SEPARATE OPINION OF JUDGE AGO

[Translation]

I

1. In the separate opinion which I appended to the Judgment of 26 November 1984 on the jurisdiction of the Court and the admissibility of the Application in the present case, I explained why I had felt able to vote in favour of the finding that the Court had "a jurisdiction in the present case enabling it to proceed to examination of the merits", convinced as I was that sufficient warrant for this finding was to be found in the existence between the Parties, under Article 36, paragraph 1, of the Statute of the Court, of a valid and indisputable jurisdictional link, one contractually and unchallengeably established in Article XXIV, paragraph 2, of the bilateral treaty of Friendship, Commerce and Navigation concluded on 21 January 1956. On the other hand, I rejected the majority view of the Court that another jurisdictional link between Nicaragua and the United States of America existed under Article 36, paragraph 2, of the Statute. Here I had reached my conclusion – which I feel bound to confirm, given the unshaken constancy of my conviction on the matter – because, to my mind, Nicaragua's alleged acceptance of the Court's compulsory jurisdiction was not and had never become real. The intention manifested on the subject in 1937 had at no time materialized in the formal undertaking which alone would have possessed legal force. It followed that no obligation had yet been accepted or even come into being on the date of the extinction of the Permanent Court of International Justice, so there was no obligation which could be "maintained" after that date, since it is impossible to maintain what does not yet exist. And if the obligation itself did not exist, neither could it have any effects that might conceivably be transferred from the Permanent Court to its successor, the International Court of Justice. In sum, the declaration of acceptance of the Court's compulsory jurisdiction which had been made by the United States of America on 14 August 1946 was not matched, as it indispensably had to be, by an equally valid acceptance on the part of Nicaragua ; hence no jurisdictional link could be founded on such a basis between the two States.

2. If the majority of the Court had in 1984 adopted the same position as certain judges, the result in the present, merits phase of the case would have been that only acts that might be regarded as breaches of obligations under the Treaty of 21 January 1956 could be taken into consideration as acts whereby the United States of America might have incurred international responsibility towards Nicaragua. However, the situation is otherwise, since the majority of the Court, in the 1984 Judgment, approved and gave

pride of place to the idea that a jurisdictional link existed between the Parties on the basis of the coincidence of two unilateral declarations accepting the Court's compulsory jurisdiction, both of which, and no less that of Nicaragua than that of the United States, had in its view been regularly made. Though somewhat reluctantly, I have felt obliged to respect the majority decision of the Court, which is now *res judicata*, and accordingly to agree to reason in the present merits phase on the basis of the supposition that when proceedings were instituted two different links of jurisdiction existed between the Parties. Of those two links, the one based upon the Optional Clause in Article 36, paragraph 2, of the Statute was manifestly of wider scope and was bound to receive the main emphasis.

3. As it happens, my scruples in this connection have to some extent been softened, though not entirely removed, on account of the recognition by the majority of the Court, in the present phase, of the effect of the restriction placed on the acceptance of its compulsory jurisdiction through the "multilateral treaty reservation", also known as the "Vandenberg Reservation" from the name of the Senator who successfully presented it for the approval of the United States Senate. Under that reservation, the United States' acceptance of the Court's compulsory jurisdiction did not extend to :

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

4. In this connection, the Court, in its Judgment of 26 November 1984 on questions of jurisdiction and admissibility, had declared that the objection advanced by the United States of America with regard to the exclusion from its acceptance of the Court's jurisdiction under the Optional Clause of "disputes arising under a multilateral treaty" raised a problem "concerning matters of substance relating to the merits of the case". This had led the Court to the conclusion that the objection did not possess an "exclusively preliminary" character and could not in the circumstances constitute an obstacle to its entertaining the merits of the case, given that Nicaragua's Application did not solely complain of breaches of multilateral conventions but also relied, quite apart from the bilateral treaty of 1956, on a number of principles of "general and customary international law". In this, the merits phase, the Court has accordingly been entirely consistent and proceeded to examine the question raised by the Respondent in its objection.

[1] If I make use solely of the original English text, this is because of the problems of interpretation to which the French translation in the *United Nations Treaty Series* might give rise – problems which there is no ground for allowing any role in the case.

