DISSENTING OPINION OF JUDGE ODA

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1. I have given support to subparagraph (1) of the Operative Clause but, by the logic of this subparagraph which has recognized the applicability of the so-called Vandenberg Reservation, the Court should now have ceased to entertain the Application of Nicaragua in so far as it is based on Article 36, paragraph 2, of the Statute (Part I below). In addition, I believe that, for other reasons as stated below (Part II), the dispute referred to the Court by the Nicaraguan Application, as so based, should have been declared non-justiciable.

2. I hold that the Court could have remained seised of this case only in relation to the alleged violation by the United States of the 1956 Treaty of Friendship, Commerce and Navigation between the two Parties. From this point of view I voted in favour of subparagraph (7), but voted against subparagraph (6) because it would have been sufficient for the Court to decide on subparagraph (7) only, and against subparagraph (8) because such a decision by the Court concerning a breach of obligations *erga omnes* under customary international law is out of place in this Judgment. I was also unable to vote in favour of subparagraph (10), for the reason that I believed the Judgment was mistaken in bringing the United States attacks on Nicaraguan territory into relation with that Treaty and, by basing a construction upon its "object and purpose", had exceeded the jurisdiction granted by its compromissory clause. My negative vote on subparagraph (11) was cast because the attacks on Nicaraguan territory could not be related in my view to a breach of the 1956 Treaty ; nor was the trade embargo to be regarded as a breach of it (Part III below).

3. I was obliged to vote against subparagraphs (2), (3), (4), (5), (9), (12) and (13), simply because I considered, as stated above, that the Court should not have pronounced on these issues in the present case unless covered by the compromissory clause of the 1956 Treaty. This does not mean, however, that I am in disagreement with all the legal arguments expounded by the Court regarding the principles of non-intervention, prohibition of the use of force and respect for sovereignty. These principles should certainly be respected, and by Nicaragua no less than the United States. In particular, my negative vote on subparagraph (9) must not be interpreted as implying that I am opposed to the Court's findings on this particular point.

*

which, together with the prohibition of the threat or use of force, came to encapsulate the founding spirit of the United Nations.

6. Thus I have no doubt that the present case conspicuously falls to be considered within the framework of the United Nations system and, for that matter, that of the Organization of American States, which has pioneered and adopted similar principles. Having regard to the fact that the Court in 1984 found that it possessed jurisdiction under Article 36, paragraph 2, of the Statute, I fully support the Court's decision that "the Court is required to apply the 'multilateral treaty reservation' contained in [the United States declaration of acceptance of jurisdiction]" (para. 292 (1)).

B. The Judgment's Failure to Understand the Effect of the "Vandenberg Reservation"

7. The United States declaration read, in part :

> ". . . this declaration shall not apply to . . .
>
> *(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 . . ."

The Court does not doubt that all parties to multilateral treaties, i.e., the Charter of the United Nations and the Charter of the Organization of American States, affected by the Judgment are not parties to the present case. Yet the Judgment states :

> "It should however be recalled that . . . the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and OAS Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply." (Para. 56.)

> "In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable." (Para. 172.)

> "It will . . . be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content." (Para. 179.)

8. In sum, the Judgment holds that the Court can still decide the issues before it for the reason that, without reference to such multilateral treaties as the Charter of the United Nations and the Charter of the Organization of American States, the Court can apply customary and general international law which, though having been subsumed in the said multilateral treaties, exists independently.

9. It may well be contended that principles such as the non-use of force and the non-intervention now exist independently as customary and general international law. However, I cannot agree with the Judgment in its contention that the Court may entertain the Nicaraguan Application under Article 36, paragraph 2, of the Statute on the alleged assumption that the United States reservation regarding "disputes arising under a multilateral treaty" simply excludes from the jurisdiction conferred on the Court under that provision of the Statute legal disputes concerning "the interpretation of a [multilateral] treaty", or that, since the present case involves a "question of international law", the Court's entertainment of it should not be affected by that reservation inasmuch as the Court, independently of "the interpretation of a treaty", can confine itself to the application of the principles of customary and general international law.

10. I believe that the issue – which relates to applicable law – of whether, *once* the Court assumes jurisdiction over a case, it can apply the rules of customary and general international law apart from any applicable treaty rules, is quite different from the other issue – which relates to the Court's jurisdiction – of *whether* a State's declaration excludes "disputes arising under multilateral treat[ies]" (United States reservation) from "the jurisdiction of the Court, [which by nature can only be voluntarily accepted] in all legal disputes concerning *(a)* the interpretation of a treaty, *(b)* any question of international law . . ." (*Statute,* Art. 36, para. 2). The United States declaration of acceptance of the Court's jurisdiction excluded disputes arising under multilateral treaties subject to exceptions which do not qualify my reasoning and, in any event, have not materialized in the present case.

11. The persistent use of the term "reservation" to describe the exception clauses attached by States to their declarations under Article 36, paragraph 2, of the Statute, and more especially the attachment of the term "Vandenberg Reservation" to the exception in the United States declaration relating to disputes that arise under a multilateral treaty, have surely contributed to a misconception of the inherent scope of such declarations,

and of that one in particular. Because of the idealism underlying the notion of a sovereign State submitting to be judged, the so-called "acceptance of the Optional Clause" has always been imagined in terms of the ideal case, where that submission is total and "unreserved". Nevertheless, the very structure of Article 36, paragraph 2, should make it clear that, in framing a declaration, a State, guided by the categories there suggested (the historical origins of which I shall explain in paras. 27-40), has simply to delineate the bounds of the area of legal disputes over which, subject to reciprocity, it is prepared to accept the Court's jurisdiction independently of treaty clauses or special agreements. If it is under no obligation to make any declaration at all, still less is it obliged to take the ideal case as its standard.

12. Hence the fact that exception clauses may frequently be useful as a means of delineation does not justify any presumption that a State employing them has retracted various parts of an *a priori* wholesale acceptance of the Court's jurisdiction ; on the contrary, the instrument remains a positive indication that the State has *unreservedly* accepted that jurisdiction within a certain area which those exceptions have merely helped to define. Outside that area, there is simply no acceptance, not even an acceptance subject to a "reservation", and to reason as if there were is to yield to a kind of optical illusion.

13. In the present case, it seems that thinking about a certain exception in terms of a "reservation" has helped the Court to imagine that if multilateral treaties were ignored as a source of positive law, the "reservation" would lose its potency, so that the exception could be circumvented. I have explained above why I find this erroneous. The reference to multilateral treaties is merely a means of drawing the boundaries of jurisdiction so as to exclude certain disputes : there is no justification for supposing that a dispute "arising under" a multilateral treaty can nevertheless be brought under the Court's authority because (inevitably) it can also be analysed in terms of general international law. Having decided that the present dispute did "arise under" such a treaty or treaties, the Court should have concluded that only in the circumstances described by the exception itself, namely, the presence of all parties affected or specific waiver, could the boundary of acceptance of jurisdiction be widened to admit the dispute under Article 36, paragraph 2.

14. Thus, if the so-called Vandenberg Reservation is applicable in this case, and the United States acceptance of the Court's compulsory jurisdiction consequently does not extend to *disputes arising under* the Charter of the United Nations and the Charter of the Organization of American States, and if the Judgment yet declares that the Court can entertain the present case as admissible under Article 36, paragraph 2, as stated :

"The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes 'arising under' the United Nations and OAS Charters" (para. 182),

the Court should have proved, not that it can apply customary and general international law independently, but that the dispute referred to it in the Applicant's claims had *not* arisen under these multilateral treaties. The Judgment, however, fails to do this. I must repeat my belief that, in so far as the Judgment holds the Vandenberg Reservation to be applicable, in my view, correctly, the Court should not, and indeed could not, on the basis of Article 36, paragraph 2, of the Statute, have entertained the whole dispute involving "military and paramilitary activities in and against Nicaragua" which the United States has allegedly pursued.

II. The Non-Justiciability of the Present Case – Nicaragua's Application Based on Article 36, Paragraph 2, of the Statute Should Be Declared Inadmissible

A. Introduction

15. While the test of jurisdiction is whether the dispute referred for judgment lies within the scope and range of the specific competence granted to the court in question by a basic instrument, so that the possession of jurisdiction has to be assessed as a matter of priority and in terms of that instrument, the question of the admissibility of a claim calls for application of fundamental norms of the judiciary as to whether the judicial function should or should not extend to cover the issues in contention. Inasmuch as the answering of this question presupposes an adequate characterization of those issues, admissibility is not necessarily a preliminary matter, in the sense of one that can be resolved before their merits are examined. In a more important sense, however, it is always preliminary, in that no finding may be made on the merits if it remains unresolved. The Judgment states :

"especially when the character of the objections is not exclusively preliminary because [the objections] contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (para. 41).

16. The Court, in its 1984 Judgment, rejected some grounds adduced by the United States for the inadmissibility of the dispute (*I.C.J. Reports*

1984, pp. 429-441). It appears to me, however, that the 1984 Judgment did not dispose of the still essential question of whether the present case is justiciable or not. Dealing with the justiciability, the Court observes that the United States did not argue that this is not a "legal dispute", and states :

> "the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine" (para. 35).

17. I believe that the Nicaraguan Application should be declared non-justiciable, since in my view the dispute at issue is one which does not fall into the category of "legal" disputes within the meaning and intention of Article 36, paragraph 2, of the Statute. It may be argued (and the present Judgment deliberately attempts to do so, see para. 32) that the interpretation of the competence of the Court as conferred in accordance with that provision has been settled by a determination of jurisdiction. However, the question as to whether this dispute should be considered as justiciable in terms of the concept of "legal disputes" within the meaning of the Statute is related to the merits of the dispute. Accordingly, it deserves and requires reconsideration at the present stage (see Section B below).

