SEPARATE OPINION OF JUDGE MOSLER

As is shown by my vote, I share the opinion of the Court that it has jurisdiction to entertain the dispute and that the Application of Nicaragua is admissible. Nevertheless, to my regret, I cannot agree with paragraph 1 *(a)* of the operative part of the Judgment, in which the Court assumes jurisdiction on the basis of Article 36, paragraphs 2 and 5, of the Statute. In my view the Court possesses jurisdiction solely on the basis of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties, but not on the basis of currently effective and mutually corresponding submissions of the Parties under the compulsory jurisdiction of the Court by virtue of the Optional Clause. However, on the assumption adopted by the majority that the Court has general jurisdiction on the basis of the Optional Clause, I support most of the consequential conclusions made by it, but I have to disagree with part of the reasoning, either because I have another view of the matter or because I think that the far-reaching consequences of the Court's conclusions should be more explicitly explained. The points in question are the effect of the notification of 6 April 1984 of the United States (the "Shultz letter"), and the multilateral treaty reservation in its Declaration of Acceptance of the compulsory jurisdiction of the Court (proviso *(c)*) (see Part II, below). I feel obliged to make the following remarks, taking into account the importance of the issues involved, which relate to fundamental questions of the jurisdictional system established by the Statute. I shall however avoid going into detail.

I

1. The Court concludes that the Nicaraguan Declaration of 24 September 1929, accepting unconditionally the compulsory jurisdiction of the Permanent Court of International Justice, is a currently valid instrument because Article 36, paragraph 5, of the present Statute transferred the Declaration to the International Court of Justice (see, *inter alia,* Judgment, para. 109). Until the entry into force of the Statute (as an integral part of the United Nations Charter) the Declaration, with regard to Nicaragua, was, according to the Judgment, undoubtedly valid from the moment of its deposit, but had not become binding (para. 25). Nicaragua, as a Member of the League of Nations, had been entitled to sign and ratify the 1920 Protocol of Signature of the Statute of the Permanent Court of International Justice and, on this basis, make a declaration under the Optional Clause, as provided for by Article 36, paragraph 2, of this Statute. Signa-

tures of the Protocol were subject to ratification ; declarations were not. While, according to the logical order, declarations followed ratifications of the Protocol on which they depended, Nicaragua in fact made its Declaration first. Constitutional procedures in Nicaragua to ratify the Protocol took place in 1934-1935, but the instrument of ratification, although announced by the telegram of 29 November 1939 to the Secretary-General of the League of Nations, was never received in Geneva (paras. 15-16). These facts are uncontested, but the legal construction given to them in the Judgment is, in my view, unclear, and susceptible of inducing errors. The Declaration of 1929 was a legal instrument, the effect of which depended on a condition precedent, namely the deposit of the instrument of ratification of the Protocol of 1920. So long as this act had not been performed the Declaration remained without legal effect. To qualify it as certainly valid, but not binding, seems to me a misconstruction of a legal act which was subject to a suspensive condition. Moreover, the use of this terminology may indicate that the "certainly valid" declaration has an intrinsic validity which has only to be completed by ratification in order to become binding. A potentially effective act however only acquires its validity if and when the condition is met. If the interpretation given in the Judgment is correct, the Declaration of Nicaragua would not have been wholly inoperative in 1945 – as in fact it was – but would have been a valid act which might be taken into account when the new Statute had to solve the problem of transferring old declarations to the new Court. The construction and the terminology regarding the Declaration of 1929 thus prepare the way for an interpretation of Article 36, paragraph 5, which I am unable to accept.

2. Article 36, paragraph 5 (the text of which is reproduced in para. 14 of the Judgment), effected, in the interpretation of the Judgment, the transfer of the declaration to the present Court. The consent thereto had been given by Nicaragua

> "which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears".

The effect attributed to paragraph 5 is open to doubt. The conduct of Nicaragua, in so far as it plays a role in this connection, will be taken up later (para. 3, below).

The Statute of the International Court of Justice seeks to guarantee, as far as possible, continuity between the Permanent Court and the International Court of Justice, thus avoiding undesirable consequences resulting from a legal discontinuity between the old and the new Court. In particular, paragraph 5 was inserted in Article 36 in order to transfer the acceptances of the compulsory jurisdiction of the Permanent Court, according to their terms, to the jurisdiction of the International Court of Justice.