5. It is in paragraphs 42 ff. of the present Judgment that the Court has given its ruling on the consequences arising from the United States' multilateral treaty reservation in the present case. In doing so it has relied in the main on the following two points : *(a)* the original source of its jurisdiction to pass upon a dispute involving a particular State is always that State's consent, which implies, *inter alia,* that any State accepting its compulsory jurisdiction under the Optional Clause is entirely free to restrict that acceptance in any way it wishes and, more especially, to exclude disputes arising out of certain categories of treaty ; *(b)* in the instant case, at least one third State, namely El Salvador, had to be considered as potentially "affected" by any decision involving the application of certain multilateral treaties including, but not limited to, the Charter of the United Nations and that of the Organization of American States. The necessary consequence was that the application of those instruments was excluded so far as the decision of this case was concerned. Thus the Court rightly rejected the idea of setting up against the United States an interpretation of the "Vandenberg Reservation" which would be manifestly different from the one always advanced by that Party and reduce it to mere redundancy. It can never be sufficiently emphasized that acceptance of the Court's compulsory jurisdiction on the basis of Article 36, paragraph 2, of its Statute is a sovereign, voluntary act the effects of which are strictly confined to the limits within which it was conceived and intended. The Court therefore proceeded correctly in holding itself obliged to conclude that the jurisdiction conferred upon it by the declaration of acceptance which the United States made in 1946 under Article 36, paragraph 2, of the Statute did not enable it to entertain the complaints submitted by Nicaragua concerning the violation of the treaties in question. But at the same time and, in my view, in perfect accord with its premises, it held that its jurisdiction to pass upon Nicaragua's complaints regarding the violation by the United States of obligations under rules proceeding from customary international law or the 1956 FCN Treaty remained intact.

6. Given the starting-point of the Court's reasoning, I cannot but find the conclusion it reached entirely correct. I have also to acknowledge its concern to uphold the independent existence in customary international law of each of the rules it has applied in the case. Even so, I am bound to express serious reservations with regard to the seeming facility with which the Court – while expressly denying that all the customary rules are identical in content to the rules in the treaties (para. 175) – has nevertheless concluded in respect of certain key matters that there is a virtual identity of content as between customary international law and the law enshrined in certain major multilateral treaties concluded on a universal or regional plane. I am ready to agree with the Court that, so far as the basic rule prohibiting use of force is concerned (para. 188), and even the rule requiring respect for the territorial sovereignty of other States (para. 212), there may be a close correspondence between unwritten general international law and the written law embodied in the Charter. But I remain

unconvinced that, for example, certain restrictive requirements on which the Charter makes resort to self-defence conditional are also to be found in customary international law. And I am still inclined to doubt whether the customary international law that exists not only at universal [1] but also at regional level in the Americas has already endorsed all the achievements of treaty law where the prohibition of intervention is concerned. I am moreover most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain "fundamental general principles of humanitarian law", which, according to the Court, were pre-existent in customary law, to which the Conventions "merely give expression" (para. 220) or of which they are at most "in some respects a development" (para. 218). Fortunately, after pointing out that the Applicant has not relied on the four Geneva Conventions of 12 August 1949, the Court has shown caution in regard to the consequences of applying this idea, which in itself is debatable.

7. There are, similarly, doubts which I feel bound to express regarding the idea which occasionally surfaces in the Judgment (paras. 191, 192, 202 and 203) that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law. I shall confine myself here to a mere placing of these impressions on record, while emphasizing that such reservations as I might express on the points concerned do not carry the implication that I should disagree with the basic findings of the Judgment.

II

8. Coming now to those aspects of the present case which more specifically and exclusively concern the merits, I would first point out that the findings reached by the Court in the present Judgment coincide in the main with those which, from another angle, it had already adumbrated in its Order of 10 May 1984 on the request for provisional measures filed by Nicaragua on 9 April of that year. Needless to say, the present analysis is developed at far greater length and the reasoning presented in order to underpin the findings is far more substantial. But the fact remains that the acts which the Court today considers should be imputed to the United States of America are the same as the decision on provisional measures had succinctly mentioned, while, more particularly, the breaches of interna-

[1] I am somewhat surprised at the assurance with which the Court in its Judgment (para. 202) has felt able to assert that "the existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice".

tional law which the Court now holds those acts to have constituted are practically the same as already enumerated under B (1) and (2) in paragraph 41 of the Order of 10 May 1984. The obligations now declared to have been violated are virtually the same as those found to exist on that previous occasion : the obligations not to intervene in the internal affairs of another State, to refrain from any recourse to the threat or use of force against the territorial integrity or political independence of another State, to accord its territorial sovereignty full respect and not to disrupt or endanger its maritime commerce. At the time, I voted knowingly and conscientiously in favour of the decisions adopted by the Court on these various points, and at the present juncture I see no reason to do otherwise.

