DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS

Although I have to disagree with several of the findings of the Court, particularly on the question of jurisdiction, I must, at the outset of this opinion, associate myself wholly with the Court's expression of regret over the United States decision not to appear, or to take any part, in the present phase of this case. This non-appearance has been particularly unfortunate – perhaps not least for the United States – in a case which involves complicated questions of fact ; where, in the merits phase, witnesses giving evidence as to the facts were called and examined by counsel for the Applicant, but their evidence was not tested by cross-examination by counsel for the Respondent ; and where the Respondent itself provided neither oral nor documentary evidence.

I also wish to express my regret that, in a Court which by its Statute is elected in such a way as to assure "the representation of the main forms of civilization and of the principal legal systems of the world", the United States in its statement accompanying the announcement of the non-participation in the present phase of the case should have chosen to refer to the national origins of two of the Judges who took part in the earlier phases of the case.

As to the effects of the United States failure to appear in the merits phase, and the meaning and application of Article 53 of the Court's Statute, I am in entire agreement with the Court ; and it is hardly necessary for me to add that I agree with the Court that, despite having chosen not to appear in the present phase, the United States remains a Party to the case, and is bound by the Judgment of the Court ; just as is also Nicaragua.

In a case like the present where an important question of jurisdiction had to be left to be dealt with at the merits stage, it is incumbent upon those Judges who have felt it necessary to vote "No" to some of the items of the *dispositif,* to explain their views, if only briefly. The reason is that the scheme of the *dispositif* is necessarily designed to enable the majority to express their decision. Even amongst them, reasons for the decision may differ ; but the actual decision, expressed by the vote "Yes", will be essentially the same decision for all of them. Not so for those voting "No". An example is the very important subparagraph (3) of paragraph 292 in the present case, by which those voting "Yes" express their common view that the respondent State has acted in breach of its obligation not to intervene in the affairs of another State : – a vote, "No", however, might mean that in the opinion of that Judge, the Respondent's acts did not amount to intervention ; or that there was a legal justification by way of collective self-defence ; or that the action was justified as a counter measure ; or that, as in the case of the present Judge, the Court had no jurisdiction to decide

any of these things, and therefore the vote "No", of itself, expressed no opinion whatsoever on those other substantive questions.

I shall deal first with the multilateral treaty reservation and jurisdiction ; then jurisdiction under the 1956 FCN Treaty ; and finally make some brief comments on the substance of the Judgment.

EFFECT OF THE MULTILATERAL TREATY RESERVATION

The multilateral treaty reservation is so oddly drafted that it must give rise to difficulties of interpretation. I agree with the Judgment, however, that, in spite of these difficulties, the Court has to respect it and apply it. The reason for this could not be clearer. The jurisdiction of the Court is consensual, this requirement being an emanation of the independence of the sovereign State ; which, it is in the present case not without pertinence to note, is also the basis of the principle of non-intervention. Consequently the Court, in the exercise under Article 36, paragraph 6, of its Statute of its competence to decide a dispute concerning its jurisdiction, must always satisfy itself that consent has in fact been accorded, before it can decide that jurisdiction exists. Moreover, the Court has to be mindful that a consent given in a declaration made under Article 36, paragraph 2, – the "Optional Clause" – is a consent that no State needs to make and that relatively very few have ever done so. Accordingly, any reservation qualifying such a consent especially demands caution and respect. I have, therefore, voted "yes" to subparagraph (1) of paragraph 292.

I agree with the decision of the Court, and for the reasons it gives in the Judgment, that the United States multilateral treaty reservation operates to exclude the Court's jurisdiction in respect of the several multilateral treaties with which the dispute between the Parties to this case is concerned : including, most importantly, the Charter of the United Nations (particularly Art. 2, para. 4, governing the use of force or threat of force, and Art. 51 governing the right of individual and collective self-defence) ; and the Charter of the Organization of American States. I am unable, however, to agree with the Court's persuasion that, whilst accepting the pertinence of the reservation, it can, nevertheless, decide on the Nicaraguan Application by applying general customary law, as it were in lieu of recourse to the relevant multilateral treaties.

This proposition raises some interesting problems about the relationship of customary law and the United Nations Charter in particular ; and I shall first touch briefly upon these ; but only briefly because, there are two

further and decisive reasons, which apply not only to the United Nations Charter but also to other relevant multilateral treaties, and show most cogently why they cannot be avoided in this case by retreating into custom.