According to the Judgment, paragraph 5 refers not only to declarations

operative at the time of the entry into force of the Statute for the declarant State, but also to a declaration still valid though not binding (para. 37). It finds support for this interpretation in the French version, which attributes the transferring effect to the declarations "faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée". The English text, which refers to "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force", cannot, according to the Judgment, be reconciled with the French text by accepting the proposition that both versions refer to binding declarations (para. 30). The preference given to the French version has been justified by recourse to the preparatory work of the Statute. It is true that the French delegation at San Francisco succeeded in replacing the original term "encore en vigueur", which corresponded to the English words "still in force", with the present French text. For two reasons I am not able to share the conclusion of the Judgment in disregarding the English text in favour of the French text interpreted in the light of the preparatory work : first, according to general principles of interpretation, as codified in the Vienna Convention on the Law of Treaties (Arts. 31 to 33), a text authenticated in several languages is equally authoritative in each language. Only if the texts cannot be reconciled are supplementary means of interpretation, such as recourse to the preparatory work, permitted. I do not see any difficulty in finding the same meaning in both texts : a declaration which has been made for a duration which has not yet expired (French text) must have been in force (English text). The Judgment is certainly right in saying that to interpret the French wording as referring also to declarations not effective in respect of the Permanent Court, but made for a period which would not yet have expired if the declaration had been effective, would contradict the English text. Apart from this reason, which seems to me in itself sufficient, I have been unable to find conclusive evidence in the preparatory work that the change from the original French text to the final version was made in order to include declarations not in force. On the contrary, the French delegation declared explicitly that no change of substance was intended (*UNCIO* doc., Vol. XIII, pp. 282-284). There could be several reasons which motivated the French delegation to ask for the change in the text without affecting the English wording. I refrain from speculating as to which possibility may be the right one. I find no indication that the meaning attributed by the Judgment to the French text was also intended by the French delegation.

My conclusion is therefore that the text of paragraph 5, without leaving the meaning ambiguous or obscure (see Art. 32 of the Vienna Convention), related to declarations being effective, according to their terms, at the critical date. Consequently, the Nicaraguan Declaration of 1929 was not affected by paragraph 5.

3. The Court has also found

"that the constant acquiescence of Nicaragua in affirmations, to be

found in United Nations and other publications, of its position as bound by the Optional Clause constitutes valid manifestation of its intent to recognize the compulsory jurisdiction of the Court" (para. 109).

This statement, in the Court's reasoning, supports a finding of jurisdiction under Article 36, paragraph 2, of the Statute independently of the interpretation and effect of paragraph 5 of that Article (para. 42). I do not exclude the view *a priori* that an unequivocal conduct of Nicaragua in respect of its unconditional adherence to the compulsory jurisdiction and the general impression existing among States that this was the status of Nicaragua with respect to this jurisdiction, may constitute sufficient reasons for the Court to apply Nicaragua's submission in the terms of the 1929 Declaration in the present proceedings. The legal reason for this view may be the clear and undoubted appearance of a valid submission which has been maintained over many years. The legal concept justifying such a consideration would be analogous to that of acquisitive prescription, a general principle of law within the meaning of Article 38, paragraph 1 *(c)*, of the Statute, by which lapse of time may remedy deficiencies of formal legal acts. If one follows this theory the facts and the conduct must be absolutely unequivocal and must not leave room for any doubt.

I cannot conclude that the constant acquiescence of Nicaragua in affirmations of its position as bound by the Optional Clause, and the inclusion of Nicaragua in the listing of declarations under Article 36, paragraph 2, in the Court's *Yearbooks,* and in United Nations publications as well as national official publications, which were often and over a long period accompanied by a qualifying caveat, sufficiently show that the requirements just mentioned are fulfilled. Nicaragua which, as the Judgment rightly notes, was aware of the deficiency and could easily have clarified the situation, failed to do so. It cannot take advantage of uncertainties which it knowingly left unchallenged. On the other hand, Nicaragua allowed a situation to subsist which could be interpreted as its adherence to the Optional Clause in the terms of the 1929 Declaration.

