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(NICARAGUA c. HONDURAS)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

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CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS

(NICARAGUA *v.* HONDURAS)

JURISDICTION OF THE COURT AND
ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 20 DECEMBER 1988

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CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS

(NICARAGUA *v.* HONDURAS)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Jurisdiction of the Court, burden of proof — Intention of the Parties.

Charter of Organization of American States — Pact of Bogotá, Article XXXI — Relationship with Article 36, paragraph 2, of the Statute and with declarations made thereunder — Article XXXI as an independent source of jurisdiction — Relationship between Articles XXXI and XXXII.

Admissibility of the Application — Political aspects — Division of general conflict into separate bilateral disputes — Res judicata *— Required degree of particularization of claim — Date at which admissibility to be determined: date of filing of Application.*

Pact of Bogotá, Article II — Settlement under that Article by direct negotiations through the usual diplomatic channels — Nature of the "Contadora process".

Pact of Bogotá, Article IV — Question whether any prior pacific procedure for settlement of dispute was "concluded" before proceedings instituted — Case of the "Contadora process" — Good faith.

JUDGMENT

Present: President RUDA; *Vice-President* MBAYE; *Judges* LACHS, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN; *Registrar* VALENCIA-OSPINA.

In the case concerning border and transborder armed actions

between

'he Republic of Nicaragua,

'epresented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,

as Agent and Counsel,

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the *Institut d'études politiques de Paris,*

as Counsel and Advocates,

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,
Mr. Antonio Remiro Brotons, Professor of Public International Law in the *Universidad Autonoma de Madrid,*
Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C., Member of the Bars of the District of Columbia and the State of California,

as Counsel,

and

the Republic of Honduras,

represented by

H.E. Mr. Mario Carías, Ambassador,

as Agent,

H.E. Mr. Jorge Ramón Hernández Alcerro, Ambassador, Permanent Representative to the United Nations,

as Co-Agent,

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Whewell Professor of International Law in the University of Cambridge,
Mr. Pierre-Marie Dupuy, Professor at the *Université de droit, d'économie et de sciences sociales de Paris,*
Mr. Julio Gonzáles Campos, Professor of International Law at the University of Madrid,

as Advocates/Counsel,

Mr. Arias de Saavedra Muguelar, Minister at the Embassy of Honduras to the Netherlands,
Mrs. Salomé Castellanos, Minister-Counsellor at the Embassy of Honduras to the Netherlands,

as Counsel,

THE COURT,

composed as above,

delivers the following Judgment:

1. On 28 July 1986, the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the Republic of Honduras in respect of a dispute concerning the alleged activities of armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaraguan territory. In order to found the jurisdiction of the Court the Application relied on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially known, according to Article LX thereof, as the "Pact of Bogotá", signed on 30 April 1948, and the declarations made by the two Parties accepting the jurisdiction of the Court, as provided for in Article 36, paragraphs 1 and 2 respectively, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Republic of Honduras; in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a letter of 29 August 1986, the Minister for External Relations of Honduras informed the Court that in his Government's view the Court had no jurisdiction over the matters raised in the Application, and expressed the hope that the Court would confine the first written proceedings to the issues of jurisdiction and admissibility. The Parties, consulted pursuant to Article 31 of the Rules of Court, subsequently agreed that the issues of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings.

4. By an Order dated 22 October 1986, the Court, taking note of the agreement of the Parties on the procedure, decided that the first pleading should be a Memorial by the Republic of Honduras dealing exclusively with the issues of jurisdiction and admissibility; and that in reply the Republic of Nicaragua should submit a Counter-Memorial confined to those same issues; and fixed time-limits for those pleadings. The Memorial and Counter-Memorial were filed within the relevant time-limits.

5. On 3 November 1986 the Registrar informed the States parties to the Pact of Bogotá that he had been directed, in accordance with Article 43 of the Rules of Court, to draw to their notice the fact that in the Application the Republic of Nicaragua had invoked, *inter alia,* the Pact of Bogotá, adding however that the notification did not prejudge any decision which the Court might be called upon to take pursuant to Article 63 of the Statute of the Court.

6. By a letter of 21 July 1987 the Registrar drew the attention of the Secretary-General of the Organization of American States to Article 34, paragraph 3, of the Statute of the Court and to the Preamble to the Pact of Bogotá whereby that instrument was stated to be concluded "in fulfillment of Article XXIII of the Charter of the Organization of American States". The Registrar went on to inform the Secretary-General of the Organization of American States that the Court, pursuant to Article 69, paragraph 3, of the Rules of Court, had instructed him to communicate to that Organization copies of all the written proceedings. The Secretary-General of the Organization was at the same time informed of the time-limit fixed for any observations the Organization might wish to submit, pursuant to that Article of the Rules of Court.

7. By a letter of 29 July 1987, the Secretary-General of the Organization of American States informed the Registrar that in his opinion he would not as Secretary-General have the authority to submit observations on behalf of the Organization, and that the convening of the Permanent Council of the Organization would require each member State to be provided with copies of the pleadings; he recorded his understanding, however, that the Court had notified all parties to the Pact of Bogotá of the fact that the proceedings appeared to raise questions of the construction of that instrument.

8. By a joint letter dated 13 August 1987, the Agents of the two Parties informed the Court of an agreement concluded between the Presidents of the two countries on 7 August 1987, whereby both Parties would request the Court "to accept the adjournment, for a period of three months, of the opening of the oral proceedings on the question of jurisdiction to be heard, *inter alia,* by the Court". That agreement provided further that the situation would be reviewed by the two Presidents on the occasion of a meeting to be held 150 days later. The Parties were informed by the Registrar the same day that the President of the Court had decided, in application of Article 54 of the Rules of Court, to adjourn the opening of the oral proceedings to a later date to be fixed after consultation with the Agents of the Parties.

9. After the Agent of Honduras had, by a letter dated 1 February 1988, informed the Court of a meeting between the Presidents of the Central American countries held in San José, Costa Rica, on 16 January 1988, it was decided, after the Parties had been consulted, to prolong the postponement of the opening of the oral proceedings.

10. On 21 March 1988 the Government of Nicaragua filed in the Registry a request for the indication of provisional measures under Article 41 of the Statute of the Court and Article 73 of the Rules of Court. This request was forthwith communicated to the Government of Honduras. By letter of 31 March 1988 the Agent of Nicaragua informed the Court that the Government of Nicaragua had instructed him to withdraw the request for the indication of provisional measures. By an Order dated the same day the President of the Court placed on record that withdrawal.

11. By a letter of 12 April 1988, the Agent of Honduras requested that oral proceedings on the questions of jurisdiction and admissibility should be held between 23 May and 10 June 1988. Following a meeting between the President of the Court and the Agents of the Parties on 20 April 1988, at which the Agent of Nicaragua indicated that his Government had no objection to the dates suggested by Honduras, the President decided that the oral proceedings should begin on 6 June 1988.

12. At public hearings held between 6 and 15 June 1988, the Court heard oral arguments addressed to it by the following:

For Honduras: H.E. Mr. Mario Carías,
H.E. Mr. J. R. Hernández Alcerro,
Professor D. W. Bowett,
Professor P.-M. Dupuy.

For Nicaragua: H.E. Mr. Carlos Argüello Gómez,
Professor Abram Chayes,
Professor A. Pellet,
Professor I. Brownlie.

In the course of the hearings, questions were put to both Parties by Members of the Court. Replies were given to some extent orally during the hearings; addi-

tional replies in writing were filed in the Registry within a time-limit fixed under Article 72 of the Rules of Court. Honduras availed itself of the opportunity afforded by that Article to submit to the Court comments on the written replies of Nicaragua.

* *

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Republic of Honduras,

in the Memorial:

"In view of the facts and arguments set forth in the preceding parts of this Memorial, the Government of Honduras requests that it may please the Court to adjudge and declare that:

As to Admissibility:

The Application of Nicaragua is inadmissible because:

1. It is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character.

2. The Application is vague and the allegations contained in it are not properly particularized, so that the Court cannot entertain the Application without substantial prejudice to Honduras.

3. Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedures established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice.

4. Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived.

As to Jurisdiction:

The Court is not competent to entertain the Application of Nicaragua because:

1. The dispute as alleged by Nicaragua is excluded from the jurisdiction of the Court by the terms of the Honduran declaration of 22 May 1986, and such declaration applies whether the jurisdiction is alleged to exist on the basis of Article XXXI of the Pact of Bogotá or Article 36, paragraph 2, of the Statute of the Court.

2. Alternatively, Article XXXI cannot be invoked as a basis of jurisdiction independently of Article XXXII, and the latter Article precludes any unilateral application to the Court except where:

(a) conciliation procedures have been undergone without a solution, *and*

(b) the parties have not agreed on an arbitral procedure.