* *

Let us look first, therefore, at the relationship between customary international law, and Article 2, paragraph 4, and Article 51 of the United Nations Charter. There is no doubt that there was, prior to the United Nations Charter, a customary law which restricted the lawful use of force, and which correspondingly provided also for a right to use force in self-defence ; as indeed the use of the term "inherent" in Article 51 of the United Nations Charter suggests. The proposition, however, that, after the Charter, there exists alongside those Charter provisions on force and self-defence, an independent customary law that can be applied as alternative to Articles 2, paragraph 4, and 51 of the Charter, raises questions about how and when this correspondence came about, and about what the differences, if any, between customary law and the Charter provisions, may be.

A multilateral treaty may certainly be declaratory of customary international law either :

> "as incorporating and giving recognition to a rule of customary international law that existed prior to the conclusion of the treaty or, on the other hand, as being the *fons et origo* of a rule of international law which subsequently secured the general assent of States and thereby was transformed into customary law" (see Baxter, *British Year Book of International Law,* Vol. XLI, 1965-1966, p. 277).

It could hardly be contended that these provisions of the Charter were merely a codification of the existing customary law. The literature is replete with statements that Article 2, paragraph 4, – for example in speaking of "force" rather than war, and providing that even a "threat of force" may be unlawful – represented an important innovation in the law. The late Sir Humphrey Waldock, in a passage dealing with matters very much in issue in the present case, put it this way :

> "The illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war was not established beyond all doubt by the law of the League, or by the Nuremberg and Tokyo Trials. That was brought about by the law of the Charter . . ." (106 *Collected Courses,* Academy of International Law, The Hague (1962-II), p. 231.)

Even Article 51, though referring to an "inherent" and therefore supposedly pre-existing, right of self-defence, introduced a novel concept in

speaking of "collective self-defence" [1]. Article 51 was introduced into the Charter at a late stage for the specific purpose of clarifying the position in regard to collective understandings – multilateral treaties – for mutual self-defence, which were part of the contemporary scene.

If, then, the Charter was not a codification of existing custom about force and self-defence, the question must then be asked whether a general customary law, replicating the Charter provisions, has developed as a result of the influence of the Charter provisions, coupled presumably with subsequent and consonant States' practice ; so that it might be said that these Charter provisions :

> "generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris,* so as to have become binding even for countries which have never, and do not, become parties to the Convention" (*I.C.J. Reports 1969,* p. 41, para. 71).

But there are obvious difficulties about extracting even a scintilla of relevant "practice" on these matters from the behaviour of those few States which are not parties to the Charter ; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself [2].

There is, however, a further problem : the widely recognized special status of the Charter itself. This is evident from paragraph 6 of Article 2, that :

> "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

This contemplates obligations for non-members arising immediately upon the coming into operation of the Charter, which obligations could at that time only be derived, like those for Members, directly from the Charter itself. Even "instant" custom, if there be such a thing, can hardly be simultaneous with the instrument from which it develops. There is, therefore, no room and no need for the very artificial postulate of a customary law paralleling these Charter provisions. That certain provisions of the

[1] Cf. Aréchaga, 159 *Collected Courses,* The Hague (1978-I), at p. 87, and p. 96 where he goes so far as to assert : "The so-called customary law of self-defence supposedly pre-existing the Charter, and dependent on this single word [inherent] simply did not exist."

[2] For an assessment of this important question, especially in relation to the Declaration of Principles of Friendly Relations, see Professor Arangio-Ruiz, 137 *Collected Courses,* The Hague (1972-III), Chap. IV.

Charter are as such part of general international law, is the conclusion of no less an authority than Hans Kelsen :

> "It is certainly the main purpose of Article 2, paragraph 6, to extend the most important function of the Organisation : to maintain peace by taking 'effective collective measures' to the relation between Members and non-members as well as the relation between non-members and thus to impose upon them the obligation stipulated in Article 2, paragraph 4." (*The Law of the United Nations*, 1950, p. 108.)

And again :

> "From the point of view of existing international law, the attempt of the Charter to apply to states which are not contracting parties to it must be characterized as revolutionary." (*Ibid.*, p. 110.)

Kelsen would hardly have used the word "revolutionary" if he had thought of it as depending upon a development of customary law [1].

That the Court has not wholly succeeded in escaping from the Charter and other multilateral treaties, is evident from even a casual perusal of the Judgment ; the Court has in the event found it impossible to avoid what is in effect a consideration of treaty provisions as such. As the Court puts it, the Court "can and must take them [the multilateral treaties] into account in determining the content of the customary law which the United States is also alleged to have infringed" (para. 183).