The case concerning the *Arbitral Award Made by the King of Spain* is part of this ambiguous conduct. In its application, Honduras founded the jurisdiction of the Court not only on the *Compromis* with Nicaragua reached under the auspices of the Organization of American States on 21 July 1957, but also on the submission of Nicaragua to the Permanent Court's compulsory jurisdiction on 24 September 1929 (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906,* Vol. I, p. 8). Nicaragua, for its part, wanted to limit the dispute with Honduras to the definition given in the said *Compromis* and its accompanying documents.

It insisted on having the dispute decided only on this basis (see, e.g., the Nicaraguan Reply, *ibid.,* Vol. I, p. 754). Proceedings on the basis of acceptance of the Optional Clause would have given Honduras the opportunity to present a more extensive claim (including compensation for damages) than one seeking judgment solely on the basis of the *Compromis.* Understandable as this conduct may be from the point of view of Nicaragua, it certainly does not prove its acquiescence in the application of the 1929 Declaration. No other events occurred by which Nicaragua took position one way or the other.

It is nevertheless a fact that Nicaragua did run the risk during many years of being sued by another State on the basis of its submission. It may well be, as the Judgment rightly says, that on this hypothesis the Court would have held Nicaragua bound by the Declaration because it tolerated or maintained the appearance shown, with and without caveats, in official documents (which, in themselves, had no authoritative character). Whether the Court would have assumed jurisdiction in such a hypothetical case cannot be either affirmed or denied. Affirmation was however a possibility to be taken into account by Nicaragua.

This consideration is however not sufficient to conclude that an application by Nicaragua against another State can be entertained on the basis of the submission under the Optional Clause. Weighing this ambiguous conduct against the strict criterion of continuous unequivocal conduct in favour of the binding force of the declaration, the conclusion can only be that this basis alone is not sufficient to justify Nicaragua's reliance on the declaration.

II

Since the majority of the Court has voted in favour of assuming jurisdiction on the basis of the Declaration (para. 1 *(a)* of the operative part of the Judgment), the following remarks on some other points of the Judgment are made on this assumption.

1. I share the Court's opinion that the notification made by the Shultz letter of 6 April 1984 has no effect on the obligations of the United States created by its Declaration of 26 August 1946 under the Optional Clause (for the text of the letter see para. 13 of the Judgment). I agree also with the Judgment that the question whether this notification – which the United States calls a "proviso" to the Declaration of 1946 – constitutes only a modification or the termination of this Declaration, is not relevant for the decision of the present dispute. My observations concern the relation between the Nicaraguan Declaration (treated as being valid) and its United States counterpart of 1946.

When the system of the Optional Clause was adopted at San Francisco

as a substitute for general compulsory jurisdiction of the new Court – an ideal which was not attainable – member States of the United Nations which became, *ipso jure*, parties to the Statute, and other parties to the Statute, remained free not only to refrain from submitting to the jurisdiction at all, but also to qualify their declarations by time-limits and reservations concerning substantive matters. Time-limits could provide either fixed periods for validity, or periods of notice for notification of termination. Moreover, according to paragraph 2 of Article 36, a consensual link between the various declarations is created only between States which undertake the "same obligation". The Nicaraguan Declaration of 1929 is unconditional with respect to substantive reservations and time-limits, whereas the United States Declaration of 1946 is qualified by three provisos containing substantive reservations, and may be terminated six months after a notification to this effect has been made.

There is general agreement that reservations relating to substantive restrictions limit the obligations of other States which have submitted to the compulsory jurisdiction without having made corresponding reservations. The consensual bond, which is the basis of the operation of the Optional Clause, comes into being at the time at which another State deposits its declaration. Although the reciprocal character of the substantive provision of declarations is not in doubt, there is, however, no such agreement regarding different time-limits in declarations which, from the point of view of their substance, are mutually applicable.

