's claim against the United States founded upon a claim against a third State. Nor is the Court called upon to determine whether any third State "has committed any international wrong" against Nicaragua, or "is under an obligation to pay compensation" to Nicaragua. Thus, "to go into the merits" of Nicaragua's claim the Court is *not* required "to decide a dispute" between Nicaragua and any third State. In these circumstances, the *Monetary Gold* case provides no basis for the Court to decline to exercise the jurisdiction conferred upon it by the parties.

244. At the oral hearing, the Deputy-Agent of the United States sought to find some support for his argument in the separate opinion of Judge Nagendra Singh in the *Trial of Pakistani Prisoners of War, Interim Protection* (*I.C.J. Reports 1973*, p. 328). The Deputy-Agent for the United States read aloud the following excerpt from that opinion:

> "It is indeed an elementary and basic principle of judicial propriety which governs the exercise of the judicial function, particularly in inter-State dis-

putes, that no court of law can adjudicate on the rights and responsibilities of a third State *(a)* without giving that State a hearing; and *(b)* without obtaining its clear consent." (*Id.* at p. 332.)

245. The Deputy-Agent of the United States has taken this statement out of context. As the Court will recall, in that case Pakistan sought to prevent India from transferring certain prisoners of war to Bangladesh where they were to be placed on trial, as Pakistan alleged, in violation of international law. Thus, like Albania in *Monetary Gold*, it was Bangladesh, the absent party, upon whose international legal responsibility the Court would have been called to adjudicate. This crucial circumstance is recognized in the paragraph in Judge Nagendra Singh's opinion immediately preceding the language quoted by the United States:

> "[F]rom the viewpoint of the Court's adjudication, whether *ad interim* or final, what is vital is the positive pleading of Pakistan that Bangla-Desh and not India is contesting Pakistan's claim to exclusive jurisdiction for the holding of trials of 195 prisoners of war." *(Id.)*

246. Thus, Judge Nagendra Singh's opinion reflects the same principle as the *Monetary Gold* case: where the "vital issue" to be adjudicated concerns the international responsibility of a third State, the Court may decline to exercise its jurisdiction in the absence of that State. The opinion, therefore, provides no support for the United States argument.

247. This view of *Monetary Gold* is again confirmed by the Court's Judgment of 21 March 1984 denying Italy's Application for permission to intervene in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment* (*I.C.J. Reports 1984*, p. 3). Italy had an acknowledged interest in the proceedings. Indeed, it claimed its sovereign rights stood to be affected by the Court's decision. Nevertheless, the Court denied permission to intervene and resolved to continue the proceedings in Italy's absence. This was proper, the Court said, because Italy's interests would not "form the very subject-matter of the decision". As the Court explained:

> "In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as a party, it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interest of the third State 'would not only be affected by a decision, but would form the very subject-matter of a decision' (*I.C.J. Reports 1954*, p. 32), which is not the case here." (*Id.*, p. 26.)

248. The rule established in *Monetary Gold* is soundly grounded in the realities of contemporary international relations. Legal disputes between States are rarely purely bilateral. As in the case of delimitation of the continental shelf, the resolution of such disputes will often directly affect the legal interests of other States. If the Court could not adjudicate without the presence of all such States, even where the parties before it had consented fully to its jurisdiction, the result would be a severe and unwarranted constriction of the Court's ability to carry out is functions. Thus, the Court was careful in the *Monetary Gold* case to preclude itself from exercising jurisdiction only where the absent State's legal interests "form the very subject-matter of the decision".

249. Accordingly, since no interest of a third State could possibly form the very subject-matter of the Court's decision in the present case, there is no ground for the Court to decline to exercise its jurisdiction.

B. All of the Parties, the Lawfulness of Whose Conduct Is at Issue in This Suit, Are Present before the Court

250. Neither Nicaragua's claims against the United States, nor the argument in defence intimated by the United States, requires the Court to adjudicate the lawfulness of the conduct of any State other than Nicaragua and the United States. As shown above, to decide Nicaragua's claim the Court need only adjudicate the lawfulness of the conduct of the United States. It is equally true that if the United States should interpose a plea of self-defence, it would require an adjudication only of the lawfulness of Nicaragua's conduct. Only if Nicaragua were engaged in unlawful "armed attacks" against other States could such a defence be sustained. Thus, only Nicaragua's conduct would be placed in issue. The Court would not be called upon to adjudicate the lawfulness of any other State's conduct. Since the only States, the lawfulness of whose conduct could be at issue in these proceedings, are present before the Court and subject to its jurisdiction, there is no basis for declining to exercise jurisdiction.

251. At the oral hearing, the Deputy-Agent of the United States, in a strained effort to bring this case within the contours of the *Monetary Gold* case, argued that the other Central American States would be implicated if the Court were to exercise its jurisdiction here, because Nicaragua's request would "cut these States off from their right to seek and receive support from the United States in meeting the armed attacks against them" (p. 111, *supra*).

252. This argument is fundamentally flawed. First and foremost, the Court would not be called upon to adjudicate the lawfulness of the conduct of any of these other States. They would only have a "right to seek and receive support from the United States in meeting the armed attacks against them" if Nicaragua were committing such attacks. If Nicaragua were not doing so, no such right would exist. Thus, the asserted "right" of the other Central American States is entirely dependent upon the lawfulness of Nicaragua's conduct. In this sense, the situation is exactly the opposite of that in the *Monetary Gold* case. There the rights of the parties were entirely dependent upon, and required prior adjudication of the conduct of the absentee, Albania. In the present case, the rights of the absentees are entirely dependent upon, and require prior adjudication of the conduct of one of the existing parties, Nicaragua. Thus, unlike *Monetary Gold*, no absent State is necessary for a proper adjudication of the dispute between the parties.

253. Second, none of the other Central American States has as yet claimed that Nicaragua has committed an "armed attack" against it, or that it has "a right to seek and receive support from the United States" in meeting such an attack, or that such a right would be imperilled if the Court were to exercise its jurisdiction in this case. The Deputy-Agent of the United States cited the "communications from the other Central American States" (which the United States submitted to the Court as its Exhibit III, Parts 3-4, Tabs P, R, S and T) as evidence "that Nicaragua's claims are inextricably linked to the rights and interests of those other States" (p. 110, *supra*). In fact, these communications do not support this contention.

254. The letters of the Governments of Costa Rica and El Salvador, and the Press Statement of the Government of Guatemala make no mention whatsoever of "armed attacks" by Nicaragua or any right to have the United States participate in collective self-defence. Costa Rica and El Salvador ask only that the Court not act in a manner that would damage the Contadora negotiations. Guatemala makes no reference to the Court or this case. None of these States suggests in any way that its legal rights would be prejudiced or even affected by adjudication of this case, and none suggests termination of the proceedings.

255. The letter of the Government of Honduras expresses a similar concern that the Court not damage the Contadora process, and to that extent is indistinguishable from the other communications. It goes on to ask that the Court take no action that would "limit" any "bilateral and multilateral agreements on international cooperation that are in force" (United States Exhibit III, Parts 3-4, Tab S, p. 6). Nicaragua's Application does not place in issue the validity or effectiveness of any such treaty, in whole or in part. Finally, Honduras's letter accuses Nicaragua of "destabilization of neighboring governments by providing encouragement, financing, training and logistical and communications assistance to groups of insurgents from other Central American countries" (*id.*, p. 2). Notably, however, Honduras does not claim: that it is one of the countries affected; that it has a right to "seek and receive support from the United States" to meet an "armed attack" by Nicaragua; or that such a right would be prejudiced or affected by the Court's adjudication of this case. Thus, none of the States whose absence the United States deems fatal has itself identified any legal right or responsibility that would be prejudiced or even affected by an adjudication in this case — much less be "the very subject-matter of these proceedings" or the "vital issue".

256. Third, even if one or more of the other Central American States could show an interest in the present proceedings, that alone would not suffice to justify termination of the proceedings. As stated in *Monetary Gold*, such a result is only justified where the absent parties' "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

257. In a number of prior cases, the Court has proceeded to adjudication despite the absence of third parties whose interests in the proceedings were stronger than the alleged interests of the absent States here. The principal cases are summarized in D. H. N. Johnson, *International and Comparative Law Quarterly*, Vol. 4 (1955), Part I, pages 106-107:

> "It is clear, however, that the mere fact that State C is in some way involved in a dispute between States A and B, is not enough to prevent the Court determining the latter dispute, even if State C is not before the Court. In the *Corfu Channel* case between the United Kingdom and Albania the Court carefully considered charges that certain mines had been illegally laid by a third State, Yugoslavia. The charges were found to be unproved, the Court saying that 'a charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here'. Yugoslavia, *though not a party to the proceedings*, had authorised the Albanian Government to produce certain Yugoslav documents for the purpose of refuting the charges. Of this action the Court observed: 'As the Court was anxious for full light to be thrown on the facts alleged, it did not refuse to receive these documents. But Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves.' Whatever the precise meaning to be attributed to this language, it does not suggest that, merely because questions arose concerning Yugoslavia — even concerning Yugoslavia's international responsibility — that country was in a position to prevent the Court from settling the dispute between the United Kingdom and Albania.
>
> In the *Anglo-Iranian Oil Co.* case (jurisdiction) one of the principal issues was whether the dispute between the United Kingdom and Iran was 'au sujet de situations ou de faits ayant directement ou indirectement trait à l'application' of an Iranian-Danish Treaty of February 20, 1934. The Court

answered this question in the negative, though at no time had the Danish Government given its consent to the question being determined. Similarly, in the second phase of the *Ambatielos* case, the Court was called upon to give at least a preliminary interpretation of various treaties between the United Kingdom on the one hand and Denmark, Sweden and Bolivia on the other hand. The Court gave this interpretation, although again the countries concerned had not consented . . ."