Neither condition is satisfied in the present case.

3. Jurisdiction cannot be based on Article 36, paragraph 1, of the Statute of the Court because States parties to the Pact of Bogotá have agreed in Article XXXII that a unilateral Application, based on the Pact of Bogotá, can only be made when the two conditions enumerated in *(a)* and *(b)*, paragraph 2 above, have been satisfied, and such is not the case with the Application of Nicaragua."

On behalf of the Republic of Nicaragua,

in the Counter-Memorial:

"A. On the basis of the foregoing facts and arguments the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. For the reasons set forth in this Counter-Memorial the purported modifications of the Honduran Declaration dated 20 February 1960, contained in the 'Declaration' dated 22 May 1986, are invalid and consequently the 'reservations' invoked by Honduras in its Memorial are without legal effect.

2. Alternatively, in case the Court finds that the modifications of the Honduran 'Declaration' dated 22 May 1986 are valid, such modifications cannot be invoked as against Nicaragua because on the facts Nicaragua did not receive reasonable notice thereof.

3. Without prejudice to the foregoing submissions, the 'reservations' invoked by Honduras are not applicable in any event in the circumstances of the present case: thus —

(a) the dispute to which the Application of Nicaragua relates is not the subject of any agreement by the Parties to resort to other means for the pacific settlement of disputes; and, in particular, neither the Contadora process nor the provisions of the Pact of Bogotá constitute the 'other means' to which the pertinent reservation refers;

(b) the dispute to which the Application of Nicaragua relates is not a dispute 'relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly', and, in the alternative, the 'reservation' in question does not possess an exclusively preliminary character and therefore the issue of its application is postponed for determination at the stage of the Merits.

4. The 'reservations' invoked by Honduras are not applicable in any event to the provisions of Article XXXI of the Pact of Bogotá, which provides an independent basis of jurisdiction within the framework of Article 36, paragraph 1, of the Statute of the Court.

5. The application of the provisions of Article XXXI of the Pact of Bogotá is not subject either to the conciliation procedure referred to in Article XXXII of the Pact, exhaustion of which is a condition of recourse to the Court exclusively within the context of Article XXXII, or to the condition of an agreement upon an arbitral procedure which relates exclusively to Article XXXII.

6. The grounds of inadmissibility of the Application alleged to derive

from the provisions of Articles II and IV of the Pact of Bogotá have no legal basis.

7. All the other grounds of inadmissibility alleged in the Honduran Memorial have no legal basis and must be rejected.

B. As a consequence of these conclusions the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. The Court is competent in respect of the matters raised in the Application submitted by the Government of Nicaragua on 28 July 1986.

2. The competence of the Courts exists: by virtue of the Honduran Declaration dated 20 February 1960 accepting the jurisdiction of the Court in conformity with the provisions of Article 36, paragraph 2, of the Statute of the Court; *or* (in case the Declaration of 1960 has been validly modified) the Honduran Declaration of 1960 as modified by the Declaration dated 22 May 1986, and the Nicaraguan Declaration dated 24 September 1929; *and/or* by virtue of the provisions of Article XXXI of the Pact of Bogotá and Article 36, paragraph 1, of the Statute of the Court.

3. The Application of Nicaragua is admissible.

C. For these reasons the Government of Nicaragua respectfully asks the Court to declare that it has jurisdiction or, alternatively, to reserve any question which does not possess an exclusively preliminary character for decision at the stage of the merits.

D. In respect of all questions of fact referred to in the Memorial of Honduras not expressly considered in the present *Counter-Memorial,* the Government of Nicaragua reserves its position."

14. In the course of the oral proceedings, each Party confirmed its submissions as made in the Memorial and Counter-Memorial respectively, without modification.

* * *

15. The present phase of the proceedings is devoted, in accordance with the Order made by the Court on 22 October 1986, to the issues of the jurisdiction of the Court and the admissibility of the Application. Honduras has in its submissions contended, first that "the Application of Nicaragua is inadmissible" and, secondly, that "the Court is not competent to entertain" that Application; the Court will however first examine the question of jurisdiction before proceeding, if it finds that it is competent, to examine the issues of admissibility.

* *

16. The Parties have devoted some argument to a question defined by them as that of the burden of proof: whether it is for Nicaragua to show the existence of jurisdiction for the Court to deal with its claims, or for Honduras to establish the absence of such jurisdiction. Each of them has cited, in support of its contention, the Court's dictum that "it is the litigant

seeking to establish a fact who bears the burden of proving it" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984,* p. 437, para. 101).

The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts. The determination of the facts may raise questions of proof. However the facts in the present case — the existence of the Parties' declarations under Article 36 of the Statute, the signature and ratification of the Pact of Bogotá, etc. — are not in dispute; the issue is, what are the legal effects to be attached to them? The question is whether in case of doubt the Court is to be deemed to have jurisdiction or not. This question has already been considered by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów, Jurisdiction,* when it observed:

> "It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection — or when it has automatically to consider the question — only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it." (*P.C.I.J., Series A, No. 9,* p. 32.)

The Court will therefore in this case have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to "ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it".

* *

17. In its Application instituting proceedings in this case, Nicaragua refers, as basis of the jurisdiction of the Court, to

> "the provisions of Article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Honduras respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute"

of the Court. In the submissions presented by Nicaragua in the Counter-Memorial it is contended more specifically that

"The competence of the Court exists: by virtue of the Honduran Declaration dated 20 February 1960 accepting the jurisdiction of the Court in conformity with the provisions of Article 36, paragraph 2, of the Statute of the Court; *or* (in case the Declaration of 1960 has been validly modified) the Honduran Declaration of 1960 as modified by the Declaration dated 22 May 1986, and the Nicaraguan Declaration dated 24 September 1929; *and/or* by virtue of the provisions of Article XXXI of the Pact of Bogotá and Article 36, paragraph 1, of the Statute of the Court."

18. The Pact of Bogotá was drafted and adopted at the Bogotá Conference in 1948, at the same time as the Charter of the Organization of American States (OAS). Among the purposes of the OAS as proclaimed in Article 2 of the Charter was the following:

"*(b)* to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States."

One Chapter of the Charter was devoted to Pacific Settlement of Disputes, and consisted of four Articles, originally numbered 20 to 23, which read as follows:

"Article 20

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.

Article 21

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.

Article 22

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution.

Article 23

A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period."

The Charter was amended by the Protocol of Buenos Aires in 1967, and further amended by the Protocol of Cartagena de Indias in 1988. Nicaragua and Honduras are parties to the Charter, as successively amended.

19. The "special treaty" referred to in Article 23 of the Charter, quoted above, is the Pact of Bogotá, which states in its Preamble that it was concluded "in fulfillment of Article XXIII of the Charter". Nicaragua and Honduras have since 1950 been parties to the Pact, in the case of Honduras without reservation; Nicaragua appended a reservation to its signature to the Pact, which it maintained at the time of ratification. The purpose of the reservation was to reserve the

> "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".

It has not been contended that that reservation (to be referred to in another context below, paragraph 40) in itself deprives the Court of any jurisdiction in this case which it might have by virtue of the Pact.

20. Article XXXI of the Pact, upon which Nicaragua relies to found jurisdiction, provides as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *(a)* The interpretation of a treaty;
> *(b)* Any question of international law;
> *(c)* The existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* The nature or extent of the reparation to be made for the breach of an international obligation."

21. The other basis of jurisdiction relied on by Nicaragua is constituted by the declarations of acceptance of compulsory jurisdiction made by the Parties under Article 36 of the Statute of the Court.

The jurisdiction of the Court under Article 36, paragraph 2, of its Statute has been accepted by Honduras, initially by a Declaration made on 2 February 1948, and deposited with the Secretary-General of the United Nations on 10 February 1948, in the following terms:

[Translation from the Spanish]

> "The Executive of the Republic of Honduras, with due authorization from the National Congress granted by Decree Number Ten of the nineteenth of December, nineteen hundred and forty-seven, and

in conformity with paragraph two of Article thirty-six of the Statute of the International Court of Justice,

Hereby declares:

That it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

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

This declaration is made on condition of reciprocity and for a period of six years from the date of the deposit of the declaration with the Secretary-General of the United Nations.

National Palace, Tegucigalpa, D.C., the second of February, nineteen hundred and forty-eight." (*I.C.J. Yearbook 1947-1948,* p. 129.)

22. On 24 May 1954, the Government of Honduras deposited with the Secretary-General of the United Nations a Declaration renewing the Declaration of 2 February 1948, "for a period of six years, renewable by tacit reconduction".

