DISSENTING OPINION OF JUDGE SCHWEBEL

I regret that I must dissent from the Court's Order. I dissent because of the decision of the Court not to hold a hearing on the Declaration of Intervention of El Salvador, a decision which departs from the observance of due process of law which the Court has traditionally upheld. Moreover, in the absence of hearing El Salvador, it has not been possible to resolve satisfactorily questions which its Declaration poses. That Declaration raises doubts, but for my part I am unwilling to resolve those doubts against El Salvador without affording it the opportunity of clarifying its position. Accordingly, once the Court declined to hear El Salvador, I felt obliged to vote in favour of admitting its right of intervention under Article 63 of the Statute, even though I recognize that neither the terms of its Declaration nor the law of the matter are altogether clear.

I. The Terms and Meaning of El Salvador's Declaration of Intervention

Article 63 of the Court's Statute provides :

> "1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
>
> 2. Every State so notified has the right to intervene in the proceedings ; but if it uses this right, the construction given by the judgment will be equally binding upon it."

El Salvador filed a Declaration of Intervention under Article 63 on 15 August 1984. Paragraph XIV of that Declaration sets forth what El Salvador maintains are the grounds of its intervention :

> ". . . Nicaragua bases its jurisdictional claim on Article 36 of the Statute of the Court . . . Nicaragua founds its principal claim against the United States on supposed violations of the Charter of the United Nations, the Charter of the Organization of American States, the Convention on Rights and Duties of States, and the Convention Relative to the Duties and Rights of States in the Event of Civil Strife . . .
>
> Assuming *arguendo* the supposed validity of Nicaragua's jurisdictional allegation, El Salvador also is a party to the Statute of the International Court, . . . and . . . the Charter of the United Nations . . . It became a member of the Organization of American States . . . It

became a member of the Convention Relative to the Duties and Rights of States in the Event of Civil Strife . . . It ratified the Convention on Rights and Duties of States . . . Therefore, El Salvador is party to all the multilateral conventions on which Nicaragua alleges the jurisdictional basis of its substantive claims.

These treaties give to El Salvador equally the right to demand that Nicaragua cease in its overt intervention in our internal affairs, and El Salvador considers, and this is a reason for intervening in the case of *Nicaragua* v. *the United States,* that all these multilateral treaties and conventions constitute the lawful mechanisms for the resolution of conflicts, having priority over the assumption of jurisdiction by the International Court of Justice . . .

In the opinion of El Salvador, . . . it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining the legitimacy or the legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua .

. . . . . .

Any case against the United States based on the aid provided by that nation at El Salvador's express request, in order to exercise the legitimate act of self defence, cannot be carried out without involving some adjudication, acknowledgment, or attribution of the rights which any nation has under Article 51 of the United Nations Charter to act collectively in legitimate defence. This makes inadmissible jurisdictional action by the Court in the absence of the participation of Central America and specifically El Salvador, in whose absence the Court lacks jurisdiction.

Finally, El Salvador points to the fact that it has entered a reservation concerning acceptance of the Court's jurisdiction, with specific reference to disputes relating to facts or situations involving hostilities, armed conflicts, individual or collective acts of legitimate defence, resistance to aggression, fulfilment of obligations imposed by international organizations, and other similar acts, measures, or situations in which El Salvador is, has been, or might be an involved party."

This Declaration did not adequately meet the specifications set forth in Article 82, paragraph 2, of the Rules of Court ; in particular, it failed to identify the particular provisions of the conventions whose construction El Salvador considered to be in question, and it did not contain a state-

ment of the construction of those provisions for which El Salvador contends.

However, on 10 September 1984, El Salvador submitted to the Registrar a letter which amplified its Declaration in clearer terms, which conformed to the essential requirements of Article 82, paragraph 2, of the Rules. Paragraphs 1 and 3 of that letter read as follows :

> "1. The construction of international conventions to which El Salvador is a party is centrally involved in the Court's forthcoming consideration of the Jurisdiction of the Court and of the admissibility of Nicaragua's application. El Salvador asserts its automatic right to intervene in this phase or stage of the proceedings in order to address the threshold questions of the construction of Article 36 of the Statute of the Court, and correlatively the construction of the relevant provisions of the Charter of the United Nations, in particular Articles 39, 51 and 52. El Salvador is a party to both these conventions, as set forth in its Declaration. El Salvador will contend that those provisions should be construed to deny the jurisdiction of the Court to consider and apply the conventional principles of international law relied on by Nicaragua to an ongoing armed conflict such as is presently underway in Central America, and will contend that the application of Nicaragua is inadmissible by a process of similar reasoning. El Salvador will particularly contend that this construction is appropriate with respect to Articles 39, 51 and 52 of the Charter, *inter alia,* and to Article 36 of the Statute, because :
>
> – these provisions, properly construed, contemplate that the application of the principles on which Nicaragua relies to an ongoing armed conflict is a political, not a judicial question, and that the exclusive appropriate fora for consideration of the search for peace in ongoing armed conflict is through the established processes of the political organs of the international system ;
>
> – these conventional provisions properly construed deny jurisdiction to the Court with respect to an ongoing armed conflict, make clear that nothing in the Charter including the actions of the Court under the Statute shall affect the right of individual or collective self-defence and make clear that such armed conflict is not a legal dispute within the competence of the Court ; and
>
> – that those provisions properly construed make the States of Central America indispensable parties to any proceeding concerned with the ongoing Central American conflict, and since these States are not parties to the proceeding it cannot go forward.
>
> . . . . . .

