SEPARATE OPINION OF JUDGE AGO

[Translation]

I

1. I have been able to vote in favour of the finding that the Court has a jurisdiction in the present case enabling it to proceed to examination of the merits, as I am convinced of the definite existence of one of the two distinct bonds of compulsory jurisdiction between the Applicant and the Respondent which the majority of the Court considers to exist between the Parties. To be specific, I consider that a valid jurisdictional link between the Parties, within the meaning of Article 36, paragraph 1, of the Statute of the Court, is provided by Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation concluded on 21 January 1956 between the United States and Nicaragua ("FCN Treaty").

2. In my view, this is an independent and not – as the majority of the Court appears to think – a merely "complementary" title of jurisdiction, and one evidently valid in so far as the complaints put forward by Nicaragua can be presented as referring to violations of the provisions of this Treaty. Nicaragua has, moreover, met this requirement by submitting in the Memorial that the United States "military and paramilitary activities in and against Nicaragua" constitute breaches of various articles of the Treaty and its Preamble. In particular, it has submitted that the "mining of Nicaraguan ports and territorial waters, as well as attacks on Nicaragua's airports, and military operations that endanger and limit trade and traffic on land" contravene Article XIX (1) of the Treaty. In addition, it has expressly reserved its right to demonstrate "during the proceedings on the merits of this case" the breaches of Article XIV (2), Article XVII (3), Article XIX (3), Article XX and Article I of the Treaty which it considers to have resulted from those activities. Finally, it maintains that the Treaty is intended to achieve certain broad goals and objectives, and that the activities which it imputes to the United States "directly contradict these goals and objectives, and the entire spirit of the Treaty". It will clearly be Nicaragua's responsibility, during the proceedings on the merits, to furnish proof of the facts alleged and of the contradiction it claims to detect between them and the specific provisions and general spirit of the Treaty. It will be at this stage, when replying to Nicaragua's arguments, that the United States of America will have the opportunity to present its own views. I am quoting these allegations at this point only in order to emphasize that, in so far as the Applicant relies upon breaches of the 1956 Treaty and its provisions, it possesses in their regard an appropriate title of jurisdiction that is provided by the Treaty itself.

3. Moreover, as rightly pointed out by the Judgment to which this opinion is appended, Nicaragua is not barred from reliance on the 1956 Treaty as a title of jurisdiction through having dealt with it expressly and in detail only in the Memorial, whereas it had not been mentioned in the Application. In point of fact, in paragraph 26 of its Application of 9 April 1984, Nicaragua reserved "the right to supplement or to amend this Application", which had been filed in the conditions of what it viewed as an emergency. Two weeks after the filing of the Application, i.e., on 24 April, the Agent of Nicaragua sent a letter to the Registry in which – as the Court has related in paragraph 14 of its Order of 10 May 1984 on the request for the indication of provisional measures – he stated that, apart from Nicaragua's 1929 Declaration, "there are in force other Treaties which provide this Court jurisdiction over the Application" (*I.C.J. Reports 1984*, p. 175). Finally, in the Memorial filed on 30 June 1984, i.e., in the document which completes and concludes the initial part of the proceedings, in which only the Applicant presents its case, Nicaragua exercised the right which it had previously reserved, by devoting the whole of Part I, Chapter III, to showing, in the words of the title, that *"The Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States provides an independent basis for jurisdiction under Article 36 (1) of the Statute of the Court as to violations of that Treaty."*

4. Unlike the issues referred to in paragraph 2 above as being appropriate for examination during the merits phase, the question raised in the United States Counter-Memorial in Part I, Chapter II, Section III, relates to the present phase of the proceedings. I refer to the question whether Nicaragua may or may not invoke the compromissory clause of the 1956 Treaty, "because it has made no effort to resolve by diplomacy any disputes under the FCN Treaty". I would emphasize, in this connection, that Article XXIV (2) of the FCN Treaty does not make use of the wording to be found in other instruments which formally requires diplomatic negotiations to have been entered into and pursued as a prior condition for the possibility of instituting proceedings before an arbitral tribunal or court of justice. The Article in question provides quite simply for the possibility of submitting to the International Court of Justice

> "any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy".

It is not always necessarily the case under these terms that diplomatic negotiations must be ascertained to have been first begun and then pursued, and finally to have broken down. The requirements of the text can even be met, under certain circumstances, without negotiations in the strict sense ever having taken place. More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an

absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists.

5. One final question that might arise in this connection is whether Article XXIV (2) of the 1956 Treaty permits the unilateral reference to the Court of any dispute as to the interpretation or application of the Treaty. Any possible doubt on this matter has, however, been eliminated by the position which the Court itself adopted in its Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran,* regarding Article XXI (2), worded in exactly the same way, of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. The United States had, at that time, submitted claims that Iran had violated various provisions of this Treaty, basing itself on the compromissory clause of this instrument (Art. XXI (2)), in addition to its primary reliance on Article I of the optional protocols on compulsory dispute-settlement accompanying the respective Vienna Conventions on Diplomatic and Consular Relations, protocols to which both those States were parties. Having specifically examined its competence, under Article XXI (2) of this Treaty, to deal with the violations of the 1955 Treaty which the Applicant alleged to have taken place, the Court came to the conclusion that

> "the United States was free on . . . to invoke [the] provisions [of Art. XXI (2)] for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement." (*I.C.J. Reports 1980,* p. 27, para. 52.)