23. The Honduran acceptance of jurisdiction was further renewed, this time "for an indefinite term", by a Declaration dated 20 February 1960, and deposited with the Secretary-General of the United Nations on 10 March 1960 ("the 1960 Declaration"):

[Translation from the Spanish]

"The Government of the Republic of Honduras, duly authorized by the National Congress, under Decree No. 99 of 29 January 1960, to renew the Declaration referred to in Article 36 (2) of the Statute of the International Court of Justice, *hereby declares*:

1. That it renews the Declaration made by it for a period of six years on 19 April 1954 and deposited with the Secretary-General of the United Nations on 24 May 1954, the term of which will expire on 24 May 1960; recognizing as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature and extent of the reparation to be made for the breach of an international obligation.

2. This new Declaration is made on condition of reciprocity, for an indefinite term, starting from the date on which it is deposited with the Secretary-General of the United Nations.

National Palace, Tegucigalpa, D.C., 20 February 1960." (*I.C.J. Yearbook 1959-1960,* p. 241.)

24. As noted in paragraph 17 above, Nicaragua claims to be entitled to found jurisdiction on the 1960 Declaration. Honduras asserts that that Declaration has been modified by a subsequent Declaration, made on 22 May 1986 ("the 1986 Declaration"), which it had deposited with the Secretary-General of the United Nations prior to the filing of the Application by Nicaragua. The 1986 Declaration is worded as follows:

[Translation from the Spanish]

"The Government of the Republic of Honduras, duly authorized by the National Congress under Decree No. 75-86 of 21 May 1986 to modify the Declaration made on 20 February 1960 concerning Article 36, paragraph 2, of the Statute of the International Court of Justice, *hereby declares* that it modifies the Declaration made by it on 20 February 1960 as follows:

1. It recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:
   (a) the interpretation of a treaty;
   (b) any question of international law;
   (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
   (d) the nature or extent of the reparation to be made for the breach of an international obligation.
2. This Declaration shall not apply, however, to the following disputes to which the Republic of Honduras may be a party:

   (a) disputes in respect of which the parties have agreed or may agree to resort to other means for the pacific settlement of disputes;
   (b) disputes concerning matters subject to the domestic jurisdiction of the Republic of Honduras under international law;

(c) disputes relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly;

(d) disputes referring to:

(i) territorial questions with regard to sovereignty over islands, shoals and keys; internal waters, bays, the territorial sea and the legal status and limits thereof;

(ii) all rights of sovereignty or jurisdiction concerning the legal status and limits of the contiguous zone, the exclusive economic zone and the continental shelf;

(iii) the airspace over the territories, waters and zones referred to in this subparagraph.

3. The Government of Honduras also reserves the right at any time to supplement, modify or withdraw this Declaration or the reservations contained therein by giving notice to the Secretary-General of the United Nations.

4. This Declaration replaces the Declaration made by the Government of Honduras on 20 February 1960.

National Palace, Tegucigalpa, D.C., 22 May 1986." (*I.C.J. Yearbook 1985-1986,* pp. 71-72.)

25. In order to be able to show that it is a "State accepting the same obligation" as Honduras within the meaning of Article 36, paragraph 2, of the Statute, Nicaragua relies on the declaration which, as a Member of the League of Nations, it made at the time of signature of the Protocol of Signature of the Statute of the Permanent Court of International Justice, and which read as follows:

[Translation from the French]

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

Geneva, 24 September 1929."

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

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

Nicaragua recalls finally that the Court, in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (*I.C.J. Reports 1984,* p. 441, para. 110), found that "the Nicaraguan Declaration of 24 September 1929 is valid", and according to Nicaragua, that Declaration is currently in effect.

26. It is, in short, claimed by Nicaragua that there exist two distinct titles of jurisdiction. It asserts that the Court could entertain the case both on the basis of Article XXXI of the Pact of Bogotá and on the basis of the declarations of acceptance of compulsory jurisdiction made by Nicaragua and Honduras under Article 36 of the Statute.

27. Since, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact.

* *

28. Honduras maintains in its Memorial that the Pact "does not provide any basis for the jurisdiction of the . . . Court". It does not contend that the present dispute by its nature falls outside the scope of the provisions of Article XXXI itself but argues that that Article nevertheless does not confer jurisdiction on the Court in the present case, and puts forward two objections to that effect.

29. Honduras first draws attention to the fact that Article XXXI begins with the words, "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice", and that the wording of the rest of the Article is almost identical with that of Article 36, paragraph 2. It contends that the interpretation of Article XXXI which is at once the most simple, the most logical and the most consistent with the literal wording of the Pact is that it "contains a jurisdiction which can be more precisely defined by means of a unilateral declaration" under Article 36, paragraph 2, of the Statute, by each party to the Pact; and that the seisin of the Court is "subject to the terms in which the jurisdiction of the Court has been acknowledged by the parties to the dispute" in such declarations. According to Honduras,

> "Under the most literal, and therefore the most simple, interpretation of the terms of the Pact, Article XXXI, in establishing the obligatory jurisdiction of the Court, at the same time requires the additional subscription, by each of the Parties, of a unilateral declaration of acknowledgement of its jurisdiction, as provided for by Article 36.2 of the Statute of the Court, to which Article XXXI of the Pact makes express reference. The reservations attached to such declarations, as in the case of the declaration of Honduras of 22 May 1986 [quoted in paragraph 24 above], therefore apply both in the context of the application of Article XXXI and on the sole basis of the Honduran declaration itself."

In the contention of Honduras, the reservations attached to the 1986 Declaration are such as to exclude the present case from the scope of the jurisdiction conferred under Article 36, paragraph 2, by the Declaration. Accordingly it maintains that the Court has no jurisdiction in the case under Article XXXI either.

30. At this stage, Honduras's interpretation of Article XXXI of the Pact was thus that it imposed an obligation to make an optional-clause declaration, and that, in the absence of such a declaration, no jurisdiction existed under that Article. The interpretation of Article XXXI espoused by Honduras was, however, elaborated during the oral arguments and in its replies to questions put by a Member of the Court. First, Honduras conceded that it was "arguable that such a declaration was not necessary, and that Article XXXI operated by its own force, on its own terms, and without need of any companion declaration". Honduras subsequently contended that Article XXXI is an incorporation into the Pact of the system of recognition of the Court's jurisdiction under the régime of the "optional clause", i.e., Article 36, paragraph 2, of the Statute.

Consequently, Honduras considers that States parties to the Pact may choose either to take no further action, in which case Article XXXI itself operates as a joint acceptance of jurisdiction under Article 36, paragraph 2, free of reservations and conditions other than the basic condition of reciprocity; or to make a declaration under Article 36, paragraph 2. According to Honduras, if that declaration contains no reservations, while it will operate in relation to States non-parties to the Pact which have made declarations under the optional clause, it will not modify the situation vis-à-vis other States parties to the Pact, in relation to whom the declarant State is already bound by the joint declaration embodied in Article XXXI. If such a declaration contains reservations, however,

> "it will then be the terms of that declaration which will indicate what is, as far as those States are concerned, the extent of the jurisdiction of the Court established in Article XXXI of the Pact".

31. In short, Honduras has consistently maintained that, for a State party to the Pact which has made a declaration under Article 36, paragraph 2, of the Statute, the extent of the jurisdiction of the Court under Article XXXI of the Pact is determined by that declaration, and by any reservations appended to it. It has also maintained that any modification or withdrawal of such a declaration which is valid under Article 36, paragraph 2, of the Statute is equally effective under Article XXXI of the Pact.

Honduras has, however, given two successive interpretations of Article XXXI, claiming initially that it must be supplemented by a declaration of acceptance of compulsory jurisdiction and subsequently that it can be so supplemented but need not be.

32. The first interpretation advanced by Honduras — that Article XXXI must be supplemented by a declaration — is incompatible with the actual terms of the Article. In that text, the parties "declare that they recognize" the Court's jurisdiction "as compulsory *ipso facto*" in the cases there enumerated. Article XXXI does not subject that recognition to the making of a new declaration to be deposited with the United Nations Secretary-General in accordance with Article 36, paragraphs 2 and 4, of the Statute. It is drafted in the present indicative tense, and thus of itself constitutes acceptance of the Court's jurisdiction.

33. Turning to the second Honduran interpretation, the Court may observe at the outset that two possible readings of the relationship between Article XXXI and the Statute have been proposed by the Parties. That Article has been seen either as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that same Article.

Honduras has advanced the latter reading. Nicaragua, after asserting in 1984, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* that Article XXXI constituted a declaration under Article 36, paragraph 2, of the Statute, has argued in the present case that Article XXXI falls under Article 36, paragraph 1, and therefore confers jurisdiction on the Court on a conventional basis.

34. There is however no need to pursue this argument. Even if the Honduran reading of Article XXXI be adopted, and the Article be regarded as a collective declaration of acceptance of compulsory jurisdiction made in accordance with Article 36, paragraph 2, it should be observed that that declaration was incorporated in the Pact of Bogotá as Article XXXI. Accordingly, it can only be modified in accordance with the rules provided for in the Pact itself. Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.