258. Finally, as noted above, the Court's Judgment denying Italy's Application for permission to intervene in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1984*, p. 3), further demonstrates that the mere fact that a third State has an interest in the matter subject to adjudication neither requires termination of the proceedings in the third State's absence, nor granting of permission to intervene to the third State where its interest does not "form the very subject-matter of the decision". In these circumstances, the alleged interests of the other Central American States cannot support termination of these proceedings.

259. During the course of his argument at the oral hearing, the Deputy-Agent of the United States mentioned the so-called "Vandenberg Amendment", the third of the three reservations to the United States declaration of 14 August 1946 accepting the compulsory jurisdiction of the Court. The Vandenberg Amendment removes from the United States acceptance of the Court's compulsory jurisdiction:

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

260. The Deputy-Agent of the United States, in his sole reference to this reservation, said that the principle later embodied in the *Monetary Gold* case

> "is reflected in proviso *(c)* of the 1946 United States declaration accepting the compulsory jurisdiction of this Court, commonly known as the Vandenberg Amendment, which is a total bar to the claims in this case arising under multilateral conventions" (p. 111, *supra*).

261. From this passing reference, it is impossible to tell whether the United States intends to maintain that the Vandenberg Amendment supports the argument for the presence of the other Central American States, or is an independent argument that the Court lacks jurisdiction over all or part of the present case, or neither. Nicaragua therefore must reserve its right to respond until it is given a fuller exposition of the United States contentions, if any, with respect to the Vandenberg Amendment. Nevertheless, certain observations may be made at this time.

262. In the first place, the Vandenberg Amendment applies, by its own terms, only to disputes arising under a multilateral treaty. Thus, it can have no impact whatsoever on Nicaragua's claims under general and customary international law (Application, pp. 8-9, *supra*, paras. 20-25). Beyond this, the meaning of the Amendment is not exactly clear. Briggs wrote that "the language of the reservation betrays such confusion of thought that to this day no one is quite sure what it means" (*Recueil des cours*, Vol. 93 (1958-1), p. 307; repeated in R. P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New York, 1961, p. 221). Quincy Wright observed that the proper interpretation of the provision is "certainly far from clear" (*American Journal of International Law*, Vol. 41 (1947), p. 446). Manley O. Hudson described its origin as a "jumble of ideas"

and stated that "the Senate had no clear intention in this connection" (*American Bar Association Journal*, Vol. 32 (1946), p. 836).

263. The origins of the Amendment do shed some light on its meaning, however, and indicate that the Amendment may be co-extensive, as suggested by the Deputy-Agent of the United States, with the principle that later emerged in *Monetary Gold*. The text of the Amendment was proposed in the Report of the Committee on Foreign Relations of the United States Senate (Sen. Doc. No. 259, 79th Congress, 2d Sess. (1946), p. 9; Ann. II hereto, Exhibit D). The text emerged in direct response to the following suggestion, submitted to the Committee by John Foster Dulles, who had been adviser to the United States Department of State in relation to the Dumbarton Oaks proposals and adviser to the United States delegation to the United Nations Conference on International Organizations, which drafted the Charter and the Statute of the Court.

> "2. *Reciprocity* — Jurisdiction should be compulsory only when all of the other *parties to the dispute* have previously accepted the compulsory jurisdiction of the Court.
>
> *Comment:* The Court statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only 'in relation to any other State accepting the same obligation' (Art. 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation. Since the Court statute uses the singular 'any other State', it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several *parties in such dispute* is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Art. 94) requiring members to comply with decisions of the Court in cases to which they are party." (*Hearing before a Subcommittee of the Committee on Foreign Relations*, US Senate. S. Vol. 806-7, 79th Cong., 2d Sess., July 11, 12 and 15, 1946, p. 44 (emphasis added).)

264. Thus, the Vandenberg Amendment would appear to create an exception to the United States acceptance of the compulsory jurisdiction of the Court with respect to disputes arising under a multilateral treaty where not all of the parties to the dispute are present before the Court. Whether or not this is another way of saying that the United States withholds its consent to jurisdiction in any case where the rights or responsibilities of an absent third State "form the very subject-matter of the decision", the result in the present case is the same: the dispute encompassed by these proceedings involves but two States, Nicaragua and the United States, and both are present before the Court. Thus, the Vandenberg Amendment neither adds support to the United States argument nor provides an independent basis for removing or limiting the Court's jurisdiction in this case.

C. Even Assuming *Arguendo*, that "Armed Attacks" by Nicaragua on Third States Would Implicate Their Legal Interests to Such an Extent that the Court Could Not Proceed in Their Absence, the Conditions Requiring the Presence of Those States Could Not Be Established before the Merits Phase of the Proceeding

265. The only "right" of any absent States that the United States claims to be in some way involved in this case is the "right" of the other Central American States "to seek and receive support from the United States in meeting the armed attacks against them" (p. 111, *supra*). (As shown above, the other Central

American States themselves have made no such claims.) In any event, this right, by definition, can only justify the use of force against Nicaragua if Nicaragua is committing "armed attacks" against one or more of the other States. Absent proof of such "armed attacks" by Nicaragua, giving rise to a right of self-defence on the part of the victims, no other Central American State could be "affected by the decision" in this case. Thus, unless and until such evidence is supplied, there is no basis whatsoever for the United States argument. Nor is there any basis for the applicability of the Vandenberg Amendment.

266. Yet the United States would have the Court terminate the proceedings now, before any "armed attacks" by Nicaragua have been proven or even properly alleged, and in the face of Nicaragua's solemn denial that it has engaged in such conduct. While, for the reasons discussed above, Nicaragua contends that there is no merit to the United States argument and no justification for invoking the Vandenberg Amendment under any circumstances, at the very least the Court must wait until the merits phase of the case, and until Nicaragua has been shown to be responsible for "armed attacks" against one or more of the other Central American States, before it can determine that the presence of such a State is necessary for a proper adjudication in this case. Were it otherwise, any Respondent State could prevent the Court from adjudicating a valid claim against it merely by raising a groundless defence — which it would never be required to prove — that theoretically implicates the rights or interests of absent third States.

SUBMISSIONS

267. Accordingly, Nicaragua submits that:

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

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

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

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

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

Respectfully submitted,

(Signed) Carlos ARGÜELLO GÓMEZ,
Agent for the Republic of
Nicaragua.

30 June 1984.

ANNEXES TO THE MEMORIAL OF NICARAGUA

Annex I

DOCUMENTS RELATING TO NICARAGUA'S DECLARATION OF 24 SEPTEMBER 1929

24 September 1929 — after signing the Protocol of Signature of the Permanent Court of International Justice, Nicaragua deposited an unconditional declaration with the Registrar of the Permanent Court. *P.C.I.J. Yearbook*, 1929-1930, pp. 144, 463, 485. (*Exhibit A* hereto.)

4 December 1934 — the President of Nicaragua approved a decree for the ratification of the Statute of the Permanent Court of International Justice and the Protocol of Signature. See *La Gaceta* No. 207, p. 1674, 18 September 1935. (*Exhibit B* hereto.) On 14 February 1935, the Senate of Nicaragua ratified these instruments, and its action was published in *La Gaceta*, No. 130, 12 June 1935, p. 1033. (*Exhibit C* hereto.) On 11 July 1935, the Chamber of Deputies of Nicaragua ratified the same instruments. Its action was published in *La Gaceta*, No. 207, 18 September 1935, p. 1674. (*Exhibit B* hereto.)

29 November 1939 — the Ministry of Foreign Affairs of Nicaragua sent the following telegram to the Secretary-General of the League of Nations:

ESTATUTO Y PROTOCOLO CORTE PERMANENTE JUSTICIA INTERNACIONAL LA HAYA FUERON RATIFICADOS PUNTO ENVIARSELE OPORTUNAMENTE INSTRUMENTO RATIFICATION — RELACIONES.

English Translation:

STATUTE AND PROTOCOL INTERNATIONAL COURT OF JUSTICE THE HAGUE WERE RATIFIED. RATIFICATION INSTRUMENT TO BE SENT OPPORTUNELY — RELATIONS.

(*Exhibit D* hereto.)

In connection with this proceeding, the Government of Nicaragua has undertaken investigations in the official archives in Nicaragua. To date, no evidence has been uncovered that the instrument of ratification of the Protocol of Signature to the Statute of the Permanent Court of International Justice was forwarded to Geneva.

Exhibit A

[Page 144]

The table included in Chapter X of the present Report (under No. 9) indicates the names of the forty-three States which have signed the Optional Clause (or have renewed their adherence thereto) and indicates the conditions of their acceptance (or renewed adherence). The date on which declarations were affixed is entered on the table in those cases where it is known from documentary evidence. The text of the declarations is reproduced on pp. 468-485 of the present volume (No. 10 of Chapter X).

The position, resulting from the information afforded by the table above mentioned is as follows:

I.

A. *States having signed the Optional Clause:*

Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Costa Rica [1], Czechoslovakia, Denmark, Dominican Republic, Esthonia, Ethiopia, Finland, France, Germany, Great Britain, Greece, Guatemala, Haiti, Hungary, India, Irish Free State, Italy, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Portugal, Salvador, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Yugoslavia.

