SEPARATE OPINION OF JUDGE NI

I have voted in favour of all the subparagraphs of the *dispositif* except one. But it occurs to me that some parts of the *dispositif* are so worded and formulated that, quite inevitably, a simple affirmative or negative vote cannot adequately reflect the trend of my thoughts on the questions under consideration. I therefore feel obliged to submit the present separate opinion for the purpose of stating the position I take.

My primary concern is with respect to the "multilateral treaty reservation", sometimes referred to as the "Vandenberg Amendment". This question might at first sight be deemed no longer important inasmuch as the jurisdictional phase could be considered already over and the Court is in any event competent to deal with the case on the basis of customary international law as well as the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States.

But a closer examination of the pleadings in the previous phase and the Judgment of 26 November 1984 will reveal the fact that there had been left behind at that time some "unfinished business" which must be considered relegated to the present phase of the proceedings.

It is to be recalled that the Court was then confronted with the United States contention that in accordance with proviso *(c)* to its declaration accepting compulsory jurisdiction of the International Court of Justice, such acceptance shall not extend to

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

The multilateral treaties relied on by the Application of Nicaragua are the Charter of the United Nations, the Charter of the Organization of American States, the 1933 Montevideo Convention on Rights and Duties of States and the 1928 Havana Convention concerning the Duties and Rights of States in the Event of Civil Strife. The threshold question during the jurisdictional phase of the proceedings was whether the above multilateral treaty reservation constituted a bar to Nicaragua's Application. To support its contention challenging the jurisdiction of the Court, the United States named three Central American States, i.e., El Salvador, Honduras and Costa Rica, as the States parties to the four multilateral treaties

mentioned above which would be *affected* by the adjudication of the claims submitted to the Court.

Whether or not these Central American States would be *affected* by the decision of the Court was a matter difficult to decide at the time of the preliminary proceedings when the merits of the case were not being considered. Before the revision of the Rules of Court in 1972, decision on a preliminary objection, such as the present one on jurisdiction, could have been joined to the decision on the merits of the case. This cannot be done in the present instance. The Court therefore stated in paragraph 75 of its 1984 Judgment that : "As for the Court, it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified." The Court concluded thereupon in paragraph 76 that :

> "the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984" (*I.C.J. Reports 1984*, pp. 425-426).

In retrospect, the Court could, in accordance with Article 79, paragraph 7, of the Rules of Court, have ruled on this preliminary objection in one of the three ways provided therein. It could have upheld the objection to its jurisdiction on the ground that, by the wording of the multilateral treaty reservation, i.e., proviso *(c)* of the United States declaration, the mere possibility of any of the other Central American States being affected by the decision, in one way or the other, was sufficient to defeat Nicaragua's claim of jurisdiction, in so far as allegations of breaches of treaty obligations were concerned. Alternatively, the Court could have rejected the preliminary objection on the ground that any decision to be given by the Court would not affect any of the Central American States and, moreover, according to Article 59 of the Statute, such decision would have no binding force except between the parties and in respect of that particular case, and therefore no third party would be affected thereby. But the Court took the cautious step of postponing a definitive decision on the question and preferred to leave it in abeyance for later consideration. Of course the circumstances of the case provided the Court with the possibility of making such a choice, because Nicaragua's claims did not rely solely on the multilateral treaties but also on customary international law and the bilateral Treaty of 1956, so that the Court was not left to the hasty choice of either throwing out the case at its very inception or accepting the jurisdiction over the treaty-based claims of Nicaragua not without a tinge of precipitation or prejudging.

Now the case has reached the stage of considering the merits. Should the Court re-examine the question of multilateral treaty reservation ? I would prefer to say that the Court should continue to examine the question in order to arrive at a more definitive decision with respect to jurisdiction and also, in consequence of going into the merits of the case, with respect to the question of the applicable law. The United States raised the multilateral treaty reservation as a plea in bar to the Application of Nicaragua. This plea, once admitted, will (1) exclude the Court from exercising jurisdiction in so far as the claims made by Nicaragua are based on the multilateral treaties in question ; and (2) preclude, if jurisdiction attaches on other grounds so that the case is still in the Court for adjudication on the merits, the application of rules of law provided in or derived from such multilateral treaties.