The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States.

35. Moreover, some provisions of the Treaty restrict the scope of the parties' commitment. Article V specifies that procedures under the Pact "may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State". Article VI provides that they will likewise not apply

"to matters already settled by arrangement between the parties, or by

arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty".

Similarly, Article VII lays down specific rules relating to diplomatic protection.

Finally, Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which "shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity". In the absence of special procedural provisions those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of adhesion to that instrument.

36. These provisions together indicate that the commitment in Article XXXI can only be limited by means of reservations to the Pact itself. It is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute. Not only does Article XXXI not require any such declaration, but also when such a declaration is made, it has no effect on the commitment resulting from that Article.

Neither the first nor the second interpretation of the text advanced by Honduras is compatible with the actual terms of the Pact.

37. Further confirmation of the Court's reading of Article XXXI is to be found in the *travaux préparatoires*. In this case these must of course be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records. The proceedings of the Conference were however published, in accordance with Article 47 of the Regulations of the Conference, in Spanish, and certain recorded discussions of Committee III of the Conference throw light particularly upon the contemporary conception of the relationship between Article XXXI and declarations under Article 36 of the Statute.

The text which was to become Article XXXI was discussed at the meeting of Committee III held on 27 April 1948. The representative of the United States reminded the meeting that his country had previously, under Article 36, paragraph 2, of the Statute, made a declaration of acceptance of compulsory jurisdiction that included reservations; he made it clear that the United States intended to maintain those reservations in relation to the application of the Pact of Bogotá. The representative of Mexico replied that States which wished to maintain such reservations in their relations with the other parties to the Pact would have to reformu-

late them as reservations to the Pact, under Article LV. The representatives of Colombia and Ecuador, members of the drafting group, confirmed that interpretation. The representative of Peru asked whether an additional Article should not be added to the draft in order to specify that adhesion to the treaty would imply, as between the parties to it, the automatic removal of any reservations to declarations of acceptance of compulsory jurisdiction. The majority of Committee III considered, however, that such an Article was not necessary and the representative of Peru went on to say, after the vote, that "we should place on record what has been said here, to the effect that it is understood that adhesion is unconditional and that reservations are automatically removed" [1] *(translation by the Registry).*

38. This solution was not contested in the plenary session, and Article XXXI was adopted by the Conference without any amendments on that point.

As a consequence the United States, when signing the Pact, made a reservation to the effect that:

> "The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case."

It is common ground between the Parties that if the Honduran interpretation of Article XXXI of the Pact be correct, this reservation would not modify the legal situation created by that Article, and therefore would not be necessary; Honduras argues however that it was not a true reservation, but merely an interpretative declaration.

39. That argument is inconsistent with the report, published by the United States Department of State, of the delegation of that country to the Conference of Bogotá, which stated that Article XXXI

> "does not take into account the fact that various States in previous acceptances of the Court's jurisdiction under Article 36, paragraph 2, of the Statute, have found it necessary to place certain limitations upon the jurisdiction thus accepted. This was the case in respect to the United States, and since the terms of its declaration had, in addition, received the previous advice and consent of the Senate, the delegation found it necessary to interpose a reservation to the effect that the acceptance of the jurisdiction of the Court as compulsory

[1] "Pero deben constar en actas las palabras pronunciadas aquí, acerca de que se entiende que es adhesión incondicional y que quedan removidas, automáticamente, las reservas." (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 167.)

ipso facto and without special agreement is limited by any jurisdictional or other limitations contained in any declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court in force at the time of the submission of any case." (U.S. Department of State, *Report of the U.S. Delegation to the Ninth International Conference of American States,* Washington, 1948, p. 48.)

In the light of this report, it is clear that the United States reservation on this point was intended to achieve something which, in the opinion of the United States delegation, could not be brought about merely by applying Article XXXI. It obviously was a reservation to the Pact, the existence of which confirms the interpretation of Article XXXI which the Court has given above.

40. That interpretation, moreover, corresponds to the practice of the parties to the Pact since 1948.

They have not, at any time, linked together Article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute. Thus no State, when adhering to or ratifying the Pact, has deposited with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under the conditions laid down by the Statute. Moreover, no State party to the Pact (other than Honduras in 1986) saw any need, when renewing or amending its declaration of acceptance of compulsory jurisdiction, to notify the text to the Secretary-General of the OAS, the depositary of the Pact, for transmission to the other parties.

Also, in November 1973 El Salvador denounced the Pact of Bogotá and modified its declaration of acceptance of compulsory jurisdiction with a view to restricting its scope. If the new declaration would have been applicable as between the parties to the Pact, no such denunciation would have been required to limit similarly the jurisdiction of the Court under Article XXXI.

Finally, Honduras has drawn attention to the Washington Agreement of 21 July 1957 between Honduras and Nicaragua to bring the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* before the Court, and has argued that the conclusion of that agreement implies that Nicaragua's reservation to the Pact (quoted in paragraph 19 above) was regarded as applicable to its declaration of acceptance of compulsory jurisdiction, and that Nicaragua thereby recognized the existence of a link between the Pact and the declaration. The Court cannot draw this conclusion from the facts. The conclusion of the Washington Agreement could be explained much more simply by the parties' desire to avoid any controversy over jurisdiction, by preventing any objection being raised before the Court either on the basis of Nicaragua's reservation to the Pact or concerning the validity of its declaration of acceptance of compulsory jurisdiction. It follows that that precedent is in no way

contrary to the consistent practice of the parties in the application of the Pact of Bogotá.

41. Under these circumstances, the Court has to conclude that the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute and deposited with the United Nations Secretary-General pursuant to paragraph 4 of that same Article. Consequently, it is not necessary to decide whether the 1986 Declaration of Honduras is opposable to Nicaragua in this case; it cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.

* *

42. The second objection of Honduras to jurisdiction is based on Article XXXII of the Pact of Bogotá, which reads as follows:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute."

43. It is the contention of Honduras that Articles XXXI and XXXII must be read together. The first is said to define the extent of the Court's jurisdiction and the second to determine the conditions under which the Court may be seised. According to Honduras it follows that the Court could only be seised under Article XXXI if, in accordance with Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which is not the situation in the present case.

44. Nicaragua on the other hand contends that Article XXXI and Article XXXII are two autonomous provisions, each of which confers jurisdiction upon the Court in the cases for which it provides. It claims that Article XXXI covers all juridical disputes which, before the conclusion of the Pact, would have been subject to arbitration under the General Treaty of Inter-American Arbitration of 5 January 1929; and that Article XXXII relates to disputes, whatever their nature, previously in the domain of conciliation under the General Convention of Inter-American Conciliation of the same date. It maintains accordingly that the Court can be seised, under Article XXXI, in the cases covered by that text, without there being any requirement to ascertain whether the procedural conditions laid down, in other cases, by Article XXXII have or have not been satisfied.

45. Honduras's interpretation of Article XXXII runs counter to the terms of that Article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation.

It is true that one qualification of this observation is required, with regard to the French text of Article XXXII, which provides that, in the circumstances there contemplated, the party has "le droit de porter *la question* devant la Cour". That expression might be thought to refer back to the question which might have been the subject of the dispute referred to the Court under Article XXXI. It should, however, be observed that the text uses the word "*question*", which leaves room for uncertainty, rather than the word "*différend* (dispute)", used in Article XXXI, which would have been perfectly clear. Moreover, the Spanish, English and Portuguese versions speak, in general terms, of an entitlement to have recourse to the Court and do not justify the conclusion that there is a link between Article XXXI and Article XXXII.

Moreover, Article XXXII, unlike Article XXXI, refers expressly to the jurisdiction which the Court has under Article 36, paragraph 1, of the Statute. That reference would be difficult to understand if, as Honduras contends, the sole purpose of Article XXXII were to specify the procedural conditions for bringing before the Court disputes for which jurisdiction had already been conferred upon it by virtue of the declaration made in Article XXXI, pursuant to Article 36, paragraph 2.

46. It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires*: the discussion at the meeting of Committee III of the Conference held on 27 April 1948 has already been referred to in paragraph 37 above. At that meeting, furthermore, the delegate of Colombia explained to the Committee the general lines of the system proposed by the Sub-Committee which had prepared the draft; the Sub-Committee took the position "that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice" [1] *(translation by the Registry).* Honduras's interpretation would however imply that the commitment, at first sight firm and unconditional, set forth in Article XXXI would, in fact, be emptied of all content if, for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and the purpose of the Pact.