In my view, time-limits are taken into account as substantive reservations because the requirement of Article 36, paragraph 2, that the consensual bond exists only between States accepting the same obligation, must be applied to both types of qualifications which are permitted to be included in declarations. Reservations restrict the substantive extent of the obligation, time-limits put an end to the obligation, whether made with or without substantive limitations, in its entirety. It is difficult to see how the "same obligation" within the meaning of Article 36, paragraph 2, can continue to exist longer for one State than for its potential counterpart whose declaration is limited by a shorter notice period, or may be terminated by notification at any moment. This consideration is, of course, no longer relevant when an application has been filed before the defendant State has made use of the shorter delay to notify the termination of its declaration, which it is, in my view, entitled to make due to the fact that the time-limit of another State's declaration is shorter. I am aware of the disadvantages flowing from the relative effect of declarations with regard to other States. But the difficulties are not much greater than the relativity generally admitted with respect to substantive reservations.

The relation between the Declarations of Nicaragua and the United States, of 1929 and 1946 respectively, is, in my view, the following: Nicaragua's Declaration is unconditional, that is, not only without reservation but also without time-limit. To this declaration the general principle applies that all legally binding acts, whether made unilaterally, or within the framework of a contractual relationship, or in the complex system

which the Judgment describes as *"sui generis"*, can, under certain conditions, be terminated. Article 56 of the Vienna Convention is based on this principle. The question remains however on what conditions the right of termination may be exercised. It may be open to doubt whether the Nicaraguan Declaration can be terminated with legal effect immediately on notice, or only after a lapse of a certain time after such notice. Article 56 of the Vienna Convention refers to the "nature of the treaty", or envisages a 12 months' notice. Applying the same ideas by analogy to the "consensual bond" effected by declarations under the Optional Clause, the "nature" of the bond is characterized by the equal significance of the obligations. This results from Article 36, paragraph 2, without any special reservation being necessary as provided for in paragraph 3 of the same Article. The Court emphasized in the case of *Right of Passage over Indian Territory (Preliminary Objections)* (*I.C.J. Reports 1957*, p. 145), that the principle of reciprocity forms part of the system of the Optional Clause. It does not follow from the "nature" of an "unconditional" declaration that it may be terminated at any time and with immediate effect. Article 56 of the Vienna Convention shows – and here again an analogy is suggested – that the termination of an obligation must be governed by the principle of good faith. Withdrawal without any period of notice seems to me not to correspond with this principle if a declaration has been made explicitly unconditional.

The precise period of notice necessary or appropriate to terminate the Nicaraguan obligation need not be decided in the circumstances in which the Shultz letter was made. This letter, which disregarded the notification clause in the 1946 Declaration, was received by the United Nations Secretariat on Friday afternoon, 6 April 1984, whereas the Application of Nicaragua was filed with the Registry of the Court on the following Monday, 9 April 1984. The Court has not yet had the opportunity to judge a parallel case. It did however pronounce, in the *Right of Passage over Indian Territory* case, on the reverse situation. Portugal had made a declaration regarding the Optional Clause only a few days before it filed an application against India based on this declaration. The Court did not accept the Indian Preliminary Objection that the Portuguese declaration – made with a view to its own application – was inadmissible.

Though I admit that a certain analogy exists between the two situations, more convincing reasons speak, in my view, for a different interpretation. If Nicaragua, as I concluded above, could not terminate its obligation with immediate effect, then the corresponding obligation of the United States, disregarding entirely the six months' notice period, or applying a period of a few days only, could also not be terminated. Admittedly, the interpretation of the requirements of good faith on either side cannot be determined in the abstract ; it must be fixed *in concreto* according to the circumstances of the case. Whatever the period of notice may be to terminate the unconditional submission, it would not have been permissible

to cut it down to a minimum. Correspondingly, the six months' notice period in the United States Declaration could not be reduced to the few days before the filing of the Nicaraguan Application. The Shultz letter could therefore not have the effect which it was intended to produce.

