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CONSEIL DE SECURITE
Quarante et unième année

Lettre datée du 18 juillet 1986, adressée au Secrétaire général par la Représentante permanente par intérim des Etats-Unis d'Amérique auprès de l'Organisation des Nations Unies

J'ai l'honneur de vous faire tenir ci-joint le texte des opinions individuelles et dissidente émises à propos de l'arrêt rendu le 27 juin 1986 par la Cour internationale de Justice en l'Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci.

Je vous serais obligé de bien vouloir diffuser cette communication, ainsi que son annexe, dans les langues originales, comme document officiel de la quarantième session de l'Assemblée générale, au titre du point 21 de l'ordre du jour, et du Conseil de sécurité.

La Représentante permanente par intérim,

(Signé) Patricia M. BYRNE

ANNEX

27 JUNE 1986

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

Separate and Dissenting Opinions

(Excluding Dissenting Opinion of Judge Schwebel)

SEPARATE OPINION OF PRESIDENT NAGENDRA SINGH

While fully endorsing the operative holdings of the Court in this Judgment, I have considered it necessary to append this separate opinion to emphasize certain aspects which I consider essential, either from the legal standpoint or for promoting peaceful community existence of sovereign States.

I

A major consideration in the resolution of the dispute in this case has been the principle of non-use of force. It is indeed a well established tenet of modern international law that the lawful use of force is circumscribed by proper regulation, and this is so from whichever angle one looks at it, whether the customary viewpoint or that of the conventional international law on the subject. However the customary aspect does visualize the exceptional need for the provision of the "inherent right" to use force in self-defence. The aforesaid concepts of the principle and its exception do have an existence independent of treaty-law as contained in the United Nations Charter or the Inter-American system of conventional law on the subject. In this context it appears necessary to emphasize certain aspects, which is attempted below.

(A) In fact this cardinal principle of non-use of force in international relations has been the pivotal point of a time-honoured legal philosophy that has evolved particularly after the two World Wars of the current century. It has thus been deliberately extended to cover the illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war which aspect may not have been established by the law of the League of Nations, or by the Nuremberg or Tokyo Trials, but left to be expressly developed and codified by the United Nations Charter. The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War - an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.

There can be no doubt therefore of the innate legal existence of this basic reasoning, irrespective of the later developments which have now found a place in the treaty provisions as reflected in Article 2, paragraph 4, and Article 51 of the United Nations Charter. However it is pertinent that the origin of legal regulation of use of

force...

force is much older than the United Nations Charter and this has been acknowledged to be so. If an issue was raised whether the concepts of the principle of non-use of force and the exception to it in the form of use of force for self-defence are to be characterized as either part of customary international law or that of conventional law, the answer would appear to be that both the concepts are inherently based in customary international law in their origins, but have been developed further by treaty-law. In any search to determine whether these concepts belong to customary or conventional international law it would appear to be a fallacy to try to split any concept to ascertain what part or percentage of it belongs to treaty law and what fraction belongs to conventional law. There is no need to try to separate the inseparable, because the simple logical approach would be that if the concept in its origin was a customary one, as in this case, and later built up by treaty law, the Court would be right in ruling that the present dispute before the Court does not arise under a multilateral treaty, so as to fall outside the Court's jurisdiction because of the Vandenberg Reservation invoked by the Respondent.

It is also argued that the Court's reasoning maintaining a close parallelism between customary law and Article 2, paragraph 4, and Article 51 of the United Nations Charter, could be justified only if the treaty text was a mere codification of custom. As that was not the case here it is further alleged that the Court appears "to apply the treaty in reality", but under the name or caption of custom, to evade the multilateral treaty reservation of the Respondent. This reasoning appears to miss the fundamental aspect of the matter, which is whether, if the treaty base of a concept was removed, that concept would fall to the ground or still survive as a principle of law recognized by the community. It is submitted that the Charter provisions have not only developed the concept but strengthened it to the extent that it would stand on its own even if the Charter for any reason was held inapplicable in this case. It is submitted in short that the removal of the Charter base of the concept would still enable that concept to survive. The obvious explanation is that the customary aspect which has evolved with the treaty-law development has come now to stay as the existing modern concept of international law, whether customary, because of its origins, or as "a general principle of international law recognized by civilized nations".

In this context the Court's approach has indeed been cautious. For example, the requirement "to report" under Article 51 of the Charter is not insisted upon as an essential condition of the concept of self-defence but mentioned by the Court as an indication of the attitude of the State which is invoking the right of self-defence but certainly not closely following the treaty. The Court's observations in paragraph 200 of the Judgment are indeed to the point in this connection. In the present case therefore the Court's approach has been a logical one, inasmuch as it has decided not to apply the multilateral treaties to the resolution of this dispute but to confine its observations to the basis of customary international law, ruling that it had jurisdiction to apply customary law for the settlement of the case before the Court. It is felt that this is not only the correct approach in the circumstances of this case for many reasons,

but also that it represents the contribution of the Court in emphasizing that the principle of non-use of force belongs to the realm of jus cogens, and is the very cornerstone of the human effort to promote peace in a world torn by strife. This aspect does need to be emphasized.

(B) Furthermore, it is submitted that this is a pertinent case for which all sources of law mentioned in Article 38 of the Statute must surely be compatible with and respect the major legal principle of non-use of force which was clearly the intention of the international community in 1946; the Court has felt the need to reiterate the same now in 1986 in the best interests of all States. To lay emphasis therefore on a doubt as to how a close parallelism could ever have evolved between customary and conventional law in relation to the concept of non-use of force and of self-defence, and thereby to regard those concepts as treaty-based, and hence a bar to the settlement of the dispute by the Court, would be to miss a major opportunity to state the law so as to serve the best interests of the community. The Court as the principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction.

Even if the Charter were not a codification of existing customary law on non-use of force and self-defence, and there were a clear progressive development leading on to the banning of reprisals involving the use of force, it needs to be stated that this developmental aspect, or the precise formulatory aspect is surely now a part of international law, whether it be categorized as customary or as one of the "general principles of law recognized by civilized nations". To invoke these could not amount to defeating the intention of the State invoking the Vandenberg Reservation, because no party before a tribunal could ever plead that it could totally opt out of all the four corners of the law both conventional - because of the reservation - and customary, because the latter was identical in content to the former and hence inapplicable. Could a party then claim not to have any law applicable to its conduct? The Vandenberg Reservation was not intended to be a self-assessing reservation, but if this approach were adopted it would certainly become much worse indeed, a self-defeating one in relation to the due process of law. Therefore the Court confined itself to applying customary international law in this case and held treaty-law as inapplicable. It could hardly promote in the settlement of the dispute the concept of total evasion of law as pleaded, when the sole intention of use of the optional clause under Article 36, paragraph 2, of the Statute could be to confer some basis of jurisdiction on the Court, however hedged about with reservations.