> 3. El Salvador thus invokes its right to intervene in a way which strictly conforms to the conditions of Article 63. Its intervention is limited. It seeks to speak only to the construction of the conventions to which it is a party. Thus, it does not propose to address the question whether Nicaragua ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, referred to in the Court's Order of 10 May 1984... El Salvador may address the effectiveness of the declaration of the United States of 6 April 1984, under Article 36, paragraph 2, of the Statute, referred to in... the Order of 10 May 1984, only to the extent that the Court's determination of the question might affect the reservation of El Salvador to the Court's jurisdiction."

It is accordingly clear that El Salvador sought to intervene in the jurisdictional phase of the proceedings between Nicaragua and the United States to argue that a proper construction of Article 36 of the Statute of the Court, and of Articles 39, 51 and 52 of the Charter, debar the Court from addressing the merits of Nicaragua's claims. Its argument appears to be more addressed to the admissibility of the claims of Nicaragua than to the Court's jurisdiction over them ; the principal thrust of El Salvador's contentions is that the resolution of an ongoing armed conflict is remitted to the political organs of the international system (in this case, the United Nations and regional arrangements) rather than to the Court.

However, this does not appear to be the whole of El Salvador's argument, for it also relies on the terms of Article 36 of the Statute and on adherences to the Court's compulsory jurisdiction under the Optional Clause of that article, as well as on provisions of the OAS Charter and two other inter-American conventions. The intendment of El Salvador's argument in these respects requires clarification, clarification which could have been sought by putting questions to El Salvador, either in the course of an oral hearing of otherwise.

In the absence of that hearing, and because the Court declined to put such questions to El Salvador before the Court convened to examine its Declaration, it is not possible to be certain of the meaning of El Salvador's contentions. But as far as I can make them out, at least as they relate to the United Nations Charter, the Statute and the Optional Clause, they appear to be as follows.

El Salvador maintains that Nicaragua's substantive case against the United States, which is essentially based on four multilateral treaties to which El Salvador equally is party, bears upon exercise of El Salvador's right of collective self-defence together with the United States. El Salvador observes that it has not consented (by the terms of its adherence to the Optional Clause which excludes disputes relating to individual or collective actions taken in self-defence), and does not consent, to a case being brought before the Court by Nicaragua against it. El Salvador thus argues

that Nicaragua's case against the United States is equally inadmissible and beyond the Court's jurisdiction. The logic of this aspect of El Salvador's claim to intervene under Article 63 in the jurisdictional phase of the instant case may be summarized in this way :

First, El Salvador claims to be acting in collective self-defence with the United States to resist Nicaraguan intervention and aggression ;

Second, the United States claims to be acting in collective self-defence with El Salvador to resist Nicaraguan intervention in and aggression against El Salvador ;

Third, El Salvador itself, by reason of the terms of its adherence to the Court's compulsory jurisdiction, is not subject to the Court's jurisdiction in this class of matter involving claims of aggression, self-defence, etc., and El Salvador does not consent to the Court's jurisdiction ;

Fourth, the Court cannot adjudge the legality of the actions of the United States of which Nicaragua complains without in effect adjudging the legality of the actions of El Salvador, for the United States and El Salvador act jointly in collective self-defence against Nicaragua ;

Fifth, since the Court cannot exercise jurisdiction either in the absence of El Salvador whose rights are at issue, or where Nicaragua directly seeks to bring El Salvador before the Court in this class of matter, it equally cannot exercise jurisdiction where the effect of Nicaragua's action against the United States – were the Court to assume jurisdiction over it – would be indirectly to bring El Salvador's rights before the Court in the very class of matter which El Salvador's adherence to the Court's compulsory jurisdiction excludes.

II. The Failure to Accord El Salvador a Hearing

Article 84 of the Rules of Court provides :

> "1. The Court shall decide ... whether an intervention under Article 63 of the Statute is admissible, as a matter of priority unless in view of the circumstances of the case the Court shall otherwise determine.
>
> 2. If, ... an objection is filed ... to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding."

Pursuant to Article 83 of the Rules, Nicaragua and the United States were invited to furnish their written observations on El Salvador's Declaration. The United States, in a letter of 14 September 1984, extensively examined the right of intervention under Article 63, and concluded that it is :

"... in the nature of intervention under Article 63 that it could be limited to one or another stage of proceedings, depending on the questions of treaty interpretation which form the basis for the right to intervene. Moreover, the interpretation contended for by the intervening State may itself imply such a limitation. This would appear to be the case here, since a major purpose of El Salvador's intervention is to argue that consideration of the merits of the Nicaraguan Application would be contrary to the Charter of the United Nations, with serious prejudice to El Salvador's interests and rights.

In sum, the United States respectfully submits its view that El Salvador is entitled to intervene in this case pursuant to Article 63 of the Statute of the Court, as a State party to multilateral conventions whose construction is at issue in this phase of the case. Further, as we understand the object and scope of El Salvador's proposed intervention, it is appropriately related and inherently limited to the current phase of proceedings. Accordingly, the United States sees no ground for objection to the admissibility of this intervention."

