

**CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA)
(JURISDICTION AND ADMISSIBILITY)**

Judgment of 26 November 1984

In this judgment, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), the Court found, by fifteen votes to one, that it had jurisdiction to entertain the case and, unanimously, that the Application filed by Nicaragua against the United States of America was admissible.

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The complete text of the operative part of the Judgment, with the voting figures, is as follows:

“THE COURT,

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

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

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

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

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

“AGAINST: *Judges* Ruda and Schwebel;

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

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

“AGAINST: *Judge* Schwebel;

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

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The Court was composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge ad hoc* Colliard.

Judges Nagendra Singh, Ruda, Mosler, Oda, Ago and Sir Robert Jennings appended separate opinions to the Judgment.

Judge Schwebel appended a dissenting opinion to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

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Proceedings and Submissions of the Parties
(paras. 1–11)

After recapitulating the various stages in the proceedings and setting out the submissions of the Parties (paras. 1–10), the Court recalls that the case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America arising out of military and paramilitary activities in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase, the case concerns the Court’s jurisdiction to entertain and pronounce upon this dispute, as well as the admissibility of Nicaragua’s Application referring it to the Court (para. 11).

I. *The question of the jurisdiction of the Court to entertain the dispute*
(paras. 12–83)

A. *The declaration of Nicaragua and Article 36, paragraph 5, of the Statute of the Court*
(paras. 12–51)

To found the jurisdiction of the Court, Nicaragua relied on Article 36 of the Statute of the Court and the declarations accepting the compulsory jurisdiction of the Court made by the United States and itself.

The relevant texts and the historical background to Nicaragua’s declaration
(paras. 12–16)

Article 36, paragraph 2, of the Statute of the International Court of Justice provides that:

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

“(a) the interpretation of a treaty;

“(b) any question of international law;

“(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

“(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

On 14 August 1946, under this provision, the United

States made a declaration containing reservations which will be described further below. In this declaration, it stated that:

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

On 6 April 1984 the Government of the United States deposited with the Secretary-General of the United Nations a notification signed by the Secretary of State, Mr. George Shultz (hereinafter referred to as “the 1984 notification”), referring to the declaration of 1946, and stating that:

“the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

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

In order to be able to rely upon the United States declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a “State accepting the same obligation” as the United States within the meaning of Article 36, paragraph 2, of the Statute.

For this purpose, it relies on a declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, the predecessor of the present Court, which provided that:

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

in any of the same categories of dispute as listed in Article 36, paragraph 2, of the Statute of the present Court.

Nicaragua relies further on Article 36, paragraph 5, of the Statute of the present Court, which provides that:

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

The Judgment recalls the circumstances in which Nicaragua made its declaration: on 14 September 1929, as a member of the League of Nations, it signed the Protocol of Signature of the Statute of the Permanent Court of International Justice:¹ this Protocol provided that it was subject to ratification and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929 Nicaragua deposited with the Secretary-General of the League a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which reads:

¹While a State admitted to membership of the United Nations automatically becomes a party to the Statute of the International Court of Justice, a State member of the League of Nations only became a party to that of the Permanent Court of International Justice if it so desired, and, in that case, it was required to accede to the Protocol of Signature of the Statute of the Court.

[*Translation from the French*]

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

Geneva, 24 September 1929

(Signed) T. F. MEDINA”

The national authorities in Nicaragua authorized its ratification, and, on 29 November 1939, the Ministry of Foreign Affairs of Nicaragua sent a telegram to the Secretary-General of the League of Nations advising it of the despatch of the instrument of ratification. The files of the League, however, contain no record of an instrument of ratification ever having been received and no evidence has been adduced to show that such an instrument of ratification was ever despatched to Geneva. After the Second World War, Nicaragua became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

The arguments of the Parties
(paras. 17–23)
and the reasoning of the Court
(paras. 24–42)

This being the case, the United States contends that Nicaragua never became a party to the Statute of the Permanent Court and that its 1929 declaration was therefore not “still in force” within the meaning of the English text of Article 36, paragraph 5, of the Statute of the present Court.