II.

B. *Of these, the following have signed, subject to ratification, and have ratified:*

Austria, Belgium, Canada, Denmark, Germany, Great Britain, Hungary, India, Ireland, Latvia, New Zealand, Siam, South Africa, Switzerland.

C. *States having signed subject to ratification but not ratified:*

Australia, Czechoslovakia, Dominican Republic, France, Guatemala, Italy, Liberia, Luxemburg, Peru, Yugoslavia.

[Page 145]

D. *States having signed without condition as to ratification* [2]*:*

Brazil, Bulgaria, China, Costa Rica [1], Esthonia, Ethiopia, Finland, Greece, Haiti, Lithuania, Netherlands, Nicaragua, Norway, Panama, Portugal, Salvador, Spain, Sweden, Uruguay.

E. *States having signed without condition as to ratification but not ratified the Protocol of Signature of the Statute:*

Costa Rica [1], Nicaragua, Salvador.

F. *States in the case of which the period for which Clause accepted has expired:*

China (date of expiration: May 13th, 1927).

---

[1] Costa Rica, on December 24th, 1924, informed the Secretary-General of her decision to withdraw from the League of Nations, this decision taking effect as from January 1st, 1927. Before that date, Costa Rica had not ratified the Protocol of Signature of the Statute; moreover, Costa Rica is not mentioned in the Annex to the Covenant of the League of Nations. This would seem to lead to the conclusion that the engagement resulting for Costa Rica from her signature of the Protocol above mentioned and, consequently, also that resulting from her signature of the Optional Clause, have lapsed.

[2] Certain of these States have ratified their declarations, although this was not required according to the Optional Clause.

III.

G. *States at present bound by the Clause:*

Austria, Belgium, Brazil[1], Bulgaria, Canada, Denmark, Esthonia, Ethiopia, Finland, Germany, Great Britain, Greece, Haiti, Hungary, India, Ireland, Latvia, Lithuania, Netherlands, New Zealand, Norway, Panama, Portugal, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay.

The foregoing data are summarized in the synoptic table on the following page.

One case has been submitted to the Court under the Optional Clause for Compulsory Jurisdiction: namely, the case of the denunciation of the Treaty of November 2nd, 1865, between China and Belgium, in which proceedings were instituted by unilateral application filed by the Belgian Government on November 25th, 1926[2]. On February 13th, 1929, the Belgian Government filed with the Registry a request for permission . . .

[Page 463]

	PROTOCOL OF SIGNATURE	OPTIONAL CLAUSE		
States	Date of ratification	Date of signature	Conditions	Date of deposit of ratification *(if any)*
Lithuania	May 16th, 1922	Oct. 5th, 1921	5 years.	May 16th, 1922
		Renewed on Jan. 14th, 1930	5 years (as from Jan. 14th, 1930).	
Luxemburg		(1921)[3]	Ratification. Reciprocity. 5 years.	
Netherlands	Aug. 6th, 1961	Aug. 6th, 1921	Reciprocity. 5 years. For any future dispute in regard to which the Parties have not agreed to have recourse to some other method of pacific settlement.	

[1] Brazil's undertaking was given, subject, *inter alia*, to the acceptance of compulsory jurisdiction by two at least of the Powers permanently represented on the Council of the League of Nations. It is to be noted that Germany has been bound by it since February 29th, 1928, and Great Britain since February 5th, 1930.

[2] See Third Annual Report, pp. 125-130, Fourth Annual Report, p. 151, and Fifth Annual Report, pp. 203-204.

[3] Declaration reproduced in the *Treaty Series* of the League of Nations, Vol. VI (1921), No. 170.

States	PROTOCOL OF SIGNATURE: Date of ratification	OPTIONAL CLAUSE: Date of signature	Conditions	Date of deposit of ratification *(if any)*
		Renewed on Sept. 2nd, 1926	Reciprocity. 10 years (as from Aug. 6th, 1926). For all future disputes excepting those in regard to which the Parties may have agreed after the entry into force of the Court's Statute, to have recourse to some other method of pacific settlement.	
New Zealand	Aug. 4th, 1921	Sept. 19th, 1929	(*See*, mutatis mutandis, *the conditions stipulated by Australia*).	March 29th, 1930
Nicaragua		Sept. 24th, 1929	(Unconditionally.)	
Norway	Aug. 20th, 1921	Sept. 6th, 1921	Ratification. Reciprocity. 5 years.	Oct. 3rd, 1921
		Renewed on Sept. 22nd, 1926	Reciprocity. 10 years (from Oct. 3rd, 1926).	

[Page 485]

twelve months or such longer period as may be agreed by the Parties to the dispute or determined by a decision of all the Members of the Council other than the Parties to the dispute.

September 20th, 1929.

(Signed) R. DANDURAND.

Nicaragua. *[Translation.]*

On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, September 24th, 1929.

(Signed) T. F. MEDINA.

Lithuania (Renewal).

For a period of five years with effect as from January 14th, 1930.

(Signed) ZAUNIUS.

[*January 14th*, 1930.]

Yugoslavia. *[Translation.]*

On behalf of the Kingdom of Yugoslavia and subject to ratification, I recognize, as compulsory *ipso facto* and without special agreement, in relation to any other Member of the League of Nations, or State the government of which is recognized by the Kingdom of Yugoslavia, and accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice in conformity with Article 36 of its Statute, for a period of five years from the date of the deposit of the instrument of ratification, in any disputes arising after the ratification of the present declaration, except disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of the Kingdom of Yugoslavia, and except in cases where the Parties have agreed or shall agree to have recourse to some other method of peaceful settlement.

May 16th, 1930.

(Signed) Dr. V. MARINKOVITCH.

Exhibit B

[Spanish text not reproduced. For English translation see United States Counter-Memorial, Annex 10]

Exhibit C

[Spanish text not reproduced. For English translation see United States Counter-Memorial, Annex 9]

Exhibit D

[Spanish text not reproduced. For English translation see United States Counter-Memorial, Annex 14]

Annex II

DOCUMENTS RELATING TO THE LETTER OF 6 APRIL 1984 FROM SECRETARY SHULTZ

Exhibit A: Declaration of the United States Recognizing as Compulsory the Jurisdiction of the International Court of Justice, 14 August 1946

Exhibit B: Letter of 6 April 1984 from Secretary of State Shultz to the Secretary-General of the United Nations

Exhibit C: Departmental Statement of the United States Department of State, 8 April 1984, and Related Articles

Exhibit D: Report of the Committee on Foreign Relations of the United States Senate Relative to Proposed Acceptance of Compulsory Jurisdiction of International Court of Justice, Doc. No. 259, 79th Cong., 2d Sess., 2 August 1946

Exhibit E: Hearings on Treaty Termination, before the Committee on Foreign Relations, United States Senate, 96th Cong., 1st Sess., 9, 10 and 11 April 1979, pp. 214-215

Exhibit A

INTERNATIONAL COURT OF JUSTICE: UNITED STATES RECOGNITION OF COMPULSORY JURISDICTION

Declaration by the President of the United States signed August 14, 1946
Senate advice and consent to deposit August 2, 1946
Deposited with the United Nations August 26, 1946

61 Stat. 1218: Treaties and Other International Acts Series 1598

DECLARATION ON THE PART OF THE UNITED STATES OF AMERICA

I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes 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 hereafter arising concerning

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

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

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

Done at Washington this fourteenth day of August 1946.

Harry S. TRUMAN.

Exhibit B

DEPARTMENT OF STATE
WASHINGTON

Excellency:

I have the honor on behalf of the Government of the United States of America to refer to the Declaration of my Government of August 26, 1946, concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and to state that the aforesaid Declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid Declaration, this *proviso* shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.

(Signed) George P. SHULTZ,
Secretary of State of the
United States of America.

6 April 1984.

His Excellency
Javier Pérez de Cuéllar,
Secretary-General of the United Nations.

Exhibit C

Departmental Statement

The United States has notified the Secretary-General of the United Nations of a temporary and limited modification of the scope of the US acceptance of the compulsory jurisdiction of the International Court of Justice in The Hague. The notification, effective April 6, provides that the Court's compulsory jurisdiction shall not apply to the United States with respect to disputes with any Central American state or any dispute arising out of or related to events in Central America, for a period of two years.

Similar action has been taken by a number of countries in the past, among them Australia, India and the United Kingdom. In addition, a large number of countries have not accepted the compulsory jurisdiction of the ICJ at all — France, Italy, the Federal Republic of Germany, Spain, the Soviet Union and other communist countries, to name only a few. Many other countries have accepted ICJ jurisdiction, but with many more reservations than the United States. The United States has long been active in its support for the Court, and its readiness to make full use of the Court in the Iran Hostages case and the now-pending Gulf of Maine case clearly demonstrate this longstanding commitment.

This step has been taken to preclude the Court's being misused to divert attention from the real issues in the region and to disrupt the ongoing regional peace process by protracted litigation of claims and counterclaims. We believe that, as evidenced by their appeal to the United Nations Security Council, recent Nicaraguan behavior has shown a lack of serious interest in addressing regional issues or the Contadora discussions. We do not wish to see the Court abused as a forum for furthering a propaganda campaign. The parties to the Contadora process can determine for themselves in what respect they wish to submit regional issues to adjudication or other forms of dispute resolution.