This use of treaty provisions as "evidence" of custom, takes the form of an interpretation of the treaty text. Yet the Court itself acknowledges that treaty-law and customary law can be distinguished precisely because the canons of interpretation are different (para. 178). To indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name. Of course this way of going about things may be justified where the treaty text was, from the beginning, designed to be a codification of custom ; or where the treaty is itself the origin of a customary law rule. But, as we have already seen, this could certainly not be said of Article 2, paragraph 4, or even Article 51, of the United Nations Charter ; nor indeed of most of the other relevant multilateral treaty provisions.

[1] For later views to much the same effect, see McNair, *Law of Treaties*, 1961, p. 217, where he speaks of these Charter provisions as possessing "a constitutive or semi-legislative character" ; also Brownlie, *International Law and the Use of Force by States*, 1963, p. 113, e.g., "the difference between Article 2, paragraph 4, and 'general international law' is the merest technicality" ; see also Tunkin, 95 *Collected Courses*, The Hague (1958-III), pp. 65-66.

The reader cannot but put to himself the question whether the Judgment would, in its main substance, have been noticeably different in its content and argument, had the application of the multilateral treaty reservation been rejected.

* *

There is no need to pursue further the relationship of the United Nations Charter and customary law ; for even if a different view of this question could be adopted, there remains, quite independently, a most cogent objection to any attempt to decide the issues of force and self-defence without the Charter of the United Nations or other relevant treaties. Although the multilateral treaty reservation qualifies the jurisdiction of this Court, it does not qualify the substantive law governing the behaviour of the Parties at the material times. Article 38 of the Court's own Statute requires it first to apply "international conventions", "general" as well as "particular" ones, "establishing rules expressly recognized by the contesting States" ; and the relevant provisions of the Charter – and indeed also of the Charter of the Organization of American States, and of the Rio Treaty – have at all material times been principal elements of the applicable law governing the conduct, rights and obligations of the Parties. It seems, therefore, eccentric, if not perverse, to attempt to determine the central issues of the present case, after having first abstracted these principal elements of the law applicable to the case, and which still obligate both the Parties.

* *

There is yet another reason why it is, in my view, not possible to circumvent the multilateral treaty reservation by resort to a residuary customary law ; even supposing the latter could be disentangled from treaty and separately identified as to its content. The multilateral treaty reservation does not merely reserve jurisdiction over a multilateral treaty, where there is an "affected" party not a party to the case before the Court ; it reserves jurisdiction over "disputes arising under a multilateral treaty".

Clearly the legal nature of a dispute is determined by the attitude of the parties between which the dispute is joined. Nicaragua eventually, though not originally, pleaded its case in the duplex form of a dispute under multilateral treaties or, in the alternative, a dispute under customary law. But there are at least two sides to a dispute. The United States did not countenance a dispute arising only under custom. Its response to the charge of the unlawful use of force, was based firmly on the terms of Article 51 of the Charter. One party cannot in effect redefine the response of the other party. If the Respondent relies on Article 51, there is a dispute arising under a multilateral treaty.

Consequently, I am unable to see how the main elements of this dispute – the use of force, and collective self-defence – can be characterized as other than disputes arising under a multilateral treaty. That being so, it follows from the multilateral treaty reservation, that the Court's jurisdiction is lacking, not merely in respect of a relevant multilateral treaty, but in respect of that dispute.

Accordingly, I have voted "No" to subparagraph (2) of paragraph 292 ; not at all on grounds of substance but on the ground of lack of jurisdiction. It follows also that I have had to vote "No" to subparagraph (4), dealing with certain direct attacks on Nicaraguan territory, and to subparagraph (5), dealing with unauthorized overflight of Nicaraguan territory ; again because of lack of jurisdiction to decide one way or the other on the question of self-defence.

* *

The question next arises whether there are any claims in the Nicaraguan application, which can be severed from disputes arising under multilateral treaties and can therefore be decided by the Court without trespass upon that area which the reservation has put outside the jurisdiction conferred upon it by the United States Declaration under Article 36, paragraph 2 ? To answer this question requires an exercise in the characterization of the various issues raised by the application. In particular, it requires some examination of the applicable law ; for the multilateral treaty reservation characterizes excluded disputes in terms of the kind of law applicable to them. The Court could not, therefore, avoid some examination of the applicable law, even for those matters which it finally has no jurisdiction to decide ; which shows how correct it was for the Court to join the consideration of the multilateral treaties reservation to the merits in 1984.