In the light of the arguments of the United States and the opposing arguments of Nicaragua, the Court sought to determine whether Article 36, paragraph 5, could have applied to Nicaragua’s declaration of 1929.

The Court notes that the Nicaraguan declaration was valid at the time when the question of the applicability of the new Statute, that of the International Court of Justice, arose, since under the system of the Permanent Court of International Justice a declaration was valid only on condition that it had been made by a State which had signed the Protocol of Signature of the Statute. It had not become binding under that Statute, since Nicaragua had not deposited its instrument of ratification of the Protocol of Signature and it was therefore not a party to the Statute. However, it is not disputed that the 1929 declaration could have acquired binding force. All that Nicaragua need have done was to deposit its instrument of ratification, and it could have done that at any time until the day on which the new Court came into existence. It follows that the declaration had a certain potential effect which could be maintained for many years. Having been made “unconditionally” and being valid for an unlimited period, it had retained its potential effect at the moment when Nicaragua became a party to the Statute of the new Court.

In order to reach a conclusion on the question whether the effect of a declaration which did not have binding force at the time of the Permanent Court could be transposed to the International Court of Justice through the operation of Article 36, paragraph 5, of the Statute of that body, the Court took several considerations into account.

As regards the French phrase “*pour une durée qui n’est pas encore expirée*” applying to declarations made under the former system, the Court does not consider it to imply that “*la durée non expirée*” (the unexpired period) is that of a commitment of a binding character. The deliberate choice of the expression seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations

which have not acquired binding force. The English phrase "still in force" does not expressly exclude a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of binding character.

With regard to the considerations governing the transfer of the powers of the former Court to the new one, the Court takes the view that the primary concern of those who drafted its Statute was to maintain the greatest possible continuity between it and the Permanent Court and that their aim was to ensure that the replacement of one Court by another should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. The logic of a general system of devolution from the old Court to the new resulted in the ratification of the new Statute having exactly the same effects as those of the ratification of the Protocol of Signature of the old Statute, i.e., in the case of Nicaragua, a transformation of a potential commitment into an effective one. Nicaragua may therefore be deemed to have given its consent to the transfer of its declaration to the International Court of Justice when it signed and ratified the Charter, thus accepting the Statute and its Article 36, paragraph 5.

Concerning the publications of the Court referred to by the Parties for opposite reasons, the Court notes that they have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. The attestations furnished by these publications have been entirely official and public, extremely numerous and have extended over a period of nearly 40 years. The Court draws from this testimony the conclusion that the conduct of States parties to the Statute has confirmed the interpretation of Article 36, paragraph 5, of the Statute, whereby the provisions of this Article cover the case of Nicaragua.

The conduct of the Parties
(paras. 43–51)

Nicaragua also contends that the validity of Nicaragua's recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties. It argues that its conduct over 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court and that the conduct of the United States over the same period unequivocally constitutes its recognition of the validity of the declaration of Nicaragua of 1929 as an acceptance of the compulsory jurisdiction of the Court. The United States, however, objects that the contention of Nicaragua is inconsistent with the Statute, and in particular that compulsory jurisdiction must be based on the clearest manifestation of the State's intent to accept it. After considering Nicaragua's particular circumstances and noting that Nicaragua's situation has been wholly unique, the Court considers that, having regard to the source and generality of statements to the effect that Nicaragua was bound by its 1929 declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. It further considers that the estoppel on which the United States has relied, and which would have barred Nicaragua from instituting proceedings against it in the Court, cannot be said to apply to it.

Finding: the Court therefore finds that the Nicaraguan declaration of 1929 is valid and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute

of the Court, a "State accepting the same obligation" as the United States at the date of filing of the Application and could therefore rely on the United States declaration of 1946.