18. Furthermore, even if my contention were not well founded, it would in my view have been prudent for the Court, in the light of the merits of the present case, to find it a matter of judicial propriety not to proceed with a case so highly charged with issues central to the sensitive political relations of many States : a circumstance that undoubtedly accounts for much of the vigour with which the Respondent has first challenged, then been seen to defy, the Court's jurisdiction (see Section C below).

19. These are the positions which I have taken throughout the Court's considerations of the present case, and I regret that the Judgment has not taken them into account.

B. Limited Scope of "Legal Disputes" in Article 36, paragraph 2, of the Statute

1. The justiciability and concept of legal disputes — historical survey

20. Referring to the concept of "legal disputes" in connection with the function of the International Court of Justice, the following two provisions may be recalled :

> *The Charter of the United Nations, Article 36, paragraph 3*
>
> "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of

Justice in accordance with the provisions of the Statute of the Court."

The Statute of the International Court of Justice, Article 36, Paragraph 2

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

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

Looking back at the history of the settlement of international disputes by arbitration or adjudication, one may clearly see that the "legal disputes" subject to such settlement were limited in scope and, more basically, that their referral to such a settlement was always to depend ultimately on the assent of the States in dispute.

(i) *The concept of "legal disputes subject to compulsory arbitration" prior to the institution of the Permanent Court of International Justice*

(a) *The 1899 and 1907 Conventions for the Peaceful Settlement of International Disputes*

21. Following the precedents set by some arbitration clauses in bilateral treaties towards the end of the nineteenth century, and by some arbitration treaties, mainly among countries of the western hemisphere, the 1899 Convention for the Peaceful Settlement of International Disputes provided that :

"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle." (Art. 16.) (*The Proceedings of the Hague Peace Conferences (Translation of the Official Texts), The Conference of 1899,* p. 238.)

Referral to arbitration was far from obligatory.

22. The 1899 Convention was amended in this regard at the Second Peace Conference in 1907 only by the addition of a new paragraph, which suggested that :

"Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers, if the case arise,

> have recourse to arbitration, in so far as circumstances permit." (Art. 38.) (*The Proceedings of the Hague Peace Conferences (Translation of Official Texts), The Conference of 1907*, Vol. I, p. 605.)

The Second Peace Conference, held in 1907, failed to establish compulsory arbitration. A project to institute it was put to the vote by the First Commission but in the end was not found acceptable. The unsuccessful draft, which would have been added to Article 16 of the 1899 Convention, sought to provide that :

> "Differences of a legal nature, and especially those relating to the interpretation of treaties existing between two or more of the contracting States, which may in future arise between them, and which it may not have been possible to settle by diplomacy, shall be submitted to arbitration, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute." (Art. 16*a*.) (*Ibid.*, p. 537.)

23. That project suggested, however, that some differences should be "by nature subject to arbitration without the reservations mentioned in Article 16*a*" (Art. 16*c*.) *(ibid.)*, and enumerated as such the following differences :

> "I. Disputes concerning the interpretation and application of conventional stipulations relating to the following subjects :
>
> 1. Reciprocal free aid to the indigent sick.
> 2. International protection of workmen.
> 3. Means of preventing collisions at sea.
> 4. Weights and measures.
> 5. Measurement of ships.
> 6. Wages and estates of deceased seamen.
> 7. Protection of literary and artistic works.
>
> II. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties." (Art. 16*d*.) *(Ibid.)*

A suggestion was also made for a protocol enumerating "such other matters . . . to admit of embodiment in a stipulation respecting arbitration without reserve . . . on condition of reciprocity" (Art. 16*e*) *(ibid.)*. The British delegate accordingly proposed a protocol, with an annexed table listing the following subjects :

> "1. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties.
> 2. Reciprocal free aid to the indigent sick.
> 3. International protection of workmen.

4. Means of preventing collisions at sea.
5. Weights and measures.
6. Measurement of vessels.
7. Wages and estates of deceased seamen.
8. Protection of literary and artistic works.
9. Governance of commercial and industrial companies.
10. Pecuniary claims arising from acts of war, civil war, arrest of foreigners, or seizure of their property.

11. Sanitary regulations.
12. Equality of foreigners and nationals as to taxes and imposts.

13. Customs tariffs.
14. Regulations concerning epizooty, phylloxera, and other similar pestilences.
15. Monetary systems.
16. Rights of foreigners to acquire and hold property.
17. Civil and commercial procedure.
18. Pecuniary claims involving the interpretation or application of conventions of all kinds between the parties in dispute.

19. Repatriation conventions.
20. Postal, telegraph, and telephone conventions.
21. Taxes against vessels, dock charges, lighthouse and pilot dues, salvage charges and taxes imposed in case of damage or shipwreck.
22. Private international law." (Art. 16*e*) (*The Proceedings of the Hague Peace Conferences (Translation of Official Texts), The Conference of 1907,* Vol. I, p. 539.)

Thus we see that, despite the aim of compulsory referral to arbitration, the project, on the one hand, embodied a reservation that the disputes concerned

> "do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute"

and, on the other hand, enumerated a limited number of extremely technical and preponderantly non-political subjects of dispute as constituting those which the parties would unreservedly agree to submit to arbitration.

24. The project itself was not put to the vote at the plenary meeting and I do not need to repeat that the result of the 1907 Conference was far from successful, at least from the point of view of obligatory arbitration. It is, however, important to note that even in that project only a narrowed selection of the "differences of a legal nature, and especially those relating to the interpretation of treaties" – a selection restricted to predominantly

technical matters – was suggested as falling within the ambit of compulsory arbitration. Hence it is clear that even the more idealistic drafters were inclined to consider that the "justiciable dispute" should be so restricted as to cover only some highly technical or procedural issues.

(b) *Justiciable disputes in arbitration treaties early in this century*

25. Four years after the 1899 Convention, but before the 1907 Second Peace Conference, the bilateral treaty of 1903 between France and Great Britain attracted the interest of the world as the first European step towards the compulsory referral of international disputes to settlement by arbitration, and this was followed by eight similar treaties concluded prior to 1907, to which in the main either Great Britain or France was a party. The number of similar bilateral treaties of arbitration concluded from 1907 to the 1920s amounts to 29. Unlike the multilateral treaty of 1899, this bilateral model set up a binding norm for the two contracting parties with regard to compulsory referral of some types of dispute to the Permanent Court of Arbitration. The 1903 treaty states that "differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties", should be referred to the Permanent Court of Arbitration (Art. I). The conditions for compulsory referral were restricted by the proviso in each treaty that :

> "[the disputes] do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties" (Art. I) (*British and Foreign State Papers*, Vol. XCVI, p. 35).

This famous clause of four reservations concerning vital interests, independence, honour and third party interests to be attached to compulsory arbitration, which, as stated above, was also later incorporated in the 1907 project at the Hague Conference, commenced with the 1903 Treaty. It is to be further noted that in each individual case the conclusion of a special agreement was a prerequisite for

> "defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure" (Art. II).

26. In 1911 the United States Government concluded with Great Britain and France respectively the General Arbitration Treaties, which provided that :

> "All differences hereafter arising between the high contracting parties . . . relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by

> one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration . . . or to some other arbitral tribunal as may be decided in each case by special agreement . . ." (Art. 1) (*American Journal of International Law*, Supplement, Vol. V, pp. 253, 249.)

These treaties provided that, in cases where the parties disagreed as to whether a difference was subject to arbitration under the treaty concerned, the question should be submitted to a joint high commission of inquiry, and that, if all, or all but one, of the members of that commission decided the question in the affirmative, the case should be settled by arbitration (Art. 3). These treaties would have been highly progressive from the standpoint of the compulsory settlement of disputes, but they failed to secure the approval of the United States Senate, in particular because of the extremely novel concept of the determination of the jurisdiction of the tribunal by a third body. Yet one more attempt to institute compulsory arbitration had thus failed.

(ii) *Justiciable and non-justiciable disputes under the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice*

(a) *The Covenant of the League of Nations*

27. Plans for the post-war institution were being prepared from 1918 onwards. The peaceful settlement of international disputes was one of the main issues, and it was always considered that, while some disputes might be suitable for settlement by arbitration, others might be more properly dealt with by that worldwide institution or through conciliation by an organ to be set up by that institution. One of the earliest plans, proposed by Lord Phillimore in 1918, identified, in particular, four types of dispute suitable for settlement by arbitration, i.e., disputes concerning "the interpretation of a treaty", "any question of international law", "the existence of any fact which if established would constitute a breach of any international obligation" or "the nature and extent of the reparation to be made for any such breach", and suggested the provision reading that "arbitration is recognized by the Allied States as the most effective and at the same time the most equitable means of settling the dispute" (David Hunter Miller, *The Drafting of the Covenant*, Vol. II, p. 4). General Smuts, British delegate at the Paris Peace Conference, referring to "the two classes of justiciable and other disputes", also mentioned these four types of dispute (*ibid.*, p. 56). Reference to the four types was maintained throughout several plans for the future institution of the worldwide organization.

28. The Commission on the League of Nations, set up by the preliminary conference to study the constitution of the League of Nations, commenced its work on 3 February 1919. The draft covenant, including some provisions concerning dispute settlement (Arts. 10-13) was presented. The basic idea was that the high contracting parties should "in no case resort to armed force without previously submitting the questions and matters involved, either to arbitration or to enquiry by the Executive Council" (Art. 10), and a provision was proposed :

> "*Article 11.* The High Contracting Parties agree that whenever any dispute or difficulty shall arise between them which they recognise to be suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration . . ." (Miller, *op. cit.*, p. 234.)

The idea of establishing a Permanent Court of International Justice was also suggested in this draft covenant (Art. 12).