II

Another major consideration which has needed to be emphasized is the difficulty which the Court has experienced as a result of the non-appearance of the Respondent at the merits stage of the case. The

regret most keenly felt by the Court, owing to the absence of the Respondent, was in relation to the correct appraisal of the evidence presented to the Court by the Applicant. Though careful observance of Article 53 of the Statute has been the key-note of the Court's approach, that Article could not require the Court to go beyond the regular procedures and to seek out all and every source of information, far and near from different corners of the world, in order to adjudicate a case submitted to it. The evidence before the Court may perhaps have fallen short of what the Court would have desired, as became noticeable because of the absence of the Respondent. However, in the light of such a situation, the Court has endeavoured to achieve as perfect an equality between the parties as possible, in order to assess the application of the law to the facts of the case with a view to drawing correct conclusions in the absence of the Respondent.

For my part, in regard to the flow of arms from Nicaragua to El Salvador, I believe that even if it is conceded that this may have been both regular and substantial, as well as spread over a number of years and thus amounting to intervention by Nicaragua in El Salvador, still it could not amount as such to an "armed attack" against El Salvador. Again, the Applicant may not have been ignorant of this flow involving the supply of arms to the rebels in El Salvador. However, even granting all this, the Court still could not hold that such supply of arms, even though imputable as an avowed object of Nicaragua's policy, could amount to an "armed attack" on El Salvador, so as to justify the exercise of the right of collective self-defence by the United States against Nicaragua. This conclusion of the Court is indeed warranted by whatever process of reasoning one adopts, and hence I have voted for subparagraph (2) of operative paragraph 292 of the Judgment.

Furthermore, it has been argued that the Court should in its Judgment have passed strictures on the conduct of Nicaragua if it found that, by the said flow of arms to El Salvador, Nicaragua was violating the principle of non-intervention in the affairs of a State, because the arms supply was imputable to Nicaragua. It is submitted that the Court rightly felt that it could not do so, because the case before the Court was between Nicaragua and the United States, and not between Nicaragua and El Salvador. The sole concern of the Court in this case was to adjudge the conduct of Nicaragua in so far as it was relevant to the determination of the validity of the plea of self-defence raised by the Respondent. In that particular context, all that was necessary was to determine if the said arms flow from Nicaragua to El Salvador was of such an order as to warrant intervention by the Respondent on the ground of collective self-defence. This aspect the Court has examined in detail in paragraphs 128 to 160 and 227 to 237 of the Judgment, and I am in entire agreement with the legal conclusions therein stated. No tribunal could do more in appreciation of the position of the absent Respondent, because to do otherwise would be to annihilate the very principle of equality of parties by placing the Respondent in a position more favourable than the Applicant.

In the light of the aforesaid reasoning, it is difficult to accept that it is a just appreciation of this case to maintain that the Court simply adopted the false testimony of witnesses produced by Nicaragua on a matter which is essential to the disposition of this case. For example in one paragraph of the Judgment, paragraph 84, Mr. Chamorro's evidence on a particular question is downgraded as "strictly hearsay", and therefore properly evaluated in the context of this case.

In fact the Court has found reason to mention in paragraphs 59 ff. of its Judgment the principles observed by it in the appraisal of the evidence produced before it. These principles by all standards are fair and just and do merit a mention in this context.

Again, in paragraph 134 of the Judgment, where the evidence of Mr. David MacMichael is relied upon, the Court has not lost sight of the basic values in assessing the testimony and has noted the probative importance of a witness "called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua has been engaged in the supply of arms to the armed opposition in El Salvador 'whose testimony' only partly contradicted that allegation" (emphasis added). Similar observations of the Court in paragraph 146 are pertinent to mention here.

Furthermore, leaving aside revision under Article 61 of the Statute, the validity of a judgment is not a matter to be challenged at any stage by anyone on any grounds. The decision of the Court is the result of a collegiate exercise reached after prolonged deliberation and a full exchange of views of no less than 15 judges who, working according to the Statute and Rules of Court, have examined the legal arguments and all the evidence before it. In this, as in all other cases, every care has been taken to strictly observe the procedures prescribed and the decision is upheld by a clear majority. What is more, the binding character of the judgment under the Statute (Art. 59) is made sacrosanct by a provision of the United Nations Charter (Art. 94): all Members of the United Nations have undertaken an obligation to comply with the Court's decisions addressed to them and to respect the judgment.

III

May I also add that I agree with the view that the CIA Manual entitled "Operaciones sicologicas en guerra de guerrillas" cannot be a breach of humanitarian law as such, but only an encouragement provoking such breaches, which aspect the Court has endeavoured to bring out correctly in subparagraph (9) of the operative paragraph 292 of the Judgment. Furthermore, I would also emphasize the assertion that the said manual was condemned by the Permanent Select Committee on Intelligence of the House of Representatives, an attempt was made to recall copies, and the contras were asked to ignore it, all of which does reflect the healthy concern of the Respondent, which has a great legal tradition of respect for the judicial process and human rights.

Nevertheless, that such a manual did appear and was attributable to the Respondent through the CIA, although compiled at a low level, was all the more regrettable because of the aforesaid traditional respect of the United States for the rule of law, nationally and internationally.

IV

I cannot conclude this opinion without emphasizing the key importance of the doctrine of non-intervention in the affairs of States which is so vital for the peace and progress of the international community. To ignore this doctrine is to undermine international order and to promote violence and bloodshed which may prove catastrophic in the end. The significant contribution which the Latin American treaty system along with the United Nations Charter make to the essentials of sound public order embraces the clear, unequivocal expression given to the principle of non-intervention, to be treated as a sanctified absolute rule of law whose non-observance could lead to disastrous consequences causing untold misery to humanity. The last subparagraph (16) of the operative paragraph 292 of the Judgment, which has been adopted unanimously by the Court really rests on the due observance of the basic principles of non-use of force and non-intervention in the affairs of States. The Court has rightly held them both as principles of customary international law although sanctified by treaty law, but applicable in this case in the former customary manifestation to fully meet the viewpoint of the Respondent which the Court has rightly respected. However, the concepts of both these principles do emerge in their manifestation here fully reinvigorated by being further strengthened by the express consent of States particularly the parties in dispute here. This must indeed have all the weight that law could ever command in any case and no reservations could ever suppress this pivotal fact of inter-state law, life and relations. This in my view is the main thrust of the Judgment of the Court, rendered with utmost sincerity in the hope of serving the best interests of the international community.

(Signed) NAGENDRA SINGH

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 unbiassed. 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...

> "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 evidentiàl 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." (Ibid., 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, p. 89.)

One should however also recall the statement of the Nicaraguan Ambassador in Washington denying that Nicaragua had agreed to submit to compulsory jurisdiction (ibid., p. 74). 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 (ibid., 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? 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." (Ibid., 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 inept.

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.....

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

"According to one doctine 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[1]."

"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 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[2]". "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[3]."

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...

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

[2] Ibid. (quoting from pp. 35-36 of the I.C.J. Pleadings volume).

[3] Ibid., p. 410.

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[1]."

* *

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 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 K.B., 1924, pp. 256 and 259).

However...

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[1] I.C.J. Reports 1978, p. 52.

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...

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 Guatamala 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 resolution 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

SEPARATE OPINION OF JUDGE RUDA

1. I have voted in favour of the decisions adopted by the Court in the operative part, with the exception of subparagraph (1), relating to the application of the reservation made by the United States of America, at the time of the acceptance of the jurisdiction of the Court, under Article 36, paragraph 2, of the Statute, which is known as the "Vandenberg Reservation".