B. *The declaration of the United States*
(paras. 52–76)

The notification of 1984
(paras. 52–66)

The acceptance of the jurisdiction of the Court by the United States on which Nicaragua relies is the result of the United States declaration of 14 August 1946. However, the United States argues that effect should be given to the letter sent to the Secretary-General of the United Nations on 6 April 1984 (see p. 4 above). It is clear that if this notification were valid as against Nicaragua at the date of filing of the Application, the Court would not have jurisdiction under Article 36 of the Statute. After outlining the arguments of the Parties in this connection, the Court points out that the most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the six months' notice clause which, freely and by its own choice, it has appended to its declaration, in spite of the obligation it has entered into *vis-à-vis* other States which have made such a declaration. The Court notes that the United States has argued that the Nicaraguan declaration, being of undefined duration, is liable to immediate termination, and that Nicaragua has not accepted "the same obligation" as itself and may not rely on the time-limit proviso against it. The Court does not consider that this argument entitles the United States validly to derogate from the time-limit proviso included in its 1946 declaration. In the Court's opinion, the notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. Reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration. The United States cannot rely on reciprocity since the Nicaraguan declaration contains no express restriction at all. On the contrary, Nicaragua can invoke the six months' notice against it, not on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it. The 1984 notification cannot therefore override the obligation of the United States to submit to the jurisdiction of the Court *vis-à-vis* Nicaragua.

The United States multilateral treaty reservation
(paras. 67–76)

The question remains to be resolved whether the United States declaration of 1946 constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States had invoked proviso (c) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

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

This reservation will be referred to as the "multilateral treaty reservation".

The United States argues that Nicaragua relies in its Application on four multilateral treaties, and that the Court, in view of the above reservation, may exercise jurisdiction only

if all treaty parties affected by a prospective decision of the Court are also parties to the case.

The Court notes that the States which, according to the United States, might be affected by the future decision of the Court, have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, any time, to come before the Court with an application instituting proceedings, or to resort to the incidental procedure of intervention. These States are therefore not defenceless against any consequences that may arise out of adjudication by the Court and they do not need the protection of the multilateral treaty reservation (insofar as they are not already protected by Article 59 of the Statute). The Court considers that obviously the question of what States may be affected is not a jurisdictional problem and that it has no choice but to declare that the objection based on the multilateral treaty reservation does not possess, in the circumstances of the case, an exclusively preliminary character.

Finding: the Court finds that, despite the United States notification of 1984, Nicaragua's Application is not excluded from the scope of the acceptance by the United States of the compulsory jurisdiction of the Court. The two declarations afford a basis for its jurisdiction.

C. *The Treaty of Friendship, Commerce and Navigation of 21 January 1956 as a basis of jurisdiction* (paras. 77-83)

In its Memorial, Nicaragua also relies, as a "subsidiary basis" for the Court's jurisdiction in this case, on the Treaty of Friendship, Commerce and Navigation which it concluded at Managua with the United States on 21 January 1956 and which entered into force on 24 May 1958. Article XXIV, paragraph 2, reads as follows:

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

Nicaragua submits that this treaty has been and is being violated by the military and paramilitary activities of the United States as described in the Application. The United States contends that, since the Application presents no claims of any violation of the treaty, there are no claims properly before the Court for adjudication, and that, since no attempt to adjust the dispute by diplomacy has been made, the compromissory clause cannot operate. The Court finds it necessary to satisfy itself as to jurisdiction under the treaty inasmuch as it has found that the objection based upon the multilateral treaty reservation in the United States declaration does not debar it from entertaining the Application. In the view of the Court, the fact that a State has not expressly referred, in negotiations with another States, to a particular treaty as having been violated by the conduct of that other State, does not debar that State from invoking a compromissory clause in that treaty. Accordingly, the Court finds that it has jurisdiction under the 1956 Treaty to entertain the claims made by Nicaragua in its Application.

II. *The question of the admissibility of Nicaragua's Application* (paras. 84-108)

The Court now turns to the question of the admissibility of Nicaragua's Application. The United States contended that it is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether

considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function".

The *first ground of inadmissibility* (paras. 85-88) put forward by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. In this connection, the Court recalls that it delivers judgments with binding force as between the Parties in accordance with Article 59 of the Statute, and that States which consider they may be affected by the decision are free to institute separate proceedings or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. None of the States referred to can be regarded as being in a position such that its presence would be truly indispensable to the pursuance of the proceedings.

