SEPARATE OPINION OF JUDGE LACHS

At the outset, I am impelled to express my regret at what, to my mind, is a strange occurrence in the present case. It was stated that much of the evidence was "of a highly sensitive intelligence character" and asserted that the Respondent would "not risk United States national security by presenting such sensitive material in public".

Giving all due respect where it is due, this is not the first time that "security risks" have been invoked in connection with proceedings before this Court. In the *Corfu Channel* case the United Kingdom Agent was requested to produce certain documents "for use of the Court". These documents were not produced, the Agent pleading naval secrecy ; and the United Kingdom witnesses declined to answer questions relating to them. Consequently the Judgment stated :

> "The Court cannot . . . draw from the refusal to produce the orders any conclusions differing from those to which the actual events gave rise." (*I.C.J. Reports 1949*, p. 32.)

However, in the present case another factor has been added to the risk of presenting "such sensitive material before a Court", for in the same context an allusion was made to the alliance whose members include the countries of which certain Judges were nationals. In brief, it was suggested that in view of this alliance these Judges, or rather the Judge in question – for only one is now involved – may be "more" than a Judge or "less" than a Judge. In either case he would be unfit to sit on the bench. If so, he would be unfit to sit not only in this but in any other case. For, even apart from the stipulations of Article 2 of the Court's Statute, two requirements are overriding : integrity and independence.

A judge – as needs no emphasis – is bound to be impartial, objective, detached, disinterested and unbiased. In invoking the assistance of this Court or accepting its jurisdiction, States must feel assured that the facts of the dispute will be properly elicited ; they must have the certainty that their jural relationship will be properly defined and that no partiality will result in injustice towards them. Thus those on the bench may represent different schools of law, may have different ideas about law and justice, be inspired by conflicting philosophies or travel on divergent roads – as indeed will often be true of the States parties to a case – and that their characters, outlook and background will widely differ is virtually a corollary of the

diversity imposed by the Statute. But whatever philosophy the judges may confess they are bound to "master the facts" and then apply to them the law with utmost honesty.

As human beings, judges have their weaknesses and limitations ; however, to be equal to their task they have to try to overcome them. Thus in both their achievements and shortcomings they must be looked upon as individuals : it is their personality that matters. As James Brown Scott so rightly stated :

> "The Court is an admirable body representing the different forms of civilization and systems of law and calculated not only to do justice between nations without fear or favour but to their satisfaction. One dream of the ages has been realized in our time." (15 *AJIL*, 1921, pp. 557-558.)

This variety of origin of the Judges is certainly the great strength of this Court. It is a major contributory factor to the confidence that all States may feel in the balanced nature of the Court's decisions and the broad spectrum of legal opinion they represent. But can this diversity justify an invidious distinction between Judges according to their nationality or the alliances of which their countries may happen to be members ? All Judges "should be not only impartial but also independent of control by their own countries or the United Nations Organization" (*UNCIO*, Vol. 13, p. 174). In fact, while they may have served their countries in various capacities, they have had to cut the ties on becoming a Judge. As was once said :

> "It is difficult for any Judge to solicit an act of faith in favour of a process so epistemologically subjective and temporal. This is essentially true of the international Judge who must seek a commitment from various societies operating within differing systems of legal hypothesis."

Each and every Judge stands on his own record. As the late Judge Philip C. Jessup held, speaking from his considerable experience and referring to a particular dispute :

> "It is one of the cases which show that a dissection of the views of the Judges of the Court to prove some kind of national alignment is often not supportable and may be quite misleading."

A telling illustration of this remark, and one apposite to the issue I raise, may be seen in the Judgment in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, pp. 44-45 ; cf. also *I.C.J. Reports 1982*, p. 8). "The Justice writing an opinion", said John Mason Brown, a distinguished literary figure on the American scene,

> "carries a burden unknown to the playwright, the poet or the novelist.

> It is a burden of public responsibility so heavy that its weight often makes itself felt in his prose. Wisdom is what we want from a Judge, not wit ; clarity of phrase, before beauty, decision rather than diversion. No wonder Judges' opinions, being the awesome things they are, using language as an instrument of action and capable of changing the history of a nation, are seldom read as literature." (Lecture delivered before the American Law Institute, 23 May 1952.)