6. The considerations set forth in the preceding paragraphs confirm me in the conviction expressed at the end of paragraph 1 above, namely that there is between the Parties to the present dispute a valid and undeniable jurisdictional link, deriving from the provisions of the Treaty, a link which confers full jurisdiction upon the Court to deal with Nicaragua's complaints alleging violation by the United States of several particular provisions of this Treaty, of its Preamble and of its general spirit.

II

7. I find myself, unfortunately, unable to take the same view of the far broader link of jurisdiction deduced by the Judgment from the coincident existence – which it thinks to discover in the facts – of acceptances by both Nicaragua and the United States of the Court's compulsory jurisdiction, expressed by way of unilateral declaration. In respect of that, I continue to have the most serious doubts.

8. The comments I shall make in this opinion bear mainly on whether the Applicant really has or has not accepted compulsory jurisdiction. The link of compulsory jurisdiction the establishment of which is provided for and regulated by Article 36, paragraph 2, of the Statute of the Court is brought into being by the coincidence on the ideal plane of the effects of two unilateral acts. By each of these two acts, the two States concerned undertake to "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" over one of the subject-matters listed in subparagraphs *(a)* to *(d)* of the provision in question. As the Judgment appropriately points out, in paragraph 14 :

> "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' within the meaning of Article 36, paragraph 2, of the Statute"

– on the understanding, of course, that the United States Declaration, for its part, has not lost its binding character.

9. However, as no act of direct acceptance of the compulsory jurisdiction of the present Court has been accomplished by Nicaragua, such acceptance, according to that country, would have to result from the automatic extension to the compulsory jurisdiction of the International Court of Justice – under Article 36, paragraph 5, of its Statute – of an acceptance made with regard to that of the Permanent Court of International Justice. The problem currently confronting the Court accordingly comprises two different, successive aspects. The first relates to the existence and scope of the acts performed by Nicaragua with a view to acceptance of the compulsory jurisdiction of the Permanent Court, the second to the applicability to those acts of the effects provided for by Article 36, paragraph 5, of the Statute of the Court which replaced it.

10. It is affirmed by the Applicant, and not contested by the Respondent, that on 24 September 1929 Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice at the same time as it signed the Optional Clause, annexed to this Protocol, relating to acceptance of the Court's jurisdiction as compulsory. Thereby Nicaragua must be held to have given two-fold evidence of intent : on the one hand, it simply set its signature to the pre-established declaration set forth in full in the Protocol itself, the effect of which was to recognize the

Statute of the Court and in general to accept jurisdiction "in accordance with the terms and subject to the conditions of the above-mentioned Statute" ; on the other, it signed a declaration reproducing, and completing as necessary, the text of the Optional Clause annexed to the Protocol, which was worded as follows :

> "The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions :".

The word "further" served to link the second, optional, declaration with the first to which it had been subjoined. As for the "following conditions", they were reduced in the case of Nicaragua to the word "unconditionally" in the text signed on its behalf by Ambassador Medina, which is reproduced in paragraph 15 of the Judgment.

11. It should nonetheless be noted that the third paragraph of the Protocol provides that :

> "The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, *is subject to ratification.* Each Power shall send its ratification to the Secretary-General of the League of Nations ; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. *The ratification shall be deposited* in the archives of the Secretariat of the League of Nations." (Emphasis added.)

There can, then, be no doubt that the Protocol in question had in no way been conceived as what would nowadays be called an "agreement in simplified form", which a mere signature could be regarded as sufficient to bring into force. It was clearly, by its very nature, importance and scope, a formal international act that could not come into force and produce legal effects for participant States until it had been ratified.

12. In the case of the signature of the declaration which reproduced and spelled out the terms of the Optional Clause, no distinct, specific act of ratification was required, although most signatories did make their declarations subject to ratification. But it is nonetheless inconceivable that the undertaking contemplated by the Optional Clause could become binding in isolation from that contemplated by the protocol to which the Clause was subjoined. Without ratification of the Protocol, signature of the declaration provided for by the Optional Clause could not in any way commit the signatory State ; neither, *a fortiori,* could it generate rights or obligations benefiting or binding other States which had ratified the Protocol and signed, if not also ratified, a declaration under the Optional Clause. The Judgment's ingenious efforts to ascribe an autonomous "potential effect" to the signature of the Optional Clause and to the declaration defining its

terms are as such sufficient in themselves to arouse feelings of reserve[1]. But, however that may be, I find it certain that this so-called potential effect could not, in any event, be binding in character. All it could give rise to on the part of third States concerned was expectancy – the expectation of seeing it turned into a genuine undertaking, within a reasonable period of time, by ratification of the Protocol. Moreover, once this reasonable period had expired, even this mere expectation must inevitably become wholly insubstantial.