2. This favourable vote does not mean that I share all and every part of the reasoning followed by the Court in reaching the same conclusions. Nevertheless, I feel it necessary to state my views only on certain subjects which are important enough to deserve a separate opinion and on which I think that the Court should have taken a different approach.

I. THE UNITED STATES AGENT'S LETTER OF 18 JANUARY 1985

3. In his letter of 18 January 1985, the Agent of the United States conveyed the position of his Government on the Court's Judgment on jurisdiction and admissibility, given on 26 November 1984. The letter states in its final part:

> "Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

4. I fully agree with the statement of the Court in paragraph 27 that a State party to proceedings before the Court may decide not to participate in them. But I do not think that the Court should pass over in silence a statement whereby a State reserves its rights in respect of a future decision of the Court.

5. Article 94, paragraph 1, of the United Nations Charter says in a clear and simple way: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

6. No...

6. No reservation made by a State, at any stage of the proceedings, could derogate from this solemn obligation, freely entered into, which is, moreover, the cornerstone of the system, centred upon the Court, for the judicial settlement of international disputes. The United States, like any other party to the Statute, is bound by the decisions taken by the Court and there is no right to be reserved but the right to have them complied with by such other parties as they may bind.

II. PROVISO (c) TO THE UNITED STATES DECLARATION OF 1946

7. In a separate opinion to the 1984 Judgment, on this case, concerning the jurisdiction of the Court and the admissibility of the Application, I tried to explain, in paragraphs 13-27, my opposition to applying this part (proviso (c)) of the United States declaration of 1946.

8. In the present Judgment the Court has developed its arguments on this subject at some length. However, I regret to say that I have not been convinced by its reasoning and I continue to think that the reservation is not applicable, for the same arguments as I put forward in 1984.

III. SELF-DEFENCE

9. I have voted in favour of the decision of the Court, appearing in subparagraph (2) to reject the plea of collective self-defence raised by the United States, but if I reached the same conclusions as the Court, in the matter of the alleged assistance given by Nicaragua to rebels in El Salvador, I did so through a different method, which I wish to summarize here.

10. In paragraph 230 the Court expresses the following:

> "As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at the time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack."

And the Court added in paragraph 247:

> "So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack."

11. I fully agree with this statement and others made by the Court in the same sense. It does not mean, of course, that assistance to rebels in another country could not be considered illegal under other rules of international law, such as the obligations not to intervene in the internal affairs of another State and to refrain in international relations from the threat or use of force against the territorial integrity or political independence of another State. But here the question to be decided in regard to the plea of the United States is whether the justification of self-defence in the case of assistance to rebels is valid or not under customary international law. My reply, just like the one given by the Court, is in the negative.

12. If juridically, assistance to rebels cannot, per se, be justified on grounds of self-defence, I do not see why the Court feels bound to analyse in detail the facts of the case relating to such assistance. Neither do I perceive the need for entering, in the Judgment, into the questions of the requirements, in the case of collective self-defence, of a request by a State which regards itself as the victim of an armed attack, or a declaration by that State that it has been attacked or of its submission of an immediate report on the measure taken in the exercise of this right of self-defence.

13. From my point of view it would have been sufficient to say, just as the Court does in its conclusions, that even if there was such assistance and flow of arms, that is not a sufficient excuse for invoking self-defence because, juridically, the concept of "armed attack" does not include assistance to rebels.

14. Therefore, I have a different method of approach from that of the Court, even though I reach the same conclusions.

15. Following the logic of my reasoning, I pass no judgment as to what the Court says on such facts as may underlie the claimed justification of collective self-defence. I share, however, the findings of fact and law of the Court on the transborder incursions in the territory of Honduras and Costa Rica.

IV. THE 1956 TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

16. I voted in the 1984 Judgment, together with another judge, against accepting the 1956 Treaty of Friendship, Commerce and Navigation as a basis for the jurisdiction of the Court to entertain the dispute and I have expressed my reasoning in a separate opinion.

However...

However, I consider that in regard to the present Judgment I was obliged to vote on the question whether the United States has acted in breach of this Treaty. The question of jurisdiction and that of the breach of a treaty are of a different juridical nature; the Court could be incompetent for lack of consent to go into the merits of a dispute, but that does not mean that the States in the controversy might have not violated a rule of international law. Once the Court has established its competence, a judge is bound to decide on the merits of the case, even if he was in the minority on the question of jurisdiction. Otherwise, in the event that a judge had voted against both sources of jurisdiction, as has happened in this case, that judge would have no standing for participating in the merits stage, which would be an absurd proposition.

17. For these reasons, I participated in the discussions and voted on the question whether the United States had acted in breach of the 1956 Treaty of Friendship, Commerce and Navigation.

(Signed) J. M. RUDA

SEPARATE OPINION OF JUDGE ELIAS

I have voted, without enthusiasm, for subparagraphs (2) to (16) of the operative clause, but I consider that subparagraph (1) of the operative clause is out of place in the present Judgment. It is inappropriate because it is contradictory to the Judgment already given in 1984, which, from the standpoint of the Court, is difficult to attempt to amend now. It has no organic or even symbolic relation to the remaining operative subparagraphs. I hesitate to call it a mere concession to expediency, but find it linguistically colourless and procedurally out of place.

By the Court's Judgment of 26 November 1984 the question of the Vandenberg Reservation was definitely left in abeyance, pending any intervention by El Salvador, Honduras or Costa Rica in the current phase of the proceedings, on merits and reparation; since none of the three countries has sought to intervene, the reservation is of no further relevance.

I cannot accept what appears to me to be the employment by the Court of Article 53 of the Statute to endow itself with the power to interpret and revise its own previous Judgment on jurisdiction and admissibility, by an extended interpretation of Articles 60 and 61 of the Statute. Such a power could not be exercised even if the non-appearing Respondent itself had requested it at this stage. It is thus even more remarkable that the Court should attempt to invoke such a power for the benefit of non-parties to the present case (like El Salvador, Honduras and Costa Rica).

* *

I do not intend to make general remarks either on the Judgment itself or on Judge Schwebel's dissenting opinion because I believe that the reader himself will read and judge. I would however like to say a few words on two attacks launched against me personally in two separate paragraphs, 109 and 115 of Judge Schwebel's dissenting opinion, together with their acccompanying remarks.