It will be convenient to examine from the point of view of jurisdiction, first the question of intervention ; then the mining of the ports ; then the breaches of humanitarian law ; and then the different question – different because it refers to Article 36, paragraph 1, of the Court's Statute – of the jurisdiction of the Court under the Friendship, Commerce and Navigation Treaty of 1956.

The Principle of Non-Intervention and the Multilateral Treaty Reservation

How far does the multilateral treaty reservation prevent the Court from deciding the questions concerning the principle of non-intervention ? There can be no doubt that the principle of non-intervention is an autonomous principle of customary law ; indeed it is very much older than any of

the multilateral treaty régimes in question. It is, moreover, a principle of law which in the inter-American system has its own peculiar development, interpretation and importance.

One is, however, immediately faced with the difficulty that a plea of collective self-defence is obviously a possible justification of intervention and that this is the justification which the United States has pleaded. So it is again a dispute arising under Article 51 of the United Nations Charter. If one turns to the Inter-American system of law, the same problem arises. Article 18 of the Charter of the Organization of American States deals with intervention in peculiarly comprehensive terms, in that it prohibits intervention "for any reason whatever" ; it also, in Article 21, deals with force and self-defence, but in specifically treaty terms. Thus, by that article, the American States "bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense *in accordance with existing treaties or in fulfillment thereof*" (emphasis added).

The latter phrase can only mean that self-defence in the inter-American system by definition requires recourse to multilateral treaties ; such as, obviously, the Rio Treaty on Mutual Assistance, as well as the Principle of the OAS Charter (Art. 3 *(f)*) that : "An act of aggression against one American State is an act of aggression against all the other American States." In short, I am wholly unable to see how the issues of intervention raised in the instant case – intervention indeed by either Party, for each accuses the other of it – can be categorized as other than a dispute, or disputes, arising under multilateral treaties, and thus caught by the multilateral treaty reservation ; at any rate where self-defence has formally been pleaded as a justification.

A possible way out of the jurisdictional problem which needs to be investigated is the following. It is certain that a respondent State could not be permitted to make a dispute into one arising under a multilateral treaty, merely by making an unsupportable allegation that a treaty was involved. Suppose, in the present case, it were manifest on the face of the matter that there had in fact been no armed attack to which a plea of collective self-defence could be a permissible response ? In that event it could surely be said that there was truly no dispute arising under Article 51 of the Charter.

This, however, is not at all the position. There is a case to answer. The Court has carefully examined both the law and the fact and has made a formal decision in subparagraph (2) of paragraph 292. In short, there is no escaping the fact that this is a decision of a dispute arising under Article 51.

Accordingly, I have had to vote "No" to subparagraph (3) of paragraph 292 ; not indeed on the ground that there has been no United States intervention in Nicaragua, for it is obvious that there has been, but because I cannot see that the Court has jurisdiction to decide whether or not the intervention is justified as an operation of collective self-defence.

* *

THE QUESTION OF THE MINING OF NICARAGUAN PORTS

The dispute concerning the responsibility of the United States for the unnotified mining of Nicaraguan ports, which apparently resulted in damage to a number of merchant ships, some under the flags of third States, seems to be a matter which does not arise out of the provisions of multilateral treaties, and is therefore within the jurisdiction of the Court. When this Court had to consider the laying of mines in a seaway in the *Corfu Channel* case, it did not find it necessary, in connection with the responsibility for damage caused by the mines, to invoke the provisions of the United Nations Charter, but based its decision on the obligation to notify the existence of the mines "for the benefit of shipping in general" ; an obligation :

> "based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war ; the principle of freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*I.C.J. Reports 1949*, p. 22).

This law would seem to apply *a fortiori* where a State lays mines in another State's ports or port approaches, and fails to notify shipping. Nor does this conclusion depend upon a construction of Article 51 of the Charter, for even supposing the United States were acting in legitimate self-defence, failure to notify shipping would still make the mine-laying unlawful.

No doubt that the Court is right, therefore, in finding that the United States has, in this matter, acted unlawfully. Accordingly, I have found myself able to vote for subparagraph (8) of the *dispositif* ; and also for subparagraph (7), which refers to the 1956 Treaty of Friendship, Commerce and Navigation, which will be discussed in a following section of this opinion. I am not able, however, to vote "Yes" to subparagraph (6), which deals with the laying of the mines in terms of a duty of non-intervention, and also in terms of a violation of sovereignty. This of course again raises the question of possible justification of the United States action as part of a

collective self-defence operation ; and on this there is in my view no jurisdiction to make a finding.