13. I also feel that one further clarification is needed in respect of the requirement that the Protocol be ratified. What must here be understood by "ratification" is what the term denotes on the international legal plane : i.e., in the case of bilateral agreements, the inter-party *exchange* of instruments of ratification already perfected on the domestic legal plane and, in that of multilateral agreements, the *deposit* of these instruments with the depositary, in this instance the Secretary-General of the League of Nations. This is certainly not a mere formality or, as it were, additive condition. This *exchange* or *deposit* of instruments, as the case may be, is itself the act which, at the level of inter-State relations, *establishes the consent* of the States concerned to be bound by the obligations contemplated by the act in question. Before this exchange or deposit has been accomplished, the act is not in force, and neither, *a fortiori,* are the obligations which it establishes.

14. In the light of these considerations, it might be thought relatively unimportant to establish whether, *in concreto,* the Protocol and the clause annexed to it had or had not undergone to perfection, at the level of domestic law, the entire process laid down by the constitution of the country for ratifying international undertakings. Yet the Parties engaged in lengthy discussion of this problem and could not agree. Upon reflection, one cannot help being struck by certain points noted which reveal that, many years after its commencement, the internal constitutional process had still not been completed. Even the famous telegram of 29 November 1939 that was sent by the Minister for Foreign Affairs of Nicaragua to the League of Nations never denoted the contrary. What it communicated to the Secretariat, concerned at the delay, was the fact that the Senate and

[1] To illustrate this concept of a "potential effect", the Judgment (para. 27) sees fit to refer to an imaginary situation in which the Nicaraguan Declaration, made on 24 September 1929, might have provided that it would apply for only five years to "disputes arising after its signature". In that event, says the Judgment, "its potential effect would admittedly have disappeared as from 24 September 1934". However, this hypothetical limitation would only have served to define *ratione temporis* the category of disputes for which the binding effect of the Declaration would have come about when the Declaration had come into force, i.e., after ratification of the Protocol. Clearly, if the ratification had not been deposited until five years after the signature, or even later, there would no longer have been any disputes to which compulsory jurisdiction could have applied, unless there had been the necessary amendment of the temporal definition of the disputes to which the Declaration could apply. However, all this would have had nothing to do with determination of the duration of the Declaration itself, a period which could have only begun to run its course as from the ratification of the Protocol.

Chamber had "ratified", or in other words had carried out their respective tasks for the purpose of ratification. But regarding the instrument of ratification proper the telegram merely said that it would be sent "oportunamente", when the time came. All this was correct, as the instrument in question, namely the presidential decree to promulgate the ratification, had not then been published in *La Gaceta* and, it seems, was never to be. That being so, its adoption could not, in Nicaraguan law, be considered accomplished, nor could the instrument itself be considered to have become valid and ready for depositing with the competent international authority.

15. That this indispensable publication never took place does not seem to be a question of mere delay due to a succession of fortuitous circumstances, or even to the general state of uncertainty pervading the globe on the eve of the Second World War, but seems rather to indicate second thoughts and *de facto* abandonment of the intention to complete the ratification process, even at domestic level. It is, moreover, perfectly normal for a country to hesitate before such a decisive step as committing itself in advance vis-à-vis an undefined number of States to bow to the compulsory jurisdiction of the Court in its disputes with them, particularly when there are reasons to fear the possible repercussions of that commitment upon what is seen as a vital interest. Nicaragua, in particular, was at the time particularly anxious to avoid thereby being led into a more or less forced recognition of the boundary with Honduras that had been defined in the Arbitral Award made by the King of Spain on 23 December 1906. After initial quasi-official signs of acceptance followed by a period in which the idea of challenging the Award took shape, an agreement with Honduras, on 21 January 1931 (and this date is important), had been enshrined in a directly negotiated "Protocol of Acceptance". However, the Government soon reverted to its previous attitude, and its refusal to implement the Spanish "laudo", which it described as obscure and inapplicable, began to be accompanied by the intention to achieve a *de facto* modification of the boundary defined in the Award [1]. Given this climate of very strained relations with the neighbouring State, it is easy to explain the reluctance of the country and its Government to perfect an act whose repercussions on a question to which public opinion was extremely sensitive could not be foreseen.

16. In any event, quite apart from this "domestic" aspect of the matter and the explanations relevant to it, what I consider decisive from the standpoint of the present case is that at international level the deposit of the ratification of the Protocol and of the annexed clause for acceptance of compulsory jurisdiction did not take place, either at the outset or later. I

[1] In 1937-1940 the Nicaraguan postal administration issued a stamp on which there appeared a boundary which was different from that determined in the Arbitral Award. This fact, together with repeated border incidents, gave rise to high feelings in Honduras and relations between the two countries deteriorated steadily.

find it furthermore beyond dispute that this deficiency could in no way be ascribed to an error on the part of the Nicaraguan authorities or to their being ill-informed, since the requirement of effecting deposit of the instrument of ratification if the Government of Nicaragua wanted the declaration it had signed to produce any legal effects was officially pointed out to that Government on three occasions by the competent authorities of the League of Nations Secretariat, namely Mr. McKinnon Wood in 1934 and 1939, and Mr. Emile Giraud in 1942. The receipt of these reminders is confirmed by the Nicaraguan Foreign Minister's having, on each occasion, replied with assurances to the said authorities of his intention to deposit the instrument of ratification, as required, as soon as the appropriate internal procedure had been completed, or "in due course".