The first point above referred to is quite obvious. The second is relevant only in cases, of which the present case is one, where the Court remains seised with jurisdiction to entertain the proceedings on grounds other than the multilateral treaty or treaties in question. Here a problem of some novelty has taken shape : whether, in a case such as the present one, which is alleged to have arisen under, or is based upon, a multilateral treaty or treaties – this being the very ground for invoking the multilateral treaty reservation –, the Respondent in the case can in the meantime turn round and say that the same multilateral treaty or treaties, the very object of the reservation, should be the applicable law for the solution of the case in dispute. The answer to this is not entirely simple and I will return to it later in the opinion.

By the 1984 Judgment, jurisdiction over Nicaragua's claims based on customary international law and the bilateral Treaty of 1956 had been affirmed and the case was ready to enter into the merits phase. However, the question of the applicability of the multilateral treaty reservation remained in abeyance, because it was not then sufficiently clear whether third States parties to the multilateral treaties in question would be *affected* by the Judgment to be given. A treatment of this question for its final disposal at this phase of the proceedings is indispensable for the following reasons :

Firstly, from the procedural point of view, the question had not been, and could not have been, given full treatment in the former proceedings. A conclusion was reached with respect to jurisdiction on grounds other than the multilateral treaties in question. Both the language and the reasoning of the 1984 Judgment do not indicate that an ultimate solution had been attempted.

Secondly, the United States, as the declarant of the instrument accepting jurisdiction of the Court on specific questions, has the right to expect a decision on the question which, though properly belonging to the phase on preliminary objection, can only be appropriately determined when the merits are examined in the present proceedings.

Thirdly, despite its absence from the current proceedings, the United

States challenge to the jurisdiction of the Court on the ground of the multilateral treaty reservation remains an objection which cannot be ignored or overridden by the acceptance of jurisdiction on grounds other than the multilateral treaties in question. Failure to make a definitive pronouncement on the objection raised by the absent Party will not be in consonance with Article 53, paragraph 2, which makes specific mention of jurisdiction.

Finally, any determination on the multilateral treaty reservation is intimately linked to the question of what rules of law are to be applied. Should the Court decide that the multilateral treaty reservation contained in the United States declaration constitutes a valid objection to the Court's jurisdiction, then only rules of customary international law and the provisions of the bilateral Treaty of 1956 will be applicable to determine Nicaragua's allegations of breaches of obligations by the United States. The multilateral treaty reservation, once admitted, carries with it not only exclusion of the Court's jurisdiction but also, as a corollary thereof, the non-applicability of the rules of law which are provided in or derived from the multilateral treaties in question, i.e., what can be called multilateral treaty law. If, on the contrary, the Court should decide that the multilateral treaty reservation in the United States declaration does not constitute a valid objection to the Court's jurisdiction, the application of multilateral treaty law will be of course unquestioned and the plea in bar against the Court's jurisdiction is thereby disposed of with finality.

In considering the merits of the case, the Court would be at liberty to examine more fully the relevant facts in order to determine with more precision whether any third State or States might be *affected* by the Judgment to be given. According to the United States,

> "El Salvador, Honduras and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression . . . the United States has responded to these requests." (United States Counter-Memorial, para. 202.)

While admitting provision of economic and military assistance to El Salvador, the United States contended that it was exercising the inherent right of individual and collective self-defence under Article 51 of the United Nations Charter. El Salvador for its part has filed, pursuant to Article 62, paragraph 1, of the Court's Statute, a Declaration of Intervention which the Court had found to be premature (*I.C.J. Reports 1984,* pp. 215-217).