Justice Frankfurter, speaking of Judges of the Supreme Court, observed :

> "What is essential for the discharge of functions that are almost too much by nine fallible creatures is that you get men who bring to their task, first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness and allegiance to nothing except the effort, amid tough words and limited insights, to find the path through precedent, through policy, through history to the best Judgment that fallible creatures can reach in that most difficult of all tasks : the achievement of justice between men and men, between men and State, through reason called law."

The words of that great judge Oliver Wendell Holmes may be added :

> "The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." ("The Path of Law", a talk given in 1897.)

This goal is certainly attainable to the very few, but we can and should attempt to strive for it : to uphold the dignity of a profession to which society for centuries has attached profound importance. In the light of such considerations, which are seldom absent from the judicial mind, it appears unseemly to doubt a Judge on account of the place where he was born or the passport he may carry. And this case is probably unique as one in which these are by implication claimed to impair a Judge's status, standing, wisdom, discretion and impartiality, and to warrant the limitation of the knowledge made available to him for the discharge of his trust.

* *

Since the Court has pronounced its final Judgment in the present case and I did not express my views at the earlier stages of the proceedings, I take this opportunity to do so now. I have to revert to some questions already settled but I will do so very briefly in order not to overburden the reader who faces so many pages reflecting the wealth of thought to which the present case has given rise. Though I would have preferred the Court to have dealt in greater detail with the question of assistance from or through Nicaragua to opposition forces in El Salvador, since the principal issues before the Court were those of self-defence and resort to the use of force, I will not touch upon the substance of this question. I would also have preferred different formulae to be used here and there in the Judgment. Be that as it may, the first issue on which I felt it behoves me to make my position clear is that of the Court's jurisdiction under Article 36 of the Statute.

I. Aspects of Jurisdiction

The 1984 Judgment, as well as the separate or dissenting opinions appended to it, revealed that the case had some highly exceptional aspects beyond the routine questions that demand to be answered in determining the Court's jurisdiction. These aspects arose chiefly from the fact that, in the League of Nations system, two instruments were involved in the procedure for accepting the jurisdiction of the Court as compulsory in all or certain international legal disputes : the Protocol of adherence to the actual Statute of the Permanent Court of International Justice, and the Declaration of acceptance corresponding to the so-called Optional Clause. While the former in all cases required ratification, the latter needed ratifying only where domestic law so demanded, which was not Nicaragua's case.

Nicaragua made its Declaration as long ago as 1929 ; thus in subsequent *Reports* of the Permanent Court of International Justice it was listed among those States having made a Declaration under the "Optional Clause" without any requirement of ratification (*P.C.I.J., Series E, No. 16, 1939-1945*, p. 49). It was not however listed among States *bound by the Clause* (*ibid.*, p. 50), because, as was noted, though it had signed the Protocol and had notified the Secretary-General of the League (by a telegram of 29 November 1939) that an instrument of ratification was to be dispatched, no trace could be discovered of such an instrument having been received.

The implications of this situation revolve on the interpretation of Article 36, paragraph 5, of the present Court's Statute, and I have to say that the issue may be seen also in a different perspective than that reflected in the Judgment of 1984 (*I.C.J. Reports 1984*, pp. 403 ff.). I feel that the making of a Declaration under the Optional Clause was not only a manifestation of

Nicaragua's willingness to subject itself to compulsory jurisdiction but also, *ipso jure*, a confirmation of its will to become a party to the Statute of the Permanent Court of International Justice. From the viewpoint of intent it was thus tantamount to ratification of its signature of the Protocol. Formally, it is true, this did not suffice, and so we are faced here with the classic issue of the relationship between "will" and "deed". For, as this Court has itself remarked :

> "Just as a deed without the intent is not enough, so equally the will without the deed does not suffice to constitute a valid legal transaction." (*I.C.J. Reports 1961*, p. 31.)

However, one has to bear in mind that in the case of Nicaragua the will was clearly manifested by the whole procedure, beginning with the acceptance of the Optional Clause and ending with the telegram concerning the ratification of the Protocol, evidenced by decisions of the competent organs of the State including signature by the President. The telegram indeed notified these acts to the Secretary-General of the League of Nations. The question arises as to its legal effects, since the instrument of ratification was not deposited.

In this context I wish to recall two factors which could not have remained without legal effect.

It may of course be argued that ratification is not a mere formality. However, in the present case, more attention should have been paid to the conduct of the States concerned, their practice, "toleration" or "lack of protest".