17. I consider that these facts alone fully warrant the conclusion, as regards this first point, that Nicaragua never became a party to the Statute of the Permanent Court of International Justice and that the declarations signed by the representative of that State at the very moment of signing the Protocol never took shape as an act producing legal effects at international level. The *Official Journal* of the League of Nations (Special Supplement, 10 July 1944) again confirmed that this conclusion was well-founded, at a time when the life of that Organization was drawing to its close.

18. It may be said that the above conclusion is in fact not contested by the Applicant and that the problem concerning it is, after all, not whether or not it was subjected to the compulsory jurisdiction of the Permanent Court of International Justice, but whether or not it is subjected to the compulsory jurisdiction of the International Court of Justice. This is true, but it will nonetheless be appropriate to stress certain aspects deriving precisely from Nicaragua's non-accession to the Statute of the Permanent Court of International Justice, since it was, for Nicaragua, an inevitable consequence of want of ratification – or at any rate internationally valid ratification – of the Protocol of Signature of the Statute that neither that instrument nor the annexed Optional Clause came into force in regard to that country : accordingly, the obligation which its declaration on the basis of that Clause should have brought into being was never constituted and laid upon it. If then, hypothetically, Nicaragua had, at the time of signing the Protocol, made a declaration of acceptance of compulsory jurisdiction for a definite period – ten years, for example – this period could not have begun to run, since it would necessarily have presupposed that, through ratification of the Protocol, the declaration had become productive of legal effects for the signatory and that its obligation to submit to compulsory jurisdiction had thus begun to exist. Even if it is true that Nicaragua's declaration had been made for an indefinite period, this hypothetical finding is not without importance, as its relevance will be seen below to be more than purely theoretical.

19. It is in the light of what happened at the time of the Permanent

Court of International Justice that one should consider the currently more relevant question of what exactly happened during that extremely eventful period which witnessed the dissolution of the League of Nations, the parallel termination of the Permanent Court of International Justice and its Statute, the creation of the United Nations Organization and the incorporation into this Organization of the International Court of Justice as its principal judicial organ, and finally the adoption of the Statute of the Court as an annex to the Charter. It was in this context that the succession between the two Courts was effected and it is this context which gives meaning to the provision of the Statute of the International Court of Justice concerning the transmission from one Court to the other.

20. The provision in question is the fifth paragraph of Article 36, which reads in English as follows:

> "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."

And in the French version :

> "Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes."

21. The reading of these two different texts in two different languages, both authoritative, has necessarily given rise, and continues to give rise, to problems of interpretation. The English text, in fact, admits of only one interpretation: a declaration which it describes as *"still* in force" (emphasis added), can only be a declaration which, at a given moment, has *begun* to be "in force", and which has accordingly come into force following the only act capable of producing such an effect, namely the deposit with the depositary of an instrument of ratification of the Protocol to which the Optional Clause was annexed. The French text, on the other hand, could apparently lend colour to different interpretations and, according to the Judgment to which this opinion is appended (para. 31), "the deliberate choice of the expression 'pour une durée qui n'est pas encore expirée' seems" – even if the Judgment recognizes that other interpretations are possible – "to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force". This was in fact the case, and was *solely* the case, with the declaration of Nicaragua – for which one would therefore have to imagine that the authors of the French text of Article 36, paragraph 5, cherished very special feelings.

22. With regard to this question I wish first to recall Article 33 of the Vienna Convention on the Law of Treaties, relating to the *interpretation of treaties authenticated in two or more languages.* In paragraph 4, this Article provides that :

> "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning *which best reconciles the texts,* having regard to the object and purpose of the treaty, shall be adopted." (Emphasis added.)

Now, in the light of this clearly logical prescription, it would seem that a *reconciliation* of these two texts with apparently different meanings can only be effected on the basis of an interpretation requiring that the declarations taken into consideration for the purposes of Article 36, paragraph 5, should be declarations which have, at a given moment, come into force and thus acquired binding character – to the exclusion of declarations which never reached that stage. The Judgment, on the contrary, has attempted a reconciliation going the opposite way and, to this end, seems to content itself with the fact (cf. para. 31 *in fine*) that the English text does not mention the binding character which declarations should have in order to come under the régime instituted by the provision in question :

> "It is therefore the Court's opinion that the English version in no way expressly excludes 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." (Para. 31.)

In my view, it remains to be explained how a declaration of acceptance of compulsory jurisdiction could be "in force" and not have the binding force which is, precisely, its sole object.