The regional peace process, while slow, has achieved notable successes. In agreeing to the 21 objectives last September, the parties set forth an agreed framework for continuing and completing their efforts to achieve a comprehensive regional peace dealing with the interrelated political, security, social and economic problems of the region. This work has recently entered a stage involving issues of both technical and political difficulty. While this is the point at which the greatest attention and commitment to that work is required, Nicaragua is regrettably considering action to attempt to divert attention from its failure to address those issues seriously by staging propaganda spectaculars in other fora. By our action we served notice that we do not intend to cooperate with this plan, or to permit the Court to be misused in that manner.

April 8, 1984.

Examples of Modification of Acceptance of Compulsory Jurisdiction to Avoid Adjudication

1. INDIA (1956). To avoid an application by Portugal concerning rights of passage over Indian territory, India modified one reservation from "disputes

with regard to questions which by international law fall exclusively within the jurisdiction of India" to "matters which are essentially within the domestic jurisdiction of India as determined by the Government of India". [1955-56] *I.C.J. Yearbook* at 186-187; [1953-54] *I.C.J. Yearbook* at 216 (former reservation); Waldock, Decline of the Optional Clause, 32 *Brit. Y.B. Int'l L.* 244, 268 (1955-56).

2. UNITED KINGDOM (1955). In October 1955 the UK terminated a declaration issued five months previously and substituted a new one containing a new reservation excluding "disputes in respect of which arbitral or judicial proceedings are taking, or have taken, place, with any State which, at the date of the commencement of the proceedings, has not itself accepted the compulsory jurisdiction of the [ICJ]". This was in response to the breakdown of an arbitration with Saudi Arabia due to Saudi bribery of potential witnesses. [1955-56] *I.C.J. Yearbook* at 185; Waldock, *supra*, at 268.

3. AUSTRALIA (1954). In 1954, to avoid a Japanese application to the ICJ on rights to pearl fisheries off the Australian coast, Australia submitted a new declaration excluding "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia . . . in respect of the continental shelf of Australia; . . . in respect of the natural resources of the sea-bed and subsoil of that continental shelf, including the products of sedentary fisheries; or in respect of Australian waters . . . being jurisdiction or rights claimed or exercised in respect of those waters . . ., except a dispute in relation to which the parties have first agreed upon a modus vivendi pending the final decision of the Court on the dispute". [1953-54] *I.C.J. Yearbook* at 210; Waldock, *supra*, at 267-68.

Wall Street Journal (April 1984): "Reagan Snubs World Court Over Nicaragua — US Rejects Tribunal's Role In Central America; Foes Point to Mining of Ports", by David Rogers

[Not reproduced]

The New York Times (9 April 1984): "US Voids Role of World Court on Latin Policy — Central America Cases Suspended for 2 Years" by Bernard Gwertzman

[Not reproduced]

Exhibit D

S. Res. 196

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 310-321]*

Exhibit E

Treaty Termination

HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION

ON

S. Res. 15, Resolution concerning Mutual Defense Treaties

April 9, 10 and 11, 1979

I will submit them. The staff will submit them to you in written form. Please give us answers to those questions, too.

[Additional questions and answers follow:]

STATE DEPARTMENT RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD

Question 1. Given the special role of the Senate in the ratification of treaties, what would be the effect of a simple Senate resolution expressing its "advice" to the President that Senate concurrence should be obtained prior to terminating any treaty?

Answer. A Senate resolution of the kind described would of course be politically important, and would be given great weight by the President. It would not be legally binding. The Senate's special role in the ratification of treaties does not mean that Senate resolutions on other aspects of treaties, including their termination, are legally binding. Nor would the President perceive such a resolution as more than an expression of opinion by the Senate. As noted, there are many instances in which the President must make determinations that will result in the termination or suspension of a treaty.

Question 2. Would you agree that the President is not able to alter the terms of an existing treaty in any significant way without the consent of the Senate?

Answer. Yes. However, he may interpret a treaty and secure the agreement of the other party or parties for a particular interpretation or method of implementation.

Question 3. If the consent of the Senate is required in the case of a significant amendment to a treaty, why is it not required in the case of the most significant "amendment" of all — complete termination of all its terms?

Answer. Termination of a treaty, which ends an obligation of the United States, is not analogous to amendment of a treaty, which changes, extends, or limits an obligation of the United States. Assuming a significant change in a

legally binding obligation to another nation, it follows that the Senate should give its advice and consent to such a change. Normally a treaty is changed by another treaty, although the characterization of the amendment may be different (e.g., Protocol).

But termination means the end of a legally binding obligation to another state. As noted in the responses to previous questions, termination may be necessary for many reasons, such as violation, impossibility of performance, completion of the terms of the treaty, formation of a new state, obsolescence, etc., which engage the responsibilities of the President and require him to make determinations. Therefore, the practice of the nation, particularly in the 20th century, as supported by legal scholars, has been for the President to terminate treaties. The policy difference between termination and amendment of treaties explains the differences in the procedures used.

Question 4. What is the effect of a "termination clause" contained in the treaty? Should it be construed as conferring authority upon the President — under domestic law — to terminate a treaty, or as simply providing an escape clause under *international law* while not altering the domestic allocation of power?

Answer. A termination provision in a treaty has an effect under both international and domestic law. Under international law, a termination provision permits either party to terminate the treaty, usually on a specified notice period, without obtaining the agreement of the treaty partner to such termination. Of course under international law a treaty may be terminated by one party even without such a termination provision and without the agreement of the other party if it is established that the parties intended to admit the possibility of denunciation or withdrawal, or such a right may be implied by the nature of the treaty. See the Vienna Convention on the Law of Treaties, Article 56.

Under domestic law, termination provisions, which are approved by the Senate, constitute the Senate's authorization to the President to terminate the treaty. The President gives the notice because he alone executes the laws and implements treaties. He implements all provisions of treaties, including termination provisions. Just as he implements other clauses without coming back to the Senate or Congress for approval, so too he implements termination provisions without coming back to the Senate or Congress for approval. For purposes of Presidential implementation of treaties, a termination clause is no different from any other clause. This domestic law interpretation of termination provisions has been accepted in modern US practice and by scholarly opinion. See particularly, the American Law Institute's Restatement of the Foreign Relations Law of the United States, Section 163 and comment thereon, at pp. 493-494.

Question 5. "Circular 175", as you know, is the State Department's basic internal directive on the procedure for initiating, negotiating and concluding treaties and other agreements. While that document does refer to the need for Congressional consultations in certain circumstances, it says almost nothing about the termination of agreements and therefore about Congressional consultation in advance. Shouldn't Circular 175 procedures be reviewed in this area, particularly when — as in the case of the US-ROC treaty — the Congress was on record expressing its particular interest in any policy changes affecting that treaty?

Answer. Section 723.1 of the Department of State's Circular 175 Procedure provides that the office or officer responsible for any negotiations is to keep in mind, *inter alia*,

> ". . . That with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate congressional leaders and com-

mittees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement."

This provision should be amended by the addition of a provision making it clear that treaty termination is also a subject for consultation with Congress.

Question 6. Is the President's authority to terminate a treaty any different where he is acting within the terms of the treaty rather than in violation of it?

Answer. Presidential action to terminate a treaty in violation of its terms is not likely to occur. There are instances, as previously noted, in which the President will have to make a judgment whether termination or suspension is warranted, and this will be true whether or not the treaty in question has a termination provision. The conclusion reached by the President is not subject to review. As Professor Henkin has noted, the courts do not "sit in judgment on the political branches to prevent them from terminating or breaching a treaty". Professor Henkin states that "both President and Congress can exercise their respective constitutional power regardless of treaty obligations, and the courts will give effect to acts within their powers even if they violate treaty obligations or other international law". (*Foreign Affairs and the Constitution*, 1972, p. 171.)

The CHAIRMAN. As Senator Javits has said — and I emphasize that I want to agree with him wholeheartedly — we are not faced with a hypothetical question, gentlemen. We are faced with the necessity to report to the Senate a resolution that will address itself to the need for congressional concurrence in the termination of treaties. I think it is incumbent on the administration, and very important to the administration, to make the best case it can right now because this may have been a gray area in the past. The precedents you cited were not treaties of major consequence where the President acted to terminate without the concurrence of Congress, and, the fact that the Congress did not challenge the President in those cases in no way deprives the Congress of its constitutional authority if it wishes to challenge at some point in the future.

You know, constitutional powers don't rust simply because they are not asserted. We are now faced with the necessity of addressing this question and making a determination. The Congress itself will pass upon it and the President will have to deal with it.

One way or another we have been thrown into this gray area of the Constitution and we have been charged with the responsibility of trying to clarify it, of trying to bring light and reason to the question and resolving it for the future. That is not an easy task. We need all the help we can get from the executive branch with respect to its views, as we will call upon the leading constitutional experts of the country for theirs.