The conduct of Nicaragua, in particular, made it clear that it had acquiesced in being bound to accept the compulsory jurisdiction of the Court and that this acquiescence had an effect on the requirement of ratification of the Protocol to the old Court's Statute – a requirement moreover which could arguably have been regarded as otiose now that Nicaragua's membership of the United Nations had made it a party to the Statute of the new and may have called for a different action. Moreover one should bear in mind that the process of ratification had been initiated ; there was at least an "inchoate ratification" ; for the process had already been engaged and completed, on the domestic plane, and the only point of such domestic ratification was to legalize the international step which had next to be taken.

Here I find a very essential factor, and one which, by force of practice over a period of almost 40 years, could not have remained without legal effect upon an instrument even if legally imperfect.

An important factor was undoubtedly the *Yearbook* of the International Court of Justice (to whose Statute Nicaragua had become a party), which consistently featured Nicaragua among the States which had accepted its compulsory jurisdiction, while adding a footnote : "the notification concerning the deposit of the instrument of ratification has not, however, been

received in the Registry." Since 1955-1956 it read : "it does not appear, however, that the instrument of ratification was ever received by the League of Nations." One wonders how this affected the heading of the list ; and another list in which reference was made to Article 36, paragraph 5, of the Statute of the present Court (cf. *I.C.J. Yearbook 1947-1948*, pp. 38 ff.).

In considering what value to attach to the *Yearbook* of the Court, which is published by its Registrar on the instructions of the Court, one has naturally to give full weight to the reservation that it "is prepared by the Registry" and "in no way involves the responsibility of the Court", a caveat that "refers particularly" to

> "summaries of judgments, advisory opinions and orders contained in Chapter VI [which] cannot be quoted against the actual text of those judgments, advisory opinions and orders and do not constitute an interpretation of them".

However, there is much more to the matter than this : the Court itself has been submitting annually for some years to the General Assembly of the United Nations a report, signed by the President of the Court, which becomes an official document of the Assembly and has evidential value. This report has from the outset, and without any caveat or footnote whatsoever, included Nicaragua among States having made declarations accepting the Court's compulsory jurisdiction.

The other factor is preparatory work that was needed to bring the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* before the Court. Here the enquiry conducted on the subject by former Judge Hudson, acting on behalf of Honduras, is not unenlightening.

Hudson approached the Registrar of the Court on this subject under discussion and received a very interesting reply :

> "I do not think one could disagree with the view you expressed when you said that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of compulsory jurisdiction. If the declaration of 24 September 1929 was in fact ineffective by reason of failure to ratify the Protocol of signature, I think it is impossible to say that Nicaragua's ratification of the Charter would make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court." (Letter of 2 September 1955 ; Counter-Memorial in the present case, Ann. 35.)

Notwithstanding this statement, Hudson took a very guarded view on the subject, because in analysing the case he arrived at the conclusion :

> "It must be borne in mind that the International Court of Justice has not determined whether there is any degree to which Nicaragua's Government is bound by the declaration of 24 September 1929 as to the International Court of Justice. Without such determination it is impossible to say definitely whether or not the Government of Honduras may proceed against the Government of Nicaragua." (Counter-Memorial in the present case, Ann. 37.)

He also visualized the following :

> "it is also possible that the action should begin against Nicaragua in spite of the fact that the State is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice. If Nicaragua later agrees to the jurisdiction the situation will be much the same as if it had agreed to a special agreement in advance of the case." *(Ibid.)*

Finally it is worth recalling that Hudson, after his exchanges with the Registrar, when publishing his last annual article on the International Court in 1957, continued to include Nicaragua in the list of *States parties to the compulsory jurisdiction of the Court.* The Respondent suggests that he did so "perhaps in deference to his client, Honduras" and goes on to point out that Hudson nevertheless "introduced a new cryptic footnote to Nicaragua's listing : 'See the relevant correspondence'." (M. Hudson, "The Thirty-fifth Year of the World Court", 51 *AJIL*, 1957, 17 : cf. also Counter-Memorial in the present case, para. 143.)

One should however also recall the statement of the Nicaraguan Ambassador in Washington denying that Nicaragua had agreed to submit to compulsory jurisdiction (*ibid.*, para. 116). Yet there was a special reason for this attitude, and this is made clear.

Nicaragua held that the dispute with Honduras was one which "ne porte en aucune façon *sur la réalité* de tout fait qui, s'il était établi, constituerait la violation d'un engagement international" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, p. 132, para. 3 ; cf. also para. 4). These were, then, the special motives in that particular case for Nicaragua to try to evade the compulsory jurisdiction of the Court and to seek a special agreement on special conditions.