As for the reference to the Press Release, I wish to say very briefly as follows:

By its Order of 4 October 1984 the Court after deliberation, decided not to hold a hearing on the Declaration of Intervention of El Salvador filed on 15 August 1984 and that the Declaration was inadmissible inasmuch as it related to the then current phase of the proceedings. These decisions were taken after consideration by the Court of the Declaration of El Salvador and of the written observations thereon submitted by Nicaragua and the United States

pursuant to Article 83 of the Rules of Court, the time-limit for which had been set at a date, 14 September 1984, prior to the opening of the oral proceedings on the questions of jurisdiction and admissibility. The opening of those oral proceedings having been fixed for the afternoon of 8 October 1984, this date was made public in advance, after consultations, in accordance with standard practice, by means of a press communiqué issued on 27 September 1984, which indicated also that the Court was seised of a Declaration of Intervention of El Salvador. There is nothing inherent in the Statute and Rules of Court that would have prevented the Court, had it so decided on 4 October 1984, from holding a hearing on the Declaration before or during the oral proceedings on the questions of jurisdiction and admissibility to open on 8 October 1984, or El Salvador from submitting during those proceedings its observations with respect to the subject-matter of the intervention pursuant to Article 86 of the Rules of Court. Under Article 82 of the Rules of Court, a State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file its declaration to that effect as soon as possible and "not later than the date fixed for the opening of the oral proceedings". It is thus evident that only after such a date is announced can other States know whether or not a declaration is filed within the time-limits prescribed by the Rules of Court. It is significant that Judge Oda, who is cited by Judge Schwebel, did vote with the majority of the Court to reject El Salvador's Declaration of Intervention.

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With regard to the interview referred to by Judge Schwebel, he should recall that it took place in the Court on 12 December 1984, after repeated requests by the Associated Press to the First Secretary in charge of information matters, to persuade me to grant an interview on the Judgment which we delivered on 26 November 1984, holding that the Court had jurisdiction to hear the case brought by Nicaragua. The First Secretary was present throughout the question and answer interview and demanded from the interviewer a promise that he would let us see the transcript from the tape recording which he had made before any publication. Judge Schwebel's account in his written dissenting opinion was the first that the First Secretary and I had ever seen of the account narrated in the opinion together with the comments of outsiders, who are not Members of the Court, also cited by Judge Schwebel. Apart from the slants given to my alleged remarks, I confirm that the gist of what I am supposed to have said is quite correct and I very much regret the use made of it in a Court's dissenting opinion to a Judgment which still confirms that the United States of America was found wrong by the Court even under a new President, on all the essential points made by Nicaragua against it.

(Signed) T. O. ELIAS

OPINION INDIVIDUELLE DE M. AGO

I

1. Dans mon opinion individuelle jointe à l'arrêt du 26 novembre 1984 sur la compétence de la Cour et la recevabilité de la requête en l'affaire qui nous occupe, j'avais précisé les raisons qui m'avaient permis de voter en faveur de la conclusion d'après laquelle la Cour avait, dans le cas d'espèce "une compétence permettant de procéder à l'examen de l'affaire quant au fond". J'étais en effet convaincu que, pour étayer cette conclusion, il suffisait de reconnaître l'existence entre les Parties, aux termes de l'article 36, paragraphe 1, du Statut de la Cour, d'un lien valable et incontestable de juridiction, contractuellement et incontestablement établi et fourni par l'article XXIV, paragraphe 2, du traité bilatéral d'amitié, de commerce et de navigation du 21 janvier 1956. Je rejetais par contre la thèse, partagée par la majorité de la Cour, de l'existence, entre le Nicaragua et les Etats-Unis d'Amérique, d'un autre lien de juridiction, fondé sur l'article 36, paragraphe 2, du Statut. J'étais parvenu à cette conclusion - et je me plais à la confirmer vu la ferme persistence de ma conviction à ce sujet - car, d'après moi, la prétendue acceptation par le Nicaragua de la compétence obligatoire de la Cour n'en était pas une et n'en était jamais devenue une. L'intention manifestée en 1937 à ce sujet ne s'était à aucun moment traduite par un engagement formel qui seul aurait été juridiquement valable. Par conséquent, une obligation qui n'avait pas encore été acceptée et qui n'était même pas née à la date de l'extinction de la Cour permanente de Justice internationale ne pouvait pas être "maintenue" après cette date, car on ne peut pas maintenir ce qui n'existe pas encore. Il était donc impensable de transférer de la Cour permanente à son successeur, la Cour internationale de Justice, des effets non moins inexistants de ladite obligation. En conclusion, à mon avis, l'acceptation de la compétence obligatoire de la Cour, faite par les Etats-Unis d'Amérique le 14 août 1946, n'avait pas son pendant indispensable dans une acceptation également valable de la part du Nicaragua; aucun lien de juridiction ne pouvait donc s'être établi sur une telle base entre les deux Etats.

2. Si, en 1984, la majorité de la Cour avait adopté la même position que certains d'entre nous, il en aurait découlé que, dans la phase actuelle de l'examen de l'affaire sur le fond, seuls des faits susceptibles d'être considérés comme des infractions à des obligations prévues par le traité du 21 janvier 1956 pourraient être pris en

considération...

considération en tant que faits générateurs d'une responsabilité internationale des Etats-Unis d'Amérique envers le Nicaragua. Cette hypothèse ne s'est toutefois pas réalisée, puisque la majorité de la Cour, dans son arrêt de 1984, a retenu aussi, et en premier lieu, l'idée de l'existence, entre les deux pays en litige, d'un lien de juridiction fondé sur le jeu de deux déclarations unilatérales d'acceptation de la compétence obligatoire de la Cour, déclarations qui, à son avis, auraient été régulièrement faites aussi bien par le Nicaragua que par les Etats-Unis. Même si c'est quelque peu à contrecoeur, je me suis donc cru tenu de respecter la décision prise par la Cour à la majorité et devenue chose jugée, et d'accepter par conséquent de raisonner, dans la présente phase sur le fond, sur la base de la prémisse qu'il existait entre les deux pays en litige, au moment de l'introduction de la présente instance, deux liens différents de juridiction. Le lien fondé sur la clause facultative de l'article 36, paragraphe 2, du Statut, avait manifestement une plus ample portée et était appelé à tenir le rôle principal.

3. Mes scrupules à ce sujet ont d'ailleurs été, je ne dirais pas levés mais atténués dans une certaine mesure, du fait que la majorité de la Cour a reconnu, dans la présente phase du procès, l'effet de la limitation apportée à l'acceptation de la compétence obligatoire de la Cour par la "réserve relative aux traités multilatéraux", dite aussi "réserve Vandenberg", du nom du sénateur qui la soumit avec succès à l'approbation du Sénat des Etats-Unis. En vertu de cette réserve, l'acceptation de la juridiction obligatoire de la Cour par les Etats-Unis ne s'étendait pas aux

> "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[1]".

4. A ce sujet, la Cour avait déclaré, dans son arrêt du 26 novembre 1984 sur les questions de compétence et de recevabilité que l'exception, soulevée par les Etats-Unis d'Amérique concernant l'exclusion des "différends résultant d'un traité multilatéral" de l'acceptation par eux de la compétence de la Cour en vertu de la clause facultative, suscitait un problème qui touchait à des points de substance "relevant du fond de l'affaire". La Cour avait ainsi été amenée à constater que cette exception n'avait pas un caractère "exclusivement préliminaire" et que, en l'espèce, elle ne pouvait avoir pour effet

d'empêcher...