There is, nevertheless, a problem in regard even to the finding that the laying of unnotified mines was unlawful. With the question of collective self-defence undecided, it is far from clear that the respondent State is answerable to Nicaragua for damaging, or impeding its shipping ; and the third States whose shipping was involved are not before the Court. However, since the laying of unnotified mines is of itself an unlawful act, it seemed right nevertheless to vote for subparagraph (8).

* *

THE *CONTRAS* AND HUMANITARIAN LAW

Nicaragua claims that the *contras* have committed violations both of the law of human rights and of humanitarian law and that the responsibility for these acts should be attributed to the United States. This is, again, a question which is not one arising under the Charter of the United Nations or of the Organization of American States, for such acts obviously are unlawful even if committed in the course of justified collective self-defence. On the other hand, it might be objected that the question of possible breaches of humanitarian law must be a dispute arising under the 1949 Geneva multilateral Conventions ; and there must be at least very serious doubts whether those conventions could be regarded as embodying customary law. Even the Court's view that the common Article 3, laying down a "minimum yardstick" (para. 218) for armed conflicts of a non-international character, are applicable as "elementary considerations of humanity", is not a matter free from difficulty. Nevertheless, there is also the point that there is no third State "affected" by a decision taken under an Article of the Geneva Conventions ; not at any rate in the way that El Salvador can be seen to be "affected" by a decision taken under Articles 2, paragraph 4, and 51 of the United Nations Charter.

It is clear enough that there has been conduct – not indeed confined to one side of the civil strife – that is contrary to human rights, humanitarian law and indeed also the most elementary considerations of humanity (see the Report of Amnesty International, *Nicaragua : the Human Rights Record*, March 1986, AMR/43/01/86). To impute any of these acts to the United States, as acts of the United States – which is what Nicaragua asks the Court to do – would require a double exercise : there must not only be evidence of the particular acts in question, but the acts must also be imputable to the United States according to the rules governing State

Responsibility in international law; which, in short, means that the unlawful acts of the *contras* must have been committed in such a way, or in such circumstances, as to make them in substance the acts of the United States itself. The Court's finding, made clear in the final phrase of subparagraph (9) of paragraph 292, is that no such acts can be imputed to the United States, and that this claim and charge of Nicaragua is rejected.

There remains, however, the matter of the dissemination of the so-called manual by the United States. This was wholly deplorable; though it is fair to remember that, when it came to the notice of the House of Representatives Permanent Select Committee on Intelligence, it was rightly condemned by them, the *contras* were urged to ignore it, and an attempt was made to recall copies (para. 120). Again, the dissemination of this manual does not, in international law, make unlawful acts of the *contras* into acts imputable to the United States. This is presumably why the Court's rebuke is in the non-technical terms of "encouragement" of unlawful acts. Nevertheless, a rebuke is appropriate and I have had no hesitation in voting "Yes" to that part of the Court's decision.

Accordingly, I have voted "Yes" to subparagraph (9) of paragraph 292.

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TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION OF 21 JANUARY 1956

It is now necessary to examine how far the Court has jurisdiction to deal with any aspects of the case by virtue of the jurisdiction clause (Art. XXIV) of the Treaty of Friendship, Commerce and Navigation of 21 January 1956, which provides:

> "2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

The Court found in the previous phase of the case, that:

> "to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 . . . the Court has jurisdiction under that Treaty to entertain such claims" (*I.C.J. Reports 1984*, p. 429).

Since that Judgment, the United States has denounced the Treaty by a

Note of 1 May 1985, giving the year's notice of denunciation required by Article XXV, paragraph 3, of the Treaty. Since this denunciation was long after joinder of issue, it remains a possible ground of jurisdiction in this case.

First, it should be noted that the 1956 Treaty creates, by Article XXIV, a title of jurisdiction under Article 36, paragraph 1, of the Court's Statute, being a treaty "in force" at the material time. It is a title of jurisdiction which is different from, and independent of, the question of jurisdiction under the United States Declaration made under Article 36, paragraph 2, of the Statute. It is, therefore, a title of jurisdiction which is not touched by the multilateral treaties reservation, which applies only to the Declaration made under Article 36, paragraph 2 ; and there is, accordingly, nothing to prevent the Court, when it is dealing with matters covered by the jurisdiction clause of the FCN Treaty, from considering and applying, for example, Articles 2, paragraph 4, and 51 of the United Nations Charter or any other relevant multilateral treaties. Indeed, the first part of Article XXI *(d)* of the FCN Treaty, to be considered below, clearly contemplates certain kinds of "obligations of a Party" arising from the United Nations Charter as being relevant to the interpretation and application of the treaty.