Nicaragua's letter of 10 September 1984 was not as straightforward. Since interpretation of the terms of that letter is essential to evaluating the Court's application of Article 84 of its Rules, it will be extensively quoted :

"1. Nicaragua has no objection in principle to a proper intervention by El Salvador in this case in accordance with Article 63 of the Statute of the Court and Articles 82-85 of the Rules of Court. Nicaragua's Application, in addition to claims under general international law, asserts claims under certain conventions. It is well established that any State may intervene as of right under Article 63 in a case involving the interpretation of a convention to which it is a party if it meets the requirements of the Article and the relevant Rules.

2. Although Nicaragua has no intention to oppose El Salvador's intervention, it feels bound to call the Court's attention to certain deficiencies, both as to form and substance, in the Declaration of Intervention.

3. As to form : The declaration purports to be made under Article 63 of the Statute of the Court. (That Article permits intervention by a State that is party to a convention the construction of which is in question in the case.) Article 82 of the Rules of the Court, which governs interventions under Article 63, provides that a declaration of intervention

'shall contain :

. . . . . .

(b) identification of the particular provisions of the convention the construction of which (the declarant) considers to be in question ;

(c) a statement of the construction of those provisions for which it contends.'

The Declaration of El Salvador contains no such 'identification' and no such 'statement'.

4. The requirements of Article 82 of the Rules are not mere matters of form. They are necessary to ensure that the intervention falls properly within the provisions of Article 63 of the Statute, and to make clear what portions of the Court's judgment are binding on the intervenor in accordance with that Article.

5. As to substance : The declaration states that El Salvador seeks to intervene for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's application of the claims set forth therein, that for multiple reasons the Court should declare itself unable to proceed concerning such application and claims, and that such application and claims are inadmissible.

To another point the Declaration states that El Salvadore :

'also wishes to participate in order to make it a matter of record that contrary to what Nicaragua has asserted in its allegation in this case, El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua'.

Article 63 of the Statute, however, does not permit intervention for the purpose of opposing jurisdiction or to make things a 'matter of record', but only for the purpose of the interpretation of an identified provision of a convention to which the intervenor is a party . . .

. . . . . .

In Nicaragua's view, the prompt disposition of the present jurisdictional phase of the case and a speedy determination of the merits is a matter of utmost urgency. In agreeing in principle to the intervention of El Salvador, Nicaragua does so on the understanding that such intervention shall not become the occasion for delaying the proceedings."

Thus, while Nicaragua purported in its letter not to have filed "an objection" to the admissibility of El Salvador's Declaration of Intervention, it voiced objections. It characterized these objections as "deficiencies, both as to form and substance, in the Declaration of Intervention". Those of form related to requirements which Nicaragua describes as "necessary to ensure that the intervention falls properly within the provisions of Article 63 of the Statute". Those of substance led Nicaragua to conclude

that "Article 63 of the Statute . . . does not permit intervention for the purpose of opposing jurisdiction . . .", that is, the very purpose for which El Salvador sought to intervene. Now it is plain that if what Nicaragua called deficiencies in form were so serious as to result in El Salvador's having failed to do what was "necessary" to comply with Article 63, and that if what Nicaragua called deficiencies of substance were so serious as not to "permit intervention" under Article 63, then Nicaragua objected to El Salvador's Declaration on these grounds. It objected in fact even if it professed to agree "in principle".

El Salvador, by letter of 17 September 1984, arrived at the following evaluation of Nicaragua's written observations :

> "4. Nicaragua's observations constitute an attempt to object to El Salvador's Declaration of Intervention while, at the same time, preventing El Salvador from exercising its procedural right to oral proceedings before the Court in the event of an objection. On the one hand, Nicaragua purports not to object in order to avoid triggering El Salvador's automatic right to a hearing under Article 84 (2) of the Rules of the Court when an 'objection' is received. On the other hand, Nicaragua then launches a full-scale attack on both the form and the substance of the Declaration in what constitutes as strong and clear an 'objection' as one can imagine. Nicaragua, in short, disclaims opposing El Salvador's intervention, but then offers lengthy alternative explanations why the Court should find the intervention inadmissible. It is inconceivable that the Court should proceed in the peremptory and injudicious fashion that Nicaragua invites. Either Nicaragua should be taken at its word and the Declaration of Intervention admitted as the exercise of an automatic right fully consistent with Article 63 of the Statute and Article 84 of the Rules due to the absence of any objection from either party, or Nicaragua's observations must be recognized as the objection that the document undeniably is and El Salvador allowed the oral proceedings which Article 84 (2) of the Rules requires when an objection is received."

The Court, however, disregarded not only what El Salvador's letter of 17 September says but what Nicaragua's letter of 10 September says. The Court insisted on taking at full and face value what Nicaragua's letter says it says rather than what it plainly said. The Court thereby found it possible not to apply the mandatory terms of Article 84, paragraph 2, of its Rules, which prescribe that, if an objection is filed to the admissibility of a declaration of intervention, "the Court shall hear the State seeking to intervene and the Parties before deciding". Nicaragua's written observations contained in its letter of 10 September were carefully, indeed artfully, crafted, but this was hardly reason to reward them with such an application

of the Court's Rules. It is not the business of the Court to restore the forms of action – the wording of pleadings – to that exalted and determinative state from which they were long ago toppled in the common law. If the Court is to deserve and maintain the confidence of States, it must act with scrupulous regard to the letter and spirit of its Rules. I am pained to find myself constrained to say that, in my view, the Court has not demonstrated that regard in this case.