9. Nevertheless, I cannot but be struck by the presence in the Judgment now rendered – with of course my own participation – of certain aspects in the appraisal of the factual and legal situation which are in my view mutually inconsistent and appear to call for some rectification.

10. The first concerns the perspective in which the Judgment appears to place and envisage the case on which the Court was required to give its decision. To my mind, it is impossible to grasp the overall, meaningful reality of this case without keeping in view the fact that the soil in which the present dispute between Nicaragua and the United States germinated, and from which it sprang, was compounded of a situation of civil strife, of conflict within a State. Today also, this situation characterizes the present case to a greater degree than appears to have been realized.

11. Not, of course, that the Judgment completely ignores this situation. Where the Court expresses its position with regard to the breaches of the rules of humanitarian law committed in the instant case, it does indeed point out (in para. 219) that :

> "The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character ; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."

This observation is certainly correct. I readily acknowledge, moreover, that in its description of the various forms of aid and assistance provided by the United States to the *contra* rebels, the Court has deliberately avoided making use of certain expressions, proposed by the Applicant, which would have given rise to dangerous ambiguity, precisely in connection with the question as to the international nature of the conflict between those rebels and the forces of the Sandinist government. Thus the Court (in paras. 113 and 114) has refused to go along with the Applicant's assertions that the *contra* forces are mere bands of "mercenaries" recruited by the

United States of America for its own ends, or in other words that they are a kind of foreign legion constituting an auxiliary body in the United States armed forces. I must also add that the very fact of construing the multifarious forms of assistance to the *contras* as a kind of unlawful intervention by one State in the internal conflicts of another provides further evidence that the Court has seen this essential aspect for what it is.

12. On the other hand, in the Court's manner of presenting the two sides in contention and, above all, the origins and causes of the internal conflict that broke out in Nicaragua, it seems to me that the Judgment fails to accord sufficient weight to the important changes that took place in that country during the months immediately following the fall of the Somoza government. In saying this, it is not my intention to question the Judgment's interpretation (in paras. 260-262) of the points included in the "Plan to secure peace" that the coalescent anti-Somoza elements had drawn up during the final stage of the liberation struggle against the dictatorship and that the Junta of the Government of National Reconstruction of Nicaragua had communicated to the Secretary-General of the Organization of American States in response to the resolution of the XVIIth Meeting of Consultation of the Ministers for Foreign Affairs of that Organization. Neither am I here concerned to deny the finding that the communication of this plan was merely a "political promise" devoid of all binding legal force, even though I still have some doubts in that respect ; for I cannot understand how the Organization of American States member governments could have agreed to adopt such an exceptional measure as the withdrawal of recognition from a government which, however dictatorial and hateful, was undeniably in charge and, from that angle, "legitimate" unless they possessed a solid guarantee that it would be replaced by a government offering the precise characteristics defined in the peace plan, one of a kind which the members of the Organization, with the exception of the Somoza government itself, all hoped to see materialize.

13. What I wish here to stress is simply the fact that at the time when the government which the Judgment itself, at the rare points where it mentions it, styles a "democratic coalition" (para. 18) "the democratic coalition government" (para. 19) or "the Government of National Reconstruction" (para. 167) took office in Managua it corresponded in its composition, however provisional that may have been, to the various points in the "Plan to secure peace". It was only later that matters changed. As I have found confirmed by many pieces of testimony, and *inter alia* by accounts of a very recent on-the-spot inquiry in Nicaragua [1], the various political trends whose adherents had taken part in the overthrow of the dictatorship were indeed represented in the government initially resulting from the revolutionary struggle. This government clearly stated its intention of setting up a stable régime characterized by democratic pluralism, political, economic

[1] See the articles entitled "Impressions du Nicaragua", I and II, by Jacques-Simon Eggly, published in the *Journal de Genève* on 26 and 27 May 1986.