29. At the second reading of the text, on 24 March 1919, Lord Robert Cecil, intending "to draw a distinction between justiciable and non-justiciable disputes" (David Hunter Miller, *The Drafting of the Covenant*, Vol. II, p. 348), suggested an alternative sentence which in fact had previously been proposed by Lord Phillimore more than a year earlier. Lord Robert Cecil's suggestion read :

> "If a dispute should arise between the States members of the League as to the interpretation of a Treaty, as to any question of any international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, if such dispute cannot be satisfactorily settled by diplomacy, the States members of the League recognise arbitration to be the most effective and at the same time the most equitable means of settling the dispute ; and they agree to submit to arbitration any dispute which they recognise to be of this nature." (*Ibid.*, p. 352.)

On 10 April, examining the draft covenant as amended by the Drafting Committee, Lord Robert Cecil again stated that

> "it was difficult to lay down a strict rule. For example, one could not say that the question of the interpretation of a Treaty should be submitted to arbitration in every instance. It might happen that such an interpretation would involve the honour or the essential interests of a country. In such a case the question should rather be submitted to examination by the Council of the League. It would be dangerous for the future of the principle of arbitration to impose it too strictly in a great number of cases." (*Ibid.*, p. 378.)

The final version of the draft covenant was adopted at the last meeting of the Commission on 11 April 1919.

30. The Covenant of the League of Nations contained, with regard to the arbitration or judicial settlement of international disputes, the following provisions [1] :

"*Article 12*

1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration * or to inquiry by the Council . . .

Article 13

1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration * and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *.

2. Disputes as to the interpretation of a treaty, as to any questions of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration *."

On 28 April, at the Peace Conference, President Wilson of the United States explained that :

> "The second paragraph of Article XIII is new, inasmuch as it undertakes to give instances of disputes which are generally suitable for submission to arbitration, instances of what have latterly been called 'justiciable' questions." (David Hunter Miller, *The Drafting of the Covenant,* Vol. II, p. 700.)

Thus the League of Nations came to declare that the four types of dispute which Lord Phillimore had originally suggested were generally suitable for submission to arbitration.

(b) *The Statute of the Permanent Court of International Justice*

31. Meeting at The Hague, the Committee of Jurists set up pursuant to the first (unquoted) sentence of Article 14 prepared a draft scheme for the institution of the Permanent Court of International Justice which, borrowing the concept of the four types of dispute, provided for the jurisdiction of the Court as follows :

[1] The words "or judicial settlement" were inserted after the asterisks in 1924 following the establishment of the Permanent Court of International Justice anticipated and referred to in Article 14.

"*Article 34*

Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine *cases of a legal nature,* 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 reparation to be made for the breach of an international obligation ;
(e) the interpretation of a sentence passed by the Court.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court." (*P.C.I.J., Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee,* p. 679.) (Emphasis added.)

32. The view advanced by the Committee of Jurists encountered objections from several delegates at the Council of the League of Nations, which dealt with the draft scheme in the course of its sessions from February to October 1920. They argued that, even if States admitted compulsory jurisdiction in the cases laid down in the suggested article, they might not go so far as to admit that *any question of international law* without exception could be submitted to the Court. The report presented by the French representative, Léon Bourgeois, on 27 October 1920 at the 10th Session of the Council in Brussels, read in part :

"We do not think it necessary to discuss here the advantages which would result from the system of compulsory jurisdiction proposed by the Committee of Jurists with regard to the good administration of international justice and the development of the Court's authority. But as in reality a modification in Articles 12 and 13 of the Covenant is here involved, the Council will, no doubt, consider that it is not its duty, at the moment when the General Assembly of the League of Nations is about to meet for the first time, to take the initiative with regard to proposed alterations in the Covenant, whose observance and safe keeping have been entrusted to it.

. . . .

At the present moment it is most important in the interests of the authority of the League of Nations that differences of opinion should not arise at the very outset with regard to the essential rules laid down

in the Covenant . . ." (League of Nations, *P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant,* p. 47.)

Léon Bourgeois suggested that in the Hague draft scheme the Council replace Articles 33 and 34 by a new text, which was eventually adopted by the Council, as follows :

"*Article 33*

The jurisdiction of the Court is defined by Articles 12, 13 and 14 of the Covenant.

Article 34

Without prejudice to the right of the Parties, according to Article 12 of the Covenant, to submit disputes between them either to judicial settlement or arbitration or to enquiry by the Council, the Court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by Treaties in force entrusted to it or to the tribunal instituted by the League of Nations." (*Ibid.,* p. 47.)

33. While the Assembly was meeting from 24 November to 7 December 1920 a subcommittee of its Third Committee made a detailed study of the draft scheme of the Court and suggested :

"Whatever differences of opinion there may be on the interpretation of the Covenant with regard to the acceptance of a compulsory jurisdiction within the scope of its provisions, and upon the political expediency of adopting an unconditionally compulsory jurisdiction in international relations, the Sub-Committee was unable to go beyond the consideration that unanimity on the part of the Members of the League of Nations is necessary for the establishment of the Court, and that it does not seem possible to arrive at unanimity except on the basis of the principles laid down in the Council's draft." (*Ibid.,* p. 210.)

The subcommittee devised in fact a modified text intended to formulate as clearly as possible the following ideas :

"1. The jurisdiction of the Court is in principle based upon an agreement between the Parties. This agreement may be in the form of a special Convention submitting a given case to the Court, or of a Treaty or general Convention embracing a group of matters of a certain nature.

2. With regard to the right of unilateral arraignment contemplated in the words ('and this without any special agreement giving it jurisdiction') in the Council's draft, the Sub-Committee, by deleting these words, has not changed the meaning of the draft. In conformity with

> the Council's proposal, the text prepared by the Sub-Committee admits this right only when it is based on an agreement between the Parties. In the Sub-Committee's opinion, the question must be settled in the following manner : If a Convention establishes, without any reservation, obligatory jurisdiction for certain cases or for certain questions (as is done in certain general arbitration treaties and in certain clauses of the Treaties of Peace dealing with the rights of minorities, labour, etc.) each of the Parties has, by virtue of such a treaty, the right to have recourse without special agreement *(compromis)* to the tribunal agreed upon. On the other hand, if the general Convention is subject to certain reservations ('vital interests', 'independence', 'honour', etc.), the question whether any of these are involved in the terms of the Treaty, being for the Parties themselves to decide, the Parties cannot have recourse to the International Tribunal without a preliminary agreement *(compromis)*. . ." (League of Nations, *P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant,* p. 211.)

The draft scheme prepared by the Council was amended by the subcommittee as follows :

> "*Article 36* (Brussels, Art. 33)
>
> The jurisdiction of the Court comprises all cases which the Parties refer to it and all matters specially provided for in treaties and conventions in force.
>
> *Article 37* (Brussels, Art. 34)
>
> When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal." (*Ibid.,* p. 218.)

34. In the course of the deliberations of the Third Committee of the First Assembly, however, Mr. Fernandes, the Brazilian delegate, introduced the text adopted by the Committee of Jurists but abandoned by the Council (quoted in para. 31 above), which was accompanied by a temporary provision reading :

> "*Article*
>
> In ratifying the Assembly's decision adopting this Statute, the Members of the League of Nations are free to adhere to either of the two texts of Article 33. They may adhere unconditionally or conditionally to the Article providing for compulsory jurisdiction, a possible condition being reciprocity on the part of a certain number of Members, or of certain Members, or, again, of a number of Members including such and such specified Members." (*Ibid.,* p. 168.)

This proposal was adopted with some amendments. The Third Committee

reported in connection with Article 36 that a new provision had been added which :

> "gives power to choose compulsory jurisdiction either in all the questions enumerated in the Article or only in certain of these questions. Further, it makes it possible to specify the States (or Members of the League of Nations) in relation to which each Government is willing to agree to a more extended jurisdiction." (*Ibid.*, p. 222.)

35. The text as amended by the Third Committee at its last session, on 10 December 1920, was finally adopted, with further slight changes, as Article 36 of the Statute of the Permanent Court of International Justice. Thus the Statute read, in part :

> "*Article 36*
>
> ... The Members of the League of Nations ... may ... declare that they recognize as compulsory *ipso facto* and without special agreement ... the jurisdiction of the Court in *all or any of the classes of legal disputes concerning* :
>
> *(a)* the interpretation of a treaty ;
> *(b)* any question of international law ;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation ;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation." (Emphasis added.)

While the Covenant of the League of Nations declared, in general terms, that "disputes" as enumerated "are generally suitable for submission to arbitration", the Statute of the Permanent Court of International Justice provided for optional acceptance of the Court's jurisdiction for "legal disputes concerning" the four categories specified in the Covenant.

(iii) *The concept of justiciable disputes subsequent to the inception of the Permanent Court of International Justice*

36. In the post-war period, particularly during a decade beginning with the mid-1920s, a great number of bilateral treaties were concluded to unify the procedure of conciliation with the submission of various kinds of international dispute to arbitration or to the newly established Permanent Court of International Justice. In October 1925, at Locarno, Switzerland, where a treaty of mutual guarantee aimed at maintaining the territorial status quo resulting from the adjustment of the western frontiers of Germany was initialled, Germany negotiated arbitration treaties with Belgium, Czechoslovakia, France and Poland, respectively, in which it was stated that :

> "All disputes of every kind between Germany and [the parties] with regard to which the Parties are in conflict as to their respective rights

> . . . shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice . . ." (Art. I.) (*League of Nations Treaty Series*, Vol. 54, p. 304.)

The disputes were to "include in particular those mentioned in Article 13 of the Covenant of the League of Nations" (Art. 1) and be submitted – but only by means of a special agreement – either to the Permanent Court of International Justice or to an arbitral tribunal (Art. 16).