This does not mean that the principal dispute, the subject of the Nicaraguan Application, could be dealt with under the FCN Treaty jurisdiction clause ; except indeed in so far as it may involve a dispute which directly concerns the "interpretation or application" of the provisions of the treaty. I am unable to accept the Nicaraguan argument, by which the treaty jurisdiction is supposed to comprise matters which could be said in general terms to be inconsistent with the "object and purpose" of an FCN treaty, but are not referred to specific articles of the treaty. The jurisdiction clause of such a treaty could not be regarded as conferring a jurisdiction to pass upon matters external to the actual provisions of the treaty, even though such matters may affect the operation of the treaty. Suppose hostilities, or even war, should arise between parties to an FCN treaty, then the Court under a jurisdiction clause surely does not have jurisdiction to pass upon the general question of the lawfulness or otherwise of the outbreak of hostilities or of war, on the ground only that this defeated the object and purpose of the treaty ; though of course it might have jurisdiction for instance to decide whether there was a "war" or hostilities, for the purposes of interpreting and applying a war clause which was a term of the treaty. If it were otherwise, there would be no apparent limit to the kinds of dispute which might in certain circumstances be claimed to come under such a jurisdiction clause. The conferment of such a potentially roving jurisdiction could not have been within the intention of the parties when they agreed the jurisdiction clause ; and if the Court had asserted such a jurisdiction, this would only have discouraged future mention of the Court in such FCN treaty jurisdiction clauses. I am therefore glad to note that the Court (para. 271) bases its jurisdiction here on Article 36, paragraph 2, of

the Statute ; though that course is not open to me, taking the view I do on the effect of the multilateral treaty reservation.

It is in any event abundantly clear that the object and purpose of this particular Treaty could not have anything like so large an ambit as Nicaragua contended. The Treaty is, in its preamble, said to be "based in general upon the principles of national and most-favoured-nation treatment unconditionally accorded" : a strictly technical formula concerned essentially with commercial relations. Thus, the "object and purpose" of this Treaty is simply not capable of being stretched in the way Nicaragua wished.

If one looks, accordingly, at the actual provisions of the Treaty, perhaps one is struck first by the extent to which many of the terms of the Treaty have been faithfully observed by both Parties. There is much, for example, concerning the treatment of the nationals of one Party in the territory of the other (e.g., Arts. VIII, IX, X and XI) and United States citizens seem to be able to travel freely to Nicaragua. As to Nicaraguans in the United States, it was striking that Mr. Chamorro, whose affidavit is much relied upon by the Court excuses himself from travelling to The Hague to give oral testimony, because travel outside the United States could possibly, he had been advised, prejudice his application for leave to establish himself and his family as permanent residents in the United States.

Nevertheless, there are acts of the United States which appear prima facie to be breaches of actual provisions of the Treaty. The mining of the ports very clearly touches Article XIX, which provides that between the territories of the two parties there shall be freedom of commerce and navigation. And by declaring a general embargo on trade with Nicaragua on 1 May 1985, the United States is prima facie in breach of the actual stipulations of several articles, including in particular Article XIX again ; for the comprehensive trade embargo is repugnant to an undertaking to establish "freedom of commerce" ; and to the provision of that Article that :

> "3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation."

At this point, however, it is necessary to consider the effect of Article XXI which contains a list of provisos – measures which the "present Treaty shall not preclude the application of" – which qualify the entire Treaty. The interesting one for present purposes is :

"*(d)* necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

The point that immediately occurs to the mind is that measures taken in individual or collective self-defence, or as counter-measures, are clearly caught by this proviso as measures necessary to protect essential security.

The question arising under Article XXI is not, however, whether such measures are justified in international law as action taken in self-defence, or as justified counter-measures in general international law ; the question is whether the measures in question are, or are not, in breach of the Treaty. Any operation that comes squarely within Article XXI, as a measure taken by one party to the Treaty, as being "necessary to protect its essential security interests", cannot be in breach of the Treaty. I do not see what other meaning can be given to a clause which simply states that "The present Treaty shall not preclude the application" of such measures, and thus is a proviso to the entire Treaty.