2. The multilateral treaty reservation (proviso *(c)* of the United States Declaration of 1946) has been invoked by the United States as applicable in the present proceedings in so far as Nicaragua founds its claim on the alleged violation by the United States of four multilateral treaties, the Charter of the United Nations, the Charter of the Organization of American States, the Convention on the Rights and Duties of States and the Convention on the Rights and Duties of States in the Event of Civil Strife. According to the reservation, the submission of the United States to the compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court". This restriction included in the Declaration of 1946 has been deplored as very far-reaching and unclear. It has been criticized because it seemed "only to have been inspired by vague fears and misconceptions as to the working of the Optional Clause in a case arising under a multilateral treaty" (H. Waldock, "The Decline of the Optional Clause", 32 *British Year Book of International Law,* 1955-1956, p. 275) and because "the language of the reservation betrays such confusion of thought that to this day no one is quite sure what it means" (H. W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *Recueil des cours,* 1958-I, p. 307). The example of the United States has however been followed by some other States, whose reservations refer simply to "all parties", while the qualification in the United States reservation which refers to the States parties "affected by the decision" does not appear (see para. 72 of the Judgment). This expansion of the use of the clause indicates that it has an applicable meaning, and that it cannot be put aside either because of its consequences or of its lack of clarity which has given rise to much confusion.

Both Parties referred to the legislative history of the reservation in the United States Senate. It was inserted in the Declaration in order to take account of Mr. J. F. Dulles' concern that the United States might be exposed to disputes before the Court by States which were parties to the same dispute, but not parties to the litigation pending before the Court against the United States, because these States had not bound themselves by the Optional Clause. It may well be that misconceptions and misunderstandings which occurred in the debates of the United States Senate are responsible for the insertion of the reservation and its actual wording. The basis of the interpretation is however the text itself. If it has a meaning which can reasonably be applied in a concrete situation, the reservation has to be given its full effect. If not, the question arises as to whether its invalidity affects the entire declaration of acceptance. On this assumption the United States could not be sued by an application referring to its

acceptance of the Optional Clause. The Court has never had the opportunity to decide whether a whole declaration under the Optional Clause may be invalid because an ineffective reservation had to be considered an essential part of it. If an affirmative conclusion were to be taken, its effect would be worse than to apply the reservation and to maintain the rest of the declaration. While this consideration, it is true, is not in itself an element of interpretation of reservations made in a declaration under the Optional Clause, it is nevertheless a point of view to be kept in mind when a reasonable construction of a reservation is made.

Of the two possibilities of interpreting the reservation in a wider sense, to include the treaties affected by the decision of the Court, or in a narrower sense which includes only the States affected by multilateral treaties relevant in a dispute before the Court, the United States prefers the latter meaning. Although it belongs to the competence of the Court to decide on the applicability of the reservation (Art. 36, para. 6, of the Statute) I agree with the Judgment when it follows this interpretation (para. 72). States which might be affected within the meaning of the reservation are thus the Central American neighbouring States of Nicaragua.

I equally share the view of the Judgment that the question as to whether States are "affected" within the meaning of the reservation cannot be answered in the present jurisdictional phase of the proceedings, but only in connection with the merits of the case. The objection based on the reservation does therefore "not possess, in the circumstances of the case, an exclusively preliminary character", a situation envisaged in Article 79, paragraph 7, of the Rules of Court. The Court has not yet had the opportunity to apply this provision, which belongs to the new provisions made by the partial revision of the Rules in 1972. The intention was to depart from the former practice in which the preliminary and the principal phase of the proceedings had not been properly distinguished and preliminary objections had been more often joined to the phase of the merits than was desirable in view of a sound economy of proceedings. There may, however, be cases in which, as in the present one, the decision on a substantive element in an objection against jurisdiction needs to be made before the Court can make a decision as to whether the objection is upheld. The consequence of this situation is that the answer to the whole question cannot be given in the proceedings on jurisdiction but must be postponed to the phase of the merits. If the answer to the question which has not an exclusively preliminary character is such that the element belonging to the merits exists in the actual case, the reservation must be given effect. In concrete terms, if the Court should find, in the merits phase, that other States are "affected", within the meaning of the reservation as interpreted by the Court, then in its decision the four multilateral treaties referred to in the Nicaraguan Application cannot be applied in the present dispute. On this hypothesis the Court remains competent to apply, with the exception of the four multilateral treaties, the other rules and principles mentioned in Article 38, paragraph 1, of the Statute. If it comes to the contrary conclusion, the four multilateral treaties can be taken into account.

To conclude this opinion, I repeat the statement made at the beginning that I dissent from the Court in so far as it founds its jurisdiction on Article 36, paragraphs 2 and 5, of the Statute.

(Signed) Hermann MOSLER.