It should be added that, once the Court took the position, as it did, that Nicaragua had not filed an objection to El Salvador's intervention, it followed that neither Party to the principal case opposed according El Salvador the right to intervene. That would appear to be a substantial consideration in favour of the Court's treating El Salvador's Declaration as admissible. But there is no indication that the Court gave weight to that consideration.

Be that as it may, the Court remained free to hold a hearing on El Salvador's Declaration, however it chose to interpret the written observations of Nicaragua. El Salvador had requested a hearing. The unanswered questions raised by El Salvador's communications, the fact that this was only the second instance in this Court's history in which a State sought to invoke Article 63 and the first in which it sought to intervene in a jurisdictional phase of a case, as well as the fact that there were questions which at least one judge of the Court wished to put to El Salvador, indicated that a hearing should be held. Considerations of judicial propriety, of the sovereign equality of States before the law, and of fair play, required a hearing. Moreover, failure to hold a hearing conflicts with the single prior precedent of the Court.

In the *Haya de la Torre* case, Cuba sought to intervene in terms to which a Party to the case, Peru objected. The Court held a hearing (*I.C.J. Pleadings, Haya de la Torre,* pp. 149-150), and granted Cuba the right to intervene on a much more limited aspect of the case than Cuba initially sought. The Court held that :

> "Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court . . . decided . . . to admit the intervention . . ." (*Haya de la Torre, Judgment, I.C.J. Reports 1951,* p. 77.)

Now it is important to recall that the Rules of Court in force at that time did not provide for a hearing in respect of the admissibility of declarations filed under Article 63. The pertinent Rule then provided : "If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court." Nevertheless, in the face of an objection or doubt, the Court did accord Cuba a hearing, and was able to narrow the scope of the intervention which Cuba

sought to permissible limits. In this case, the Court has disregarded the instructive precedent which the *Haya de la Torre* case provides. Far from holding a hearing which the current Rules do require, and far from endeavouring to reduce El Salvador's intervention to those limits which it adjudged to be appropriate, the Court has contented itself with dismissing El Salvador's Declaration in terse terms.

That dismissal appears to have been foreshadowed by the Court's press communiqué No. 84/28 which the President of the Court caused to be issued on 27 September 1984. The communiqué announced that, on 8 October 1984, the Court will open a hearing on the questions of whether it has jurisdiction to deal with the merits of the case brought by Nicaragua against the United States and whether Nicaragua's application is admissible. The release concluded with the following paragraph :

> "Meanwhile, El Salvador has filed a declaration of intervention within the meaning of Article 63 of the Court's Statute, which enables States to intervene if notified that the interpretation of a treaty to which they are party is in issue . . . The Court's decision in regard to this declaration will be made known to the press in a subsequent communiqué."

At the time of the issuance of this release, the Court had not met, and was not scheduled to meet until 4 October 1984, but was in receipt of a communication from the Agent of El Salvador of 24 September to the Registrar which recounted that he had been informed by the Registry that any decision the Court might take in connection with the Declaration of Intervention will be communicated to the Agents of the Parties and to the Agent of El Salvador prior to 8 October, on which date the President had fixed the opening of oral proceedings on the questions of jurisdiction and admissibility. El Salvador's communication of 24 September requested a postponement of the 8 October date, on the ground that it would be "difficult in the extreme for El Salvador adequately to prepare" to take part in those hearings, the more so since it had not yet been afforded access to the written pleadings of Nicaragua and the United States on these questions.

In these circumstances, it must have been clear to El Salvador and others who were closely following the matter that the time schedule fixed by the President and announced to the press in the terms in which it was announced had been shaped on the assumption that El Salvador's Declaration of Intervention would be denied. The Court of course remained free to override that assumption. But it hardly seems to be an assumption to have been made, the more so since, in a letter of 14 September 1984 to the Registrar, the United States had already drawn the matter to the Court's attention in these terms :

> "Article 86 of the Rules of Court provides that a State whose intervention as of right under Article 63 of the Statute is admitted 'shall be furnished with copies of the pleadings' of the Parties to the

case, and shall be entitled to submit written observations on the subject-matter of its intervention 'within a time-limit to be fixed . . .'. In his letter of 10 September, the Agent of El Salvador requested a reasonable period of time in which to review the pleadings in order to determine how they bear on El Salvador's construction of the various conventions the meaning of whose provisions are at issue at this phase of the case.

The United States respectfully submits that consideration of the scheduling of further proceedings on the questions of the jurisdiction of the Court and the admissibility of the Nicaraguan Application should be deferred until after such time as a determination has been reached by the Court on the admissibility of the Salvadoran intervention as of right."

III. The Right of El Salvador to Intervene in the Jurisdictional Phase of the Current Proceedings on the Grounds Stated by It

While under Article 63 of the Statute, a State has "the right" to intervene whenever the construction of a convention to which it is a party is in question in proceedings before the Court, it always has been accepted that the Court must pass upon whether the State seeking to intervene is such a party, and whether the construction of the convention cited is in question in the proceedings. If the Court so finds, the Court does not need to grant permission to intervene ; it simply – and, as the distinguished President of the Court has put it, "rather significantly" (Taslim O. Elias, *The International Court of Justice and Some Contemporary Problems,* 1983, p. 86) – "records" that the declarant State intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute and "accepts" its intervention. *(S.S. "Wimbledon", Judgments, 1923, P.C.I.J, Series A, No. 1,* p. 13. But in the *Haya de la Torre* case, *supra,* the Court "decided . . . to admit" the intervention.)