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[1] Je cite la disposition dans son texte anglais d'origine à cause des problèmes d'interprétation que pourrait faire naître la traduction française qui figure au Recueil des traités publié par les Nations Unies et qui n'a aucune raison de jouer un rôle en l'espèce.

d'empêcher la Cour de connaître du fond de l'affaire, vu que la requête du Nicaragua ne limitait pas ses griefs à des violations de conventions multilatérales mais invoquait aussi, outre le traité bilatéral de 1956, un certain nombre de principes du "droit international général et coutumier". En parfaite cohérence avec cette conclusion, la Cour a donc dûment procédé, dans la présente phase sur le fond, à l'examen de la question que le défendeur avait soulevée dans son exception.

5. C'est aux paragraphes 42 et suivants du présent arrêt qu'elle a statué sur les conséquences que la réserve des Etats-Unis relative aux traités multilatéraux devait entraîner en l'espèce. A cette fin elle s'est essentiellement basée sur deux constatations : a) que sa compétence pour se prononcer sur un différend concernant un Etat déterminé repose toujours à l'origine sur le consentement de ce dernier, ce qui comporte en particulier la pleine liberté de l'Etat qui accepte la compétence obligatoire de la Cour en vertu de la clause facultative de limiter à son gré une telle acceptation et, en particulier, d'en exclure les litiges nés de certaines catégories de traités; et b) que, dans le cas concret, un Etat tiers au moins, à savoir El Salvador, devait être considéré comme pouvant être "affecté" par une décision comportant l'application de certains traités multilatéraux dont notamment, quoique non exclusivement, la Charte des Nations Unies et celle de l'Organisation des Etats américains. Il en résultait forcément que l'application de ces instruments était exclue en ce qui concerne la décision en la présente affaire. La Cour a ainsi à juste titre rejeté l'idée d'opposer aux Etats-Unis une interprétation de la "réserve Vandenberg" manifestement différente de celle qu'ils en ont donnée dès l'origine et qui l'aurait réduite à une simple redondance. En effet, on ne soulignera jamais assez que l'acceptation de la compétence obligatoire de la Cour, sur la base de l'article 36, paragraphe 2, du Statut de celle-ci, est un acte souverain et volontaire, qui ne produit d'effet que dans les limites à l'intérieur desquelles il a été conçu et voulu. Il est donc correct que la Cour se soit vue dans l'obligation de conclure que la compétence que pouvait lui avoir attribuée la déclaration d'acceptation formulée en 1946 par les Etats-Unis d'Amérique en vertu de l'article 36, paragraphe 2, du Statut ne lui permettait pas de connaître des griefs concernant la violation des traités multilatéraux en question avancés par le Nicaragua. Mais en même temps, et, à mon avis, tirant la conclusion qui s'impose de ces prémices, elle a affirmé que sa compétence pour statuer sur les griefs du Nicaragua relatifs à la violation par les Etats-Unis d'obligations découlant de règles du droit international coutumier ou du traité bilatéral de 1956 restait intacte.

6. Vu la base de départ adoptée par la Cour, je ne peux qu'estimer tout à fait correcte la conclusion à laquelle elle est arrivée. Je dois de même reconnaître son souci d'affirmer l'existence autonome dans le droit international coutumier de chacune des règles qu'elle a appliquées en l'espèce. Cette constatation ne m'empêche pas toutefois d'exprimer de sérieuses réserves à propos de la facilité avec laquelle il me semble que la Cour - tout en niant expressément que toutes les règles coutumières aient un contenu identique à celui des règles énoncées dans les conventions (par. 175) - a néanmoins conclu, pour plusieurs

matières-clé, à l'existence d'une quasi-identité de contenu entre le droit international coutumier et le droit consigné dans certains grands traités multilatéraux conclus sur le plan universel ou sur le plan régional. Je suis prêt à admettre, avec la Cour, que, en ce qui concerne la règle fondamentale interdisant l'emploi de la force (par. 188), et même la règle exigeant le respect de la souveraineté territoriale des autres Etats (par. 212), il puisse y avoir une correspondance étroite entre le droit international général non écrit et le droit écrit consacré dans la Charte. Mais je ne suis pas convaincu, par exemple, que certaines modalités restrictives prévues par la Charte pour le recours à la légitime défense puissent se retrouver dans le droit international coutumier. De même je reste sceptique quant à l'idée que, en ce qui concerne l'interdiction de l'intervention, non seulement le droit international coutumier universel[2] mais même celui qui existe sur le seul plan régional américain, ait à l'heure actuelle entériné toutes les conquêtes réalisées par le droit conventionnel. Je suis également très hésitant devant l'idée qu'il existerait une large coïncidence de contenu entre les conventions de Genève et certains "principes généraux de base du droit humanitaire", qui, de l'avis de la Cour, préexisteraient dans le droit coutumier et dont les conventions ne seraient "que l'expression concrète" ou tout au plus "à certains égards le développement" (par. 218 et 220). Heureusement, ayant elle-même relevé que le demandeur n'avait pas fait état des quatre conventions de Genève du 12 août 1949, la Cour a fait preuve de prudence quant aux conséquences de l'application de cette idée, en elle-même contestable.

7. De même, je ne puis qu'exprimer des doutes quant à l'idée qui transparaît parfois dans l'arrêt (par. 191, 192, 202 et 203) selon laquelle on peut voir dans l'acceptation de certaines résolutions ou de certaines déclarations formulées dans le cadre des Nations Unies ou de l'Organisation des Etats américains, ainsi que dans un autre contexte, une preuve concluante de l'existence, chez ces Etats, d'une opinio juris concordante ayant la valeur d'une véritable règle coutumière internationale. Je me borne ici à faire état de ces impressions, en soulignant que les réserves que je puis formuler sur ces points n'impliquent pas que je doive différer des conclusions fondamentales auxquelles l'arrêt est parvenu.

II...

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2 Je suis quelque peu surpris de l'assurance avec laquelle l'arrêt (par. 202) a cru pouvoir affirmer que :

> "L'existence du principe de non-intervention dans l'opinio juris des Etats est étayée par une pratique importante et bien établie."

II

8. Me référant maintenant aux aspects de la présente affaire touchant plus spécifiquement et plus exclusivement au fond, ma première remarque sera de relever que les conclusions auxquelles la Cour est parvenue dans le présent arrêt rejoignent pour l'essentiel celles que, sous un autre angle, elle avait déjà esquissées dans son ordonnance du 10 mai 1984 sur la "Demande en indication de mesures conservatoires" déposée par le Nicaragua le 9 avril de la même année. Bien sûr, l'analyse actuelle est bien plus longuement développée et l'argumentation fournie à l'appui des conclusions est bien plus étoffée. Mais les faits que la Cour estime aujourd'hui devoir être imputés aux Etats-Unis d'Amérique restent en réalité ceux-là mêmes que l'ordonnance relative aux mesures conservatoires avait succinctement mentionnés. Surtout les infractions internationales qui, selon la Cour, ont été commises et ont pour origine lesdits faits, sont pratiquement celles qui figuraient déjà dans le tableau dressé aux points 1 et 2 du paragraphe 41 B, de l'ordonnance du 10 mai 1984. Les obligations dont on déclare aujourd'hui la violation sont virtuellement celles dont on avait alors constaté l'existence : obligations de ne pas intervenir dans les affaires intérieures d'un autre Etat, de s'abstenir de tout recours à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique de cet autre Etat, de respecter pleinement sa souveraineté territoriale, de ne pas interrompre ou rendre périlleux son commerce maritime. J'ai alors voté en toute conscience en faveur des décisions adoptées par la Cour sur ces divers points et ne vois pas de raison de ne pas le faire à l'heure actuelle.