Annex III

DOCUMENTS RELATING TO THE UNITED NATIONS SECURITY COUNCIL AND GENERAL ASSEMBLY, AND THE ORGANIZATION OF AMERICAN STATES

Exhibit A: United Nations Security Council Resolution 530, 19 May 1983 (S/RES/530 (1983))

Exhibit B: United Nations General Assembly Resolution 38/10, 11 November 1983

Exhibit C: Resolution 675 of General Assembly of the O.A.S., 18 November 1983 (AG/RES. 675 (XIII-0/83))

Exhibit D: Draft United Nations Security Council Resolution of 4 April 1984 (S/16463) and Summary of Security Council Vote Thereon

---

Exhibit A

Resolution 530 (1983)

Adopted by the Security Council at its 2437th meeting, on 19 May 1983

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 275]*

Exhibit B

38/10. *The situation in Central America: threats to international security and peace initiatives*

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 290-292]*

Exhibit C

AG/RES.675 (XIII-0/83)

Peace Efforts in Central America

(Resolution adopted at the seventh plenary session, held on November 18, 1983)

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 287-288]*

Exhibit D

[Summary not reproduced]

Nicaragua: Draft Resolution

The Security Council,

Having heard the statement of the Permanent Representative of Nicaragua,

Also having heard the statements made by the representatives of several States Members of the United Nations in the course of the debate,

Recalling its resolution 530 (1983), which reaffirms the right of Nicaragua and of all the countries of the region to live in peace and security free from all foreign interference,

Noting resolution 38/10 of the General Assembly, in which, *inter alia*, the States of the region, as well as other States, are urged to refrain from continuing or initiating military operations with the objective of exercising political pressure which would aggravate the situation in the region and hinder the negotiation efforts by the Contadora Group,

Reaffirming all the purposes and principles of the Charter of the United Nations, particularly the obligation of all States to refrain from resorting to the threat or use of force against the sovereignty, territorial integrity or political independence of any State,

Commending the sustained efforts being carried out by the countries that make up the Contadora Group in the search for a peaceful and negotiated solution to the conflicts that affect the region,

Recognizing and welcoming the broad international support expressed to the Contadora Group in its efforts to bring peace and development to the region,

Noting with great concern the foreign military presence from outside the region, the carrying out of overt and covert actions, and the use of neighbouring territories for mounting destabilizing actions that have served to heighten tensions in the region and hinder the peace efforts of the Contadora Group,

Noting also with deep concern the mining of the main ports of Nicaragua,

1. *Condemns and calls for* an immediate end to the mining of the main ports

of Nicaragua, which has caused the loss of Nicaraguan lives and injuries to nationals of other countries as well as material damage, serious disruption to its economy and the hampering of free navigation and commerce, thereby violating international law;

2. *Affirms* the right of free navigation and commerce in international waters and calls on all States to respect this right by refraining from any action which would impede the exercise of this right in the waters of the region;

3. *Reaffirms* the right of Nicaragua and of all the countries of the region to live in peace and security and to determine their own future free from all foreign interference and intervention;

4. *Calls on* all States to refrain from carrying out, supporting or promoting any type of military action against any State of the region as well as any other action that hinders the peace objectives of the Contadora Group;

5. *Expresses* its firm support to the Contadora Group for the efforts it has so far carried out and urges it to intensify these efforts on an immediate basis;

6. *Requests* the Secretary-General to keep the Security Council informed of the development of the situation and of the implementation of the present resolution;

7. *Decides* to remain seized of the matter.

Annex IV

DOCUMENTS RELATING TO THE CONTADORA PROCESS

Exhibit A: Text of Joint Note issued on Contadora Island, Panama, by the Ministers of Foreign Affairs of Panama, Colombia, Mexico and Venezuela, 9 January 1983

Exhibit B: Information Bulletin of Ministers of Foreign Affairs, Contadora Group, 12 May 1983

Exhibit C: Cancún Declaration of Heads of State of Contadora Group, 17 July 1983

Exhibit D: Document of Objectives of Ministers of Foreign Affairs of Contadora Group, 9 September 1983

Exhibit E: Statement of Ministers of Foreign Affairs of Contadora Group, "Measures to Be Taken to Fulfil the Commitments Entered into in the Document of Objectives", 8 January 1984

Exhibit F: Communiqué of Ministers of Foreign Affairs of the Contadora Group, 8 April 1984

Exhibit G: Comments of Foreign Minister of Mexico, 13 April 1984

Exhibit H: Joint Declaration of Ministers of Foreign Relations of Nicaragua and Costa Rica, 15 May 1984

Exhibit I: By-laws of Commission of Supervision and Prevention Established by Nicaragua and Costa Rica, Signed 31 May 1984

Exhibit J: Report of the Inter-American Dialogue, May 1984 (Excerpts)

Exhibit K: Chronology of Nicaragua's Participation in the Contadora Process

---

Exhibit A

Tlatelolco, D.F., January 9, 1983.

In response to the invitation extended by the Minister of Foreign Affairs of the Republic of Panama, Lic. Juan José Amado III, the Ministers of Foreign Affairs of Colombia, Dr. Rodrigo Lloreda Caicedo, Mexico, Lic. Bernardo Sepúlveda Amor, and Venezuela, Dr. José Alberto Zambrano Velasco, met on January 8 and 9, 1983, on Contadora Island.

The Foreign Ministers met with His Excellency, the President of the Republic, Lic. Ricardo de la Espriella T., and with His Excellency, the Vice President of the Republic, Dr. Jorge Illueca.

At this cordial meeting, the strong feelings of brotherhood, solidarity and reciprocal understanding which the governments and peoples of Colombia, Mexico, Panama and Venezuela have traditionally shared were reaffirmed.

The Foreign Ministers dealt with various topics of regional interest, and agreed on the need to intensify the dialogue at the Latin American level as an effective means to deal with the political, economic and social problems which jeopardize the peace, democracy, stability and development of the countries of the hemisphere.

They studied the complex situation existing in Central America, as well as the

political processes which are under way in the area, their interrelation and their effects on stability and peace in the region. In expressing their deep concern with the foreign interference — direct or indirect — in the conflicts of Central America, and in pointing out that it is highly undesirable to place those conflicts in the context of the East-West confrontation, they agreed on the need for removing the external factors that aggravate those conflicts.

They urgently called upon all the countries of the Central American area to reduce tensions and to establish the basis for a lasting climate of friendly relations and mutual respect among the states, through dialogue and negotiation.

Upon reaffirming the obligation of the states not to resort to threats or to the use of force in their international relations, they urged all of them to refrain from acts which could aggravate the situation, creating the danger of a generalized conflict that would spread throughout the region.

Likewise, there was an account of the various peace initiatives and their effects. In this regard, respecting the principles of nonintervention and self-determination of nations, the Foreign Ministers analyzed possible new actions, and pointed out the desirability of including in those efforts the valuable contribution and the necessary support of other countries of the Latin American community.

They reaffirmed their decision to continue contributing to the economic strengthening of the Central American and Caribbean countries through initiatives such as the Energy Cooperation Program sponsored by Mexico and Venezuela and the Financial Cooperation Plan advanced by Colombia. They felt that these and other economic cooperation measures serve the purposes of political stability and social peace.

With regard to the upcoming meeting of the Bureau for the Coordination of the Movement of Nonaligned Countries, to be held in Managua, Nicaragua, from January 10 through 14 of this year, the Foreign Ministers emphasized the importance of the movement to the developing nations.

Best wishes were expressed for the successful outcome of that meeting, in the conviction that the final conclusions will constitute factors conducive to balanced and constructive solutions to the regional problems.

They agreed on the importance of expanding participation of the Latin American nations in the Movement of Nonaligned Countries, either as members or as observers, because this would assure better systems for consultation, dialogue and negotiation, and would strengthen the bases of nonalignment and political pluralism.

Upon examining international economic matters, the Foreign Ministers noted with concern the downturns in the world economy. They pointed out the negative effects this situation has had in Latin America in terms of financing, trade, investment and employment, and they stressed the need to reorganize an international economic system which, in its imbalanced condition, is causing the developing countries serious maladjustments.

The Foreign Ministers examined the decline in world trade, the prevalence of protectionism in the industrialized countries, the terms imposed for external credit, and the insufficiency of such credit. They pointed out that the promotion of development financing requires the foreign exchange obtained from foreign trade and from other financial sources supplementing it, in addition to domestic savings. These factors which are essential to the Latin American economies, will make it possible, to the degree in which they materialize, to consolidate productive investment and to ensure the creation of jobs.

The Foreign Ministers emphasized the importance of the periodic consultations at the ministerial level to deal with economic topics of interest in the Latin American sphere. In view of the obvious usefulness of coordination in SELA,

the Foreign Ministers noted the importance of the Ministerial Meeting of Latin America and Caribbean Countries, to be held in February in Cartagena, and the Ministerial Meeting of the Group of 77, which will be held in Buenos Aires next March.

To these ends, they reaffirmed their desire to make an effective contribution so that those meetings may accomplish their purpose, which is to coordinate and establish the joint negotiating position of the developing countries at the VI UNCTAD, to be held in Belgrade. This forum should become the driving force of a series of global negotiations which, in the context of the United Nations, are to set the standards for international cooperation for development.

The Foreign Ministers agreed on the importance of faithfully complying with the Panama Canal Treaties, and they observed with approval the progress made from the jurisdictional standpoint in the implementation of those treaties. Nevertheless, they expressed concern over the unfavorable effects of the use of discriminatory legal instruments in other aspects of the Torrijos-Carter treaties which are in the process of implementation.

On the occasion of the bicentennial year of the birth of the Liberator Simón Bolívar, the Foreign Ministers stressed the significance of that notable event and the opportunity it provided to strengthen friendship and foster the cooperation among all the Latin American nations.

The ministers of foreign affairs of Colombia, Mexico and Venezuela thanked His Excellency the President of the Republic of Panama, Mr. Ricardo de la Espriella, and the Panamanian Government, for their hospitality in holding this meeting, which they called highly useful. They also expressed their appreciation to the people and authorities of Panama for the many kindnesses shown to them during their stay in the isthmus nation.