47. In short, Articles XXXI and XXXII provide for two distinct ways

[1] "La Subcomisión estimó que el procedimiento principal para el arreglo pacífico de los conflictos entre los Estados Americanos ha de ser el procedimiento judicial ante la Corte Internacional de Justicia; . . ." (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 156).

by which access may be had to the Court. The first relates to cases in which the Court can be seised directly and the second to those in which the parties initially resort to conciliation.

In the present case, Nicaragua has relied upon Article XXXI, not Article XXXII. It is accordingly not pertinent whether the dispute submitted to the Court has previously been the subject of an attempted conciliation, nor what interpretation is given to Article XXXII in other respects, in particular as regards the nature and the subject-matter of the disputes to which that text applies. It is sufficient for the Court to find that the second objection put forward by Honduras is based upon an incorrect interpretation of that Article and, for that reason, cannot be accepted.

48. Article XXXI of the Pact of Bogotá thus confers jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court does not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras set out in paragraphs 23 to 25 above.

* * *

49. The Court now turns to the question of admissibility of the Nicaraguan Application. Four objections have been raised by Honduras, two of which are general in nature and the remaining two presented on the basis of the Pact of Bogotá.

50. Before examining these objections, it will be convenient to recall briefly the claims of Nicaragua against Honduras, as stated in the Application. Nicaragua alleges the existence of armed bands, generally known as the *contra* forces, openly based in Honduran territory and carrying out armed attacks on Nicaraguan territory (Application, paras. 11 and 13). It claims that these forces operate with the knowledge and assistance of the Honduran Government (*ibid.*, para. 14); that the Honduran military forces not only aid and abet the *contras* but have directly participated in military attacks on Nicaragua and have given vital intelligence and logistical support to the *contras* (*ibid.*, para. 19); and that the Honduran Government has used the threat of force against Nicaragua in both words and facts (*ibid.*, para. 20). Nicaragua therefore claims that Honduras has incurred legal responsibility for the breach of, *inter alia*, the prohibition of the threat or use of force as provided by the Charter of the United Nations (*ibid.*, para. 22); the prohibition of intervention in the internal or external affairs of other States laid down in the Charter of the OAS (*ibid.*, para. 23); and the obligations of customary international law not to intervene in the affairs of another State, not to use force against another State, not to violate the sovereignty of another State, and not to kill, wound or kidnap citizens of other States (*ibid.*, paras. 26-29). On this basis, Nicaragua requests the Court to adjudge and declare that the acts and omissions of Honduras constitute breaches of international law; that Honduras is under a duty immediately to cease and to refrain from all

such acts; and that Honduras is under an obligation to make reparation to the Republic of Nicaragua.

51. Honduras's first objection to the admissibility of the Application is that "It is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character"; it claims that Nicaragua is attempting to use the Court, or the threat of litigation before the Court, as a means of exerting political pressure on the other Central American States.

52. As regards the first aspect of this objection, the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. So far as the objection of Honduras is based on an alleged political inspiration of the proceedings, it therefore cannot be upheld.

53. The second aspect of the first objection of Honduras is its claim that the request is artificial. In its Memorial Honduras explains that in its view the overall result of Nicaragua's action is "an artificial and arbitrary dividing up of the general conflict existing in Central America", which "may have negative consequences for Honduras as a defendant State before the Court", because, it is said, certain facts appertaining to the general conflict "are inevitably absent from the proceedings before the Court", and other facts have already been in issue before the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America).* Honduras contends that no real distinction can be made between the general situation of tension in the region and the various bilateral disputes which Nicaragua claims to exist there, and that the "procedural situation" created by Nicaragua's splitting-up of the overall conflict into separate disputes is contrary to the requirements of good faith and the proper functioning of international justice.

54. The Court cannot uphold this contention. It is not clear why any facts should be "inevitably absent" from the proceedings, since it is open to Honduras to bring to the Court's attention any facts which in its view are relevant to the issues in this case. Nor can it be accepted that once the Court has given judgment in a case involving certain allegations of fact,

and made findings in that respect, no new procedure can be commenced in which those, as well as other, facts might have to be considered. In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute).

There is no doubt that the issues of which the Court has been seised may be regarded as part of a wider regional problem. The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran,* "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*I.C.J. Reports 1980,* p. 19, para. 36).

55. The second Honduran objection to admissibility is that "the Application is vague and the allegations contained in it are not properly particularized, so that the Court cannot entertain the Application without substantial prejudice to Honduras". In support of this Honduras asserts that "a large number of the matters put forward by Nicaragua do not constitute concrete acts or omissions, identifiable by reference to place and to time", but concern "indeterminate situations" or "opinions about intentions"; that another large group of these matters are referred to only by the year in which they took place without geographical location; and that the Application confuses facts of a different nature and attributable to different causes.

56. Article 40, paragraph 1, of the Statute requires that an Application indicate "the subject of the dispute". Under the Rules of Court, an Application is required to specify "the precise nature of the claim", and in support thereof to give no more than "a succinct statement of the facts and grounds on which the claim is based" (Art. 38, para. 2). The Court considers that the Nicaraguan Application in the present case, summarized in paragraph 50 above, meets these requirements.

57. Accordingly none of these objections of a general nature to admissibility can be accepted.

* *

58. The Court now turns to the objections to admissibility which Honduras bases upon Articles II and IV of the Pact of Bogotá.

59. Article II of the Pact, upon which Honduras bases its third objection to admissibility, reads as follows:

"The High Contracting Parties recognize the obligation to settle

international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.

Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties [in the French text "de l'avis de l'une des parties"], cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

60. The submission of Honduras on the application of Article II is as follows:

"Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedures established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice."

The contention of Honduras is that the precondition to recourse to the procedures established by the Pact is not merely that both parties should hold the opinion that the dispute could not be settled by negotiation, but that they should have "manifested" that opinion. The opinion of Honduras on the question was stated by its Co-Agent at the hearings. Referring to the requirement in Article II that the dispute should, in the opinion of the parties, not be capable of a negotiated settlement, he stated that

"this first condition of the Pact is not fulfilled in this case, since Honduras is not of the opinion that the Parties have exhausted all possibility of settlement by direct negotiation",

and that,

"at least in the opinion of Honduras, the dispute may be settled by direct negotiations through the usual diplomatic channels; this is confirmed by the intense diplomatic activity which is in progress in Central America . . ."

The diplomatic activity referred to is that of the Contadora process and its aftermath, to be described below (paragraphs 70 to 74 and 81 to 88). Honduras has asserted that the negotiations in that context were "direct negotiations" within the meaning of Article II of the Pact, that throughout the process there were exchanges between the delegations of Honduras and Nicaragua, proposals and counter-proposals; it has also relied on the Court's jurisprudence as to the established modes of international negotiation in order to discount any distinction between the direct bilateral

negotiations between Nicaragua and itself prior to April 1983 and the negotiations in the context of the Contadora process.

61. Nicaragua has argued, first, that it does not necessarily follow from the text of Article II that recourse to pacific procedures is available only when it is the opinion of the parties that the dispute cannot be settled by direct negotiations; that it is perfectly logical to read Article II as setting forth one circumstance — but not the exclusive one — in which the parties bind themselves to use the procedures set forth in the Pact.

62. The Court does not consider that Article II, in the context of the Pact as a whole, can be read in this sense; that provision constitutes, as was argued by Honduras, a condition precedent to recourse to the pacific procedures of the Pact in all cases. The Court has therefore to consider how that condition applies in the present case.

63. Nicaragua then rejects the interpretation of Article II advanced by Honduras, that both parties to a dispute should have manifested the opinion that it cannot be settled by negotiations, contending that it would give a recalcitrant party to a dispute a right of veto of judicial or other settlement which would shatter the whole carefully constructed scheme of compulsory jurisdiction established by the Pact. It further contends that the question is not whether one of the parties or both of them must think that the dispute cannot be settled by diplomatic means, but whether the dispute can in fact be settled by such means; in its view the jurisprudence of the Court supports the principle that when there is disagreement between the parties on the point, the issue is to be resolved not so much on the basis of the particular form of words used in the compromissory instrument, but by an objective evaluation by the Court of the possibilities for settlement of the dispute by direct negotiations.

The Court observes however that that jurisprudence concerns cases in which the applicable text referred to the possibility of such settlement; Article II however refers to the opinion of the parties as to such possibility. The Court therefore does not have to make an objective assessment of such possibility, but to consider what is the opinion of the Parties thereon.

64. Before proceeding further, the Court notes that the Parties have drawn attention to a discrepancy between the four texts of Article II of the Pact (English, French, Portuguese and Spanish). In the French text, what is required is that, "de l'avis de l'une des parties", i.e., "in the opinion of one of the parties", the dispute should not be susceptible of settlement by negotiation. In the English, Portuguese and Spanish texts, the corresponding phrase is "in the opinion of the parties", or the equivalent in the other two languages. For reasons which will appear, the Court's reasoning does not require the resolution of the problem posed by this textual discrepancy, and it will therefore not rehearse all the arguments that have been put forward by the Parties to explain it or to justify the preferring of one version to another.