9. Ceci dit, cependant, je ne puis pas manquer d'être frappé par la présence, dans l'arrêt qui vient d'être rendu, avec ma participation d'ailleurs, de certains aspects à mon avis contradictoires dans l'appréciation de la situation de fait et de droit, aspects qui me paraissent appeler quelques mises au point de ma part.

10. Le premier de ces aspects concerne la perspective dans laquelle l'arrêt paraît situer et voir l'affaire dans laquelle la Cour était requise de donner sa décision. A mon sens l'on n'arrive pas à saisir cette affaire dans sa réalité effective et globale si l'on ne garde pas à l'esprit le fait que l'humus dans lequel a germé et s'est développé le différend qui oppose aujourd'hui le Nicaragua aux Etats-Unis d'Amérique est tout de même fait d'une situation de lutte civile, de conflit d'ordre interne. Cette situation caractérise aujourd'hui aussi, et plus qu'on ne semble le penser, la présente affaire.

11. Ce n'est pas, bien entendu, que l'arrêt veuille ignorer totalement une telle situation. Sans doute, là où elle a pris position sur des infractions qu'auraient subies, dans le cas qui nous occupe, les règles du droit humanitaire, la Cour a relevé (par. 219) que :

"Le...

> "Le conflit entre les forces contras et celles du Gouvernement du Nicaragua est un conflit armé 'ne présentant pas un caractère international'. Les actes des contras à l'égard du Gouvernement du Nicaragua relèvent du droit applicable à de tels conflits, cependant que les actions des Etats-Unis au Nicaragua et contre lui relèvent des règles juridiques intéressant les conflits internationaux."

Cette remarque est certainement exacte. De même, je reconnais volontiers que, dans sa description des différentes formes d'aide et assistance prêtées par les Etats-Unis aux forces rebelles des contras, la Cour a sciemment évité d'utiliser certaines expressions proposées par le défendeur, qui auraient créé une dangereuse équivoque, précisément à propos de la nature interne ou bien internationale du conflit opposant les forces rebelles des contras aux forces du gouvernement sandiniste. La Cour a en effet refusé (par. 113 et 114) de suivre le demandeur dans ses assertions d'après lesquelles les forces des contras ne seraient que des bandes de "mercenaires", recrutés pour leur compte par les Etats-Unis d'Amérique, autrement dit une sorte de légion étrangère constituant un corps auxiliaire des forces armées nord-américaines. Je tiens aussi à ajouter que le fait même d'avoir vu dans l'aide multiforme accordée aux forces contras une forme d'intervention illicite d'un Etat dans un conflit intérieur d'un autre Etat est une preuve supplémentaire de ce que la Cour a perçu de façon correcte cet aspect essentiel.

12. Par contre, dans la présentation qu'il fait des deux Parties en lutte et surtout des origines et des causes du conflit interne qui a éclaté au Nicaragua, l'arrêt ne me paraît pas attribuer un poids suffisant aux changements importants qui se sont produits dans ce pays pendant les mois postérieurs à la chute du gouvernement Somoza. En disant cela, je ne me propose pas de discuter ici l'interprétation donnée dans l'arrêt (par. 260 à 262) des points inclus dans le "plan de paix" que les éléments anti-somozistes coalisés avaient établi pendant la période finale de la lutte de libération contre la dictature et que la junte du gouvernement de reconstruction nationale du Nicaragua avait communiqué au secrétaire de l'OEA, en réponse à la résolution de la XVII^{e} réunion de consultation des ministres des relations extérieures de l'Organisation. Je n'entends pas non plus m'attacher ici à contester la conclusion d'après laquelle la communication de ce plan ne serait qu'une simple "promesse politique" dépourvue de tout effet contraignant sur le plan juridique, encore que je garde des doutes à ce sujet. Je ne comprendrais pas en effet que les gouvernements réunis à l'OEA aient accepté d'adopter une mesure aussi exceptionnelle que le retrait de la reconnaissance d'un gouvernement qui, aussi dictatorial et exécrable qu'il fût, était indéniablement un gouvernement en charge et, à cet égard, "légitime", sans avoir une solide garantie qu'il serait remplacé par un gouvernement répondant précisément aux caractéristiques définies dans le plan de paix et que les membres de l'OEA, gouvernement somozien excepté, étaient d'accord pour souhaiter.

13. Ce...

13. Ce que j'entends souligner, c'est seulement qu'au moment où le gouvernement - qualifié par l'arrêt lui-même, dans les rares occasions où il le mentionne, "de coalition nationale" (par. 18), "de coalition démocratique" (par. 19) ou "de reconstruction nationale" (par. 167) - s'est installé à Managua, il répondait dans sa composition, aussi provisoire qu'elle fût, au pluralisme du "plan de paix". Ce n'est que plus tard que les choses ont changé. Dans le gouvernement issu immédiatement de la lutte révolutionnaire donc, comme j'en trouve la confirmation, parmi tant d'autres témoignages, dans le reportage d'une enquête ponctuelle menée tout dernièrement au Nicaragua[3], les divers courants politiques qui avaient pris part au renversement de la dictature étaient représentés. Le gouvernement disait clairement vouloir instaurer un régime stable de pluralisme démocratique, de liberté dans les domaines politique, économique et syndical, et de non-alignement dans les relations internationales. Ce ne fut que plus tard, encore qu'à la suite d'un brusque changement, que l'on aboutit à l'instauration d'un régime d'obédience exclusivement sandiniste. Le nouveau gouvernement qui, dès la fin de 1979, se trouva avoir remplacé le premier, n'avait plus, en effet, qu'une composition pratiquement uniforme et une orientation bien différente de celle de son prédécesseur sur le plan de la politique intérieure, de l'organisation de la production industrielle et agricole, de la politique syndicale, des structures militaires, de la politique et des relations internationales. Cette évolution amena par réaction la formation d'une opposition dans laquelle se rencontraient des milieux très différents, cette opposition gagnant graduellement du terrain malgré se mise sous surveillance étroite et en dépit des mesures restrictives dirigées contre elle. Dans ce climat, les élections organisées par le gouvernement furent boycottées par les partis qui en contestaient la régularité démocratique; les relations entre le pouvoir civil et l'église se détériorèrent; les contrastes s'accentuèrent entre les syndicats traditionnels et ceux d'obédience gouvernementale, la condition des minorités ethniques s'aggrava. Cet ensemble de facteurs amena l'abandon du pays par des fractions des différents courants d'opposition au nouveau régime, poussées à chercher refuge dans l'exil. C'est un fait que, dans l'exil, les nouveaux réfugiés furent amenés à contrecoeur à rechercher la collaboration des résidus, peu nombreux à ce qu'il paraît, de la garde somoziste et ceci afin de constituer une coalition de forces rebelles capable de se battre pour provoquer une évolution susceptible de permettre leur retour dans le pays dans de nouvelles conditions. Mais cela ne doit pas faire perdre de vue qu'à la base du conflit civil dont on parle il y avait comme facteur déterminant une scission entre les diverses composantes de la coalition qui s'était opposée à la dictature de Somoza et en avait provoqué la chute. Cela ne doit pas non plus faire perdre de vue que, si les réfugiés en question ont reçu pour leur action une aide et une assistance, aussi massive et multiforme que vitale pour eux, cela n'a pas eu pour effet de les transformer en autre chose que

ce...