Under the given circumstances, should the Court find that the facts of the case do not justify the United States claim of collective self-defence, then El Salvador's claim of individual self-defence would also be in question. On the other hand, if the Court should find the United States claim of collective self-defence to be well founded, it would also reflect on the justification of El Salvador's claim of its right of individual self-defence. In

one way or the other, El Salvador, to single it out as an example of a third State involved without mentioning any other, cannot be held to be unaffected, though not bound by the Judgment to be given. It is difficult to imagine that the Court, in making such determination, can either justify or deny the United States contention without reference to the position of El Salvador either in express language or by implication. This will give rise to a kind of situation that, while the United States is bound by the Judgment to be given, a third State thus linked thereto remains technically beyond the reach of the *res judicata.* Thus it might be said that, under normal circumstances, the multilateral treaty reservation raised by the United States, in so far as jurisdiction based on multilateral treaties is concerned, merits consideration. However, the matter does not end there.

As has been said before, admission of a reservation like the present one precludes, if jurisdiction still attaches on other grounds, the application of multilateral treaty law, and thus only customary international law and rules of law provided in or derived from the bilateral Treaty of 1956 will apply to determine the merits of the claims made by Nicaragua in the Court against the United States. However, it is to be noticed that the United States, while relying on the multilateral treaty reservation to challenge the exercise of jurisdiction by the Court, has at the same time, both within and outside the proceedings in the Court, persistently invoked the United Nations Charter, the main source of multilateral treaty law applicable to the case before the Court, in order to justify its actions vis-à-vis Nicaragua.

In an address before the American Society of International Law on 12 April 1984, three days after the filing of the Nicaraguan Application in this Court, the United States Permanent Representative to the United Nations spoke for the first time of the right of individual and collective self-defence under Article 51 of the United Nations Charter. It was stated that :

> "This prohibition on the use of force was never intended to stand on its own, but, as everyone here knows, I am certain, was to be seen in the context of the entire Charter. In particular, as stated in Article 51, it was not intended to 'impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'." (Nicaraguan Memorial, Ann. C, Attachment II-4.)

It is also to be recalled that, after the Judgment of 26 November 1984 on jurisdiction and the admissibility of Nicaragua's Application was given, the United States repeated, in its statement of 18 January 1985, the claim of the right of collective self-defence under the United Nations Charter (*International Legal Materials,* 1985, No. 1, p. 246).

Such references to the right of individual and collective self-defence

under Article 51 of the United Nations Charter were made by counsel for the United States in the oral proceedings on interim measures of protection in April 1984 as well as in the phase on jurisdiction and admissibility in October of the same year (hearings of 27 April 1984 and 16 October 1984). For instance, counsel for the United States stated to the Court that :

> "Nicaragua's Application and request improperly call upon this Court in the circumstances of this case to make judgments and to impose measures potentially impairing the inherent right of States to individual and collective self-defence under Article 51 of the United Nations Charter" (hearing of 27 April 1984, morning).

At another instance, counsel for the United States stated with such gravity as to say :

> "the right to engage in individual or collective self-defence recognized by Article 51 of the Charter is absolute, may not be impaired by this Court or any other organization of the United Nations..." (hearing of 16 October 1984, morning).

In the written proceedings in the phase on jurisdiction and admissibility, the Counter-Memorial submitted by the United States on 17 August 1984 contained numerous passages in explanation of its position. It stated categorically that :

> "Under Article 51 of the Charter of the United Nations, El Salvador has an inherent right of self-defense against such armed attacks and a right to request that the United States provide it with assistance in resisting such attacks. The United States presently does provide economic and military assistance to El Salvador . . ." (United States Counter-Memorial, para. 290.)

Under the caption "The Various Multilateral Treaties on which Nicaragua Bases its Claims Are the Applicable Law Among Nicaragua, the United States, and the Other Central American States", the United States claimed that :

> "Nicaragua, the United States, and the other four Central American States are all parties to each of the four multilateral treaties on which Nicaragua bases its claims, most notably the Charters of the United Nations and the Organization of American States. Regardless of the status of the Charter of the United Nations as customary and general international law, those treaties constitute the *lex inter partes*, and Nicaragua's claims cannot be adjudicated by referring to some other, unagreed sources of law." (United States Counter-Memorial, para. 320.)