A State has the right to intervene whether or not it has been notified by the Registrar that the construction of a convention to which it is a party is in question ; Article 82, paragraph 3, of the Rules of Court so provides. By an administrative decision of this Court taken early in its history under the Presidency of Judge Basdevant, and affirmed by President Winiarski, the Registrar does not routinely send notifications to States parties when the United Nations Charter is cited before the Court, particularly because, under the terms of Article 40, paragraph 3, of the Statute, the Registrar, when a case is brought before the Court, shall forthwith communicate the application to the Members of the United Nations and any other States entitled to appear before the Court. It was accordingly decided that, since States which could intervene under Article 63 have already had the application communicated to them under Article 40, there is no need to send them a new communication in such cases even though their attention had

not been expressly drawn to Article 63. While, in general, the Registrar subsequently has been so guided in respect of the Charter, otherwise he has usually sent out notices specifically referring to Article 63. The practice of the Court appears to indicate that an intervention based on Article 63 cannot be aimed at the interpretation of a convention referred to but which is not at issue in the dispute brought before the Court. (Cf. *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972,* p. 48, where the Court recorded that, Pakistan having advanced the contention that questions concerning the construction of the Convention on International Civil Aviation and the International Air Services Transit Agreement were "in issue", States were notified in accordance with Article 63.)

Unprecedented questions not resolved by the foregoing body of practice have arisen in the instant case. They are these :

– May intervention under Article 63 take place in the jurisdictional phase of a proceeding ?
– If so, is such intervention confined to conventions other than the Statute of the Court and the Charter of the United Nations ?
– If such intervention is not so confined, does it embrace the Statute as well as the Charter ?
– If so, may intervention embrace not only the Charter and the Statute but declarations submitted under the Optional Clause of the Statute ?

It will be convenient to begin with jurisdictional intervention in general.

A. Intervention under Article 63 in the Jurisdictional Phase of Proceedings

The terms of Article 63 of the Statute are comprehensively cast : "Whenever" the construction of "a convention" is "in question . . .". There is no hint in these terms – or in their *travaux préparatoires* – that they mean other than what their plain meaning says. "Whenever" – that is, whatever time in the proceedings of a case – imports not some but all, not some phases of a case but any phase. Moreover, the Rules of Court support the interpretation that "Whenever" indeed means whenever. Article 82, paragraph 1, of the Rules provides :

> "A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect . . . Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In

exceptional circumstances a declaration submitted at a later stage may however be admitted."

It will be observed that that Rule does not provide that a declaration under Article 63 shall be filed not later than the date fixed for the opening of the oral proceedings "on the merits" but simply the opening of "the oral proceedings". If the intention had been to confine intervention to the stage of the merits, the Rule presumably would have so stated.

Indeed, that conclusion is more than a presumption. The fact is that the question of barring intervention under Article 63 of the Statute in the jurisdictional phase of a case never seems to have been proposed to, considered or accepted by the Court. In contrast, the Court did give careful consideration to limiting intervention under Article 62 of the Statute only to the merits of the case before the Court, so as to exclude intervention under Article 62 in respect of interlocutory proceedings (though ultimately the Court did not so provide in the version of its Rules it adopted). The reason which was given for so proposing in respect of Article 62 recognized that a third State could have a legal interest in the jurisdictional phase of a case, but it was suggested that that interest was too remote to be admitted. However, a showing of "an interest of a legal nature which may be affected by the decision in the case" is a condition of intervention under Article 62. There is no such condition in Article 63 ; there it suffices if the third State is party to a convention whose construction is in question in the principal case.

Thus the terms of Article 63 and the Rules which the Court has adopted in implementation of those terms both indicate that intervention under Article 63 in the jurisdictional phase of a case is permitted. The sense of Article 63 implies no less. Why should intervention at the jurisdictional phase of a case not be admitted ? There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies that have come before the Court more than once over the force and effect of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court's jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends ?

In fact, as will be shown below, the Court and the Registrar have acted consistently with the conclusion that intervention in the jurisdictional

phase of a proceeding is within the scope of the right with which States are endowed by the terms of Article 63.

B. Intervention in Respect of Construction of the United Nations Charter

It has been shown that the terms and the intendment of Article 63 of the Statute generally embrace intervention in the jurisdictional phase of the proceedings over the construction of conventions, such as the 1928 General Act. Another convention which has been the subject of jurisdictional controversy before the Court and described as a convention whose construction was susceptible of such intervention is the Convention on the Prevention and Punishment of the Crime of Genocide. (See the dissenting opinion of Judge Petrén in the case concerning *Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973, I.C.J. Reports 1973,* pp. 334-335.) Even if intervention in the jurisdictional phase of a case is generally permitted, however, may a State intervene under Article 63 over the construction of provisions of the United Nations Charter ?

Since the provisions and purpose of Article 63 suggest no reason why a State should not be permitted to intervene over the construction of the United Nations Charter, the burden of showing that intervention to construe articles of the Charter is impermissible rests on those who so maintain. No arguments in support of such an exceptional conclusion have come to light. On the contrary, the understanding of the Court and of its Registry appears to have been that intervention in construction of the Charter is appropriate, and that such intervention may be made at a jurisdictional stage.