23. But even if one takes no account of these difficulties, and supposing that one were to rely upon the French text alone, I have strong doubts as to the cogency of the interpretation sought to be founded upon it. The provision to which we are referring speaks of "declarations made under Article 36 of the Statute of the Permanent Court of International Justice". Now that provision – as no one thinks to deny – permitted States to make the declaration recognizing the jurisdiction of the Court as compulsory either when signing or when ratifying the Statute. It could, of course, be made on either occasion, and this double possibility was connected with the normal expectation that the two acts of signature and ratification of the "Protocol of Signature" would be successive, as the Protocol did not provide for signature alone to be adequate but explicitly required ratification. But whether it was made on the first or second of these occasions, it was as from the date of ratification, and only as from that date, that the declaration in question could become a legal act producing legal effects and could give rise to the legal obligation upon the State making the

declaration to subject itself to the jurisdiction of the Court. In other words, a declaration made at the time of signature could not have any legal effects, and could not bind the State that had made it, until such time as there had been a ratification of the provision upon which the very possibility of making the declaration had been based. On this point there seems to be no disagreement. That being so, let us reconsider the hypothesis of a declaration made by a State accepting the obligation to subject its international disputes to the jurisdiction of the Court for a given period, and the question which would then arise of determining both the *dies a quo* and the *dies ad quem* of the obligation thus entered into. I imagine it would be out of the question for the period of an obligation entered into for, say, ten years to begin to elapse before the existence of the obligation in question had been established by the determinative deposit of the instrument of ratification, and it would be difficult to imagine that it could expire until ten years had passed from that moment. The same would be true – though only for the *dies a quo,* of course – in the case of an obligation entered into for an indefinite period. Finally, in a situation like the one under present examination, where the discussion hinges on a declaration made for an indefinite period, but regarding which there has been no act of ratification capable of generating binding legal effects, I find the only admissible conclusion to be that the obligation contemplated by the declaration never began to "elapse" for the simple reason that it never began to "exist".

24. That being the case, it will be appreciated why I find it difficult to accept the proposition that it could have been the intention of the authors of even the French text of Article 36, paragraph 5, of the Statute of the present Court to ensure, for the sake of that Court's succession to the other, that manifestations of intent which had never produced legal effects in relation to the old Court, or in other words had never existed as sources of legal obligations, were endowed with "continuity" of legal effect. I am prepared to admit that, at the time of this succession, the underlying concern of the jurists and diplomats who presided over this operation was to safeguard all the achievements of the former Court for the benefit of the new. However, for this to be done, these achievements had surely to be real, i.e., declarations which had begun to produce the legal effects which were their aim, and not mere manifestations of an intent which had never taken concrete shape through the acts required for it to become an actual source of legal effects in international law. It is perfectly correct to say, as Professor Chayes did on behalf of Nicaragua, that the underlying concern in 1946 was to ensure, through the medium of Article 36, paragraph 5, of the Statute of the new Court, the "continuity" of the legal effects of acceptances of compulsory jurisdiction expressed with reference to the former Court. But – and this is the very point – for any "continuity" of effects to be possible, there had to have been, in relation to the former Court, some acceptances productive of such effects, hence, in this sense, acceptances which had entered into force and assumed a *binding* character in interna-

tional law. The plane of strict identity is forsaken when an old declaration is credited with effects in relation to the new Statute which it never possessed in relation to the previous one.

25. Besides, is it true, as has been maintained, that the case-law of the International Court of Justice contradicts the position I feel dictated by juridical logic ? From that standpoint, it is of particular interest to study the positions taken up at the time of the Judgment in *Aerial Incident of 27 July 1955,* which has perhaps been too lightly passed over as concerning a situation different from the present one. Where the decision to be adopted in that case was concerned, there was a disagreement between the majority of the Court and three Members (Sir Hersch Lauterpacht, Judge Wellington Koo and Sir Percy Spender) who appended a joint dissenting opinion to the Judgment. In the context of the problem before us, it is worthwhile examining the positions of all in that case who expressed one.

26. What strikes me as the most important position is that of the majority of the Court, since it could serve as a weighty precedent for the present case. One aspect of the matter seems to me to deserve particular attention. Reference is made on pages 137 ff. of *I.C.J. Reports 1959,* especially on page 138, to the "simple operation" effected by Article 36, paragraph 5, in its application to States which had signed the Statute of the International Court of Justice at San Francisco. On this point, the majority emphasized that the provision in question was designed to transfer to the new Court the *"obligations"* which had previously existed vis-à-vis the Permanent Court, and this seems clearly to *exclude* its having been designed to extend the operation in question to declarations which, although made at a given moment, had never reached the stage of having *binding* force. The following passage is highly significant in this respect :

> "In the case of signatory States, by an agreement between them having full legal effect, Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations ; *in so doing, it maintained an existing obligation while modifying its subject-matter."* (*I.C.J. Reports 1959,* p. 138, emphasis added.)

Furthermore, the 1959 Judgment immediately went on to confirm this concept by pointing out *a contrario* that, as concerned States which, not having attended the San Francisco Conference, had not then signed the Statute of the Court, "the Statute . . . could *neither maintain nor transform their original obligation"* (emphasis added)[1]. Thus the identification of

[1] I wish also to point out that the present Judgment's theory of the "separability" of an Optional-Clause declaration (without binding force) from its "institutional foundation" (see para. 29) appears refuted by the preclusion of the eventual transfer of a declaration which had created an obligation that lapsed on the dissolution of the Permanent Court.