37. Originating with the Committee on Arbitration and Security which the Preparatory Committee of the Disarmament Conference established in November 1927, the General Act for Pacific Settlement of International Disputes was approved by the Ninth Assembly of the League of Nations in 1928 as a compendium of the results produced by a number of bilateral arbitration or conciliation treaties. As to judicial recourse, it was agreed that "All disputes with regard to which the parties are in conflict as to their respective rights" should be submitted for decision to the Permanent Court of International Justice. It was understood, however, that these disputes would "include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice" (Art. 17) (*League of Nations Treaty Series*, Vol. 93, p. 351).

38. The arbitration treaties concluded by the United States in the years 1928-1930 with as many as 25 countries provided for the submission to the Permanent Court of Arbitration or to some other competent tribunal of :

> "all differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise . . . which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" (Art. I) (*The American Journal of International Law*, Supplement, Vol. 23, p. 197).

A special agreement for the submission was first to be made by the parties in each case. In 1929 the United States concluded at Washington with 19 Latin American States the General Treaty of Inter-American Arbitration, which belonged to the same type in providing for the obligation of the contracting parties to submit to arbitration :

> "all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise . . . which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law" (Art. I) (*League of Nations Treaty Series*, Vol. 130, p. 140).

The Treaty also provided that the "questions of juridical character" (Art. 1) would include four types of dispute specified in Article 13, paragraph 2, of the Covenant of the League of Nations. The formulation of a special agreement, to be concluded in each case, was to define the particular subject-matter of the controversy (Art. 4).

(iv) *Legal disputes found suitable for settlement by the International Court of Justice*

39. The United Nations set up the International Court of Justice as "the principal judicial organ of the United Nations" to "function in accordance with the annexed Statute" (Charter, Art. 92), but the principal responsibility for the maintenance of international peace and security is entrusted to the Security Council, which should as a final resort handle a dispute the continuation of which is likely to endanger the maintenance of international peace and security, while taking cognizance of the consideration that "*legal* disputes" should as a general rule be referred by the parties to the International Court of Justice (Charter, Art. 36, para. 3).

40. The 1945 Statute of the present Court, the relevant provision of which is quoted above (para. 20), follows the pattern of the previous Court except that declarations may be made accepting the jurisdiction of the Court "in all legal disputes concerning . . ." (Art. 36, para. 2), not "in all or any of the classes of legal disputes concerning . . .", and that the Optional Clause attached to the protocol of signature of the previous Statute was incorporated in the new Statute (Art. 36, paras. 3 and 4). All that the dropping of the reference to "classes" of legal dispute indicates is a realization of the redundancy of this vague expression, while the relocation of the Optional Clause is but a corollary of the permanent integration of the Court and its Statute into the system of the Charter. Consequently, any suggestion that the present Court possesses a wider jurisdiction than its predecessor *ratione materiae* must depend on an assumed evolution in the meaning of the term "legal disputes".

2. *The difficulty of viewing the present case as concerning a "legal dispute" within the meaning of the Statute*

(i) *In general*

41. The above survey of the developments behind the provision of Article 36, paragraph 2, of the Statute of the International Court of Justice leads me to the following observations.

42. First, the term "legal disputes" was defined in some instruments as referring to those disputes which arise

> "by virtue of a claim of right made by one against the other under treaty or otherwise [and] which are juridical in their nature by reason

of being susceptible of decision by the application of the principles of law" (e.g., the 1911 General Arbitration Treaties),

or in other cases as those "with regard to which the Parties are in conflict as to their respective rights" (e.g., the 1925 Locarno Treaties ; the 1928 General Act). These definitions should not be overlooked or made light of in interpreting the term "legal disputes" as used in the Statute.

43. Secondly, the well-known reservations in the 1903 Anglo-French Treaty concerning vital interests, independence, honour and third-party interests in connection with referral to arbitration disappeared with the League of Nations. However, this was only because disputes involving such considerations were thenceforth to be submitted for examination by the Council, the League's pre-eminently political organ. In the United Nations system, it is likewise the Security Council which is entrusted with the ultimate function for the peaceful settlement of any dispute the continuance of which is likely to endanger the maintenance of international peace and security.

44. Thirdly, it should be recalled that, while the draft prepared by the Hague Committee of Jurists was being discussed at the Brussels Council, the suggestion of the compulsory referral of disputes over *any* point of international law met with opposition, as reflected in Léon Bourgeois's report, part of which read :

> "If this view advanced by the Jurisconsults at The Hague is adopted without modification, a considerable advance has certainly been made, in view of the terms of Article 34. What must be understood, then, by the expression 'any point of international law' ? Even if the States admitted the compulsory jurisdiction in the cases definitely laid down in the Article, will they consent to go so far as to admit that any question of international law may be submitted to the Court ? Objections of this nature have been raised by several Governments, which have forwarded us their remarks on the draft scheme." (League of Nations, *P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant*, pp. 46-47.)

45. Fourthly, it is important to note that at the First Assembly of the League of Nations the proposal for the compulsory referral of "legal disputes" to arbitration was declared acceptable subject to its voluntary acceptance by each State, as witness the eventual Article 36 of the Statute. It follows that, despite the provision of the Statute that *determination* of the Court's jurisdiction should in case of doubt be in the hands of the Court (Art. 36 (6)), it is to be assumed that when voluntarily accepting compul-

sory jurisdiction a State (the United States in this case) will not only have had in mind its own concept of what should constitute a justiciable "legal dispute" under Article 36, paragraph 2, of the Statute but may legitimately entertain expectations that that concept will if necessary be elicited and respected by the Court.

(ii) *Precedents in the previous and present Courts*

46. Previous opportunities for testing this assumption have been almost non-existent, as may be demonstrated by a survey of the past practice regarding the submission of a case under the Optional Clause of the Statutes of the previous and present Courts. Of more than 20 contentious cases during the period of the Permanent Court of International Justice, the cases which were brought to the previous Court relying on Article 36, paragraph 2, numbered only seven, among which three cases – *Denunciation of the Treaty of 2 November 1865 between China and Belgium, Losinger* and *Legal Status of the South-Eastern Territory of Greenland* – were eventually withdrawn, and the *Electricity Company of Sofia and Bulgaria* case was not concluded because of the Second World War. *Legal Status of Eastern Greenland, Phosphates in Morocco* and *Panevezys-Saldutiskis Railway* were the only such cases to have remained before the previous Court, and in the first of these Denmark, the respondent Party, raised no objection to the Court's jurisdiction. The objections raised in the other two were merely procedural in character ; the previous Court, recognizing the objection of the Respondents, declared the applications in both cases inadmissible. There was no single case before the previous Court in which judgment on the merits was given against a challenge by a Respondent to the Court's jurisdiction under the Optional Clause of the Statute.

47. Of the ten cases brought before the present Court under Article 36, paragraph 2, prior to the present case, there were three in which objections regarding jurisdiction and admissibility were not raised by the Respondent : *Fisheries, Rights of Nationals of the United States of America in Morocco* and *Application of the Convention of 1902 Governing the Guardianship of Infants.* In the remaining seven cases : *Anglo-Iranian Oil Co., Nottebohm, Certain Norwegian Loans, Right of Passage over Indian Territory, Interhandel, Aerial Incident of 27 July 1955* and *Temple of Preah Vihear,* the jurisdiction of the Court was disputed only for reasons of a *procedural* nature. The Court, after having rejected the preliminary objections raised by the Respondents, has proceeded on the merits only in the following three cases : *Nottebohm, Right of Passage over Indian Territory* and *Temple of Preah Vihear.* In these cases, the objections raised by the Respondents were of a procedural nature not related to the substantive justiciability of the dispute. Prior to the present case, therefore, there has never been an Article 36, paragraph 2, case before either the previous or the present Court where justiciability was doubtful because of the *substantive* nature of the dispute.

(iii) *Conclusion*

48. In consequence, the fact that the Court or its predecessor entertained a handful of previous cases submitted on the basis of Article 36, paragraph 2, of the Statute affords absolutely no ground for concluding that voluntary acceptance of the obligation for submission of legal disputes to the Court's jurisdiction under that Article equates with the submission of all disputes however politically charged they may be. The United States, though having voluntarily accepted the Optional Clause, appears to be of the view that the present dispute does not fall within the meaning of what is a "legal dispute" under Article 36, paragraph 2. Even if it did not explicitly contend this during the proceedings on jurisdiction, which were largely devoted to the jurisdictional position of the Applicant, its reliance on the "ongoing armed conflict" argument furnished a clear indication that the Respondent viewed the dispute as "not susceptible of decision by the application of the principles of law" – or, in other words, that the sense of "legal dispute" had not evolved so far as to embrace the subject-matter of the application. Whether this view is right or wrong is beside the point in considering a *voluntary* acceptance of jurisdiction.

49. In sum, the Court should note that the meaning of "legal disputes" is not to be taken separately from the fact that the Court's jurisdiction over "legal disputes" can only be accepted voluntarily. The Court is at present not in a position, as it was in the *Aegean Sea Continental Shelf* case, to apply an extended concept of the law, one not contemplated at the time of the filing of the declaration, because by doing so it would risk imposing its jurisdiction in contravention of the voluntary character of that instrument, whereas in the case referred to it did so in order to be quite sure of respecting that character in the case of the Respondent's declaration.

C. Considerations of Judicial Propriety that Should Have Dissuaded the Court from Pronouncing on the Nicaraguan Application on the Basis of Article 36, Paragraph 2, of the Statute

1. The Court should not have adjudged the Application because of the considerations of administration of justice – a preliminary issue

50. Even if the foregoing argument (Section B above) is not considered well founded, and if the present dispute is regarded as a "legal dispute" under Article 36, paragraph 2, of the Statute from the procedural point of view, I still believe that "judicial propriety" provides another prudential ground for concluding that the Nicaraguan Application as based on that

provision should be declared by the Court as non-justiciable and hence as inadmissible.