As is well known, the Parties did conclude a special agreement, yet, this notwithstanding, Honduras referred in its Memorial to Article 36, paragraph 2, of the Statute of the Court and also to the Decree of 14 February 1935 of the Senate of Nicaragua ratifying the Statute and Protocol of the Permanent Court of International Justice, a similar action undertaken on 11 July 1935 by the Chamber of Deputies and its publication in the *Official Gazette* in 1939, No. 130, page 1033. In the same Memorial Honduras referred further to the fact that the Parties had, on the basis of Article 36, paragraph 2, of the Statute of the International Court of Justice, recognized its compulsory jurisdiction (*I.C.J. Pleadings, Arbitral*

Award Made by the King of Spain on 23 December 1906, Vol. I, p. 59, paras. 37-39).

If the Registrar referred to above had a negative view on the subject, why did he continue to publish this information ? Obviously, the footnote did not resolve the problem. Was it not his duty to draw the attention of the respective United Nations organs to it in order to clarify the situation in the light of the circumstances which arose in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* ? Should not the attention of the Court have been drawn to the status of Nicaragua as he saw it ? Clearly the only possible way of arriving at a definite conclusion would have been for the Court and the Secretary-General of the United Nations to be informed in order to resolve the issue. It could have been decided to inform Nicaragua accordingly. Its Government could have been asked to make clear whether it considered itself bound, in which case it may have been requested to clinch the matter, or, if it felt otherwise, to say so, which would imply its deletion from the list. This was not done, and no action was taken for a further 30 years. Here I cannot avoid concluding that the blame for this very awkward and time-wasting controversy on the issue of jurisdiction which caused so many difficulties must be laid at the door of the United Nations and those of its organs which failed to clarify the situation in time.

If this was so, the reason was not that Nicaragua was accorded special status or that the law was interpreted in its favour. Thus any suggestions that the Court insisted on the exercise of jurisdiction are revealed as hollow. It has never so conducted itself in the past, and has not done so now. I, for one, have always been inclined to severity in testing the requirements to this effect.

My final conclusion on the subject of Nicaragua's Declaration is that while that State's submission to the jurisdiction of the Permanent Court of International Justice was imperfect, so far as the present Court is concerned, Nicaragua's status as a party to the Statute, the effluxion of time – 40 years' acquiescence on the part of all concerned – the lack of action by the responsible officials, must all be taken into account. No less essential has been the documentary affirmation of Nicaragua's status in the *Yearbook* and *Reports* of the Court. At all events, all these factors had combined to cure the imperfection which may have constituted an obstacle in the acceptance of the jurisdiction. For one should bear in mind that legal effects, rights and obligations arise in the most different circumstances, some unforeseen and unforeseeable : legal relations evolve sometimes owing to a strange accumulation of will and deeds.

On the other hand, the jurisdiction established by the bilateral treaty of 1956 leaves no room for doubt.

* *

II. JUSTICIABILITY OF THE CASE

I now approach another subject, one raised in the first place by the respondent State – that of the alleged non-justiciability of the case. This indeed is a very serious objection and needed to be given adequate consideration. In principle, a case may be justiciable *only* if the jurisdiction of the Court has a basis in law and the merits of the case can be decided in accordance with law, which however "shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto" (Statute, Art. 38, para. 2). In the present case it has been claimed that the submission of the "lawfulness of an allegedly ongoing use of armed force" to the Court for determination is without precedent (Counter-Memorial, para. 480) ; that "decisions concerning the resort to force during ongoing armed conflict are the exclusive preserve of political modes of resolution, which by their nature need not entail determinations of legal fault" (*ibid.*, para. 484 ; also paras. 520 ff.) : if a country's security is in jeopardy, the necessity of using force is alleged to be a purely political or military matter, thus not a matter such as the Court could possibly decide. It has also been claimed, as recalled by the Judgment, that the matters subject of the Application were left by the Charter "to the exclusive competence of the political organs" of the United Nations, in particular the Security Council (*ibid.*, paras. 450 ff.). Strictly speaking, however, this question of the competence of other organs of the United Nations involves issues of "judicial propriety" rather than justiciability.

It is also submitted that the "established processes for the resolution of the overall issues of Central America have not been exhausted" and that "adjudication of only one part of the issues involved in the Contadora Process would necessarily disrupt that process" (*ibid.*, paras. 532 ff. and 548 ff.). Thus the Respondent suggests that the dispute is not justiciable.