Exhibit B

The Ministers for Foreign Affairs of the Contadora Group, at their meeting held at Panama City on 11 and 12 May 1983, considered the following subjects:

(a) The request of the Government of Costa Rica for the establishment of an observer commission;

(b) The course of the debate in the United Nations Security Council convened at the request of Nicaragua;

(c) The programme of work of the next meeting of the Ministers for Foreign Affairs of the Contadora Group with the five Ministers for Foreign Affairs of the Central American countries, to be held at Panama beginning on 28 May 1983.

The Government of Costa Rica has made a request to the Organization of American States for the establishment of a "peace force, capable of effectively monitoring the area of Costa Rica bordering on Nicaragua". As grounds for its request, it pointed out that Costa Rica has no army and has difficulty in patrolling a long and irregular frontier. The authorities of Costa Rica advanced similar considerations to the Governments of Colombia, Mexico, Panama and Venezuela through special envoys, indicating their desire that an observer commission should be established for that purpose.

The Ministers for Foreign Affairs of the Contadora Group, acting in accordance with the principles which guide their conduct, recalled that the original and essential purpose of the formation of the Group was to fulfil a diplomatic role

designed to seek the settlement of conflicts through political means, relying on the co-operation of the parties involved.

From this perspective, the Contadora Group believes that its work should focus on the concentration of political efforts to promote dialogue, understanding and, in general, the development of political machinery which, with the co-operation of the States concerned, can ensure the full attainment of their objectives.

In the circumstances of the case, the proposal to set up an observer commission is closely related to the efforts to create conditions of peace in the region. The success of this proposal requires the co-operation of both countries.

In view of the foregoing, the Ministers for Foreign Affairs of the Contadora Group have decided to send an observer commission, consisting of two representatives from each of their countries, which will have the task of carrying out a study *in situ* in order to establish the facts, evaluate the circumstances and submit appropriate recommendations.

For the performance of these functions, the members of the commission may be accompanied by such advisers as, in the view of each country, are necessary, and they may, if they deem it appropriate, consult international experts.

The Ministers for Foreign Affairs of Colombia, Mexico, Panama and Venezuela note with deep concern the development of the Central American conflict over the past few days and the repeated violation of essential principles of the international legal order.

These circumstances have given rise to various initiatives aimed at seeking the intervention of multilateral organizations. The initiatives include the recent requests made by Central American countries to the United Nations Security Council and the Permanent Council of the Organization of American States.

It would be highly desirable that in the deliberations taking place in the said forums, and especially those currently under way in the Security Council, there should be a strengthening of principles which should guide the activities of States in the international arena.

These principles include: self-determination and non-interference in the affairs of other States, respect for the territorial integrity 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 conflicts.

The countries of the Contadora Group once again call upon the Central American countries to help attain the goal of peace and, to that end, to apply their political will to the search for ways leading to dialogue and understanding to settle their current differences. This constructive and open attitude will largely determine the success of the peace initiatives.

With a view to achieving these objectives, a formal invitation has been sent to the five Ministers for Foreign Affairs of Central America to hold a working meeting at Panama on 28, 29 and 30 May 1983. The meeting will operate within the framework agreed upon during the most recent meeting held in April regarding the procedure for consultations and negotiations. A time-frame concerning the organization of items, their discussion in working groups and, lastly, their consideration in plenary meeting has been worked out.

The Ministers for Foreign Affairs of Colombia, Mexico and Venezuela express appreciation for the hospitality and generous facilities provided for their work, which once again enabled them to fulfil the purpose for which the Contadora Group had been convened on this occasion.

Panama City, 12 May 1983.

Exhibit C

General Assembly; Security Council (Doc. A/38/303; S/15877)

Letter Dated 19 July 1983 from the Permanent Representatives of Colombia, Mexico, Panama and Venezuela to the United Nations Addressed to the Secretary-General

We have the honour to transmit to you the text of the Cancún Declaration on Peace in Central America, drawn up by the Presidents of Colombia, Mexico, Panama and Venezuela at the close of the meeting which they held on 17 July 1983 at Cancún, Mexico.

We would request you to have the text of this Declaration circulated as a document of the General Assembly, under items 64, 66, 78 and 125 of the preliminary list, and of the Security Council.

(Signed) Carlos ALBAN-HOLQUIN,
Ambassador,
Permanent Representative of Colombia.

(Signed) Miguel MARIN-BOSCH,
Ambassador
Deputy Permanent Representative of Mexico, Chargé d'affaires a.i.

(Signed) Leonardo KAM,
Ambassador,
Deputy Permanent Representative of Panama, Chargé d'affaires a.i.

(Signed) Alberto MARTINI-URDANETA,
Ambassador,
Permanent Representative of Venezuela.

Annex

CANCÚN DECLARATION ON PEACE IN CENTRAL AMERICA

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 278-281]*

Exhibit D

(On September 9, 1983, the Central American Governments, under the auspices of the Contadora Group, adopted the following Document of Objectives.)

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 283-285]*

Exhibit E

General Assembly; Security Council (Doc. A/39/71 ; S/16262)

Letter Dated 9 January 1984 from the Chargé d'Affaires a.i. of the Permanent Mission of Panama to the United Nations Addressed to the Secretary-General

[See supra, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 296-299]*

Exhibit F

Communiqué of the Foreign Ministers of the Contadora Group, Caracas, Venezuela, April 8, 1984

"The Foreign Ministers of Colombia, Mexico, Panama and Venezuela met on April 8, 1984, to evaluate the critical situation in the region, and the most recent events that have taken place in Central America as well as the progress of the working commissions created within the framework of the Contadora process dealing with political matters, security and social and economic affairs.

As regards the situation in Central America, the Ministers examined the degree of fulfillment of the Document of Objectives ratified in September 1983 by the five Central American Governments which objectives establish the commitments undertaken in the negotiation process. They took note of the necessity that the Governments of the region conform their international conduct to the spirit of conciliation which derives from the norms of execution adopted in January of this year. They warned that in the course of the past weeks the regional situation had deteriorated seriously. Actions of irregular forces have intensified aided by supplies and communications centers located in the territories of neighboring countries and oriented toward the destabilization of the Governments of the region. Sophisticated arms, new military tactics and dangerous methods of attack have been introduced.

Operations such as the mining of the ports have been carried out which drain the economy, disrupt trade and militate against freedom of navigation. At the same time they expressed their concern at the presence, each time more visible, of foreign troops and advisers, the increase of the arms race, the proliferation of military actions and maneuvers, all of which contribute to the increase of tensions and the deepening of distrust. That is why they consider it indispensable that the countries of the region demonstrate with concrete actions the support which they have expressed for the Contadora Group underlining once again that a conflict of greater proportions would have serious repercussions in all the countries of the region and would affect the entire continent.

As far as the political situation is concerned the ministers took note of the electoral processes that are underway. And they affirmed their value in the sense that they can contribute to internal reconciliation and the lessening of regional tensions to the degree that proper guarantees are granted by an independent electoral organ and the effective participation of all political currents is assured.

As far as social and economic matters are concerned, they referred to the formal establishment and the beginning of the works of the action committee of assistance to the Social and Economic Development in Central America (CADESCA) which has opened a useful and opportune perspective to channel international aid for the internal efforts of integration of the Central America countries, in cooperation and coordination with the economic organs already established by the governments themselves of Central America.

Evaluating the progress made by the working commissions the Foreign Ministers of the Contadora Group agreed that in certain aspects significant progress had been made, but in others there persisted obstacles derived from attitudes that on occasion were not always flexible and effectively oriented toward negotiation.

In the light of all these considerations, the Foreign Ministers of the Contadora Group exhorted the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua to renew their political disposition and to intensify the preparations for the final phase of the working commissions which should be entrusted with their juridical projects, studies and recommendations at the joint meeting of Ministers which will take place the 29th of April, with this purpose and to prepare for that meeting they will establish direct communication with their Central American counterparts."

I certify that this is a correct English translation of the Communiqué of the Foreign Ministers of the Contadora Group, issued on April 8, 1984.

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

[Spanish text not reproduced]

Exhibit G

The New York Times (14 April 1984): "Mexican Official Condemns Mining of Nicaragua's Ports", by Richard J. Meislin

[Not reproduced]

Exhibit H

Unofficial translation

Joint Declaration

The Ministers of Foreign Relations of Costa Rica and Nicaragua, meeting in Panama City, Republic of Panama, on May 15, 1984, in the presence of the Vice-

Ministers of Foreign Relations of the Contadora Group, and in accordance with the political will of their respective governments to make the efforts necessary to bring an end to tensions and incidents in the border area, and to foment a climate of trust between both countries, have decided to create a Commission of Supervision and Prevention, the characteristics of which will be the following:

(1) The Commission will be made up of one representative and one alternate, both high level, from Costa Rica and Nicaragua, and by one representative from each of the countries of the Contadora Group. The responsibility of the representatives of the Contadora countries will be to mediate disputes. They may be designated from among the members of their diplomatic missions, two in San José and two in Managua.

(2) The principal function of the Commission will be the on-site inspection, as well as verifications, of facts surrounding events that may give rise to tensions or border incidents.

(3) Both states commit themselves to taking measures necessary for correcting the situations that give rise to such investigations, in accordance with the previous paragraph.

(4) This Commission will be in a position to visit any part of the territory of both states.

(5) Costa Rica and Nicaragua commit themselves to establishing the system of direct telephone and radio communication for the benefit of the Commission, as recommended in the July 1982 meeting of the bilateral commission.