51. I do not deny that once a judicial institution is duly seised of a dispute which is not primarily legal, that dispute may be held justiciable, as a matter of principle. In many systems of domestic law, *non liquet* is generally rejected, even if a directly applicable rule of law is lacking, and a judicial court, in relying on the exclusion of *non liquet,* is in theory able to pass judgment. The French Civil Code of 1804 states :

> "Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." (Art. 4.) (*Code civil des Français, édition originale et seule officielle,* 1804, p. 2.)

Speaking of English law, Sir Frederick Pollock in his note on Maine's *Ancient Law* stated :

> "[English judges] are bound to find a decision for every case, however novel it may be ; and that decision, so far as it goes beyond drawing inferences of fact, will be authority for other like cases in future ; therefore it is part of their duty to lay down new rules if required. Perhaps this is really the first and greatest rule of our customary law." (Maine, *Ancient Law,* with introduction and notes by Sir Frederick Pollock, 1906, p. 48.)

52. In the case of international law, the Statute of the Permanent Court of International Justice introduced the clause "the general principles of law recognized by civilized nations" mainly to avoid a *non liquet* resulting from the lack of any positive rules. The Model Rules on Arbitral Procedure prepared by the International Law Commission in 1958 state that "the tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied" (Art. 11) (*Yearbook of the International Law Commission,* 1958, Vol. II, p. 84). Here it is important to note that the exclusion of *non liquet* is connected with the absence of an alternative forum.

53. It is definitely not my intention to have the Court declare, as a matter of principle, that disputes relating to use of force or intervention are non-justiciable, nor to contend that the Court is incapable of dealing with the present dispute once it is properly entertained. Yet my opinion is that the fact that the Court *can* entertain a case *once* it is properly seised is a different matter from the suggestion that the Court *must* exercise jurisdiction. Let me quote a well-known passage from the 1963 Judgment in the case concerning the *Northern Cameroons* :

> "In its Judgment of 18 November 1953 on the Preliminary Objection in the *Nottebohm* case . . . the Court had occasion to deal at some

length with the nature of seisin and the consequences of seising the Court. As this Court said in that Judgment : 'the seising of the Court is one thing, the administration of justice is another'. It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*I.C.J. Reports 1963*, p. 29.)

54. It must be added that the Court should not allow any sentiment that States *ought* to accept its jurisdiction to affect its perception of the voluntary nature of such acceptance or its caution not to overstep the limits of individual acts of acceptance. Thus, for example, the phenomenon of the so-called self-judging reservation may be objectively dubious and deplorable, but it must nonetheless be respected as a symptom of the importance attached by the declarant State to the voluntary character of its submission to the Court. It therefore behoves the Court to exercise that caution with special care in dealing with States that have made such reservations – and the United States is notoriously one. In pointing this out, however, I must not be understood as suggesting that the subject-matter of the present case belongs in any way to the exclusive domestic jurisdiction of that country ; clearly it does not, and the United States has not maintained that it does.

2. The concept of the non-justiciable "political dispute" – parallelism of legal and political disputes

55. As stated above (sec. B,1), it has throughout this century been considered that any dispute which a State was prepared voluntarily to submit to judicial settlement should be one where the parties are in conflict as to their respective rights, or where differences arise by virtue of a claim of right made by one against the other ; and disputes such as the present one, at least where it concerns allegations of threat or use of force and intervention, have not been deemed to fall into this category. The distinction between "legal" and "non-legal" (or political) is certainly vague inasmuch as, on the one hand, a legal dispute may eventually give rise to political friction and tension and, on the other, any political dispute is almost bound to contain certain aspects of a legal nature ; yet in the 60-year history of the past and present Courts, issues regarding matters of an overwhelmingly political nature have never been dealt with by way of adjudication before the Court on the basis of Article 36, paragraph 2, of the Statute.

56. The drafters of the Covenant of the League of Nations were well aware that those disputes which could have been excluded from the Court's jurisdiction in terms of the well-known four reservations of the 1903 Treaty could more properly be disposed of in the international political field, not by a neutral third party, but by a highly political organ such as the Council, as rightly pointed out by Lord Robert Cecil at the drafting of the Covenant of the League of Nations, when he stated that :

> "One could not say that the question of the interpretation of a Treaty should be submitted to arbitration in every instance. It might happen that such an interpretation would involve the honour or the essential interests of a country. In such a case the question should rather be submitted to examination by the Council of the League." (David Hunter Miller, *The Drafting of the Covenant,* Vol. II, p. 378.)

The League of Nations accordingly initiated a means of having its supreme political organ, that is, the Council, offer a conciliation procedure for the fundamental frictions and tensions existing among nations, apart from some differences of view over certain specific items covered by the terms "disputes as to the interpretation of a treaty, as to any question of international law, . . ." (Covenant of the League of Nations, Art. 13, para. 2).

57. There can be no doubt that this parallelism was essentially maintained by the United Nations. While Article 36 of the United Nations Charter states that "legal disputes should as a general rule be referred by the parties to the International Court of Justice", this certainly should not be interpreted as implying that the term "legal disputes" covers disputes which are non-justiciable because of their overwhelmingly political nature. In other words, it is normal to assume that the term "legal disputes" refers to disputes whose primary characteristic it is to be "legal". Otherwise – since practically every dispute has a "legal" aspect as at least a secondary characteristic – there would have been no reason to include the word "legal" in the provision. Furthermore, the qualifying phrase "as a general rule" serves to stress the necessity of not jumping to the conclusion that the presence of a legal element in a dispute attracts the application of the provision. For it is well known that the phrase in question, just like "in principle", functions as a pointer to the possibility of exceptions and borderline cases. Moreover, it may be observed that, in practice, the parties to international legal disputes do not, as a general rule, refer them to the Court, while, for its part, the Security Council has almost invariably failed to make recommendations for such referral ; this may be deplored, but should not be ignored as an indication of the relative cogency of the rule.

58. Under the United Nations system, where the maintenance of international peace and security falls within the functions of the Security

Council, resort to force as a means of self-defence is permissible only until such time as the Security Council has taken the necessary measures, and any measures taken by the member State in the exercise of its right of self-defence must be reported immediately to the Security Council. This would mean, in my view, that a dispute in which use of force is resorted to is in essence and *in limine* one most suitable for settlement by a political organ such as the Security Council, but is not necessarily a justiciable dispute such as falls within the proper functions of the judicial organ.

59. I certainly am not suggesting any principle that, once a dispute has been brought before the Security Council, or considered through regional negotiations, it cannot or should not be dealt with by the Court. The 1984 Judgment was quite correct in stating that "the fact that the matter is before the Security Council should not prevent it being dealt with by the Court and both proceedings could be pursued *pari passu*" (*I.C.J. Reports 1984*, p. 433). Yet the international community, or the States Members of the League of Nations or the United Nations, have always been aware that certain disputes are more properly resolved by a means other than judicial settlement, that is, by the Council in the case of the League of Nations and the Security Council or the General Assembly in the case of the United Nations, or by some other means. The parallel scheme pursued under the League of Nations and the United Nations is surely confirmed by a scrutiny of the precedents, in the previous and present Courts.

60. The case of *United States Diplomatic and Consular Staff in Tehran* has often been referred to as an instance of a highly political issue having been dealt with by the present Court. Yet the Court then stood seised of the United States Application not because of the Optional Clause, i.e., Article 36, paragraph 2, of the Statute, but on the basis of some multilateral and bilateral treaties to which both Iran and the United States were signatory parties, thus because of Article 36, paragraph 1, of the Statute. It was therefore to *the subject-matter of those treaties* that the Court had to look in order to determine the admissibility of the Application, and it did not have to involve itself, for that particular purpose, in any general considerations of justiciability or propriety.

3. Incomplete picture of the dispute as portrayed by the Court

(i) *Lack of sufficient means for fact-finding*

61. The subject-matters comprised in the dispute at issue are related to the resort to force and intervention that the United States has allegedly undertaken against Nicaragua and to the United States allegation that these measures have been taken as a means of collective self-defence against actions of Nicaragua. Yet the picture which the Court has depicted for the present conflict between the two States seems to be incomplete. The Judgment hinges to a critical extent on the mere assumptions that, while

there may have been a flow of arms from Nicaragua to El Salvador prior to 1981, no significant flow of arms has occurred since that time, and that there has never been any use of force by Nicaragua against El Salvador amounting, in the Court's interpretation, to armed attack. The Judgment states :

> "The Court merely takes note that the allegations of arms-trafficking are not solidly established ; it has *not*, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981." (Para. 153.) (Emphasis added.)

> "[The Court] can only interpret the *lack of evidence* of the trans-border arms-flow in one of the following two ways . . ." (Para. 154.) (Emphasis added.)

> "[T]he Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, *the evidence is insufficient* to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period." (Para. 160.) (Emphasis added.)

The Court has thus frequently had to admit that the evidence, particularly concerning the relevant facts attributable to Nicaragua, is not sufficient.

62. The assertions in the Judgment, based on the evidence presented to the Court, may – or may not – be unchallengeable from the point of view of the Court's procedure on evidence. Be that as it may, the materials available through official publications of the United States Government suggest completely opposite facts. The 13 May 1983 Report of the Permanent Select Committee on Intelligence of the House of Representatives, presented by Nicaragua as evidence, reiterated its early finding that :

> "The insurgents [in El Salvador] are well trained, well equipped with modern weapons and supplies, and rely on the use of sites in Nicaragua for command and control and for logistical support." (P. 5.)