The *Northern Cameroons* case is referred to, and in particular the statement that "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction" (*I.C.J. Reports 1963*, p. 29). In that case it was held that Cameroon had directed its plea to the General Assembly, which had rejected it (*ibid.*, p. 32). The Judgment added that, in the circumstances, "The decisions of the General Assembly would not be reversed by the judgment of the Court" (*ibid.*, p. 33). The Respondent in the present case suggested that "the Court should be guided" by the "considerations" of that case. With all due respect to this reasoning, it is worth recalling that, in the case referred to, the Court found "that the resolution [of the General Assembly] had definitive effect" (*ibid.*, quoted by the Respondent). But the most important passage of the Judgment states :

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties." (*I.C.J. Reports 1963*, pp. 33-34.)

In short, it was a "moot" case. For the Court found that "circumstances that have since arisen render any adjudication devoid of purpose" (*ibid.*, p. 38). The same view was also held in the *Nuclear Tests* cases : "The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless." (*I.C.J. Reports 1974*, p. 271, para. 58.) The present case, in contrast, is one in which the issues are very much alive and in which a clarification of the law can produce positive results. It is above all one in which the action of the Court may well assist the deliberations of the other organs and intermediaries concerned. The precedents referred to are therefore inapt.

Reliance has also been placed on the decision of the Court in the *Corfu Channel* case. However, the argument based on that case was rebutted by recalling that what was there in question amounted to no more than a single act involving use of force, whereas the present case features continuous hostile action. *Corfu Channel* has therefore little bearing on whether or not the Court may consider situations of "ongoing armed conflict". However that may be, it should be emphasized that the Parties now before the Court have been at odds for a long time, yet they maintain diplomatic relations, they are not at war, their armies are not engaged in battle, and the acts of force considered here are not executed by them. The Court is not faced with the "armed forces" of one State acting against another. Thus the argument of the necessity of force, or its use by an organ of a State, is not involved. In a case of this kind it may be maintained that there is no predetermined limit to the possibilities of judicial settlement. In a message of the Swiss Federal Council published in 1924 on the occasion of the conclusion of a treaty for the arbitration and judicial settlement of disputes it was stated that :

> "Un Etat n'abdique rien de sa souveraineté lorsque, librement, délibérément, il assure par avance une solution arbitrale ou judiciaire à tous les différends, sans exception, qui n'auraient pu être aplanis par voie de négociations directes. Il renonce seulement, par esprit de justice et de paix, à faire prévaloir ce qu'il considère comme son bon droit par des moyens qui pourraient être inconciliables avec la conception même du droit." (*Feuille fédérale de la Confédération suisse*, 1924, Vol. III, p. 697.)

In general it is power relationships – or whatever other name may be attached to this area of relations between States – which render a given legal dispute indivorcible from considerations going beyond the legal object and thus prevent its judicial solution.

But today the body of international law has in any case grown to dimensions unknown in the past. Almost all disputes arising between States have both political and legal aspects ; politics and law meet at almost every point on the road. Political organs, national or international, are under obligation to respect the law. This does not mean that all disputes arising out of them are suitable for judicial solution. Need I recall that in the last century and the beginning of the present, those concerning "vital interests" of States, or their "honour", were viewed as political, and thus not subject to third-party settlement ? Even a very minute dispute may be viewed as touching the vital interests of a State. On the other hand, boundary disputes which frequently involve hundreds of miles of land, and vast areas of the ocean – thus concerning the vital interests of many States – have been most frequently referred to courts. It is here where subjective and objective criteria confront one another. If the first criterion is applied, then of course the will of the parties, or of one of them, is decisive. If the second is involved, one can confirm without hesitation that there is no dispute which is not justiciable. Yet a balance must be struck between the two criteria : the world we live in is one where certain notions, though part of the vocabulary of law, continue to be controlled by subjective evaluations. An illustration in this respect may be found in the field of disarmament : or the very concept of "balance of power". If a State were to seek a legal remedy from the Court, relying on the criterion of "balance of power", the Court would have to reflect very seriously before assuming jurisdiction, no matter how well established the Court's formal competence.

The Court's primary task is to ascertain the law, and to leave no doubt as to its meaning.