"existing declaration" with "declaration having *binding* legal effect" could not be more clear, and, that being so, it is difficult indeed to imagine that the Court could at a given moment have envisaged the possibility of the *transfer* of the binding "legal effect" of a declaration which did not have one. It is moreover characteristic that the 1959 Judgment does not even speak of the transfer of declarations possessing binding force, but directly describes the operation carried out under Article 36, paragraph 5, as a *transfer of obligations.* It must therefore be realized that on this point the present Judgment undeniably represents a break with the 1959 precedent. Of course, there is nothing to hinder this, but it is as well to be fully aware of it.

27. As for the joint dissenting opinion, it should first be noted that the three judges laid special emphasis on the identity of meaning between the English and French texts of Article 36, paragraph 5, and on the fact that the French text was not designed to depart from, still less modify, but at the very most to clarify the meaning of the English text. What is most interesting about the opinion in this context is that it brings out the reason why the French delegation at San Francisco had submitted, so insistently, its amendment to the French text. The opinion recalls that there were present at San Francisco a number of States, including China, Egypt, Ethiopia, France, Greece, Peru, Turkey and Yugoslavia, that had in the past made declarations of acceptance which, not having been renewed, "had lapsed and were therefore no longer *in force*" (emphasis added). That being so, the dissenting opinion explains (p. 161):

> "It was clearly necessary, by inserting the expression 'which are still in force', to exclude those States from the operation of paragraph 5. That interpretation is supported by the French text which is as authoritative as the English text and which is even more clear and indisputable than the latter."

28. The fact that one of the States in the above situation was France serves to explain the legitimate concern of that coumtry's delegation to insure against the risk of the French Government's having foisted upon it, through an insufficiently explicit text, an obligation which it wished at the time to be deemed extinguished. The preoccupation behind the amendment was therefore the clear and rigorous containment of the effects of Article 36, paragraph 5, and not the broadening of its scope, still less its unexpected extension to a State whose acceptance of compulsory jurisdiction could not even be described as *no longer in force,* since it had *never been in force.*

29. These, then, are the conclusions which may be drawn from the whole of the views expressed in 1959 by the Court itself or within its framework in the case concerning the *Aerial Incident of 27 July 1955.* Until the present case, that was the only one in which the Court had had occasion to take a

position on the interpretation and effects of Article 36, paragraph 5, of its Statute.

30. In this same context, I think that some comment is called for with regard to the *Yearbooks* of the Court, because I feel that the real situation in this regard should be described with great precision, so as to avoid misinterpretations. In these documents, the form of typographic presentation may have changed, but not the substantive position adopted with regard to the question which concerns us. This position was fixed in *Yearbook 1946-1947,* page 210. Nicaragua's situation with regard to the Optional Clause was there objectively set out, in that the text of its declaration of acceptance of the compulsory jurisdiction of the Permanent Court was reproduced, but accompanied with a footnote specifying that the Registry had not received notification of the instrument of ratification of the Protocol of Signature of the Statute of that Court. In fact, this was tantamount to saying that the declaration reproduced had not entered into force, with all the consequences which might flow therefrom in regard to its legal effects. In the *Yearbook* for subsequent years up to 1954-1955, this footnote does not appear in the same place but is encompassed by a reference to the relevant page of *Yearbook 1946-1947* in the list of States having made declarations of acceptance of compulsory jurisdiction (see, for instance, p. 168 of the *Yearbook 1952-1953*). It would therefore be wrong to argue that in the *Yearbooks* in question the caveat concerning non-notification of ratification of the Statute had disappeared. Then, ever since *Yearbook 1955-1956,* the footnote has again appeared in the same place as in 1946-1947. There is a slight change in wording ("it does not appear, however, that the instrument of ratification was ever received by the League of Nations"), but the effect it was meant to have as a caveat does not seem to have changed. I wish to make all this clear in the interests of accuracy, but obviously without implying that this published material, which states what it states, involves the responsibility of the Court itself.

31. It now remains for me to give my opinion on the conclusion which the Court seems to have reached in this case to the effect that the conduct of Nicaragua after the establishment of the new Court constitutes a valid manifestation of its consent to be definitively bound in law by its intent expressed in 1929 to accept the compulsory jurisdiction of the Court and to do so unconditionally. On this point, I must first enter an express reservation as to the very idea that the indisputable requirement of a formal act of acceptance could admissibly be replaced – and, what is more, in so special and delicate a field as acceptance of the obligation to submit one's international disputes to the jurisdiction of the Court – by mere evidence of conduct, even if the intention revealed by this conduct is not in doubt. But what I wish above all to bring out is the fact that the evidence adduced to prove this "consenting" conduct is not only unpersuasive as presented but, in my view, stands confounded by the facts.