The *second ground of inadmissibility* (paras. 89-90) relied on by the United States is that Nicaragua is, in effect, requesting that the Court in this case determines the existence of a threat to peace, a matter falling essentially within the competence of the Security Council because it is connected with Nicaragua's complaint involving the use of force. The Court examines this ground of inadmissibility at the same time as the *third ground* (paras. 91-98) based on the position of the Court within the United Nations system, including the impact of proceedings before the Court on the exercise of the inherent right of individual or collective self-defence under Article 51 of the Charter. The Court is of the opinion that the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court and that both proceedings could be pursued *pari passu*. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events. In the present case, the complaint of Nicaragua is not about an ongoing war of armed conflict between it and the United States, but about a situation demanding the peaceful settlement of disputes, a matter which is covered by Chapter VI of the Charter. Hence, it is properly brought before the principal judicial organ of the United Nations for peaceful settlement. This is not a case which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter.

With reference to Article 51 of the Charter, the Court notes that the fact that the inherent right of self-defence is referred to in the Charter as a "right" is indicative of a legal dimension, and finds that if, in the present proceedings, it became necessary for the Court to judge in this respect between the Parties, it cannot be debarred from doing so by the existence of a procedure requiring that the matter be reported to the Security Council.

The *fourth ground of inadmissibility* (paras. 99-101) put forward by the United States is the inability of the judicial function to deal with situations involving ongoing armed conflict, since the resort to force during an ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal. The Court observes that any judgment on the merits is limited to upholding such submissions of the Parties as has been supported by sufficient proof of relevant facts and that ultimately it is the litigant who bears the burden of proof.

Separate Opinion by Judge Nagendra Singh

The *fifth ground of inadmissibility* (paras. 102–108) put forward by the United States is based on the non-exhaustion of the established processes for the resolution of the conflicts occurring in Central America. It contends that the Nicaraguan Application is incompatible with the Contadora process to which Nicaragua is a party.

The Court recalls its earlier decisions that there is nothing to compel it to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects (*United States Diplomatic and Consular Staff in Tehran case, I.C.J. Reports 1980*, p. 19, para. 36), and the fact that negotiations are being actively pursued during the proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function (*Aegean Sea Continental Shelf case, I.C.J. Reports 1978*, p. 12, para. 29). The Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of Nicaragua's Application.

The Court is therefore unable to declare the Application inadmissible on any of the grounds the United States has advanced.

Findings (paras. 109–111)

Status of the provisional measures (para. 112)

The Court states that its Order of 10 May 1984 and the provisional measures indicated therein remain operative until the delivery of the final judgment in the case.

OPERATIVE PROVISIONS OF THE
COURT'S JUDGMENT

THE COURT,

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

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

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

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

AGAINST: *Judges Ruda and Schwebel;*

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

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

AGAINST: *Judge Schwebel;*

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

While Judge Nagendra Singh has voted for the jurisdiction of the Court on both counts, namely under the Optional Clause of Article 36, paragraphs 2 and 5, of the Statute of the Court, as well as under Article 36, paragraph 1, of the Statute on the basis of Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation of 21 January 1956, he has felt all along in those proceedings that the jurisdiction of the Court resting upon the latter, namely the Treaty, provides a clearer and a firmer ground than the Jurisdiction based on the Optional Clause of Article 36 (2) and (5) of the Statute. The difficulties which confront the Court in relation to the imperfect acceptance of the jurisdiction by Nicaragua and the unwilling response from the United States, as revealed by its declaration of 6 April 1984 intended to bar the Court's jurisdiction in relation to any dispute with the Central American States for a period of two years. In addition there is also the question of reciprocity in relation to six months' notice of termination stipulated in the United States declaration of 14 August 1946. On the other hand, the Treaty of 1956 does provide a clear jurisdictional base, although the field of the jurisdiction is restricted to disputes concerning the interpretation and application of that Treaty. However, the said jurisdiction is not subject to the multilateral treaty reservation of the United States, which is applicable to the Court's jurisdiction under the Optional Clause of Article 36(2) of the Statute. Another helpful feature of the jurisdiction based on the Treaty of 1956 is that it would help to specify and legally channelise the issues of the dispute. The Parties will have to come to the Court under the Treaty, invoking legal principles and adopting legal procedures which would helpfully place legal limits to the presentation of this sprawling dispute, which could otherwise take a non-legal character, thus raising the problem of sorting out what is justiciable as opposed to non-justiciable matters being brought before the Court. He concludes, therefore, that the jurisdiction of the Court as based on the Treaty is clear, convincing and reliable. Nicaragua will now have to spell out clearly and specifically the violations of the Treaty involving its interpretation and application when the Court proceeds to consider the merits of the case.