More concretely, the document *Background Paper : Central America* of 27 May 1983 stated in section III that :

> "Throughout 1981, Cuba, Nicaragua and the Soviet bloc aided in rebuilding, rearming and improving the Salvadoran guerrilla forces, which expanded their operations in the fall . . . The FMLN headquarters in Nicaragua evolved into an extremely sophisticated com-

mand-and-control center – more elaborate in fact, than that used by the Sandinistas against Somoza. Guerrilla planning and operations are guided from this headquarters, where Cuban and Nicaraguan officers are involved in command and control. The guidance flows to guerrilla units widely spread throughout El Salvador. The FMLN headquarters in Nicaragua also coordinates propaganda and logistical support for the insurgents, including food, medicines, clothing, money and – most importantly – weapons and ammunition." (P. 6.)

"During the first 3 months of 1982, arms shipments into El Salvador surged. Cuban-Nicaraguan arms flowed through Honduras into El Salvador by sea, air, and overland routes. In February, for example, Salvadoran guerrilla groups picked up a large shipment on the Salvadoran coast, near Usulutan, after the shipment arrived by sea from Nicaragua." (P. 7.)

The document *Background Paper. Nicaragua's Military Build-up and Support for Central American Subversion* of 18 July 1984 offered extensive accounts of "The Nicaraguan Supply Operations for the Salvadoran Guerrillas", "Sources of FMLN Armaments", "Training, Communications, and Staging of the FMLN", "The International Connection", "The Significance of the Subversive Network" and others. The conclusions of this document read in part :

"Guerrilla and Sandinista defectors maintain that the Nicaraguan regime provides the Salvadoran guerrillas communications centers, safehouses, storage of arms, shops for vehicles, and transportation of military supplies . . .

Training of Central American guerrillas has taken place in Nicaragua, Cuba, and Vietnam.

Because of the subversive system involving a number of governments and terrorist organizations centered in Nicaragua, the Sandinista Government is able to threaten neighboring countries and to carry out the threats, indirectly, through one or other of the organizations." (P. 37.)

"Revolution Beyond Our Borders" – Sandinista Intervention in Central America issued in September 1985, addressed to the library of the Court during the oral proceedings on the merits and mentioned in the Judgment (para. 73), reads in part :

"The Sandinistas can no longer deny that they have engaged and continue to engage in intervention by :

– Providing the arms, training areas, command and control facilities, and communications that transformed disorganized factions in El Salvador into a well-organized and -equipped guerrilla force of several thousand responsible for many thousands of civilian casualties and direct economic damages of over $1 billion." (P. 31.)

63. In addition, these elements supplied by the United States were supported in El Salvador's Declaration of Intervention filed with the Court on 15 August 1984, which stated :

"A blatant form of Nicaraguan aggression against El Salvador is the Sandinista involvement in supply operations for the FMLN subversives. Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (Para. VIII.)

"The subversives, aided and abetted by their allies in Nicaragua, have destroyed farms, businesses, bridges, roads, dams, power sources, trains and buses. They have mined our roads in an attempt to disrupt our economy and with the purpose of preventing our citizens from participating effectively in the national elections. The total of the damages produced by the subversion to the Salvadorian economy since 1979 to the end of 1983 has been conservatively estimated to amount to approximately US$800 million." (Para. XI.)

"up to this moment, Nicaragua continues to be the principal source of material assistance to the subversives (munitions, arms, medical supplies, training, etc.) in preparation for the expected general summer offensive, predicted by the very same FMLN" (Para. XIII).

64. The clear discrepancy thus revealed in the assessment of the facts mainly derives from three elements : first, that no counter-claim has ever been presented by the United States against Nicaragua (see (ii) below) ; secondly, that El Salvador was not allowed to intervene in this case when it wished *(ibid.)* ; thirdly, that the United States was absent from the whole of the proceedings on the merits (see (iii) below). These missing elements were of such potential importance that the Court was ill-advised to rely on certain evidence which, had these missing elements been present, would undoubtedly have been tested in a normal adversarial framework. Thus, while I am in no way attempting to suggest that conclusions disseminated by the United States Government outside the courtroom should be accepted as evidence, it is in my view beyond any doubt that the picture of the present dispute painted by the Court is far from the reality. That is clear even if one confines oneself to a scrutiny of the evidence which the United States duly submitted in 1984 together with its Counter-Memor-

ial on jurisdiction and admissibility – evidence to which the Judgment barely alludes. I enlarge upon this view in the following subsections.

(ii) *Nicaragua's Application reflecting only one side of the dispute*

65. If one notes that the conflict in progress between Nicaragua and the United States is not simply one involving accusations levelled by Nicaragua against the United States, but that the accusations made by the United States against Nicaragua may be claimed to be technically not at issue in this case, brought as it is by the one side, and in the absence of formal submissions by the other, it should also be noted that the true facts may have remained hidden behind the scenes. It may be contended that such a problem could have been properly solved if the United States had presented a counter-claim in this case or El Salvador had been allowed to participate ; but the actual situation to be faced is simply that the United States did not bring a counter-claim – whether it could have, under the Statute, in the present case is another matter – and that the Court, in its Order of 4 October 1984, denied El Salvador the right to participate when it wished.

66. Thus I would like here to take the opportunity of expressing regret that, with regard to the attempt of El Salvador to intervene in the earlier phase of the present case, I took a negative position towards granting that State a hearing ; however, as I stated in my separate opinion attached to the Order of 4 October 1984, I did so only for "purely procedural reasons". At any rate, the situation resulting from the absence of any counter-claim by the United States and the frustration, at that stage, of El Salvador's intervention effectively precluded the Court from obtaining a complete picture of the dispute in all the ramifications needed to determine the validity of the United States claim of acting in collective self-defence.

(iii) *Non-participation of the United States in the proceedings – Article 53 of the Statute*

67. In the present case, Nicaragua presented a great amount of evidence to the Court and asked for five witnesses to be heard, but it would certainly not have been expected to provide evidence unfavourable to itself. Owing to the United States failure to participate in the proceedings, the evidence presented by Nicaragua was not challenged, and the witnesses were not subjected to cross-examination, although questions were put from the bench. Moreover, Nicaragua was not obliged to and in fact did not make any comment upon several relevant United States documents, some duly deposited with the Court in 1984.

68. Here I wish to consider the spirit behind the Statute relevant to this

problem. What is laid down in the first paragraph of Article 53 of the Statute originates in a general rule of domestic law. In civil cases in domestic society, the obligation of the defending party to appear before and be subject to the jurisdiction of the court is, in principle, not disputed : and the rule has been established in domestic society that the simple fact of non-appearance of a defendant allows the court to deliver a judgment in favour of the plaintiff. However, inter-State issues in dispute before an international judicial court are placed in a different legal environment in that the jurisdiction of the Court is based upon the consent of sovereign States and compulsory jurisdiction is lacking. The second paragraph of Article 53 is therefore drafted so as to prevent the absolute application of the above rule of domestic law. This provision, whereby the Court is not allowed to pronounce judgment in favour of an applicant for the simple reason that the respondent has not appeared, is unique in procedure before an international judicial forum.

69. This does not however suggest that the Court is *required* to establish *proprio motu* facts on behalf of the absent respondent, or to assume the mantle of a defending counsel. The way in which the Judgment proposes to handle the evidence and information available to it may be correct under the Statute, and the Judgment is right in stating that "the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage" (para. 31). Yet Article 53 by no means prohibits the Court from endeavouring to find facts *proprio motu*, and the facts ascertained by the Court through the procedure of evidence under its interpretation of Article 53 of the Statute and Article 58 of the Rules of Court do not necessarily reflect the true situation of the dispute as a whole. The Court should therefore have been wary of over-facile "satisfaction" as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence.

D. *Concluding Remarks on Non-Justiciability*

70. The present case is characterized by the fact that the dispute at issue, not being a *legal* dispute within the demonstrable meaning of Article 36, paragraph 2, of the Statute, is one which the Respondent had never imagined as falling under the jurisdiction which it had voluntarily accepted. To point this out is not to nullify but to clarify Article 36, paragraph 2, of the Statute. It must be realized that, in accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute, States express their readiness to accept the Court's decision in disputes the scope of which is limited to the issue as to whether or not the right which the Applicant asserts has a ground in international law. A number of disputes of political significance which contain certain legal implications have been reported from every corner of the world for the past six decades, both prior and subsequent to the Second World War. Yet they have not been treated as justiciable

disputes subject to compulsory jurisdiction before the Court or its predecessor under the Optional Clause of the Statute. How then could this particular case have come to be singled out ? Is it because the Court has managed to assume jurisdiction in the present case, in spite of the objections of the United States, through a questionable loophole in Article 36, paragraph 2, of the Statute (not to speak of the questionable loophole which the Court drilled into Article 36, paragraph 5), when jurisdiction should have been based in principle on the sovereign consent or will of the respondent State ?

71. A second characteristic of the present case is that the facts the Court could elicit by examining the evidence under the conditions of Article 53 of the Statute were far from sufficient to show a complete picture of the dispute, because the issues placed before the Court were limited to aspects significantly narrower than the whole.

72. Considering these two characteristics together, I came to the conclusion that it would not be consonant with judicial propriety for the Court to entertain Nicaragua's Application on the basis of the Optional Clause of the Statute. The Court's appropriation of a case against the wish of a respondent State under these circumstances will distort the genuine solution of the dispute. I neither undervalue the sincere intentions of Nicaragua in bringing a dispute of such a massive scale to the Court under the Optional Clause of the Statute nor necessarily support the activities which the United States is pursuing against Nicaragua. In my opinion, however, judicial propriety dictates that the correct manner for dealing with the dispute would have been, and still may prove to be, a conciliation procedure through the political organs of the United Nations or a regional arrangement such as the Contadora Group, and not reference to the International Court of Justice, whose function, which is limited to the purely legal aspect of disputes, has heretofore not been exceeded.