Turning now, therefore, to the "measures" which the Court's decision treats as breaches of this Treaty, it will be convenient first to consider the unnotified mining of Nicaraguan ports which, in subparagraph (7) of paragraph 292, is said to be in breach of the Treaty. This is a question which I have not found it at all easy to resolve.

There is of course, as already mentioned above, no question that the United States, "by failing to make known the existence and location of the mines", has indeed "acted in breach of its obligations under customary international law" (subpara. 8). The question, however, in relation to the 1956 Treaty, is not whether the United States acted in breach of "elementary considerations of humanity", but whether it acted also in breach of the bilateral treaty relationship with Nicaragua, having regard to the general proviso in Article XXI ? Again it must be emphasized that the issue here is not simply the lawfulness or unlawfulness of the act in general international law, but whether it was also in breach of the terms of the Treaty ? Certainly it is prima facie a breach of Article XIX, providing for freedom of navigation ; but is it a "measure" excepted by the proviso clause of Article XXI ? Although not without some remaining doubts, I have come to the conclusion that Article XXI cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence. I have therefore voted "Yes" to subparagraph (8) of paragraph 292. (As explained above, I cannot vote in favour of subparagraph (6) because this is dependent upon being able to vote "Yes" to subparagraph (2).)

Turning now to subparagraph (10) of paragraph 292, the Court finds that the "attacks on Nicaraguan territory referred to in subparagraph (4)", are calculated to deprive the 1956 Treaty of its object and purpose. Here,

there is, in my view, no need to consider Article XXI, because I fail to see how these direct attacks upon Nicaraguan territory have anything to do with the treaty at all. In fact any examination of whether bombing attacks are, or are not, breaches of a treaty "based in general upon the principles of national and of most-favoured-nation treatment unconditionally accorded", might be thought not wholly free from an element of absurdity.

I have already discussed the question of jurisdiction in relation to the "object and purpose" ; but here it is the substance of the Court's decision that causes me unease. Either those acts are breaches of some provision of the Treaty or they have nothing to do with the Treaty. The "object and purpose" of a treaty cannot be a concept existing independently of any of its terms. I have, therefore, voted "No" to subparagraph (10).

As to the general embargo on trade with Nicaragua of 1 May 1985 : this was instituted by the Executive Order of 1 May 1985, made by the President of the United States ; it contained a finding that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" ; the Order also declared a "national emergency to deal with that threat" (see Judgment, para. 125). This statement on national security made no reference to Article XXI of the 1956 Treaty, and was presumably to serve a purpose of domestic United States law. It went on to prohibit "all imports into the United States of goods and services of Nicaraguan origin" ; and "all exports from the United States of goods and services to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto". There was also a prohibition in general terms on all air carriers and vessels, the latter being prohibited from entering United States ports if of Nicaraguan registry.

There is no difficulty in holding that the total trade embargo, and of air and sea transit, by the Order of 1 May 1985, was a prima facie breach of the terms of the Treaty ; and again it is Article XIX that is directly involved. It seems to me there is equally no difficulty in seeing that these measures came squarely within Article XXI and therefore are not in breach of the Treaty.

Accordingly, I have voted "No" to subparagraph (11) of paragraph 292.

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The Place of "Armed Attack"

Although I am of the opinion that, owing to the operation of the multilateral treaty reservation, the Court has no jurisdiction to pass upon the question of self-defence, it seems right nevertheless to comment briefly

upon some passages of the Court's Judgment where it deals with these matters in a way with which I do not find myself entirely in agreement.

The question of what constitutes "armed attack" for the purposes of Article 51, and its relation to the definition of aggression, are large and controversial questions in which it would be inappropriate to become involved in this opinion. It is of course a fact that collective self-defence is a concept that lends itself to abuse. One must therefore sympathize with the anxiety of the Court to define it in terms of some strictness (though it is a little surprising that the Court does not at all consider the problems of the quite different French text : "où un Membre . . . est l'objet d'une agression armée"). There is a question, however, whether the Court has perhaps gone too far in this direction.

The Court (para. 195) allows that, where a State is involved with the organization of "armed bands" operating in the territory of another State, this, "because of its scale and effects", could amount to "armed attack" under Article 51 ; but that this does not extend to "assistance to rebels in the form of the provision of weapons or logistical or other support" *(ibid.)*. Such conduct, the Court goes on to say, may not amount to an armed attack ; but "may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States" *(ibid.)*.