32. After the San Francisco Conference, the situation with regard to Nicaragua's attitude towards our problem did not change. Its reluctance to adopt an attitude favourable to definitive acceptance of the Court's compulsory jurisdiction, far from coming to an end, certainly heightened following the subsequent deterioration of the situation regarding its frontier with Honduras. The successive attempts at conciliation and mediation had all failed. It is in the light of this situation that Nicaragua's silence vis-à-vis the caveat which continued to be expressed in the *I.C.J. Yearbook* footnotes had to be understood. This caveat had in fact the same meaning as that made at the time of the League of Nations and as the reminders on the same subject then sent to the Government by the Secretariat. If there had been any real intention to rectify the position of the country and dispel the ambiguity which continued to surround it, nothing would have been easier than to deposit a new acceptance with the Secretariat of the United Nations, as provided for by the Statute. But nothing of the sort was done. In 1948, by signing and ratifying the Pact of Bogotá, Nicaragua accepted *by treaty* the jurisdiction of the International Court of Justice in its relations with the other American States which were parties to this treaty. But it entered the following reservation:

> "The Nicaraguan Delegation, on giving its approval to the American Treaty on Pacific Settlement (Pact of Bogotá) wishes to record expressly that no provisions contained in the said Treaty may prejudice any position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law, which clearly permit arbitral decisions to be attacked when they are adjudged to be null or invalidated. Consequently, the signature of the Nicaraguan Delegation to the Treaty in question cannot be alleged as an acceptance of any arbitral decisions that Nicaragua has contested and the validity of which is not certain."

33. Meanwhile, relations became more and more strained, and there was an increasing number of frontier and other incidents. Eventually, since all attempts at mediation had failed, a legal adviser to Honduras enquired into the possibility of referring the dispute to the Court unilaterally on the basis of the Nicaraguan Declaration of 1929. But he was not encouraged to pursue this line by the replies he received. This idea was therefore not followed up and it was decided to deal with the dispute within the framework of the Organization of American States. Under an OAS resolution, a commission of mediation was established and its efforts finally led to the conclusion between the two States in dispute of the Agreement of 21 July 1957, under which the Parties, after *noting the recognition of the compulsory jurisdiction of the Court as it figured in the Pact of Bogotá* (hence not of a jurisdiction resulting from parallel declarations of unilateral acceptance by both countries), undertook to submit their dispute to the

Court, on the understanding that each Government "in the exercise of its sovereignty and in accordance with the procedures outlined in this instrument shall present such facets of the matter in disagreement as it deems pertinent". Both States considered this agreement formally to be a special agreement within the meaning of Article 36, paragraph 1, of the Statute of the Court.

34. However, Honduras had no intention of giving up the advantage which it would derive from the application of Article 36, paragraph 2 *(c)*, of the Statute, or the possibility of invoking the existence of a jurisdictional link derived from the presumed acceptance, via unilateral declarations made by each of the Parties, of the compulsory jurisdiction of the Court. In the Memorial submitted to the Court on 5 January 1959, Honduras therefore founded its claim on a dual jurisdictional basis. The first was provided by the above-mentioned Agreement of 21 July 1957 setting out the procedure to be followed for submission to the International Court of Justice of the dispute between the two States over the arbitral award made by the King of Spain on 23 December 1906. This agreement had been reached after both countries, having finally complied with an OAS resolution and *noted the recognition of the compulsory jurisdiction of the International Court of Justice as it figured in the Pact of Bogotá,* undertook to submit their dispute to the Court under the conditions already mentioned. The second basis alleged was the recognition, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, of the compulsory jurisdiction of that Court, Honduras having on 24 May 1954 renewed for a period of six years its declaration of acceptance of the compulsory jurisdiction made on 10 February 1948, which had duly entered into force, and Nicaragua having declared on 24 September 1929 that it recognized the compulsory jurisdiction of the Permanent Court of International Justice, this declaration being considered by Honduras as having been duly ratified and its force as having thus been transferred to the International Court of Justice by virtue of Article 36, paragraph 5, of the Statute of that Court (Memorial of Honduras, paras. 36-40).

35. In the light of this position adopted by Honduras, the Counter-Memorial of Nicaragua formally declared in its introduction that Nicaragua did not deny that the International Court of Justice had jurisdiction in the case, but in support of this submission it pointed out that this jurisdiction had been

> "moreover, expressly admitted by both Parties in the Agreement of June 21st and 22nd, 1957, annexed hereto, and . . . reproduced in the Resolution of the Organization of American States, dated 5th July 1957, . . . Nicaragua agrees with Honduras . . . in ascribing to that instrument the character of a special agreement".

36. Although Nicaragua thereby expressly recognized the Special Agreement as a valid title of jurisdiction, it did not have a word to say about the assertion of Honduras regarding the existence between the two

d'un deuxième lien de juridiction basé sur une prétendue coïncidence de deux déclarations unilatérales reconnaissant la juridiction obligatoire de la Cour, dont l'une aurait émané du Nicaragua. Le contre-mémoire s'étendait uniquement sur le compromis de 1957 et sur ses effets quant à la position des deux parties dans le cadre de cet instrument. Après quoi le contre-mémoire ajoutait :

> « que ce ne peut être que par inadvertance que le Honduras présente la première demande formulée dans ses conclusions comme entrant dans la catégorie de différends visés à l'article 36, chiffre 2 *c),* du Statut de la Cour internationale de Justice... »

Le même contre-mémoire ajoutait aussi que le Nicaragua ne pouvait de même que « marquer sa surprise de l'invocation faite par le Honduras de l'article VI du pacte de Bogotá », et rappelait la réserve qu'il avait apposée à ce pacte au sujet d'une sentence arbitrale contestée.