III. Breach of Obligations under the 1956 Treaty of Friendship, Commerce and Navigation – the Court's Appropriation of the Case under Article 36, Paragraph 1, of the Statute

A. The Court's Jurisdiction Granted by Article XXIV, the Compromissory Clause, of the 1956 Treaty

73. The contention that the Court should not be seised of the Nicaraguan Application in so far as it is based on Article 36, paragraph 2, of the Statute does not preclude the Court's seisin on the basis of Article 36,

paragraph 1. The term "all matters" to be comprised by the jurisdiction of the Court under Article 36, paragraph 1, of the Statute is different from "all legal disputes" under Article 36, paragraph 2, since the former, "provided for in the Charter of the United Nations or in treaties and conventions in force", are specified in concrete terms in each instrument, no matter whether legal or political, and thus there will be no supervening question of justiciability, as I stated above (para. 60) in connection with the case of *United States Diplomatic and Consular Staff in Tehran.*

74. In fact, the 1956 Treaty of Friendship, Commerce and Navigation was not mentioned at all in Nicaragua's Application, even though the compromissory clause of the Treaty reads :

> "*Article XXIV*
>
> 2. 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."

Nevertheless, considering that

> "the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial" (*I.C.J. Reports 1984,* p. 426),

the Court found in the operative parts of its 1984 Judgment that it had

> "jurisdiction to entertain the Application . . . in so far as that Application relates to a dispute concerning the interpretation or application of the [1956] Treaty of Friendship, Commerce and Navigation" (*ibid.,* p. 442, para. 113 (1) *(b)*).

With regard to a precondition of adjustment by diplomacy, the Court was of the view in 1984 that :

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (*ibid.,* p. 428).

In 1984, the Court thus confirmed its jurisdiction under the 1956 Treaty on "any dispute between [Nicaragua and the United States] as to the interpretation or application of the Treaty".

B. The Court's Partial Reversion to Jurisdiction under Article 36, paragraph 2, of the Statute in Relation to the Treaty

75. If the Court remained duly seised of this case, it was in my view only because the Court's jurisdiction was granted by virtue of Article XXIV of the 1956 Treaty under Article 36, paragraph 1, of the Statute. I further believe that, irrespective of my arguments in opposition to the Judgment, expounded in Parts I and II above, to the effect that the Court should have ceased to entertain the Nicaraguan Application in so far as it is based on Article 36, paragraph 2, of the Statute, the Court has erred in its handling of this Treaty even within the bounds of the jurisdiction under Article 36, paragraph 1, of the Statute which it recognized in 1984 to be the proper basis for its consideration of this Treaty.

76. The Court first identifies "the direct attacks on ports, oil installations, etc." and "the mining of Nicaraguan ports" as activities of the United States "which are such as to undermine the whole spirit of" the 1956 Treaty (para. 275) ; referring to "the acts of economic pressure", the Judgment also states that

> "such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty" (para. 276).

In the Court's view these activities on the part of the United States "were violations of customary international law" (para. 274). Thus the Court attempts to dissociate these issues from the compromissory clause of the 1956 Treaty, and states instead that this particular provision (which, as I have just pointed out, the Judgment in 1984 referred to as a basis for the Court's jurisdiction) does not constitute "a bar to examination of Nicaragua's claims" (para. 274). The Judgment further states that these violations of customary international law cannot be justified under Article XXI (that is, an exclusion clause) of the Treaty.

77. The Judgment then speaks of breaches of concrete provisions of the Treaty, and maintains that

> "the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty" (para. 278)

and that the trade embargo declared by the United States Government on 1 May 1985 "constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty" (para. 279). The relevant provisions, quoted in the Judgment, read :

"*Article XIX*

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

. . . .

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 . . ."

78. The Court comes to a conclusion that

"the United States [on the one hand] is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and [on the other hand] has committed acts which are in contradiction with the terms of the Treaty" (para. 280).

Thus the Judgment appears to be very confused, as it partially reverts to the Court's jurisdiction under Article 36, paragraph 2, of the Statute by speaking of the customary law rule not to defeat the object and purpose of a treaty despite the fact that it, quite properly, adjudges breaches of the terms of the 1956 Treaty on the basis of Article 36, paragraph 1.

C. Misconception of the Customary-Law Rule not to Defeat the "Object and Purpose" of a Treaty

79. It appears to me that the Court exceeds its powers in examining the question of a "duty not to deprive the 1956 FCN Treaty of its object and purpose" (para. 280). The "undermin[ing of] the whole spirit" (para. 275) of a treaty or "violation of the obligation not to defeat the object and purpose of" (para. 276) a treaty is not tantamount to specific breach of the treaty obligations. But it is the fulfilment of those obligations, and of those alone, that may be subject to the Court's jurisdiction under Article XXIV, the compromissory clause in the Treaty. The Court, therefore, should simply have taken a decision as to whether the United States had breached the terms of the 1956 Treaty and thus incurred responsibility for the violation of international law.

80. The Court appears to have been misled by speaking of the customary law rule concerning respect for "the whole spirit" or "the object and purpose" of the treaty. The term "the object and/or purpose of the treaty" is referred to several times in the 1969 Vienna Convention on the Law of Treaties but only for the purpose of indicating first, that a reservation to a treaty is impermissible unless it is compatible with "the object and purpose of the treaty" (Art. 19), or, second, that multilateral treaties may only be modified as between certain of the parties if the modification "does

not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (Art. 41), and, third, in connection with the termination or suspension of the operation of a treaty as a consequence of its breach. The Convention stipulates in the latter connection that :

> *"Article 60*
>
> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> . . . .
>
> 3. A material breach of a treaty, for the purpose of this article, consists in :
>
> . . . .
>
> *(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

Here it is important to emphasize the reference to the *violation of a provision* in paragraph 3 *(b)*. All that the Convention is here seeking to establish is that there is a degree of such violation justifying termination or suspension, and that the touchstone of that degree is that the *provision* violated should be essential to the accomplishment of the treaty's object and purpose. There is no suggestion that the undermining of the object and/or purpose, *independently* of any breach of a provision, would be tantamount in itself to a violation of the Treaty.

81. Thus the Court appears to have misinterpreted the words "the object and purpose" of a treaty, as introduced by the 1969 Convention on the Law of Treaties in a completely different context. Independently of that Convention, it is noted that the Court attributes to Nicaragua an argument to the effect that abstention from conduct likely to defeat the object and purpose of a treaty is an obligation implicit in the principle *pacta sunt servanda*. However, the Judgment does not make it clear whether it is espousing this point of view. In any case, I would like to take this opportunity of indicating my own understanding of this principle, which to my mind requires compliance with the letter of obligations subscribed to, and not necessarily the avoidance of conduct not expressly precluded by the terms of the given treaty. It may furthermore be asked where the jurisdiction granted by a treaty clause would ever end if it were held to entitle the Court to scrutinize any act remotely describable as inimical to the object and purpose of the treaty in question. The ultimate result of so sweeping an assumption could only be an increasing reluctance on the part of States to support the inclusion of such clauses in their treaties.

82. All this may be said without in any way condoning or minimizing the gravity of any action which does in fact thwart the purpose of a treaty.

D. Breaches of the Terms of the 1956 Treaty

1. Breaches of Article XIX of the Treaty

83. If the Court is duly seised of Nicaragua's Application on the basis of Article 36, paragraph 1, of the Statute, the Court should have more clearly declared what United States actions, unjustifiable by reference to Article XXI (to which I shall refer in paras. 85-89) of the 1956 Treaty of Friendship, Commerce and Navigation, constituted breaches of the treaty obligations incumbent upon the United States under specific provisions of that Treaty. The Judgment refers in its reasoning to a few activities of the United States as constituting breaches of the 1956 Treaty. As stated above (para. 77), the laying of mines in early 1984 and the trade embargo on 1 May 1985 are thus mentioned.

84. The Judgment does not in its reasoning identify any other types of action taken by the United States as constituting breaches of treaty obligations under the Treaty. In the operative part of the Judgment, however, the Court lists not only "laying mines" (para. 292 (7)) and the "general embargo on trade" (para. 292 (11)) but also "the attacks on Nicaraguan territory" *(ibid.)* as breaches of the United States obligations under Article XIX of the Treaty. No reasoning is given as to how the attacks on Nicaraguan territory constituted a violation of that Article, which is exclusively devoted to matters of maritime commerce.

2. Applicability of Article XXI of the Treaty

85. The question which remains is whether, in case the United States has breached the provisions of Article XIX of the 1956 Treaty, these actions could have been justified for the reasons specified in Article XXI of the Treaty, which provides :

> "1. The present Treaty shall not preclude the application of measures :
>
> . . . .
>
> *(c)* regulating the production of or traffic in arms, ammunition and implements of war, . . .
>
> *(d)* necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

The Court's treatment of this provision involves, in my view, a *non sequitur* when it states :

> "The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on alle-

> gation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be 'measures . . . necessary to protect' essential security interests." (Para. 271.)

Article XXI is meant, in my view, to absolve either treaty partner from responsibility in the event of its having applied certain measures which, had they not possessed the character described, would have conflicted with any obligations imposed in any provisions of the Treaty, and not to afford "a defence to a claim under customary international law" as the Judgment states.