Separate Opinion by Judge Ruda

The separate opinion of Judge Ruda, who concurred in the Court's finding that it had jurisdiction to entertain the Application, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court, concerns three points: the Treaty of Friendship, Commerce and Navigation of 1956 as a basis of the Court's jurisdiction, the reservation contained in proviso (c) of the United States declaration of 1946, and the conduct of States as a basis for the Court's jurisdiction.

In regard to the first point, Judge Ruda maintains that the Parties have not fulfilled the conditions set forth in Article XXIV of the Treaty, which therefore cannot serve as a basis for the jurisdiction of the Court.

In regard to the second point, he considers that the reservation contained in proviso (c) of the declaration is not applicable in the present instance because there is not only a dispute between the United States and Nicaragua but also a separate dispute between, on the one hand, Honduras, El Salvador and Costa Rica and, on the other hand, Nicaragua.

In regard to the third point, Judge Ruda is of the opinion that the conduct of States does not constitute an independent

basis for the Court's jurisdiction if there has been no deposit of a declaration accepting the optional clause with the Secretary-General of the United Nations.

Judge Ruda concurs in the Court's interpretation of Article 36, paragraph 5, of the Statute.

Separate Opinion by Judge Mosler

Judge Mosler does not agree with the opinion of the Court that it has jurisdiction on the basis of the Nicaraguan declaration of 1929 relating to the jurisdiction of the Permanent Court of International Justice. In his view the Court possesses jurisdiction only on the basis of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties.

Separate Opinion by Judge Oda

Judge Oda concurs in the conclusion of the Court solely because the case can be sustained under the 1956 Treaty between Nicaragua and the United States. Thus in his view the scope of the case should be strictly limited to any violation of specific provisions of that Treaty.

However, Judge Oda holds the firm view that this case cannot be entertained under the Optional Clause of the Statute, for the following two reasons. First, there is no ground for concluding that Nicaragua can be held to have legal standing in the present proceedings on the basis of the acceptance of the Optional Clause. Secondly, assuming that Nicaragua has legal standing in the present proceedings, the United States by its Shultz letter of 6 April 1984 effectively excluded, before the seisin of the case, the type of dispute at issue from its obligation under the Optional Clause in its relation to Nicaragua: when it is sought to bring a case before the Court under that clause, a provision fixing a certain duration, such as in the United States declaration, cannot, because of the rule of reciprocity, be invoked by another party whose declaration is terminable or amendable at any time.

Separate Opinion by Judge Ago

Judge Ago concurred in the Court's finding that it had jurisdiction to entertain the merits of the case because of his conviction that a valid link of jurisdiction between the Parties was present in Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation concluded between the United States of America and Nicaragua on 21 January 1956. That link, in his view, conferred jurisdiction upon the Court to consider Nicaragua's claims implying breaches of that Treaty by the United States.

Judge Ago did not reach the same conclusion as regards the broader jurisdictional link presented by the Judgment as deducible from the facts concerning the acceptance by both Nicaragua and the United States of the Court's compulsory jurisdiction by unilateral declaration, since he remained unconvinced of the existence of that link either in fact or in law.

Separate Opinion by Judge Sir Robert Jennings

The Court does not have jurisdiction under Article 36, paragraph 5, of its Statute because Nicaragua never became a party to the Statute of the Permanent Court; accordingly, its declaration made under Article 36 of that Court's Statute cannot be one "still in force" in the sense of Article 36, paragraph 5, of the present Court's Statute, because it never was in force. To attempt to support a different view on entries in reference books such as the *Yearbooks* of the Court is wrong in principle and unsupported by the facts relied on.