The Counter-Memorial went on at great length to argue that the provisions of the United Nations Charter relevant to the present case "sub-

sume" and "supervene" related principles of customary international law (paras. 313-319). It stressed in one of its concluding paragraphs that

> "It is well-settled that the right of individual or collective self-defense is an inherent right of States. The special and extraordinary nature of the right of individual or collective self-defense is explicitly recognized in the prescription of Article 51 that 'nothing in the present Charter shall impair' that right." (Para. 516.)

Various arguments were advanced by the United States to equate the Charter provisions with customary international law relevant to the present case (United States Counter-Memorial, paras. 313-322), for the purpose of showing that, since the multilateral treaty reservation, once admitted, bars application of treaty law, it will likewise bar the application of customary international law because the latter has been subsumed or supervened by the former.

However, it is certain that when principles of customary international law are incorporated into a multilateral treaty like the United Nations Charter, these principles of customary international law do not thereby become extinct. The same principles continue to be operative and binding on States, sometimes alongside or in conjunction with treaty law, in their international relations with one another. Article 38, paragraph 1, of the Statute enumerates, as applicable by the Court, the various sources of international law which, in the course of application, usually support, rather than preclude, each other. But it would be inconceivable that application of one should exclude that of any other.

The Judgment of 26 November 1984 clearly stated :

> "The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that these above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions." (*I.C.J. Reports 1984*, p. 424, para. 73.)

What is left of the above-mentioned arguments is that the United States is unreservedly committed to the position of accepting the multilateral treaties, the United Nations Charter in particular, as the applicable law for the settlement of the present dispute. This is clearly in contradiction to the stand it took in respect of the multilateral treaty reservation in challenging the exercise of jurisdiction over the dispute by the Court.

What is more, not only did the United States hold firm on the application of multilateral treaty law, but Nicaragua also, for its part, responded to the United States contention based on Article 51 of the United Nations Charter by arguing that the factual allegations made against Nicaragua by

the United States fell short of an "armed attack" within the meaning of the aforesaid Article and that the United States had not fulfilled the condition of immediately reporting to the Security Council as required by that Article. Counsel for Nicaragua stated, for instance, the following :

> "Article 51 recognizes 'the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations'. The critical words are 'if an armed attack occurs'. They delimit the scope of the exception." (Hearing of 25 April 1984, morning).
>
> "Article 51 provides that measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council. Neither the United States nor El Salvador has ever made such a report to the Security Council." *(Ibid.)*

It can be plainly seen that the two Parties have in fact already joined issue not merely on the *applicability,* but also on the *substance,* of a specific provision in the multilateral treaty. They hold different views which, however, stem from the same source, Article 51 of the United Nations Charter. It is left to the Court to decide, on the basis of such multilateral treaty, whether the actions of the United States can be justified. Although such exchanges did not occur in the present phase of the proceedings, the like-minded logic of the Parties to rely on multilateral treaty law as the applicable law for the solution of the case in dispute should not be negatived by the mere fact that such exchanges were made at an earlier stage. No procedural formalism will in all seriousness disregard the Parties' shared positive attitude towards the application of the rules of law flowing from instruments of global or regional recognition. The United States itself has quoted authorities to show that it is only when there are no provisions of a treaty applicable to a situation that international customary law is, next in hierarchical order, properly resorted to and that these conclusions are virtually axiomatic (United States Counter-Memorial, para. 321). If it can be taken that Members of the United Nations may "opt out" of the Organization's Charter by way of invoking a multilateral treaty reservation, why cannot they "opt in" by joining issue on the merits of such multilateral treaty ?

It is to be pointed out that claims based on a treaty do not only owe their creation and existence to the treaty. They are also to be regulated by the treaty in question. It can hardly be imagined that claims are based on a treaty but not regulated by it. It is owing to the possibility of affecting a third party or parties by the application of multilateral treaty law, that the Court is asked to refrain from exercising jurisdiction in a case such as the present. Therefore, where the Court refrains from exercising jurisdiction

because of the multilateral treaty reservation, it will be precluded from applying multilateral treaty law. Conversely, if the Court does exercise jurisdiction notwithstanding the multilateral treaty reservation, it logically follows that the multilateral treaty law, which regulates the mutual rights and obligations of the parties, will be applied for the settlement of the dispute before the Court.