(6) Both states will provide the Commission with the facilities to allow for the greatest mobility and for necessary protection, so as to allow for the proper carrying out of its mission, and for its recommendation of measures to be taken by both states.

Costa Rica, Nicaragua and the countries of the Contadora Group will designate their representatives soon enough so that the Commission of Supervision and Prevention can begin functioning at the border post of Peñas Blancas Saturday, May 26.

The Ministers of Foreign Relations of Nicaragua and Costa Rica reaffirm their trust in the efforts of the Contadora Group and the necessity of favoring direct dialogue between both states. They also recognized the positive efforts that can be developed through the channels of communications and exchange in order to promote relations of friendship, cooperation and mutual understanding between both sister nations.

Panama, May 15, 1984.

Miguel D'ESCOTO B.
Minister of Foreign Relations.

Carlos José GUTIÉRREZ,
Minister of Foreign Relations.

Vice-Ministers of Foreign Relations of the Contadora Group:

Laura OCHOA DE ARDILA,
Colombia.

Ricardo VALERO,
Mexico.

José María Cabrero JOVANE,
Panama.

Germán Nava CARRILLO,
Venezuela.

[Spanish text not reproduced]

Exhibit 1

Unofficial translation

BY-LAWS OF THE COMMISSION OF SUPERVISION AND PREVENTION

Membership

Article 1

The Commission of Supervision and Prevention, hereafter called "the Commission", will be composed of a Representative and an Alternate, from both Nicaragua and Costa Rica, both of high level, designated by the Governments of Costa Rica and Nicaragua and by a permanent Representative of each one of the Contadora countries.

The members belonging to the Commission may be accompanied by as many as two consultants from their respective governments.

Article 2

The permanent Representatives of the Contadora countries will mediate and may be designated from among the officials of their respective Diplomatic Missions. Two must reside in San José and two in Managua.

Objectives

Article 3

The Commission's objectives are to achieve the diminishment of tensions and incidents in the border areas, and to foster understanding and trust between Costa Rica and Nicaragua, to which end they may make suggestions and recommendations relevant to the matters submitted for the Commissions's consideration.

Procedure for Convening

Article 4

Towards the end of fulfilling the duties charged to the Commission by the Joint Declaration, written 15 May 1984 in the city of Panama, the Commission may be convened by either of the two governments of Costa Rica or Nicaragua, through their representative on the Commission. The Commission may be convened when it is considered that there are indications that an event, capable of producing tension or incidents between the two countries, may occur, and in the cases where such an event or condition has already occurred.

Article 5

The authorities of both countries will seek at all times to communicate to their counter-parts the situations or indications that may produce or have produced tensions or incidents. When possible, these communications will be in writing.

Article 6

The Governments of Costa Rica and Nicaragua will provide to the members of the Commission the transportation, protection, and means necessary for the fulfillment of their work.

Consultants and Specialists

Article 7

The Commission, when it considers it necessary, may seek from the respective governments the assistance of consultants or specialists for specific cases which require them.

Information

Article 8

The Governments of Costa Rica and Nicaragua promise to provide to the Commission the data which supports their assertions, in order that it might be analyzed and verified.

Adoption of Measures

Article 9

The Governments of Costa Rica and Nicaragua promise each other to adopt immediately the means necessary to correct all acts and conditions that might produce or have produced tension or incidents between the two countries, in conformity with the recommendations that the Commission makes.

Done in the City of Managua, Republic of Nicaragua, on May 31, 1984.

(Signed)

Johnny CAMPOS,
Vice Ministro de Seguridad Publica
de Costa Rica.

José Leon TALAVERA,
Vice Ministro del Exterior
de Nicaragua.

Gil MILLER PUYO,
Embajador de Colombia
en Costa Rica.

Luisa Maria LEAL,
Embajador de Mexico
en Costa Rica.

Reynaldo Rivera ESCUDERO,
Embajador de Panama
en Nicaragua.

José Rafael Zapata LUIGI,
Embajador de Venezuela
en Nicaragua.

[Spanish text not reproduced]

Exhibit J

"The Americas in 1984: A Year for Decisions"

Report of the Inter-American Dialogue

May 1984

(Excerpts)

The Inter-American Dialogue brings together leading citizens from the United States, Canada, Latin America, and the Caribbean to discuss issues affecting the

future of the Western Hemisphere. Participants in the Dialogue include former presidents; bankers, industrialists, and labor officials; scholars and foundation heads; religious, political, and military leaders; and former ministers and cabinet secretaries. The chairmen of the Dialogue are Sol M. Linowitz, former US Ambassador to the Organization of American States and Co-negotiator of the Panama Canal treaties, and Galo Plaza, former President of Ecuador and former Secretary General of the Organization of American States.

The Dialogue is a private, nonpartisan activity supported by grants from foundations and corporations. It first convened in late 1982 and early 1983 under the auspices of the Woodrow Wilson International Center for Scholars in Washington, D.C. In April, 1983, the Dialogue published its first report, *The Americas at a Crossroads*.

In March, 1984, the Inter-American Dialogue reconvened under the auspices of the Aspen Institute for Humanistic Studies. Additional copies of this year's report, *The Americas in 1984: A Year for Decisions*, may be obtained from:

Inter-American Dialogue
c/o Aspen Institute for Humanistic Studies
1333 New Hampshire Avenue, N.W., Suite 1070
Washington, D.C. 20036
Telephone: (202) 466-6410

. . . are internal to each nation; even when external support of insurrection is present, as in El Salvador, the underlying problems are domestic. Even though there is a military dimension to the conflict, the solutions ultimately lie in economic and social development and in political dialogue, not in more weapons, military advisors, and troops.

The United States and the other nations of the Hemisphere should work together to keep Soviet and Cuban combat forces and military bases out of Central America, and to prevent Cuba and the Soviet Union from disrupting the sea lanes in and around the region. Agreement should be reached among the countries of the Americas not to establish any offensive or strategic facilities in Central America, nor to threaten the territorial integrity of any country. At the same time, the United States should make it clear to the Soviet Union that any attempt by the USSR to introduce combat forces, bases, offensive weapons, or strategic facilities into the Caribbean Basin would be met by whatever measures are necessary to prevent or reverse it.

The danger of regional conflagration in Central America could be reduced by regional agreements to permit international inspection of border regions, bar new military bases, limit and reduce the number of foreign military advisors, and restrict the weapons being introduced into Central America. All Central American nations should guarantee that they will not assist forces seeking to destabilize other governments.

In El Salvador, the just-concluded elections are a positive step, but by themselves they cannot produce peace. Elections without prior negotiations among the belligerents will not resolve the conflict. Appropriate interim arrangements must be devised to win the confidence of Salvadorans in their country's electoral process. To bar any such agreement in advance by labelling it "power-

sharing" is to be imprisoned in a semantic trap, and to prejudice negotiations before they begin.

The underlying problems that feed Central America's conflicts must be faced. It is essential to stop the death squads that have cursed the political life of Guatemala and El Salvador, undertake social reforms and economic development programs throughout Central America, and expand effective political participation in all countries of the region. A plan for peace in Central America must also help the millions of victims of the region's violence, especially the displaced persons and refugees.

The Contadora process — the diplomatic initiative of Colombia, Mexico, Panama, and Venezuela — affords the best chance for building peace in Central America, and deserves strong, consistent backing. As a concrete step, the United States should immediately end support for the military and paramilitary activities of the *contras* against Nicaragua. If Cuba and . . .

. . . alter its ties with the Soviet Union. Most informed analysts agree, however, that Cuba now seeks to avoid a further escalation of violence in the Caribbean Basin, and we share this appraisal.

In the United States, there have been some positive signs as well. After several months of study and testimony from many witnesses, including several members of our Dialogue, the National Bipartisan Commission on Central America, chaired by former Secretary of State Henry Kissinger, reached a number of important findings: that economic injustice and political oppression are at the heart of Central America's turmoil and that basic change there will be needed to resolve these causes of continuing insurrection; that the establishment of a military presence by or on behalf of the Soviet Union in Central America should be strenuously resisted; that indigenous revolutionary movements in Central America are not in themselves a security threat to the United States; that negotiations in Central America should be pursued and that the Contadora diplomatic process deserves US support; that US economic assistance to Central America should be substantially expanded on a regional basis; and that economic and military assistance to Central America should depend on each nation's capacity to use the aid effectively and on its respect for human rights. If translated into policy and implemented, these conclusions would contribute significantly to making peace possible in Central America.

Other aspects of the Commission's report, however, trouble most of us. The report portrays Central America as a geostrategic crossroads of global dimensions and as a prime arena of East-West confrontation. This characterization contributes unnecessarily to making the region a focal point of the Cold War. The Commission's report defines Central America as a zone of vital security interest to the United States. It suggests that the exclusion of Soviet bases is not the only or even the main security concern, but it contains no clear statement of just what, in fact, is at stake. The report avows that indigenous revolutionary movements in Central America do not threaten US security, but it employs a definition of "indigenous revolution" so restricted that many of us believe there is little if any possibility that an actual insurgency could fit the category. The report endorses the principle of nonintervention, but does not oppose the US Government's support for the counter-revolutionary war against Nicaragua, a

practice that violates the principle. It expresses support for the Contadora process, but makes Contadora peripheral to US policy. More generally, *the National Bipartisan Commission's report seems to most of us to treat the Central American crisis primarily as a military problem with a political dimension rather than, as we all see it, an essentially political and economic problem with an important military dimension.*

We are deeply concerned about several aspects of the US Government's policy toward Central America. *Although the US Government has repeatedly voiced its backing for the Contadora process, Washington's practice has been at odds with major elements of the Contadora approach.* Support for the raids by armed insurgents (the *contras*) into Nicaragua and the mining of Nicaragua's harbors violate the basic principles of respect for national sovereignty, territorial integrity, and nonintervention emphasized by Contadora and traditionally espoused by the United States. The major US military build-up in Honduras contradicts the Contadora objectives of excluding foreign military bases from Central America, reducing and eventually removing foreign troops and advisors from the region, and separating Central America from the East-West conflict. The US Government has shown no willingness so far to test the proposals offered by Nicaragua and by Cuba within the past year as means to advance discussions. And the continued strong US support for El Salvador's government despite its failure to end gross abuses of human rights — as well as the proposed renewal of US military cooperation with Guatemala — directly contravenes the Kissinger report's emphasis, and our own, on the importance of human rights.