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[3] Voir les reportages : "Impressions du Nicaragua", I et II, par Jacques-Simon Eggly, publiés dans le Journal de Genève des 26 et 27 mai 1986.

ce qu'ils étaient, de faire disparaître leur appartenance au peuple nicaraguayen, de faire changer la nature de lutte civile du combat qui les oppose au gouvernement de leur pays. L'arrêt aurait pu et dû utilement, à mon avis, pousser davantage l'investigation de cet aspect pour faire mieux comprendre les diverses facettes de la présente affaire; en disant cela, cependant, je ne me propose pas de provoquer des modifications quant aux conclusions établies à ce sujet.

III

14. L'autre aspect auquel je voudrais brièvement me référer est celui de l'imputabilité ou non à l'Etat défendeur des différentes catégories de faits alléguées par le demandeur, en tant que faits générateurs d'une responsabilité internationale.

15. A cet effet, j'estime sans hésitation que, pour certains faits du moins, il convient de souscrire aux conclusions de l'arrêt. Dans la série des faits dénoncés par le Nicaragua, la Cour a eu pleinement raison de tenir pour imputables à l'Etat défendeur ceux qui correspondaient indéniablement à des comportements d'agents ou organes proprement dits des Etats-Unis d'Amérique, à savoir des faits de personnes ou de groupes faisant directement partie de l'appareil étatique nord-américain et agissant en cette qualité. La Cour a utilement précisé que, au cas où les comportements en question se seraient déroulés en présence ou avec la participation de personnes ou de groupes n'ayant pas une telle qualification (en l'espèce des contras), cette présence ou participation n'aurait pu changer en quoi ce soit la conclusion énoncée. Tout cela est conforme aux dispositions de l'article 5 (Attribution à l'Etat du comportement de ses organes) du projet d'articles adopté par la Commission du droit international en la matière. La Cour a également eu raison de considérer comme étant des faits des Etats-Unis d'Amérique les comportements de personnes ou de groupes qui, sans être à proprement parler des agents ou des organes de l'Etat en question, appartiennent néanmoins à des entités publiques habilitées, dans son ordre juridique interne, à l'exercice de certaines prérogatives de la puissance publique. Je relève là une conformité avec les dispositions de l'article 7 (Attribution à l'Etat du comportement d'autres entités habilitées à l'exercice de prérogatives de la puissance publique) du projet de la Commission du droit international. La première des deux hypothèses mentionnées ici s'appliquait notamment à des comportements de membres de l'administration étatique ou de membres des forces armées des Etats-Unis, la seconde à des agissements de membres de la CIA, des UCLAs ou d'autres organismes du même genre. Bien que la Cour n'ait pas esquissé, comme il aurait été intéressant de le faire, une justification théorique de ses conclusions dans ces deux hypothèses, je ne puis que me joindre à elle pour les reconnaître fondées.

16. La conformité aux dispositions du projet de la Commission du droit international[4] se retrouve aussi dans le fait que la Cour a par contre donné une réponse négative à la suggestion, avancée par le demandeur, de considérer comme des faits imputables aux Etats-Unis d'Amérique les agissements commis par des membres des forces contras. Il serait en effet en contradiction avec les principes régissant la matière de voir dans des membres de la contra des personnes ou des groupes agissant au nom et pour le compte des Etats-Unis d'Amérique. Les seuls cas où il serait possible de le faire seraient ceux où certains membres de la contra auraient été spécifiquement chargés par des autorités des Etats-Unis de commettre pour le compte de celles-ci une action ou de remplir une tâche ponctuellement déterminée. Ce n'est que dans cette hypothèse que le droit international admet, à titre tout à fait exceptionnel, qu'un comportement de personnes ou de groupes ne revêtant pas la qualité d'agents ou d'organes d'un Etat, de membres de son appareil (même pris dans son acception la plus large) puisse être tenu pour un fait de cet Etat. Par conséquent l'arrêt voit juste lorsque, se référant en particulier aux atrocités, aux actes de violence ou de terrorisme et aux autres agissements inhumains qui, selon le Nicaragua, auraient été commis par des contras à l'égard de populations civiles, de leurs membres et de leurs biens, il exclut que les auteurs de ces agissements puissent être considérés comme ayant été spécifiquement chargés de les commettre par des autorités des Etats-Unis, à moins que, dans quelques cas concrets, la preuve du contraire n'ait été incontestablement apportée.

17. Sur ce dernier point je ne puis donc qu'être d'accord en principe avec la constatation faite dans l'arrêt (par. 116) que la Cour ne devait pas s'occuper, dans le cadre du présent procès, des agissements anti-humanitaires que les contras auraient commis et dans lesquels le Nicaragua voudrait à tort voir des violations de principes du droit international humanitaire attribuables aux Etats-Unis d'Amérique, et ne devait prendre en considération que des illicéités éventuelles dont les Etats-Unis se seraient rendus responsables "en relation avec les activités des contras". Les quelques hésitations ainsi que les quelques impropriétés de langage que parfois l'on peut relever dans la rédaction de certains passages à ce sujet n'enlèvent rien pour l'essentiel au bien-fondé de cette remarque. Je ne puis surtout qu'être d'accord avec la reconnaissance fondamentale de la non-imputabilité aux Etats-Unis d'Amérique des agissements commis par les contras au cours de leurs opérations militaires ou paramilitaires au Nicaragua (par. 115, 116 et 278).

18. Je...

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[4] Je me réfère au jeu conjoint des articles 11 (Comportement de personnes n'agissant pas pour le compte de l'Etat) et 8 (Attribution à l'Etat du comportement de personnes agissant en fait pour le compte de l'Etat).

18. Je ne puis toutefois pas manquer de relever dans l'arrêt quelques hésitations et quelques contradictions au moins apparentes[5], ainsi qu'un certain défaut d'argumentation juridique à l'appui de la position prise sur les points en question. J'éprouve surtout quelque regret que l'arrêt ne se soit pas référé expressément au précédent de l'arrêt du 24 mai 1980 sur l'affaire relative au Personnel diplomatique et consulaire des Etats-Unis à Téhéran. La Cour me semble avoir perdu de vue qu'elle avait alors dû faire face à une situation sous bien des aspects analogue à la situation actuelle. Elle avait eu notamment à décider si, et dans quelle mesure, les faits qui s'étaient produits dans la première phase de l'affaire, à savoir l'attaque armée perpétrée le 4 novembre 1979 par des "militants" iraniens contre l'ambassade des Etats-Unis, l'invasion de ses locaux et la prise en otage des personnes qui s'y trouvaient, la saisie de ses biens et de ses archives, si tous ces agissements "actifs", en d'autres termes, étaient ou non imputables à l'Etat iranien. Et elle était parvenue à une conclusion négative à ce sujet car les "militants" en question ne possédaient pas un statut officiel quelconque en tant qu'agents ou organes de l'Etat et que rien ne prouvait qu'ils avaient agi en fait au nom et pour le compte des

autorités...