In any event the letter of 6 April 1984 from the United States Secretary of State bars jurisdiction because the recent practice shows that States have the right to withdraw or alter their optional clause declarations with immediate effect, at any time before an application to the Court based on the declaration.

Sir Robert concurs with the Court's decision in respect of the United States multilateral treaties reservation; and the 1956 Treaty of Friendship, Commerce and Navigation.

Dissenting Opinion by Judge Schwebel

Judge Schwebel dissented from the judgment of the Court, which he found to be "in error on the principal questions of jurisdiction" involved. However, if the Court were correct in finding that it has jurisdiction, then the case would be admissible.

On the question of whether Nicaragua is party to the Court's compulsory jurisdiction under its Optional Clause, and thus has standing to maintain suit against the United States, Judge Schwebel concluded that it is not a party and hence lacks standing. Nicaragua has never adhered to this Court's compulsory jurisdiction under the Optional Clause. It claimed that it nevertheless was party by reason of its 1929 declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice. If the 1929 declaration had come into force, Nicaragua would be deemed party to this Court's compulsory jurisdiction by operation of Article 36, paragraph 5, of this Court's Statute. But Nicaragua's 1929 declaration had never come into force. Under the terms of Article 36, paragraph 5, accordingly it has no period in which it still runs, since it never began to run at all. It has no period which has not yet expired since its declaration never was "inspired".

That this is the correct interpretation of Article 36, paragraph 5, is demonstrated not only by the plain meaning of its text, but by the drafting history of the article at the San Francisco Conference and by four cases of this Court. All, clearly and uniformly, construe Article 36, paragraph 5, as referring exclusively to declarations made under the Statute of the Permanent Court by which States were "bound", i.e., which were in force.

The fact that, for almost 40 years, Nicaragua has been listed in the Yearbook of this Court and elsewhere as bound under the Optional Clause is not sufficient to overturn this conclusion or independently to establish Nicaragua's standing. The Yearbooks have always contained or referred to a footnote warning the reader that Nicaragua's adherence to the Optional Clause was in doubt. Moreover, Nicaragua's conduct has been equivocal. Not only has it failed to manifest its intent to be bound by this Court's compulsory jurisdiction by depositing a declaration. It also evaded obvious occasion for declaring that it recognized itself to be bound under Article 36, paragraph 5, as in the *King of Spain* case.

Even if, however, Nicaragua had standing to maintain suit under the Optional Clause, it may not do so against the United States. Assuming Nicaragua's declaration to be binding, Nicaragua could terminate it at any time with immediate effect. By operation of the rule of reciprocity, the United States likewise could terminate its adherence to the Court's compulsory jurisdiction, *vis-à-vis* Nicaragua, with immediate effect. Thus, while generally the United States could not terminate or modify its adherence to the Court's compulsory jurisdiction—as its notification of April, 1984 purports to do—on less than six months' notice, it could validly do so in relationship to Nicaragua.

In any event, even if the United States could not terminate

its declaration *vis-à-vis* Nicaragua, by the terms of its multilateral treaty reservation to its declaration, the United States is entitled to exclude Nicaragua's reliance in its Application on four multilateral treaties, including the United Nations and OAS Charters, unless all other parties to the treaties affected by the decision are parties to the case. Those parties—as is demonstrated by the pleadings of Nicaragua in the case—are Honduras, Costa Rica and El Salvador. Since those States are not parties, Nicaraguan reliance on those four treaties should have been barred by the Court. However, the Court—erroneously in Judge Schwebel's view—has held that those other States cannot now be identified and appears

to have put off the question of application of the reservation to the stage of the merits.

Finally, in Judge Schwebel's view, the Court does not have jurisdiction over the claims made against the United States by Nicaragua in its Application by reason of their being party to a bilateral Treaty of Friendship, Commerce and Navigation. Nicaragua had failed to pursue the procedural prerequisites for invoking that treaty as the basis of the Court's jurisdiction. More than that, this purely commercial treaty has no plausible relationship to the charges of aggression and intervention made in Nicaragua's Application.