The pertinent provision of Article 63 is unqualified : whenever the construction of "a convention" is in question, the right to intervene arises. The United Nations Charter is not only a convention, it is the most important existing component of the body of conventional international law. The first distinguished Registrar of the International Court of Justice, the late Edvard Hambro, who studied Article 63 intensively in a number of published papers, concluded :

> "Article 63 uses the word Convention, which must be given the same interpretation here as under Article 38 which uses the same term. According to the Vienna Convention on the law of treaties, which to a very large extent is a codification of international customary law, this means : 'An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'." (Edvard Hambro, "Intervention under Article 63 of the Statute of the International Court of Justice", *Il processo internazionale. Studi in onore di Gaetano Morelli,* 1975, pp. 388-389.)

When the Court had cause to consider the meaning of the term "a convention" as it is found in Article 63, in the course of revision of its Rules, it was accepted that the definition of treaties contained in the Vienna Convention on the Law of Treaties applied to it. Indeed, it was understood that "a convention" as used in Article 63 referred to multilateral conventions as described in the following definition which the International Law Commission of the United Nations had composed for what ultimately became the Vienna Convention :

> "*(a)* Treaty means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law." (Draft Articles on the Law of Treaties, Article 1, Definitions, *Yearbook of the International Law Commission,* 1962, Vol. II, p. 161.)

Moreover, the Rules of Court which are in force give no suggestion that the term "the convention" as used in Article 82 does not embrace the United Nations Charter.

The practice of the Court in implementation of Article 63 of the Statute and its pertinent Rules supports two conclusions : first, that intervention under Article 63 may occur in a jurisdictional phase of a case ; and second, that such intervention may concern the construction of the Statute of the Court and of the United Nations Charter.

In the very first case to come before the Court as it was constituted with the coming into force of the United Nations Charter, the *Corfu Channel* case, the Court took a position on these questions which it has never modified. In its Application instituting proceedings, the British Government relied, *inter alia,* on construction of Article 36, paragraph 1, of the Statute, and of Articles 25, 32 and 36 of the Charter. In its Preliminary Objection, Albania invoked a construction of paragraphs 1 and 3 of Article 36, and Article 40, of the Statute, and Articles 25 and 32 of the Charter (*Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948,* pp. 17, 20-23). The Court's Judgment on the Preliminary Objection records :

> "The Albanian Preliminary Objection was transmitted, . . . to the Agent for the United Kingdom and was communicated . . . to the Members of the United Nations, pursuant to the provisions of Article 63 of the Statute." (*Ibid.,* p. 23.)

That is to say, "pursuant to the provisions of Article 63 of the Statute", the Court notified the Members of the United Nations who are parties to the Statute of the Court and the Charter of the United Nations that construc-

tion of the Statute and the Charter was at issue in the phase of a case concerned with jurisdiction and admissibility, so that those Members might consider employing their right under Article 63 to intervene.

In the *Anglo-Iranian Oil Co.* case, the Registrar addressed the following letter to the States Members of the United Nations :

> "LE GREFFIER AUX ÉTATS MEMBRES DES NATIONS UNIES
>
> 21 février 1952.
>
> Monsieur le Ministre,
>
> Par ma lettre en date du 12 février 1952, j'ai fait savoir à Votre Excellence qu'en l'affaire de l'Anglo-Iranian Oil Company, introduite devant la Cour internationale de Justice par requête du Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, le Gouvernement impérial de l'Iran, défendeur, avait présenté, aux termes de l'article 62 du Règlement de la Cour, un document intitulé *'Observations préliminaires : refus du Gouvernement impérial de reconnaître la compétence de la Cour.'*
>
> J'ai aujourd'hui l'honneur, en me référant à l'article 63 du Statut de la Cour, de porter à votre connaissance que, dans ce document, le Gouvernement de l'Iran invoque, entre autres considérations, l'interprétation qu'il donne de l'article 2, paragraphe 7, de la Charte des Nations Unies..." (*I.C.J. Pleadings, Anglo-Iranian Oil Co.*, p. 741.)

This letter records that, at the jurisdictional phase of that case, Iran, among other preliminary objections, raised a question of interpretation of an article of the United Nations Charter. Referring expressly to Article 63 of the Statute, the Registrar transmitted the Iranian preliminary objections so that other Members of the United Nations might consider invoking their right to intervene. This constitutes a renewed demonstration of the understanding of the Court that Article 63 both permits intervention at the jurisdictional stage and permits it on questions of construction of the United Nations Charter.

In its Judgment on Iran's Preliminary Objections, the Court confirmed this conclusion. It recorded that the British Application had been circulated among States entitled to appear before the Court pursuant to Article 40 of the Statute ; that these States were informed of the Iranian Objection ; and that :

> "Finally, in pursuance of Article 63 of the Statute of the Court, the Members of the United Nations were informed that in its Objection, the Iranian Government, relied, *inter alia,* upon its interpretation of Article 2, paragraph 7, of the Charter of the United Nations." (*Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952,* p. 96.)

As has been observed above, the Registrar did not subsequently follow the practice of sending notifications under Article 63 when the Charter was at issue in a case before the Court, but rather relied upon transmission of the application pursuant to Article 40 of the Statute, as has the Court. (Cf.