65. For the purpose of determining the application in this case of Arti-

cle II of the Pact, the Court will proceed on the hypothesis that the stricter interpretation should be used, i.e., that it would be necessary to consider whether the "opinion" of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it. This is in fact the view of Honduras, as expressed by its Co-Agent at the hearings:

> "It is for the Court to decide for itself whether, by their conduct, the Parties have provided substantive evidence that they consider in good faith that a dispute can or cannot be settled by direct negotiations through the usual diplomatic channels . . .
>
> The Court may disregard what has been said by one of the Parties if it is clearly apparent that the contentions it has put forward are in contradiction with reality.
>
> The Court has to seek for evidence of the Parties' genuine intentions. It cannot substitute its own opinion for that of the Parties as to whether the dispute is susceptible to settlement by direct negotiations."

This statement presupposes that the holding of opinions can be subject to demonstration, and that the Court may expect "the Parties [to provide] substantive evidence that they consider in good faith" a certain possibility of negotiation to exist or not to exist. It even invites the Court "to seek for evidence of the Parties' genuine intentions".

66. The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962,* p. 344). It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms. In this case, the date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is 28 July 1986, the date of filing of the Nicaraguan Application.

67. To ascertain the opinion of the Parties, the Court is bound to analyse the sequence of events in their diplomatic relations. It is common ground between the Parties that their relations deteriorated seriously when, from 1980 onwards, many active opponents of the Nicaraguan Government formed themselves into irregular military forces and commenced a policy of armed opposition; a substantial group operated from 1981 onwards along the Nicaraguan borders with Honduras. According to Nicaragua, there ensued repeated border incidents, and instances of

material support given to those opponents, which have compelled it to protest diplomatically to Honduras "continuously since 1980". The Presidents of the two States held talks on these matters at El Guasaule, Nicaragua, in May 1981. Bilateral contacts between the Parties continued for some time after this date; the Parties have however made conflicting assertions as to their nature and extent.

68. On 23 March 1982 the Honduran Foreign Minister presented to the Permanent Council of the OAS a draft "plan to internationalize peace in Central America". At a meeting of the two Foreign Ministers in Tegucigalpa on 21 April 1982, Nicaragua responded with a seven-point plan calling *inter alia* for the signing of a bilateral non-aggression pact, a system of joint border patrols and the dismantling of the military encampments said to be maintained in Honduras by opponents of the Nicaraguan Government. Honduras commented on this proposal, without committing itself, two days later. The Honduran Foreign Minister explained to the National Congress that in his reply, a diplomatic Note of 23 April 1982, "without refusing discussion of the bilateral problems" he had reiterated Honduras's position of the prior importance of a solution within a regional context. In that Note, before commenting on the specific Nicaraguan proposals, he said the following:

> "I understand, as was very clearly explained by Your Excellency, that your proposal is of a bilateral nature and is aimed at improving relations between our two countries, while the Honduran initiative is wider in scope, of a regional nature and with perhaps more ambitious objectives. Despite this, my Government considers that the regional approach should prevail since a major part of the problems confronted by the Central American countries go beyond the possibility of a bilateral solution."

69. Thus, it appears that in 1981 and 1982, the Parties had engaged in bilateral exchanges at various levels including, at the very beginning, that of the Heads of State. Broadly speaking, Nicaragua sought a bilateral understanding while Honduras increasingly emphasized the regional dimension of the problem and held out for a multilateral approach, eventually producing a plan of internationalization which led to unsuccessful Nicaraguan counter-proposals.

70. The Foreign Ministers of the countries which were to become known as the Contadora Group — Colombia, Mexico, Panama and Venezuela — met on 8 and 9 January 1983 on Contadora Island, Panama, to consider in what way their countries could contribute to the resolution of the grave and dangerous problems that persisted in Central America.

They urgently called upon all Central American countries "to reduce tensions and to establish the basis for a lasting climate of friendly relations and mutual respect . . . through dialogue and negotiation". Within three months they had visited Nicaragua, Honduras, Costa Rica, El Salvador and Guatemala and had secured the agreement of the Governments of those countries to engage in a common dialogue. On 17 July 1983 the Heads of States of the Contadora countries issued the Cancún Declaration on Peace in Central America, recording the establishment, with the agreement of all those Governments, of "an agenda covering the salient aspects of the problems of the region". Two days later, the President of Nicaragua made a speech in which he expressed his Government's acceptance "that the beginning of the negotiation process promoted by the Contadora Group be of a multilateral character" and proposed immediate discussions with a view to reaching agreements on certain points; he added:

> "Nicaragua states its willingness to assume, with full responsibility, all commitments arising from the said agreements and makes this clear by accepting the point of view of the Heads of States of the Contadora Group to the intent that the task of settling specific differences between countries must be begun initially with the signature of a memorandum of understanding and the creation of commissions allowing the parties to carry out combined actions and guarantee effective control of their territories, especially in the frontier zones."

There followed a joint meeting in Panama at the end of July 1983 between the Contadora Foreign Ministers and those of the five Central American States, at which the Central American Foreign Ministers "made known their acceptance and gave their support to" the Cancún Declaration.

71. On 9 September 1983 the Group drew up a "Document of Objectives" covering a vast range of political, military, social, economic, humanitarian and financial questions. For the purpose of the instant case, it should be noted that the objectives included the following:

> "To promote détente and put an end to situations of conflict in the area, refraining from taking any action that might jeopardize political confidence or prevent the achievement of peace, security and stability in the region.
>
> . . . . . .
>
> To create political conditions intended to ensure the international security, integrity and sovereignty of the States of the region.
>
> . . . . . .
>
> To prevent the use of their own territory [i.e., that of the participant

States] by persons, organizations or groups seeking to destabilize the Governments of Central American countries and to refuse to provide them with or permit them to receive military or logistical support." (UN doc. S/16041.)

The Group having requested concrete proposals towards an agreement aimed at the objectives concerned, Nicaragua responded with the submission of five proposed treaties, collectively called "Legal Bases for Guaranteeing Peace and the International Security of the Central American States" on 15 October 1983, the date which Honduras identifies as marking the beginning of Nicaragua's active participation in what has come to be called "the Contadora process".

72. On 1 May 1984 the Contadora Group issued an information bulletin noting *inter alia* that at a meeting held in Panama the previous day the Foreign Ministers of the Central American States had reaffirmed their conviction that the Contadora process "represented the genuine regional alternative and the appropriate forum for the resolution of the conflicts those countries are currently facing" (UN doc. A/39/226; S/16522). By then the Group had begun the drafting of a "Contadora Act for Peace and Co-operation in Central America", covering in great detail the same vast range of topics as had been covered by the Document of Objectives. This was published in July 1984, and a revised version of the draft Act was circulated on 7 September 1984.

73. On 21 September 1984 the President of Nicaragua informed the Contadora Group that his Government had decided to accept the revised Contadora Act in its totality and without modification. The Government of Honduras took a more guarded attitude, and invited the other Central American Governments to a meeting in Tegucigalpa for the purpose of considering further revisions. At this meeting, held on 20 October 1984, but in which Nicaragua did not participate, a different proposed treaty was provisionally agreed to by Honduras, El Salvador and Costa Rica.

74. No progress appears to have been made toward the adoption of the Contadora Act during the next twelve months, although Nicaragua agreed to negotiate changes in the initial draft; those negotiations lasted through most of 1985. At a meeting in Cartagena (Colombia) on 24-26 August 1985, the Foreign Ministers of the Contadora Group were joined by the Foreign Ministers of Argentina, Brazil, Peru and Uruguay (the "Lima Group", later known as the "Support Group"). Consultations resulted in the preparation of a further draft Act, presented by the Contadora Group and the Support Group to the Central American States on 12-13 September 1985. None of the Central American States fully accepted the draft, but negotiations continued, to break down in June 1986.

75. At this stage the Court is not called upon to pronounce on the legal consequences of this breakdown, but merely to determine the nature of the procedure which was followed, and to ascertain whether, as Honduras claims, the negotiations conducted in the context of the Contadora process could be regarded as direct negotiations through the usual diplomatic channels, within the meaning of Article II of the Pact of Bogotá.

This process, during the period now in question, was a "combination of consultation, negotiation and mediation", as Honduras has observed, and the General Assembly of the OAS in Resolution 702 of 17 November 1984, noted with pleasure "the intensive effort made by the Foreign Ministers of the Contadora Group in consulting, mediating between, and negotiating with, the Central American governments . . .".