and trade-union freedom, and non-alignment in international relations. Only later, and only after a sudden change, did a government come to power which was exclusively Sandinist in complexion. That is to say, the new government which replaced the first towards the end of 1979 was practically uniform in its make-up and followed a very different line from its predecessor in regard to domestic policy, the organization of industrial and agricultural production, trade-union policy, the structure of the armed forces, foreign policy and international relations. By reaction, this development led to the formation of an opposition including elements from some very disparate backgrounds, an opposition which gradually gained ground despite being subjected to close surveillance and measures of restriction. In this climate, the elections organized by the government were boycotted by the political parties which denied their democratic regularity ; relations between the civil authorities and the church worsened ; there was a growing split between the traditional trade unions and those owing allegiance to the government ; the conditions of the ethnic minorities deteriorated. On account of the combination of these factors, various groups belonging to the trends opposed to the new régime left the country, feeling driven to seek refuge in exile. As it happens, once in exile, the new refugees felt reluctantly impelled to seek the collaboration of the apparently sparse remnants of the Somoza guard with a view to setting up a coalition of rebel forces capable of fighting in order to provoke a development of the situation such as might enable them to return home in new circumstances. But this turn of events should not be allowed to obscure the fact that underlying the civil conflict in question there was the determining factor of a split between the various components of the coalition that had opposed the Somoza dictatorship and brought about its downfall. Neither must it be allowed to obscure the fact that the receipt by these refugees of the massive and multifarious aid and assistance that was vital for their action has not turned them into anything other than they were, has not erased their identity as part of the Nicaraguan people or rendered their fight against the government of their country anything other than a civil struggle. In my opinion, the Court could and should in its Judgment have delved more deeply into this aspect for the sake of a better understanding of the various facets of this case, though in saying this I have no intention of seeking any substantial modifications in regard to the findings reached on this subject.

III

14. The other aspect to which I would like briefly to refer concerns the question whether the various categories of acts the subject of the Applicant's allegations are or are not imputable to the Respondent *qua* acts giving rise to international responsibility.

15. Here I consider that the findings of the Judgment, at least where

certain acts are concerned, merit unhesitating concurrence. Among the accumulation of acts complained of by Nicaragua, the Court was entirely right in returning an affirmative answer to the question of the imputability to the Respondent of those which must undeniably be construed as the conduct of United States agents or organs in the proper sense of those terms, namely acts performed by persons or groups directly belonging to the State apparatus of that country and acting as such. The Court has done well to add that where this conduct took place in the presence or with the participation of persons or groups that cannot be so described (in the case in point, *contras*) the presence or participation of the latter could not change this finding in the slightest. This is in conformity with the provisions of Article 5 *(Attribution to the State of the conduct of its organs)* of the draft articles adopted on the subject by the International Law Commission. The Court was also right to consider as acts of the United States of America the conduct of persons or groups that, without strictly being agents or organs of that State, belong nevertheless to public entities empowered within its domestic legal order to exercise certain elements of the government authority. Here I note conformity with the provisions of Article 7 *(Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority)* of the International Law Commission's draft. The first of the two hypotheses here mentioned applied in particular to conduct by members of the government administration or armed forces of the United States, and the second to activities of members of the CIA, or of UCLAs or of other bodies of the same kind. Although the Court has not outlined, as it would have been interesting to do, any theoretical justification of its findings with regard to these hypotheses, I entirely share the view that they are well founded.

16. On the other hand, the negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [1]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest

[1] I refer to Articles 11 *(Conduct of persons not acting on behalf of the State)* and 8 *(Attribution to the State of the conduct of persons acting in fact on behalf of the State)*, read together.

acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.

17. Where this last point is concerned, therefore, I naturally agree in principle with what the Judgment observes in paragraph 116, namely that the Court, within the framework of the present proceedings, did not have to concern itself with any anti-humanitarian misdeeds as the *contras* may have committed which Nicaragua wrongly sees as violations, attributable to the United States of America, of the principles of humanitarian law, but solely with unlawful acts for which the United States may be responsible "in connection with the activities of the *contras*". One or two hesitations or linguistic improprieties that can be noted in the drafting of certain passages do nothing to impair the essential correctness of that observation. More especially, I cannot but agree with the fundamental recognition that the misdeeds committed by the *contras* in the course of their military or paramilitary operations in Nicaragua are not imputable to the United States of America (paras. 115, 116 and 278).