Tension between the parties is not the decisive factor : it may be the outcome of an eminently "legal" dispute. Nor is the test to be sought in the "importance" of the dispute. Sometimes the officials responsible would prefer to have the dispute settled by the parties themselves and not by a group of jurists who are mostly unknown to them ; to have it resolved on subjective criteria, by a decision less learned but more practice-oriented.

It is frequently argued that on matters of great importance law is less precise while on other, minor matters it contains much more detail. One could maintain that the present state of international law opens the way to the legal solution of all disputes, but would such a solution always dispose of the problems behind them ?

Thus it becomes clear that the dividing line between justiciable and non-justiciable disputes is one that can be drawn only with great difficulty. It is not the purely formal aspects that should in my view be decisive, but the legal framework, the efficacy of the solution that can be offered, the contribution the judgment may make to removing one more dispute from the overcrowded agenda of contention the world has to deal with today.

The view "that the Court cannot adjudicate the merits of the complaints alleged in the Nicaraguan Application does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes" (Counter-Memorial, para. 531).

In this context reference is made to Lauterpacht's dictum :

> "Here as elsewhere care must be taken not to confuse the limitation upon the unrestricted freedom of judicial decision with a limitation of the rule of law [1]."

However, Lauterpacht also maintained that :

> "there is no fixed limit to the possibilities of judicial settlement. All conflicts in the sphere of international politics can be reduced to contests of a legal nature. The only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of law." *(Ibid.)*

Among the reservations contained in the Respondent's declaration recognizing the Court's jurisdiction, there is none which would exclude disputes of the character reflected in the present case. For it is not among those declarants which have accepted the compulsory jurisdiction of the Court with the exception of "disputes arising out of any war or international hostilities", or "affecting the national security".

Once the case is brought before it, the Court is obviously not bound by the reasoning of either party, which may attach to the dispute different labels. Here it need not accept the reasoning of Nicaragua and in fact it does not on several points. In this context it may be of interest to recall some comments on the Judgment in the *United States Diplomatic and Consular Staff in Tehran* case made by a recognized authority on the International Court of Justice :

> "According to one doctrine of justiciability of disputes, it would be difficult to imagine a more tension-laden and therefore non-justiciable dispute. The alleged non-justiciable character of the dispute was underscored by Iran in its letter of 9 December 1979 to the Court [2]."
>
> "In the view of the United States, the case was eminently justiciable." [As the Applicant's Agent stated in presenting the case at the phase of Provisional Measures :] "this case presents the Court with the most dramatic opportunity it has ever had to affirm the rule of law

[1] Cf. *The Function of Law in the International Community*, Oxford 1933, p. 389.

[2] Leo Gross , *United States Diplomatic and Consular Staff in Tehran 1974* case, 2 *AJIL*, 1980, pp. 395 ff.

among nations and thus fulfil the world community's expectations that the Court will act vigorously in the interests of international law and international peace [1]". "It would seem [says Gross] that the Court lived up to these expectations." "There is no doubt that this case represents a landmark in the relations between the United States and the Court." [The author adds :] "This then is the first time in 35 years that the United States has turned to the Court [2]."

Finally, the justiciability of the present case is not affected by any other means tried by the Parties in order to solve their disputes. As I indicated some time ago :

"There are obviously some disputes which can be resolved only by negotiations, because there is no alternative in view of the character of the subject-matter involved and the measures envisaged. But there are many other disputes in which a combination of methods would facilitate their resolution. The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved. It is sometimes desirable to apply several methods at the same time or successively. Thus no incompatibility should be seen between the various instruments and fora to which States may resort, for all are mutually complementary [3]."

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III. Judicial Error

Anatole France had one of the heroes of his stories, Judge Thomas de Maulan, say : "un juge soucieux de bien remplir sa fonction se garde de toute cause d'erreur. Croyez-le bien, cher monsieur, l'erreur judiciaire est un mythe." Yet such errors do occur, to all. As Justice Frankfurter stated in the *United Mine Workers* case : "Even this Court has the last say only for a time. Being composed of fallible men, it may err." (330 US 308, quoted in his concurring opinion in the famous *Little Rock School* case : 358 US 22.)

As an illustration of this unfortunate fact, I myself find upon reflection that the Order of 4 October 1984 (*I.C.J. Reports 1984*, pp. 215 ff.), should

[1] Leo Gross, *op. cit.* (quoting from pp. 35-36 of the *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*).
[2] *Ibid.*, p. 410.
[3] *I.C.J. Reports 1978*, p. 52.

have granted El Salvador a hearing on its declaration of intervention. In that Order the Court took note that El Salvador reserved

> "the right in a later substantive phase of the case to address the interpretation and application of the conventions to which it is also a party relevant to that phase".