While there were extensive consultations and negotiations between 1983 and 1986, in different forms, both among the Central American States themselves, and between those States and those belonging to the Contadora Group and the Support Group, these were organized and carried on within the context of the mediation to which they were subordinate. At this time the Contadora process was primarily a mediation, in which third States, on their own initiative, endeavoured to bring together the viewpoints of the States concerned by making specific proposals to them.

That process therefore, which Honduras had accepted, was, as a result of the presence and action of third States, markedly different from a "direct negotiation through the usual diplomatic channels". It thus did not fall within the relevant provisions of Article II of the Pact of Bogotá. Furthermore, no other negotiation which would meet the conditions laid down in that text was contemplated on 28 July 1986, the date of filing of the Nicaraguan Application. Consequently Honduras could not plausibly maintain at that date that the dispute between itself and Nicaragua, as defined in the Nicaraguan Application, was at that time capable of being settled by direct negotiation through the usual diplomatic channels.

76. The Court therefore considers that the provisions of Article II of the Pact of Bogotá relied on by Honduras do not constitute a bar to the admissibility of Nicaragua's Application.

* * *

77. The fourth and last objection of Honduras to the admissibility of the Nicaraguan Application is that:

> "Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for

> pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived."

Article IV of the Pact of Bogotá, upon which Honduras relies, reads as follows:

> "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

78. It is common ground between the Parties that the present proceedings before the Court are a "pacific procedure" as contemplated by the Pact of Bogotá, and that therefore if any other "pacific procedure" under the Pact has been initiated and not concluded, the proceedings were instituted contrary to Article IV and must therefore be found inadmissible. The disagreement between the Parties is whether the Contadora process is or is not a procedure contemplated by Article IV. Honduras contends that the Contadora process is a "special procedure" for the purposes of Article II of the Pact, which refers to "such special procedures as, in their [the parties'] opinion, will permit them to arrive at a solution" of the dispute, as an alternative to "the procedures established in the present Treaty". This special procedure has, in the contention of Honduras, been entered into by agreement between the Parties, and thus must be regarded as a "pacific procedure" for the purposes of Article IV. Nicaragua on the other hand denies that the Contadora process can be treated as a "special procedure" for purposes of Articles II and IV of the Pact, because, *inter alia,* its subject-matter is distinct from the dispute before the Court.

79. It is clear that the question whether or not the Contadora process can be regarded as a "special procedure" or a "pacific procedure" within the meaning of Articles II and IV of the Pact would not have to be determined if such a procedure had to be regarded as "concluded" by 28 July 1986, the date of filing of the Nicaraguan Application. The date of the institution of proceedings is the date at which the admissibility of a claim has to be assessed (paragraph 66 above); for the application of Article IV, the question is specifically whether any initial pacific procedure which may have been instituted has been "concluded" before any other procedure, including judicial procedure, is "commenced".

80. For the purposes of Article IV of the Pact, no formal act is necessary before a pacific procedure can be said to be "concluded". The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.

81. In order to decide this issue in the present case, the Court will resume its survey of the Contadora process. The initial stages of the process have already been described in paragraphs 70 to 74 above. Subsequently, from 5 to 7 April 1986 a meeting of the Foreign Ministers of the Contadora Group and of the Support Group was held in Panama for the purpose of reviewing progress. On the outcome of this meeting, the Contadora Group

> "invited the five Central American Governments to a meeting on 6 June 1986 at Panama City for the purpose of declaring the negotiation of the text of the Contadora Act officially concluded and proceeding to its formal adoption" (letter addressed by the Group to the Secretary-General of the United Nations on 26 June 1986 (see paragraph 85 below); UN doc. A/40/1136; S/18184, Ann. I).

The five Governments responded in a communiqué of 18 May 1986 announcing their intention "to gather for the signing of the Act on 6 June 1986" and by the Declaration issued at Esquipulas, Guatemala, on 25 May 1986, in which their Presidents stated *inter alia*:

> "That they are willing to sign the 'Contadora Act for Peace and Co-operation in Central America', and agree to comply fully with all the undertakings and procedures contained in the Act. They recognize that some aspects remain outstanding, such as military manœuvres, arms control and the monitoring of compliance with the agreements. Today, however, in this dialogue among the leaders of fraternal peoples, they find the various proposals put forward by the countries to be sufficiently productive and realistic to facilitate the signing of the Act."

82. Immediately after the meeting of Presidents at Esquipulas, their plenipotentiaries resumed discussions with a view to settling such differences as remained, but came to the conclusion that it would be impossible for the Act to be signed on the appointed date; they nevertheless "communicated the determination of their respective Governments to continue to promote the diplomatic negotiation process" (letter of 26 June 1986 to the Secretary-General cited in the previous paragraph). In that context, all Foreign Ministers concerned met at Panama City on 6-7 June 1986 for the formal delivery of "that which, in the opinion of the Contadora Group, constitute[d] the final draft of the Act of Contadora for Peace and Co-operation in Central America", to quote the letter dated 6 June 1986 addressed by the Group to the Central American Foreign Ministers on that occasion. The Group explained that the text "incorporates the essential political commitments related to the substantive aspects", and went on:

"Once this question is resolved, we propose to proceed immediately to another phase of the negotiations, referring to matters of an operational character and which will refer mainly to the establishment of the Verification and Control Commission."

83. On 12 June 1986, the Governments of Costa Rica and El Salvador released a joint statement rejecting the draft Act of Contadora. On 13 June 1986, the Government of Honduras issued a press communiqué, stating, in particular:

"1. The last project for an instrument ('acta') proposed by Contadora does not constitute, in the opinion of the Government of Honduras, a document that establishes reasonable and sufficient obligations for guaranteeing its security.

2. The Contadora Group stated in that meeting that the project in reference exhausted its mediation efforts with relation to the substantive elements of the 'acta', but that notwithstanding they were available for collaborating in the negotiation of the operative and practical elements of the 'acta'.

3. The Government of Honduras reiterates its willingness to continue exploring new formulas that effectively guarantee the legitimate interests of all the States . . ."

On 21 June 1986 the Government of Honduras addressed a letter to the Contadora Group, expressing its attitude to the Final Act. In that letter, *inter alia,* it quoted paragraph 1 of the press communiqué, and referred to paragraph 2; it noted that the Contadora Group "would remain ready to collaborate in the negotiation of [the] operative and practical aspects" of the Act, and stated that in its view

"it would only be possible to systematically approach these matters insofar as the agreement dealing with the substantive aspects of the Act, would have been clearly established and accepted".

84. The Foreign Minister of Nicaragua, in a letter of 17 June 1986, gave the formal response of his Government, to the effect, *inter alia,* that the Final Act was the only instrument "capable of producing a quick and efficient conclusion of the negotiating process", and offered to implement a number of proposals it contained, in particular on military and logistical matters.

85. On 26 June 1986, the Foreign Ministers of the Contadora Group called on the Secretary-General of the United Nations (UN doc. A/40/1136; S/18184), and handed to him a letter recounting developments since September 1985; in that letter the Group stated:

"Now that the substantive issues of the Contadora Act have been resolved, as the Central American Governments have unequivocally

> stated, and in order that the Act may be signed, we propose that we should pass on immediately to another phase of the negotiation. In this phase we will deal jointly and systematically with matters of a procedural and operational nature referring principally to the statute of the Verification and Control Commission for Security Matters which will be an integral part of the Act and to other regulatory matters."

The Act, and the proposal for negotiation, were not accepted, and the Contadora process was thus at a standstill.

86. The situation in the area deteriorated, and on 1 October 1986 the Foreign Ministers of the Contadora Group and the Support Group, meeting in New York during the United Nations General Assembly, expressed their concern in a declaration in which they said that they had decided to take a new peace initiative. For this purpose they visited the five Central American States, and following that mission, in a communiqué issued in Mexico in January 1987, they could do no more than reiterate their "determination to maintain dialogue with all the countries directly or indirectly involved in the conflict", and "to continue to push on with diplomatic negotiations" between the Central American States.

87. A new stage in the situation in Central America began when President Oscar Arías of Costa Rica, on 15 February 1987, presented the Peace Plan which bears his name. This plan contemplated new approaches and new mechanisms for the settlement of the problems facing the countries of the region. The Foreign Ministers of the Contadora Group and the Support Group, meeting in Buenos Aires on 13 April 1987, again expressed their concern at the standstill in the negotiation process since June 1986, emphasized the importance of President Arías's proposal and noted the stated intention of the Government of Costa Rica to sponsor, at the proposed meeting of the five Central American Presidents at Esquipulas, an agreement by the five countries to resume negotiation of the Contadora Act together with the signing of President Arías's proposal.