37. Le Nicaragua se refusait donc, dans le cas d'espèce, à une quelconque discussion s'étendant à un cadre qui ne fût celui très strict du compromis de 1957, ainsi qu'à tout examen de la question de l'éventualité d'une base de juridiction autre que la base fournie par ledit compromis. Cela étant, il me semble vraiment difficile, sinon carrément impossible, de présenter sa conduite de l'époque comme une sorte d'acceptation tacite ou d'acquiescement à la thèse voulant qu'il fût juridiquement tenu par sa déclaration faite en 1929 par laquelle il reconnaissait sans condition la juridiction obligatoire. Bien au contraire, à mon avis, son attitude revenait à opposer à l'assertion faite en ce sens par le Honduras la fin de non-recevoir la plus nette et la plus sèche.

38. C'est d'ailleurs ainsi que l'attitude du Nicaragua fut interprétée par le Honduras. Ce dernier pays avait été dominé par la crainte que le Nicaragua se refusât finalement à comparaître devant la Cour. L'insistance avec laquelle, à chaque étape de la procédure écrite, il avait réitéré dans ses conclusions la formule « plaise à la Cour, *tant en présence qu'en l'absence du Gouvernement du Nicaragua,* de dire et juger » en est la preuve. Le bien-fondé de cette crainte lui ayant paru confirmé par l'attitude adoptée par la Partie adverse à l'égard de sa présentation des bases de juridiction, le Honduras se décida finalement, dans la procédure orale, à ne plus fonder son argumentation que sur le compromis, à renoncer pendant la suite du procès à toute revendication fondée sur la prémisse qu'il existait une autre source de juridiction. Quant à la Cour elle-même, elle se limite dans son arrêt du 18 novembre 1960 à une fort brève allusion à la position prise par une seule des Parties à propos de l'existence d'une deuxième base de juridiction, s'abstenant de tout commentaire à ce sujet et présupposant sa compétence sur la base exclusive du compromis.

39. A la lumière de cet ensemble de constatations relatives à ce qui se passa à l'occasion des préliminaires, du déroulement et de la conclusion de l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906,* il ne me semble pas que l'on puisse y trouver la preuve d'une attitude du Nicaragua permettant de conclure à une acceptation définitive de sa

pulsory jurisdiction to which it had provisionally subscribed in 1929. In fact, Nicaragua's attitude in this matter did not change even after the conclusion of this case which had for so long dominated its relations with its neighbour to the north. Throughout the succeeding two decades, Nicaragua still held back from taking the simple and indispensable step of producing a formal act of acceptance, validly drawn up and deposited in accordance with the provisions of Article 36, paragraph 2, of the present Statute of the Court. It was only on the eve of its institution of proceedings against the United States of America that Nicaragua, suddenly realizing that it was in its interest to be held validly bound to the United States of America by all possible links of jurisdiction, changed its attitude. But it did so, even then, merely to take over for its own purposes the argument, fragile though it had been, which Honduras had raised against it, and which Nicaragua had at the time so negatively received, to the effect that the 1929 Declaration remained valid and that its purported effect had been transferred to the new Court by virtue of Article 36, paragraph 5, of the new Statute. Whatever else might be said, this change of attitude is certainly to be explained by the fact that in 1959-1960 Nicaragua found itself in the position of a Respondent, whereas at present it has turned to the Court as an Applicant. Then there surely remains the question whether it is admissible for a State, at its convenience of the moment, to turn a blind eye to a link of compulsory jurisdiction when it might be bound by it as Respondent, and to spotlight that same link when it is the Applicant.

40. The foregoing detailed analysis of the relevant legal and factual aspects of the question under consideration should make it clear why I find that there is an insuperable obstacle to my sharing the opinion of the majority of the Court as to the existence between Nicaragua and the United States of America of a tie of compulsory jurisdiction of which the non-perfected declaration made by Nicaragua in 1929 would have to be one of the supporting pillars. In my view, this declaration constitutes a manifestation of intent valid as such, which could, however, never have produced any legal effects under either the Permanent Court or the present Court, whether for Nicaragua or for any of the other States therein addressed. Furthermore, it is not, in my view, the quite unprobative conduct of Nicaragua which can have cured this basic flaw.

41. I am therefore compelled to conclude that in this case the Applicant has failed to provide the proof rightly required of it in this matter. Moreover, even if any doubts were to remain, it would not, to my mind, be possible to grant their benefit, in the present phase of the proceedings, to the Applicant rather than to the Respondent. However, while expressing that conclusion, I wish at the same time to re-emphasize my conviction that there does exist between the two countries in dispute a contractually established jurisdictional link, one undoubtedly valid and not open to challenge in other respects either, which is provided by the Treaty of 1956. I believe I have demonstrated as much under Section I of this opinion. This instrument may, in my view, prove, when applied, to be far more capable

than is thought of encompassing, perhaps not completely but certainly in stricter and better-defined form, the issues in dispute between the Parties. This jurisdictional link constitutes at all events a fully adequate basis to enable the Court to move forward to the next stage of the proceedings.

(Signed) Roberto AGO.