Aerial Incident of 27 July 1955 (Israel v. *Bulgaria), Judgment, I.C.J. Reports 1959,* p. 129.) In respect of other conventions, usually but not invariably notifications have been made with express reference to Article 63. See, for example, *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council,* p. 781 ; *I.C.J. Pleadings, Trial of Pakistani Prisoners of War,* pp. 113, 166 ; and *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran,* p. 498. (A fuller listing is found in the Court's *Yearbooks,* e.g., that of 1962-1963, pp. 101-103.)

C. Intervention in Respect of Construction of the Statute

While the foregoing analysis and exposition of practice indicate that a State may exercise its right to intervene under Article 63 at a jurisdictional phase of the proceedings over the construction of the Court's Statute as well as the United Nations Charter, distinctions have been raised between the two which may merit consideration.

In the first place, it is argued that, under Article 1 of its Statute, the Court "shall function in accordance with the provisions of the present Statute" ; that, therefore, all the Court does engages the provisions of the Statute ; and that it cannot be that, by functioning under its Statute, the Court furnishes ground for States to intervene under Article 63 on questions that may arise in respect of those functions.

This argument is true as far as it goes, but that is not far. Article 63 is not concerned with the application of provisions of a convention, including the Statute, but their construction, i.e., interpretation, and questions of interpretation of the Statute are not posed by its routine application. Moreover, it has been established in the practice of the Court that Article 63 comes into play only if a provision of a convention is "at issue" in a case. If a provision of the Statute is not incidentally engaged or mentioned, but is at issue in a case between two States, then there is no reason why a third State cannot intervene over the construction of that provision. And, apart from Article 36, other provisions of the Statute are not frequently at issue in a case.

In the second place, it is argued, as a consequence of the first argument, that, if Article 63 meant that, whenever the construction of the Statute of the Court arises in a case, notification shall be made under Article 63, there would be no purpose in Article 40, pursuant to which the Registrar forthwith communicates applications in cases to all States entitled to appear before the Court. Article 63 assumes exceptional notification in some cases, not notification in every case as under Article 40. But treating the Statute as a convention within the meaning of Article 63 requires notification under that Article in every case.

The answer to this argument is that the purpose of notification under Article 40 is simply to inform States that an application has been made and of what the terms of that application are. The purpose of notification under Article 63 is to alert States to the fact that the construction of a convention to which they are party may be at issue in the case before the Court. Such construction may be pleaded not only in the application but otherwise, as in preliminary objections. Treating the Statute as a convention within the meaning of Article 63 does not require that the exceptional notification of Article 63 shall be made to the States parties to the Statute in every case. It only requires that notification be made – or it only permits intervention under Article 63 – in those exceptional cases where the pleadings in a case reveal that the construction of a provision of the Statute is at issue.

In the third place, it is observed that the Registrar has not routinely sent notifications under Article 63 whenever Article 36 or 38 or other Articles of the Statute of the Court are invoked in a case. That is true, but it is not probative, for the reason that the Registrar does not send notices under Article 63 in respect of construction of the Charter, a practice which appears to have included the Statute.

The apprehension has been expressed that, if the Statute were to be treated as a convention within the meaning of Article 63, third States party to the Statute would be entitled to intervene in a case whenever there is a jurisdictional dispute between the Parties ; and the result could be a cascade of interventions. That does not follow, if the jurisdictional dispute concerns – as it often does – not the terms of the Statute but of other conventions or of declarations under the Optional Clause. But in any event, the Court's Judgment in the *Corfu Channel* case which has been quoted above surely is open to the interpretation that the Statute is a convention within the meaning of Article 63 ; that Judgment was rendered 36 years ago ; and in that time, only one State (Cuba) has, before the instant case, sought to intervene under Article 63 at all, and El Salvador is the first to seek to intervene at a jurisdictional stage in construction of the Statute. Thus there hardly seems ground to be concerned about a flood of interventions.

It may be added that the Statute affirms that the International Court of Justice is established by the Charter of the United Nations as the principal judicial organ of the United Nations (Art. 1). The Charter provides that the Statute of the Court, which is annexed to the Charter, "forms an integral part of the present Charter" (Art. 92). If a State has the right to intervene under Article 63 of the Statute on a question of construction of the Charter, does it not follow that it equally has the right to intervene on a question of the construction of that Statute which is an integral part of the Charter ?

D. Intervention in Respect of the Construction of Declarations under the Optional Clause

Does intervention under Article 63 embrace disputes over the effect of declarations of States under the Optional Clause of the Statute ?

That great Judge and scholar of international law, Sir Hersch Lauterpacht, expressed the conclusion in two separate opinions that intervention under Article 63 is permissible at the jurisdictional phase and not merely with regard to interpretation of the Statute but even of declarations under the Optional Clause. In the *Norwegian Loans* case, Judge Lauterpacht said, in referring to the self-judging element of the submission to the Court's compulsory jurisdiction which was there at issue :

> "The circumstance that a decision of the Court may affect Governments which have had no opportunity to express their view on the subject is a cause of concern. It would have been preferable if, in accordance with Article 63 of the Statute, the Governments which had made a Declaration in these terms had been given an opportunity to intervene." (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957,* pp. 63-64.)