86. I must now, for the sake of clarity, recapitulate the argument of the Judgment in respect of Article XXI. Considering "whether the exceptions in Article XXI, paragraphs 1 *(c)* and 1 *(d)*, . . . may be invoked to justify the acts complained of", the Judgment includes in these acts "the direct attacks on ports, oil installations, etc. ; the mining of Nicaraguan ports ; and the general trade embargo of 1 May 1985" (para. 280). The "direct attacks on ports, oil installations, etc.", which were not mentioned at all as constituting breaches of the terms of the 1956 Treaty in any preceding part of the Judgment, are suddenly placed in this context.

87. As the Court finds that "laying mines" and the "general trade embargo" constitute violations of Article XIX, it has to examine whether these acts were justifiable or not under Article XXI. The Court considers that

> "the mining of Nicaraguan ports . . . cannot possibly be justified as 'necessary' to protect the essential security interests of the United States" (para. 282).

With regard to the trade embargo, the Court is also "unable to find that the embargo was 'necessary' to protect those interests" (para. 282). In conclusion, the Judgment suggests that "Article XXI affords no defence for the United States in respect of any of the actions here under consideration" *(ibid.)*. The Judgment states :

> "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests." (Para. 282.)

88. Now, whatever the situation with regard to the laying of mines (see para. 89 below), I totally fail to understand what the Court has attempted to contend in connection with the trade embargo ordered on 1 May 1985. From my point of view, the United States decision on a trade embargo,

quite unlike that on laying of mines, is open to justification under Article XXI. Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty to which that State is a party, and can be suspended under certain circumstances expressly specified in that treaty. In fact, the United States, when declaring a trade embargo on 1 May 1985, did not announce its reliance on this particular provision of the Treaty, but, instead, gave notice on the same day to terminate the Treaty. Even so, I am inclined to maintain that, in principle, the trade assured by Article XIX, paragraph 3, of the Treaty, could also justifiably have been suspended in reliance on another provision, Article XXI, of the same Treaty.

89. "Laying mines" is totally different, in that it is illegal in the absence of any justification recognized in international law, while Article XXI of the Treaty, being simply one provision in a commercial treaty, can in no way be interpreted to justify a State party in derogating from this principle of general international law. I must add that this action did not meet the conditions of necessity and proportionality that may be required as a minimum in resort to the doctrine of self-defence under general and customary international law. I thus conclude that, under the jurisdiction granted to the Court by Article XXIV of the 1956 Treaty, the Court should have found the United States responsible only for violation of Article XIX by laying mines in Nicaraguan waters. It was for this reason only that I voted for subparagraph (14) in the operative clause.

IV. Supplementary Observations

90. Since I hold the view that the Court should have dismissed the Nicaraguan Application so far as it is based on Article 36, paragraph 2, of the Statute, I have refrained from making comments on the doctrines of non-use of force, non-intervention, etc., which the Court has expounded. However, I would like to express just one of my concerns, namely that the Court was so precipitate in giving its views on collective self-defence justifying the use of force which would otherwise have been illegal.

91. The term "collective self-defence", unknown before 1945, was not found in the Dumbarton Oaks proposals which were prepared by the four big Powers to constitute a basis for a general international organization in the post-war period. The deliberations on Chapter VIII, Section C, of the Dumbarton Oaks proposals concerning regional arrangements were entrusted, at the San Francisco Conference in 1945, to Commission III (Security Council), Committee 4 (Regional arrangements). On 17 May 1945, in this Committee, the United States representative observed that his delegation was "now prepared to submit a formula regarding the relationship of regional agencies to the world Organization" (*United Nations*

Conference on International Organization, Vol. 12, p. 674). This United States formula had already been announced by Stettinius, the United States Secretary of State, on 15 May 1945 as follows :

> "As a result of discussions with a number of interested delegations, proposals will be made to clarify in the Charter the relationship of regional agencies and collective arrangements to the world Organization.
>
> These proposals will :
>
> . . . .
>
> 2. Recognize that *the inherent right of self-defense, either individual or collective,* remains unimpaired in case the Security Council does not maintain international peace and security and an armed attack against a member state occurs . . .
>
> The second point will be dealt with by an addition to chapter VIII of a new section substantially as follows :
>
> Nothing in this Charter impairs *the inherent right of self-defense, either individual or collective,* in the event that the Security Council does not maintain international peace and security and an armed attack against a member state occurs . . ." (*Documents on American Foreign Relations,* Vol. VII, 1944-1945, p. 434.) (Emphasis added.)

92. On 23 May 1945, a subcommittee on the Amalgamation of Amendments unanimously recommended to Committee 4 :

> "2. That a new paragraph be inserted into the language of the Dumbarton Oaks Proposals, in accordance with a further suggestion in the United States proposal for the amalgamation of amendments to Chapter VIII, Section C, reading as follows :
>
> 'Nothing in this Charter impairs *the inherent right of individual or collective self-defense* if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain international peace and security . . .' "
>
> (*United Nations Conference on International Organization,* Vol. 12, p. 848.) (Emphasis added.)

93. Committee 4, at its fourth meeting on 25 May 1945, unanimously approved the following decision :

> "That a new paragraph be inserted in the text of the Dumbarton Oaks Proposals, to read as follows :
>
> '*Nothing in this Charter impairs the inherent right of the individual or collective self-defense if an armed attack occurs against a member*

> *state,* until the Security Council has taken the measures necessary to maintain international peace and security . . .' " (*United Nations Conference on International Organization,* Vol. 12, p. 680.) (Emphasis added.)

The emphasized part of this quotation was expressed in the French version as follows :

> "Aucune disposition de la présente Charte ne peut porter atteinte au droit naturel de tout Etat Membre de se défendre, par une action individuelle ou collective, contre une agression armée." (*Ibid.,* p. 691.)

In connection with this decision, the Chairman, speaking as the delegate of Colombia, made the following statement :

> "The Latin American Countries understood, as Senator Vandenberg [a delegate of the United States] had said, that the origin of the term 'collective self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimatizes the right of collective self-defense to be carried out in accord with regional pacts so long as they are not opposed to the purposes and principles of the Organization as expressed in the Charter. If a group of countries with regional ties declare their solidarity for their mutual defense, as in the case of the American States, they will undertake such defense jointly if and when one of them is attacked. And the right of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity through regional arrangements, with the country directly attacked." (*Ibid.,* p. 680.)

After the exchange of opinions, particularly among the Latin American delegates, "the Chairman paid tribute at this point to the work of Senator Vandenberg [of the United States] in the elaboration of the new text" (*ibid.,* p. 682). Senator Vandenberg replied that "in his opinion the unanimity expressed by voice and vote on this question was a signpost towards a peaceful world with justice for free men in a free earth" (*ibid.*). Thus the concepts of individual or collective self-defence were incorporated into the United Nations Charter, at the suggestion of the United States, without much discussion. Hence Article 51 of the Charter reads :

> "Nothing in the present Charter shall impair *the inherent right of individual or collective self-defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken necessary measures to maintain international peace and security . . ." (Emphasis added.)

This text is practically identical to the one adopted by Committee 4 but the French version is different :

> "Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée . . ."

It is to be noted that the reflexive verb "se défendre" (corresponding to the English "self-defence") has disappeared in this version, so that it no longer appears that the invocation of individual or collective defence is the exclusive prerogative of the State directly attacked.

94. At all events, there was certainly no discussion whether the right of *collective* self-defence was *inherent* or not. If there was any statement that the right of self-defence is inherent, this goes back to 1928, when at the time of the preparation of the 1928 Multilateral Treaty for the Renunciation of War the United States Government sent notes to various governments on 23 June 1928, which read :

> "There is nothing in the American draft of anti-war treaty which restricts or impairs in any way the right of self-defense. That right is *inherent* in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." (*American Journal of International Law, Supplement,* Vol. 22, p. 109.) (Emphasis added.)

A fortiori, the idea that the right of *collective* self-defence is *inherent* is certainly not traceable up to 1928, and so far as the proceedings of the San Francisco Conference indicate, there was hardly any discussion on this point in 1945.

95. After recalling that "the Charter [of the United Nations] itself testifies to the existence of the right of collective self-defence in customary international law" (para. 193), and that the General Assembly resolution containing the Declaration on the principles of international law concerning friendly relations and co-operation among States

> "demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law" *(ibid.),*

the present Judgment states that

> "Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred." (Para. 194.)

Referring to a precondition required for the exercise of collective self-defence, the Judgment remarks :

> "Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack." (Para. 195.)

And it goes on to mention a second condition :

> "The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked." (Para. 199.)

The Judgment also draws certain inferences from a further requirement imposed by the Charter of the United Nations for the exercise of the right of self-defence under Article 51, namely that : "measures taken by States in exercise of this right of self-defence must be 'immediately reported' to the Security Council" (para. 200).

96. The concept of *collective* self-defence has been the subject of extensive discussion among the scholars of international law for the past several decades. It is well known that speaking of "inherent" right of self-defence, Kelsen stated :

> "This is a theoretical opinion of the legislator which has no legal importance. The effect of Article 51 would not change if the term 'inherent' were dropped." (*The Law of the United Nations*, 1950, p. 791.)

Julius Stone held the view :

> "In its form as reserving a preexisting right of 'collective self-defence', Article 51 presents such insoluble problems that it may seem better to treat the term 'inherent' as otiose, and regard Article 51 as itself conferring the liberties there described." (*Legal Controls of International Conflict*, 1954, p. 245.)

I do not attempt to suggest that these views necessarily reflect the leading school of thought. Yet the Court should have been aware of so much discussion, either for or against, on the inherent right of *collective* self-

defence. Attention should also be paid to the difference in connotations of the English and French texts of Article 51 of the United Nations Charter.

97. In sum even if it was necessary for the Court to take up the concept of collective self-defence – and I do not agree that it was – this concept should have been more extensively probed by the Court in its first Judgment to broach the subject.

(Signed) Shigeru ODA.