The multilateral treaty reservation of the United States, though procedurally linked to jurisdiction, is in substance related to the regulation of the rights and obligations of the Parties. The United States cannot claim that the multilateral treaty reservation concerns only the jurisdiction of the Court and is without relation to the question of the applicable law. These two aspects are intimately related and cannot contradict each other, if the reservation is to have any meaning at all. However, the United States, while invoking the multilateral treaty reservation, had at all times declared its unconditional reliance on the United Nations Charter, which is a multilateral treaty, and had at no time made any intimation that such attitude was without prejudice to its position on the reservation with respect to jurisdiction. In fact, it could not have maintained such a self-conflicting stand.

Throughout the proceedings prior to its withdrawal from participation, the United States had persistently relied on multilateral treaties, the United Nations Charter in particular, not merely for the purpose of convincing the Court, as suggested in paragraph 46 of the Judgment, that the present dispute was one "arising under" those treaties and hence excluded from jurisdiction by the United States multilateral treaty reservation, *but* to fortify its claim of justification for its actions vis-à-vis Nicaragua on the basis of Article 51 of the United Nations Charter, which constitutes the mainstay of its affirmative defence in the present case. Although the United States chose not to participate in the proceedings on the merits, it did clearly state the bases of its arguments against Nicaragua's Application during the phase on jurisdiction and admissibility. In this sense, the question of applicable law is considered by the United States as essential and central to its defence.

Since lack of jurisdiction, if the multilateral treaty reservation is effective, will presuppose non-application of multilateral treaty law, insistence on applying multilateral treaty law can only be taken as abandonment of the position on the multilateral treaty reservation. In view of the attitude shared by both Parties towards the question of the applicable law, and in deference to the paramountcy of the United Nations Charter, it is submitted that the United States should be considered as having waived its objection based upon the multilateral treaty reservation which concerns both the jurisdiction of the Court and the application of law. The attitude of the United States as described above warrants a conclusion of such waiver, which alone is compatible with its own stance of strong adherence to the United Nations Charter, as well as the other multilateral treaties. It is to be recalled that the United States once emphasized : "those treaties

constitute the *lex inter partes,* and Nicaragua's claims cannot be adjudicated by referring to some other, unagreed sources of law" (United States Counter-Memorial, para. 320).

According to the Judgment of 26 November 1984, the Court has jurisdiction to adjudicate Nicaragua's claims based on customary international law and the bilateral Treaty of 1956. What remains to be decided in the merits phase on the question of the multilateral treaty reservation is whether or not the Court is also competent to entertain the proceedings with respect to Nicaragua's claims based on multilateral treaties and, as a corollary thereof, what law will be the applicable law. Since the question of the applicable law cannot be treated independently of the multilateral treaty reservation, the unequivocal attitude maintained by the United States with respect to the applicable law can only be taken as waiver of the multilateral treaty reservation. The assumption of waiver does not alter the position of the Court, which has already entertained jurisdiction over the present proceedings. Such being the case, while the Court remains seised of the case as before, the rights and obligations of the Parties are subject to both the multilateral treaty law and the related principles of customary international law as well as rules derived from the bilateral Treaty of 1956.

There is no legal barrier to prevent the United States from giving effect to the waiver, since, according to the text of the multilateral treaty reservation, the United States can always specially agree to jurisdiction. It is also to be noted that Nicaragua has not complained in the Court of any third State or States. It did not question the right of El Salvador to receive from the United States assistance, military or otherwise (Nicaraguan Memorial, para. 193). The Court has likewise made clear in its 1984 Judgment on jurisdiction and admissibility of Nicaragua's Application that "the rights of no other State may be adjudicated in these proceedings" (*I.C.J. Reports 1984,* p. 436, para. 98). Whether or not they will be affected in any manner by the decision to be given, it might be appropriate to refer to Article 59 of the Statute, which provides that a decision will have no binding force except between the parties and in respect of the particular case. In fact, on the question whether or not Nicaragua has acted in such a way as to amount to resort to the threat or use of force against its neighbours, the Court in the present Judgment considers the evidence to be insufficient or inconclusive. Consequently no third party would be in all certainty affected thereby.