Breaking the Cycle of Despair

The past year, then, has seen a slide toward wider war in Central America, accompanied by some glimmers of hope that peace may still be achievable. *A grim race is underway in Central America between the escalation of violence and the pursuit of peace.* Initiatives are needed now to break the cycle of despair. Central America must be helped to move toward peace.

A plan for peace in Central America must address six different but interconnected problems: (1) Central America's entanglement with the East-West conflict; (2) the growing danger of inter-state wars in Central America, a danger that has already started a regional arms race; (3) external aid to insurgents in the region; (4) the civil strife within Central America's nations; (5) the human suffering of the victims of violence; and (6) the underlying social, economic, and political problems that both cause and exacerbate Central America's seething tensions. None of these six problems can be fully and finally resolved without facing the others. But they are separate questions, and they are best analyzed and approached as such.

The East-West Dimension

To be sure, there is an East-West dimension to events in Central . . .

———

. . . They must understand that further escalation of violence will bring new dangers. And they know that if the wars are not to widen, they need to be stopped.

Strengthening Contadora

We believe events of the last year have shown that *the Contadora initiative affords the best chance for building peace in Central America.* The four Contadora nations have some influence and leverage in Central America but are not widely regarded as interventionist or intrusive. Each of the Contadora countries is committed to helping bring peace to the Central American isthmus. Their efforts have been cautious, to be sure. The four Contadora countries have somewhat different perspectives and priorities; they have encountered some resistance at home and in the region, as well as mixed signals from the United States; and the conflicts in Central America they seek to mediate seem intractable. It is unlikely, however, that any better avenue will be found for bringing external influence for peace to bear on the Central American conflicts.

We call upon the Contadora presidents to redouble their efforts in Central America. We hope they will give their personal and prompt attention to the reports now emerging from the Contadora-initiated working groups on security, political, and economic-social matters. If these reports warrant, we recommend that the Contadora presidents discuss next steps not only with the Central American presidents but, in separate meetings, with the presidents of the United States and of Cuba.

We urge the other nations of the Americas to make clear their readiness to support the Contadora process: by political solidarity; by economic assistance contingent on Central American peace; and by providing personnel and technical backing, on request, for peace-keeping measures, verification, and monitoring.

In particular, *we urge the Government of the United States to take concrete initiatives to foster peace.* Over recent months, the *contras* have stepped up their activities with the "covert" support of the United States. *The United States should immediately end support for the military and para-military activities of the* contras *against Nicaragua.* Although some of us think that past pressures may have influenced Nicaragua to be more conciliatory, we believe that further support for them is unjustifiable. It would be ineffective, counter-productive, and, in the view of most of us, plain wrong.

The Contadora countries should obtain firm assurances from Cuba and Nicaragua that neither country will provide military or . . .

Exhibit K

Chronology of Nicaragua's Participation in the "Contadora" Process

1. *9 September 1983:* Nicaragua signed the Document of Objectives issued by the Contadora Group. (See this Annex, Exhibit D.)
2. *17 October 1983:* Nicaragua officially presented to the Contadora Group a four-part proposal to establish legal bases to guarantee peace and security in the region. This proposal addressed those portions of the 21 objectives in the Document of Objectives that related to peace and security issues. Nicaragua's four proposals consisted of: (1) a draft treaty between Nicaragua and the United States, (2) a draft treaty between Nicaragua and Honduras, (3) a draft accord between Nicaragua and El Salvador, and (4) a draft treaty for

all the Central American Republics. (See Nicaragua's Exhibit IX submitted to the Court in connection with the 25 April 1984 hearing on interim measures, p. 217, *supra*.)

3. *1 December 1983:* Nicaragua officially presented to Contadora, at a meeting of the Contadora Technical Group in Panama, a proposal addressing the rest of the 21 points in the Document of Objectives: a Draft Document of Commitment Concerning Military Affairs, a Draft Declaration and a Draft Accord to Promote the Economic and Social Development of Central America. At the meeting of the Contadora Foreign Ministers held in Washington on 14 November 1983, it was agreed that concrete and detailed proposals would be submitted by 1 December. Only Nicaragua presented such proposals by that deadline. (See Nicaragua's Exhibit IX submitted to the Court in connection with the 25 April 1984 hearing on interim measures, p. 217, *supra*.)
4. *8 January 1984:* Nicaragua signed the Contadora Statement on Measures to be Taken to Fulfill the Commitments Undertaken in the Document of Objectives. (See this Annex, Exhibit E.)
5. *31 January to 30 April 1984:* Nicaragua participated fully in the tasks of the Contadora working commissions, whose work was presented to the Joint Meeting of Ministers of Foreign Affairs of the Contadora Group on 30 April 1984.
6. *15 May 1984:* The Ministers of Foreign Relations of Nicaragua and Costa Rica, meeting in Panama with the Vice-Ministers of Foreign Relations of the Contadora Group, signed a Joint Declaration creating a Commission of Supervision and Prevention, in an effort to bring an end to tensions and incidents in the border areas of the two countries. The Commission is to be made up of representatives of both countries, and will conduct on-site inspection and verification of facts surrounding events that may give rise to tensions or border disputes between Nicaragua and Costa Rica. (See this Annex, Exhibit H.)
7. *26 May 1984:* The Ministers of Foreign Relations of Nicaragua and Costa Rica met at Peñas Blancas, Nicaragua, with other representatives of their respective governments to inaugurate formally the Commission of Supervision and Prevention. On *31 May 1984*, the Vice-Minister of Public Security of Costa Rica and the Vice-Minister of Foreign Relations of Nicaragua, signed the By-laws of the Commission. (See this Annex, Exhibit I.) By 18 and 19 June 1984, the Commission had met four times addressing subjects that included Commission procedures and methods of improving communication between the heads of border security forces of both Nicaragua and Costa Rica and specific recent border incidents.

The publications of the INTERNATIONAL COURT OF JUSTICE may be ordered from any bookseller. For information regarding the sale of the Court's publications please write to the following:

United Nations, Sales and Marketing Section, Room DC2-853, New York, NY 10017, United States of America. Tel. (+1-212) 963 83 02. Fax (+1-212) 963 34 89. E-mail: publications@un.org

or:

Organisation des Nations Unies, Section de vente et commercialisation, Bureau C-115, Palais des Nations, 1211 Geneva 10, Switzerland. Tel. (+4122) 917 26 14. Fax (+4122) 917 00 27. E-mail: unpubli@unog.ch

The publications of the PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1946) are obtainable from C.J.R. Periodicals Inc., 237 Washington Avenue, Hackensack, New Jersey 07601, United States of America. Tel. (+1-201) 488 94 90 or (+1-800) 223 83 23. Fax (+1-201) 488 94 96. E-mail: percjr@aol.com

All enquiries other than with regard to purchase of publications should be addressed to the *Registrar of the International Court of Justice, Peace Palace, 2517 KJ The Hague, Netherlands.* Tel. (+3170) 302 23 23. Fax (+3170) 364 99 28. E-mail: mail@icj-cij.org

On peut acquérir les publications de la COUR INTERNATIONALE DE JUSTICE auprès des librairies spécialisées du monde entier. Pour tous renseignements, prière de s'informer aux adresses suivantes:

Organisation des Nations Unies, Section de vente et commercialisation, Bureau C-115, Palais des Nations, 1211 Genève 10, Suisse. Tél. (+4122) 917 26 14. Télécopie (+4122) 917 00 27. Adresse électronique: unpubli@unog.ch

ou:

United Nations, Sales and Marketing Section, Room DC2-853, New York 10017, Etats-Unis d'Amérique. Tél. (+1-212) 963 83 02. Télécopie (+1-212) 963 34 89. Adresse électronique: publications@un.org

On peut acquérir les publications de la COUR PERMANENTE DE JUSTICE INTERNATIONALE (1920-1946) auprès de C.J.R. Periodicals, Inc., 237 Washington Avenue, Hackensack, New Jersey 07601, Etats-Unis d'Amérique. Tél. (+1-201) 488 94 90 ou (+1-800) 223 83 23. Télécopie (+1-201) 488 94 96. Adresse électronique: percjr@aol.com

Pour toutes questions autres que l'achat de publications, s'adresser à *Monsieur le Greffier de la Cour internationale de Justice, Palais de la Paix, 2517 KJ La Haye, Pays-Bas.* Tél. (+3170) 302 23 23. Télécopie (+3170) 364 99 28. Adresse électronique: mail@icj-cij.org.

PRINTED IN GREAT BRITAIN

ISSN 0074-4433
ISBN 92-1-070823-7