88. It was in these circumstances that the Presidents of the five Central American States adopted on 7 August 1987 a "Plan to Establish a Firm and Lasting Peace in Central America", known as the Esquipulas II Accord. This agreement comprised a number of commitments, directed in particular to national reconciliation, an end to hostilities, democratization, free elections, a halt to aid to irregular forces or insurrectionist movements, and the non-use of territory to attack other States. The role which was thereafter to be attributed to the Contadora Group and the Support Group was defined in Section 7 and Section 10 *(a)*. Section 7 provided for participation of the Contadora Group in connection with security, verification and control. Section 10 *(a)* provided for an International Verifica-

tion and Monitoring Commission whose membership was to include the Foreign Ministers of the Contadora and Support Group countries. The implementation of the agreement was entrusted to an executive committee made up of the Foreign Ministers of the five Central American States. The details of the negotiations which began on this basis do not have to be gone into here, save that at the joint meeting between the Central American States and the Contadora Group on 10 December 1987, it was decided that various provisions of the draft Final Act of Contadora should be re-examined, and that the necessary proposals would be made by the Central American countries.

89. From this account it is clear that the Contadora process was at a standstill at the date on which Nicaragua filed its Application. This situation continued until the presentation of the Arías Plan and the adoption by the five Central American States of the Esquipulas II Accord, which in August 1987 set in train the procedure frequently referred to as the Contadora-Esquipulas II process. The question therefore arises, for the purposes of Article IV of the Pact, whether this latter procedure should be regarded as having ensured the continuation of the initial procedure without interruption, or whether on 28 July 1986 that initial procedure should be regarded as having "concluded", and a procedure of a different nature as having got under way thereafter. This question is of crucial importance, since on the latter hypothesis, whatever may have been the nature of the initial Contadora process with regard to Article IV, that Article would not have constituted a bar to the commencement of a procedure before the Court on that date.

90. The views of the Parties in this respect were given in particular in their replies to a question put by a Member of the Court. Nicaragua indicated that "the Contadora process has not been abandoned or suspended at any moment". As for Honduras, it declared that "the Contadora process has not been abandoned" and that, after the non-signature of the Act of Contadora, the Contadora Group and the Support Group continued their efforts up to the time of the approval of the Esquipulas II Accord. Since that time the process, according to Honduras, continued without interruption.

91. The Court fully appreciates the importance of this concordance of views between the Parties on the subject of regional initiatives which are highly regarded by them. But it cannot see in this a concordance of views as to the interpretation of the term "concluded" in Article IV of the Pact of Bogotá, in relation to the position of the Contadora process at the moment of the filing of the Nicaraguan Application. In the Court's view, on the basis of the facts described above the action of the Contadora Group before June 1986 cannot be regarded, for the purposes of the application of the Pact, as on the same footing as its subsequent action.

While the peacemaking process has continued to bear the name "Contadora", the fact is that that title has become practically a symbol of all the

stages traversed and all the multilateral initiatives taken in the last few years to restore peace to Central America. In fact however the Contadora process, as it operated in the first phase, is different from the Contadora-Esquipulas II process initiated in the second phase. The two differ with regard both to their object and to their nature. The Contadora process, as has been explained above, initially constituted a mediation in which the Contadora Group and Support Group played a decisive part. In the Contadora-Esquipulas II process, on the other hand, the Contadora Group of States played a fundamentally different role. The five countries of Central America set up an independent mechanism of multilateral negotiation, in which the role of the Contadora Group was confined to the tasks laid down in Sections 7 and 10 *(a)* of the Esquipulas II Declaration, and has effectively shrunk still further subsequently.

92. The facts show that the Contadora Group regarded its mission as completed, at least so far as the negotiation of any substantive accord is concerned, with the presentation to the Central American States on 6-7 June 1986 of the final and definitive Act of Contadora. The signature of that Act would have crowned the mediation with a success; its non-signature had the opposite effect. Moreover, it should not be overlooked that there was a gap of several months between the end of the initial Contadora process and the beginning of the Contadora-Esquipulas II process; and it was during this gap that Nicaragua filed its Application to the Court.

93. The Court concludes that the procedures employed in the Contadora process up to 28 July 1986, the date of filing of the Nicaraguan Application, had been "concluded", within the meaning of Article IV of the Pact of Bogotá, at that date. That being so, the submissions of Honduras based on Article IV of the Pact must be rejected, and it is unnecessary for the Court to determine whether the Contadora process was a "special procedure" or a "pacific procedure" for the purpose of Articles II and IV of the Pact, and whether that procedure had the same object as that now in progress before the Court.

*

94. The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogotá but also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests, I.C.J. Reports 1974,* p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist. In this case however the contention of Honduras is that, on the basis of successive acts by Nicaragua culminating in

the Esquipulas Declaration of 25 May 1986 (paragraph 81 above), Nicaragua has entered into a "commitment to the Contadora process"; it argues that by virtue of that Declaration, "Nicaragua entered into a commitment with which its present unilateral Application to the Court is plainly incompatible". The Court considers that whether or not the conduct of Nicaragua or the Esquipulas Declaration created any such commitment, the events of June/July 1986 constituted a "conclusion" of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.

* *

95. The Court concludes from the foregoing that the third and fourth objections raised by Honduras to the admissibility of the Application must be dismissed.

96. The Court would add the following. It has to determine the admissibility of an Application brought before it as a matter of law. Accordingly, in the present case the question whether a particular "procedure" is, or is not, to be regarded as "concluded" for the purposes of Article IV of the Pact of Bogotá has been appreciated in the light of the position at the moment of the Nicaraguan Application to the Court. This does not mean that the Court is unaware that, subsequent to that date, efforts to resolve the difficulties existing in Central America took a new lease of life with the agreement known as Esquipulas II. Nor should it be thought that the Court is unaware that the Application raises juridical questions which are only elements of a larger political situation. Those wider issues are however outside the competence of the Court, which is obliged to confine itself to these juridical questions.

* *

97. The Court also takes note of the fact that the Contadora Group did not claim any exclusive role for the process it set in train. Paragraph 34 of the Preamble to the revised draft Contadora Act of 7 September 1984 provided the following:

> "The Governments of the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua ...
>
> . . . . . .
>
> *Reaffirming,* without prejudice to the right to resort to competent international forums, their willingness to settle their disputes in the framework of the negotiation process sponsored by the Contadora Group ..."

The similar wording of preambular paragraph 35 of the Final Act dated 6 June 1986 makes it clear that the dispute settlement procedures to be

adopted under that instrument were not intended to exclude "the right of recourse to other competent international forums".

* *

98. The Court concludes that it has jurisdiction to entertain the present case under Article XXXI of the Pact of Bogotá, and that the Application filed by Nicaragua on 28 July 1986 is admissible.

* * *

99. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction under Article XXXI of the Pact of Bogotá to entertain the Application filed by the Government of the Republic of Nicaragua on 28 July 1986;

(2) Unanimously,

Finds that the Application of Nicaragua is admissible.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and eighty-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and to the Government of the Republic of Honduras, respectively.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge LACHS appends a declaration to the Judgment of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEEN append separate opinions to the Judgment of the Court.

(Initialled) J.M.R.
(Initialled) E.V.O.

DÉCLARATION DE M. LACHS

[Traduction]

L'arrêt de la Cour doit nécessairement ne traiter et ne résoudre que des questions de procédure (compétence et recevabilité). On peut reprocher aux arrêts de ce genre d'être apparemment empreints de juridisme.

C'est cependant une des activités essentielles de tout tribunal que de trancher des questions de procédure puisque ces questions déterminent l'attitude qu'il adopte quant au sort à réserver à un différend porté devant lui. En prenant une telle décision, la Cour peut soit statuer définitivement sur ce différend, soit ouvrir la voie à l'examen au fond. Lorsqu'elle se prononce, la Cour doit veiller avec le plus grand soin à décourager toute tentative de porter devant elle un différend en l'absence de fondement de juridiction adéquat, sans pour autant nier aux Etats le droit qui est le leur de bénéficier de ses décisions lorsqu'il existe un tel fondement. Il suffit parfois d'ouvrir la voie à l'examen au fond pour qu'un différend trouve sa solution.

Dans la présente affaire, la Cour a dû prendre des décisions qui n'étaient pas sans soulever de délicates questions, ainsi qu'il ressort de la lecture de l'arrêt. La responsabilité des juges était grande, qu'il s'agisse de l'examen de la situation dans laquelle l'affaire s'inscrivait ou de l'aspect juridique de leur responsabilité.

La Cour n'a pas préjugé l'avenir. Les Parties conservent donc leur liberté d'action et toutes possibilités de trouver des solutions.

Toutes ces considérations m'ont conduit à donner mon appui à cette décision de la Cour. Sur les dix-neuf arrêts à l'élaboration desquels j'ai participé, c'est le dix-huitième pour lequel j'ai voté affirmativement.

(Signé) Manfred LACHS.