Before concluding, it may be said that the treatment of the multilateral treaty reservation invoked by the United States has followed a zigzag path for which a careful mapping would be necessary. Failure to do so will confound the issues resulting in contradictions and inconsistencies, as can be demonstrated by the conflict between the United States stand in respect of jurisdiction and its stand in respect of the applicable law. They need to be re-aligned and given comprehensive appraisal in accordance with logic

and good sense. For the foregoing reasons, I regret that I cannot cast an affirmative vote for subparagraph (1) of paragraph 292 in the operative part of the Judgment, which finds the multilateral treaties invoked by Nicaragua as not applicable because of the multilateral treaty reservation of the United States. As to the other subparagraphs in which customary international law and provisions of the Treaty of Friendship, Commerce and Navigation signed on 21 January 1956 are taken as bases, I have voted in favour on the understanding that relevant rules of the multilateral treaty law are, where appropriate, not precluded from being applied as bases in support of the findings.

(Signed) NI Zhengyu.

1. Je me suis prononcé en faveur du sous-paragraphe 1 du dispositif de l'arrêt mais en bonne logique, comme la Cour y reconnaît l'applicabilité de la « réserve Vandenberg », elle n'aurait dès lors pas dû continuer à connaître de la requête du Nicaragua dans la mesure où celle-ci était fondée sur l'article 36, paragraphe 2, du Statut (voir ci-après la première partie). Dans la même mesure, mais pour d'autres raisons que j'exposerai, je pense que la Cour aurait dû dire en plus que le différend dont elle était saisie n'était pas justiciable (voir ci-après la deuxième partie).

2. A mon avis, la Cour ne pouvait demeurer saisie de cette affaire qu'en ce qui concerne les violations du traité d'amitié, de commerce et de navigation de 1956, conclu entre les deux Parties, qui auraient été commises par les Etats-Unis. Partant de ce point de vue, j'ai voté pour le sous-paragraphe 7 mais contre le sous-paragraphe 6 parce qu'il aurait suffi que la Cour fonde sa décision sur le sous-paragraphe 7, et contre le sous-paragraphe 8 parce que la décision de la Cour qui y figure concerne un manquement à des obligations *erga omnes* découlant du droit international coutumier et que cette décision n'a pas sa place dans l'arrêt. Je n'ai pas non plus pu voter pour le sous-paragraphe 10 parce que j'estime que la Cour fait erreur quand elle établit une relation entre les attaques des Etats-Unis contre le territoire du Nicaragua et le traité de 1956, et qu'en fondant son raisonnement sur « le but et l'objet » de ce traité, elle a outrepassé la compétence que lui donne la clause compromissoire qu'il contient. Si j'ai voté contre le sous-paragraphe 11, c'est parce que les attaques contre le territoire du Nicaragua ne peuvent pas à mon avis être liées à un manquement au traité de 1956 ; quant à l'embargo général sur le commerce, il ne doit pas être considéré comme un tel manquement (voir ci-après la troisième partie).

3. J'ai été contraint de voter contre les sous-paragraphes 2, 3, 4, 5, 9, 12 et 13 pour la simple raison que j'ai estimé, comme je l'ai dit plus haut, que la Cour n'aurait dû se prononcer sur ces questions en la présente affaire que si ces questions avaient relevé de la clause compromissoire du traité de 1956. Toutefois, cela ne veut pas dire que je sois en désaccord avec tous les motifs de droit exposés par la Cour au sujet des principes de la non-intervention, de l'interdiction de l'emploi de la force et du respect de la souveraineté. Il est certain que ces principes doivent être respectés par le Nicaragua non moins que par les Etats-Unis d'Amérique. En particulier, le fait que j'ai voté contre le sous-paragraphe 9 ne doit pas être interprété comme impliquant que je suis contre les conclusions de la Cour sur la question qui y est traitée.

*