In the *Interhandel* case, Judge Lauterpacht concluded :

> "I have refrained from referring to or elaborating the additional, and no less decisive, reason why, in my view, the Court is without jurisdiction to entertain the request for interim measures filed by the Swiss Government. In my separate opinion in the case of *Certain Norwegian Loans* . . . I came to the conclusion that a reservation of the kind as now before the Court is invalid and that its invalidity entails the invalidity of the Declaration of Acceptance as a whole. If that is so, the Government of the United States cannot validly become either a plaintiff or a defendant under its Declaration of Acceptance – although it is open to it, in respect of any claim brought against it in reliance on its Declaration of Acceptance, to submit to the jurisdiction of the Court on some other basis. However, I have abstained from adopting that view as a ground of the present opinion seeing that the question of the validity of the above reservation of the United States of America is not now before the Court and that it may, with the possible participation of other Signatories of the Optional Clause intervening by virtue of Article 63 of the Statute, form the subject-matter of a decision of the Court at a subsequent stage of the proceedings." (*Interhandel, Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957,* p. 120.)

The views of Judge Lauterpacht are entitled to exceptional weight. Nevertheless, there is room for another opinion, based upon the fact that the declarations which States submit pursuant to Article 36, paragraphs 2, 3 and 4, of the Statute are not conventions. May it be maintained that Article 63 – which expressly relates to the construction of "a convention" – may be extended to include declarations made pursuant to a convention ? That appears to be questionable.

The legal character of declarations made under the Optional Clause is at issue in the jurisdictional phase of the current case between Nicaragua and the United States. At this point, it would not be appropriate to note more than that neither Party appears to view declarations made under the Optional Clause as treaties or conventions.

E. The Scope of El Salvador's Declaration

As was shown in Section I of this opinion, El Salvador's Declaration invokes the construction of provisions of the Statute (Art. 36), the United Nations Charter (Arts. 39, 51 and 52), and, with insufficient specificity, provisions of the OAS Charter and two inter-American treaties. It also appears to invoke the construction of the terms of its declaration under the Optional Clause, as well, in some limited measure, as that of the United States.

In the light of the analysis set forth in this opinion, I conclude that El Salvador's Declaration of Intervention is admissible, and should have been found admissible by the Court, even though it relates to the current jurisdictional phase of the proceedings brought by Nicaragua against the United States. However, there might have been ground for the Court excluding from the scope of such an admission construction by El Salvador of declarations under the Optional Clause, particularly those of the Parties to the case.

F. Should El Salvador's Declaration Have Been Barred on the Ground that it Relates to Admissibility Rather than Jurisdiction and that Questions of Admissibility Should Be Joined to the Merits ?

A question which remains is this. Even if it is accepted that the right of intervention under Article 63 applies to the jurisdictional phase of proceedings, and even if it is accepted that it embraces the construction of the Statute and Charter as well as other conventions, should the Court have barred intervention by El Salvador at this stage on the ground that it sought to intervene on questions of admissibility rather than jurisdiction and that these questions can be properly dealt with only at the stage of merits since they are so intertwined with the merits ?

That is a substantial question, the answer to which, in my view, is negative. I so conclude for the following reasons :

– While the main thrust of the contentions of El Salvador does appear to relate essentially to questions of admissibility rather than jurisdiction, those are questions which are before the Court at the stage of the proceedings on which it is now about to embark. In the hearings which led up to the issuance of the Court's Order of 10 May 1984, the United States had advanced arguments which purported to demonstrate that Nicaragua's claims were inadmissible, essentially on the ground that other organs and modalities of the international system are to be charged, and have in this case been charged, with resolution of a political dispute involving the current use of armed force. Nicaragua advanced arguments to meet these contentions of the United States. Having heard these arguments, the Court, in its Order of 10 May, decided :

> "that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 187.)

– In response to the Court's Order, the Memorial submitted by Nicaragua and the Counter-Memorial submitted by the United States extensively address questions of admissibility.

– In seeking to intervene, El Salvador seeks the construction of provisions of the United Nations Charter and other conventions which relate to some of the very questions of admissibility argued by the Parties to the case.

– Thus to deny El Salvador the right to intervene on the ground that it will argue issues of admissibility is at odds with the Order of the Court and the presumed course of the impending hearings.

– Moreover, such a conclusion is unnecessary. Suppose that it is assumed, *arguendo,* that such arguments of admissibility of El Salvador (and of the United States and Nicaragua) go more to the merits and should be joined to the merits, on the ground, e.g., that the argument that another organ than the Court should deal with an ongoing armed conflict requires a finding that there is a conflict and that that is a question of finding a fact. Nevertheless, for the purpose of appraising and admitting El Salvador's Declaration of Intervention, it can equally be assumed, *arguendo,* and without prejudice to an ultimate holding at the stage of the merits, that there is an armed conflict. On such an assumption, I conclude that, on the basis of its arguments of admissibility, El Salvador should have been admitted to intervene at the current stage of the proceedings. That is not, of course, to say that its arguments are, or are not, good arguments, any more than it is to say at this juncture that the arguments on admissibility of the

United States and Nicaragua are or are not good arguments. But to deny the admissibility of El Salvador's Declaration of Intervention on the ground that it may involve assumptions of or findings of fact does not appear to me to be either necessary or, given the state of the pleadings of the Parties, equitable.

(Signed) Stephen M. SCHWEBEL.