18. However, I feel obliged to point out that the Judgment exhibits some hesitancy, a few at least apparent contradictions [1] and a certain paucity of

[1] The underlying idea is expressed most precisely in paragraph 115, where the Judgment holds that "even the general control by the respondent State over a force with a high degree of dependency on it" would not in itself mean "that the United States *directed or enforced* the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (emphasis added). Subsequently, in this paragraph and another (277), the Judgment relies to the same purpose on the fact that the Court is "not satisfied that the evidence available demonstrates that the *contras* were 'controlled' by the United States when committing" the acts in question. This observation is not wrong as far as it goes, but it is less precise than the previous one I have quoted. It would, I think, be regrettable if the introduction at this point of the idea of "control", accompanied by such expressions as those in paragraph 116 which contrast the acts of the *contras* to those for which the United States might be "responsible directly", should implant in readers the erroneous idea that the Court is establishing an analogy between the situation here envisaged and instances where it is appropriate to speak of "indirect responsibility" as opposed to "direct responsibility". In my view, the situations which can be correctly termed cases of indirect responsibility are those in which one State that, in certain circumstances, exerts control over the actions of another can be held responsible for an internationally wrongful act *committed by and imputable to that second State*. The question that arises in such cases is not that of the *imputability* to a State of the conduct of persons and groups that do not form part of its official apparatus, but that of the transfer to a State of the international responsibility incurred through an act imputable to another State.

legal reasoning in seeking to substantiate the position the Court takes on the points in question. I am above all inclined to regret that the Judgment does not refer explicitly to the precedent provided by the Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran.* The Court seems to me to have overlooked the fact that, at that time, it was faced with a situation in many ways similar to the present one. *Inter alia,* it had to decide whether and, if so, to what extent the acts committed in the initial phase of the affair, namely the armed attack perpetrated on 4 November 1979 by Iranian "militants" against the Embassy of the United States, the invasion of its premises and the taking of the persons there as hostages, the seizure of the Embassy's property and archives, all those "active" misdeeds, in other words, could or could not be imputed to the Iranian State. And it reached a negative conclusion on this subject, because the "militants" in question had no official status of any kind as agents or organs of the State and there was nothing to prove that they had in fact acted in the name and on behalf of the Iranian authorities. The Court explicitly noted that even the congratulatory or approving statements made immediately following the misdeeds in question could not alter the fact that these acts committed by the "militants" could not, at that time, be attributed to the State, even if their authors were the darlings of the supreme authorities of the country. The only thing the Court considered could be attributed to the State, in this first phase of events, was the "negative" fact of having neglected to take appropriate steps for the protection of the premises and staff, so as to ward off attacks which were only to be expected on the part of over-excited hostile elements, or the equally "negative" fact that, once the attack had been perpetrated, the official authorities failed to respond to the incessant appeals for help addressed to them and did not intervene to free the persons and premises in question.

19. In the present case the Court has in effect reached similar conclusions as to the non-imputability – to the United States of America this time – of the misdeeds perpetrated by the insurgents against the Sandinist government in the context of the hostilities pursued by them in Nicaraguan territory, and the imputability to the United States solely of such conduct as can be duly proved to be that of organs of the United States "in connection with" these misdeeds of the *contras.* In sum, this is the second time in a very brief period that the Court has had to deal with questions of international responsibility and, more specifically, situations in which the principles to be applied have been those concerning problems of imputability, which is one of the most delicate aspects of the entire theory of responsibility. I can only regret that the Court has not seized the opportunity to emphasize, by appropriate references, a confirmation of the position it took before and of the theoretical reasoning developed in support, so as to underline the continuity and solidity of the jurisprudence.

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There are other points in the Judgment on which I could comment and in regard to which, perhaps, I could express some partial disagreement [1]. However, I prefer to confine myself here to these few observations and points that I feel it has been necessary to put forward in order to make known my views regarding some selected aspects of fact and law which to my mind were the most important. Here and there the reader will note some reservations which are not merely formal in regard to the holdings set forth in certain chapters or paragraphs of the Judgment and its attendant reasoning. Yet, in the last resort, there are no disagreements of such an order as to impel me to forsake the general concurrence that I believe in all objectivity I may accord the Judgment delivered today.

(Signed) Roberto AGO.

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[1] For example, I find that the Court has devoted a disproportionately lengthy passage and attached undue importance (in paras. 117 ff.) to the – apparently limited – dissemination among the *contra* forces of the CIA-published manual on *Operaciones sicológicas en guerra de guerrillas*. Even apart from the fact – recognized by the Judgment – that the opposing sides in a civil war like the one unhappily raging in Nicaragua need no outside encouragement to engage in activities which may be anti-humanitarian, I have difficulty in seeing precisely how the responsibility deriving from such "encouragement", the reality and efficacy of which remain moreover to be proved, would take shape in general international law.