It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provision of arms, coupled with "logistical or other support" is not armed attack is going much too far. Logistical support may itself be crucial. According to the dictionary, logistics covers the "art of moving, lodging, and supplying troops and equipment" (*Concise Oxford English Dictionary,* 7th ed., 1982). If there is added to all this "other support", it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of collective self-defence ; nor indeed may be responded to at all by the use of force or threat of force, for, to cite the Court again, "States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack' " (see para. 211).

This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. The original scheme of the United Nations Charter, whereby force would be

deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.

These observations have mainly to do with the Court's statement of the law. As to the case before the Court, I remain somewhat doubtful whether the Nicaraguan involvement with Salvadorian rebels has not involved some forms of "other support" besides the possible provision, whether officially or unofficially, of weapons. There seems to have been perhaps overmuch concentration on the question of the supply, or transit, of arms ; as if that were of itself crucial, which it is not. Yet one is bound to observe that here, where questions of fact may be every bit as important as the law, the United States can hardly complain at the inevitable consequences of its failure to plead during the substantive phase of the case. It is true that a great volume of material about the facts was provided to the Court by the United States during the earlier phases of the case. Yet a party which fails at the material stage to appear and expound and explain even the material that it has already provided, inevitably prejudices the appreciation and assessment of the facts of the case. There are limits to what the Court can do, in accordance with Article 53 of the Statute, to satisfy itself about a non-appearing party's case ; and that is especially so where the facts are crucial. If this were not so, it would be difficult to understand what written and oral pleadings are about.

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THE NATURE OF COLLECTIVE SELF-DEFENCE

Another matter which seems to call for brief comment, is the treatment of collective self-defence by the Court. The passages beginning with paragraph 196 seem to take a somewhat formalistic view of the conditions for the exercise of collective self-defence. Obviously the notion of collective self-defence is open to abuse and it is necessary to ensure that it is not employable as a mere cover for aggression disguised as protection, and the Court is therefore right to define it somewhat strictly. Even so, it may be doubted whether it is helpful to suggest that the attacked State must in some more or less formal way have "declared" itself the victim of an attack and then have, as an additional "requirement", made a formal request to a particular third State for assistance. Thus the Court says :

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

It may readily be agreed that the victim State must both be in real need of assistance and must want it and that the fulfilment of both these conditions must be shown. But to ask that these requirements take the form of some sort of formal declaration and request might sometimes be unrealistic.

But there is another objection to this way of looking at collective self-defence. It seems to be based almost upon an idea of vicarious defence by champions : that a third State may lawfully come to the aid of an authenticated victim of armed attack provided that the requirements of a declaration of attack and a request for assistance are complied with. But whatever collective self-defence means, it does not mean vicarious defence ; for that way the notion is indeed open to abuse. The assisting State is not an authorized champion, permitted under certain conditions to go to the aid of a favoured State. The assisting State surely must, by going to the victim State's assistance, be also, and in *addition* to other requirements, in some measure defending itself. There should even in "collective self-defence" be some real element of self [1] involved with the notion of defence. This is presumably also the philosophy which underlies mutual security arrangements, such as the system of the Organization of American States, for which indeed Article 51 was specifically designed. By such a system of collective security, the security of each member State is meant to be involved with the security of the others ; not merely as a result of a contractual arrangement but by the real consequences of the system and its organization. Thus, Article 27 of the Charter of the Organization of American States provides that :

"Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

This, I believe, should not be regarded as a mere contractual arrangement for collective defence – a legal fiction used as a device for arranging for mutual defence – ; it is to be regarded as an organized system of collective security by which the security of each member is made really and truly to have become involved with the security of the others, thus providing a true

[1] It may be objected that the very term "self-defence" is a common law notion, and that, for instance, the French equivalent of "légitime défense" does not mention "self". Here, however, the French version is for once, merely unhelpful ; it does no more than beg the question of what is "légitime".

basis for a system of collective self defence. This underlying philosophy of collective self-defence is well expressed in a classical definition of that concept in Lauterpacht's edition of *Oppenheim's International Law* (Vol. II, 1952, p. 155):

> "It will be noted that, in a sense, Article 51 enlarges the right of self-defence as usually understood – and the corresponding right of recourse to force – by authorising both individual and collective self-defence. This means that a Member of the United Nations is permitted to have recourse to action in self-defence not only when it is itself the object of armed attack, but also when such attack is directed against any other State or States whose safety and independence are deemed vital to the safety and independence of the State thus resisting – or participating in forcible resistance to – the aggressor."

(Signed) R. Y. JENNINGS.