One might have hoped or expected that El Salvador would at the later stage – the "substantive phase" – deal with all the issues of interest to it, and thus assist the Court in the performance of its task.

However, while there was no adequate reason to grant El Salvador the right of intervention at the jurisdictional stage, it would probably have been in the interest of the proper administration of justice for the Court to have granted "a hearing" and thus to have become more enlightened on the issues El Salvador had in mind ; at the very least, it would have prevented an impression of justice "not being seen to be done". It is, after all, "of fundamental importance that justice should not only be done, but should manifestedly and undoubtedly be seen to be done" (Lord Hewart in *The King* v. *Sussex Justices* ex parte *McCarthy*, 1 K.B. [1924], pp. 256 and 259).

However, "I sometimes think that we worry ourselves overmuch" – Justice Cardozo once exclaimed – "about the enduring consequences of our errors. They may work a little confusion for a time. The future takes care of such things."

Might it not be a slight exaggeration to draw from the error to which I refer conclusions totally unrelated to it ?

* *

IV. Regional Efforts Towards a Solution

The Court's decision is intended to resolve the dispute between the Parties submitted to it in the present case.

However, it is also greatly to be hoped that it will serve to diminish the basic tension and confrontation between them. It should give occasion to the opening of a new chapter in their mutual relationship and to the redoubling of efforts to assist them in the resolution of their conflict.

The Court should take note with satisfaction of the well-known diplomatic initiative undertaken in 1983 by four countries of the area : Colombia, Mexico, Panama and Venezuela. Its purpose was to reach a regional arrangement including those States and the five countries of Central America – among them Nicaragua. This plan was commended by the

Security Council of the United Nations (res. 530, 19 May 1983) and the group was urged "to spare no effort to find solutions to the problems of the region". Similar action was taken by the General Assembly (res. 38/10, 11 November 1983) and the General Assembly of the Organization of American States (AC/res. 675 (XXII-6/83), 18 November 1983).

It is noteworthy in how consistent and determined a fashion the Group has continued its efforts, addressing itself to basic economic, social, political and security concerns which plague the region. This has been borne out by a series of meetings, draft agreements and continuous consultations.

I am confident that the Governments of the "Contadora Group" States are genuinely concerned to fulfil the task they voluntarily accepted : to secure peace, territorial integrity and economic development in the countries of Central America ; i.e., Nicaragua, Costa Rica, Honduras, El Salvador and Guatemala.

At a recent stage the interest in these problems has grown and other Latin American States – Argentina, Brazil, Peru and Uruguay – have established the so-called "support group" to work in co-operation with the Contadora Group.

While the Court was dealing with the case, representatives of all these States met in order to prepare the Contadora Act. The meeting held in Guatemala City (15 January 1986), following the inauguration of the first civilian President after 32 years, was viewed as particularly successful. The last meeting held in May 1986 recorded some progress but as yet has not produced the hoped-for treaties.

This remains the best way for the solution of the conflict : one in which the Applicant and other Central American States would undertake clear and unequivocal obligations and which would be guaranteed by other Latin American States with the participation of the respondent Government. Both Parties, then, should co-operate with the Contadora Group as the most-qualified intermediary.

As the Court held in the past, its real function, whatever the character of the dispute, is "to facilitate, so far as is compatible with its Statute, a direct and friendly settlement" (*P.C.I.J., Series A, No. 22,* p. 13). It has stressed on other occasions the great desirability of a negotiated settlement (*P.C.I.J., Series A/B, No. 78,* p. 178).

Therefore, while it is my profound conviction that a peaceful solution of the dispute remains a realistic possibility and the only feasible one, I consider the Court should in the meantime have stressed that, in order not to disturb such a solution, both Parties should refrain from any activities likely to aggravate or complicate their relationship and should do everything in their power to speed up their efforts, jointly with the States mentioned, to reach the required agreement on reconciliation, and on co-operation in various domains.

The Judgment can thus make a constructive contribution to the reso-

lution of a dangerous dispute – paving the way to stability in a region troubled for decades by conflict and confrontation.

This Court can make contributions in many other cases and resolve controversies which trouble good relations between States. This is the task to which the Court is committed.

(Signed) Manfred LACHS.