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[5] L'idée de base est évoquée dans les termes les plus exacts au paragraphe 115, là où l'arrêt dit que "même le contrôle général exercé par eux [les Etats-Unis] sur une force extrêmement dépendante à leur égard", ne signifierait pas par lui-même "que les Etats-Unis aient ordonné ou imposé la perpétration des actes contraires aux droits de l'homme et au droit humanitaire allégués par l'Etat demandeur" (souligné par moi). Par la suite, dans le même paragraphe et dans un autre (par. 277), l'arrêt invoque, aux mêmes fins, le fait que "la Cour n'est ... pas convaincue par les informations dont elle dispose que les contras étaient 'contrôlés' par les Etats-Unis au moment où" les actes en question étaient commis. La remarque n'est pas en elle-même inexacte, mais moins précise que celle auparavant rapportée. Il serait regrettable, je pense, que l'introduction à cet endroit de l'idée du "contrôlé", accompagnée d'expressions comme celle figurant au paragraphe 116, qui opposent aux actes des contras ceux dont les Etats-Unis pourraient être "directement" responsables, puisse engendrer chez les lecteurs de l'arrêt la fausse idée que la Cour ferait un rapprochement entre la situation envisagée ici et les hypothèses dans lesquelles on peut de façon appropriée parler d'une "responsabilité indirecte" par opposition à une "responsabilité directe". Les hypothèses que, à mon avis, l'on qualifie correctement comme de responsabilité indirecte, sont celles où un Etat, dans certaines conditions, exerce un contrôle sur l'action d'un autre Etat, peut être rendu responsable d'un fait internationalement illicite commis par cet autre Etat et imputable à lui. La question qui se pose alors n'est pas celle de l'imputabilité ou non à un Etat d'un comportement de personnes ou de groupes n'appartenant pas à l'appareil officiel de cet Etat, mais celle du transfert à un Etat déterminé de la responsabilité internationale découlant d'un agissement imputable à un autre Etat.

autorités iraniennes. La Cour avait expressément relevé que même les déclarations de félicitation ou d'approbation qui avaient immédiatement suivi les agissements mentionnés ne pouvaient pas modifier le caractère, à ce moment-là non attribuable à l'Etat, de ces faits commis par les "militants", qui étaient quand même les enfants chéris des autorités suprêmes du pays. La seule chose que la Cour avait estimé pouvoir être attribuée à l'Etat, dans cette première phase des événements, était le fait "négatif" d'avoir négligé de prendre les mesures appropriées pour la protection des locaux et du personnel, afin de prévenir les attaques auxquelles on pouvait s'attendre de la part d'éléments surexcités et hostiles, et le fait, également "négatif", qu'une fois l'attaque perpétrée, les autorités officielles n'aient pas répondu aux appels au secours qu'on n'avait cessé de leur adresser et ne soient pas intervenues pour libérer les personnes et les locaux.

19. Dans la présente affaire l'arrêt est effectivement parvenu à des conclusions semblables quant à la non-imputabilité - aux Etats-Unis d'Amérique cette fois - des agissements perpétrés par les rebelles au gouvernement sandiniste dans les hostilités menées par eux en territoire nicaraguayen et quant à l'imputabilité aux Etats-Unis des seuls comportements dûment prouvés que des organes de cet Etat auraient "eus en relation" avec les agissements des contras. Pour conclure, c'est la deuxième fois en un très bref laps de temps que la Cour a eu à faire à des questions de responsabilité internationale et, plus spécifiquement, à des cas où les principes à appliquer concernent des problèmes d'imputabilité, l'un des aspects les plus délicats de toute la théorie de la responsabilité. Je ne puis que regretter qu'elle n'ait pas saisi l'occasion pour souligner, par des références appropriées, qu'elle confirme sa prise de position précédente et l'argumentation théorique développée à son appui, afin de bien marquer ainsi la continuité et la solidité de sa jurisprudence.

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D'autres points de cet arrêt pourraient appeler de ma part des observations et peut-être l'expression d'un désaccord partiel[6]. Mais je préfère m'en tenir ici à ces quelques remarques et à ces quelques mises

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[6] Je trouve, par exemple, disproportionné le développement et exagérée l'importance attribuée dans l'arrêt (par. 117 et suiv.) à la question de la diffusion, limitée à ce qu'il paraît, auprès des forces contras, du manuel édité par la CIA sur les "Operaciones sicológicas en guerra de guerrillas". Même en faisant abstraction du fait que les parties qui s'affrontent dans une lutte civile comme celle qui malheureusement sévit au Nicaragua n'ont pas besoin d'un encouragement extérieur pour se livrer à des agissements parfois anti-humanitaires - et l'arrêt le reconnaît - je vois mal comment prendrait forme, dans le droit international général, la responsabilité qui devrait découler d'un "encouragement" semblable, dont la réalité et l'effet [illegible]

au point que j'ai estimées nécessaires pour préciser mes vues sur certains aspects choisis, de fait et de droit, qui m'ont semblé les plus importants. On relèvera parfois des réserves qui ne sont pas seulement de forme à propos des constatations faites dans certains chapitres ou certains paragraphes de l'arrêt et dans le raisonnement qui les accompagne. Mais, en définitive, il n'y a pas là de divergences telles que je doive renoncer à l'adhésion globale que j'estime objectivement pouvoir donner à l'arrêt rendu aujourd'hui.

(Signé) Roberto AGO

Since I have voted against subparagraph (1) of paragraph 292 of the Judgment, I feel myself obliged to append this separate opinion stating my reasons.

During the previous proceedings relating to the jurisdiction and admissibility of the Nicaraguan Application of 9 April 1984, the multilateral treaty reservation attached to the 26 August 1946 United States Declaration of Acceptance of the Court's jurisdiction under Article 36, paragraph 2, of the Statute was subjected to thorough and detailed discussion, leading to the decision of the Court in the Judgment of 26 November 1984. The two Parties in their arguments examined the reservation in all its aspects, and weighed all possible interpretations of its rather nebulous wording and the consequences of its application.

It should be recalled that the reservation is contained in proviso (c) to the Declaration, which excludes from the operation of the clause

> "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" (I.C.J. Yearbook 1984-1985, p. 100).

Five member States have appended a similar reservation to their Declarations of Acceptance, namely, El Salvador, India, Malta, Pakistan and the Philippines. However, only the reservations of Pakistan and Malta include the wording appearing in the United States reservation "all parties to the treaty affected by the decision". The reservations of El Salvador, India, and the Philippines exclude disputes arising from the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties in the case before the Court (I.C.J. Yearbook 1984-1985, pp. 75, 78 and 92 respectively). Of course the latter version of the reservation is broader in scope, because, if the multilateral treaty reservation were to be applied as it appears in the Indian, Philippine and Salvadorian formulations, all the States parties to a multilateral convention would have to appear before the Court together with the original parties in the case. It is difficult to see how the reservation could apply to universal treaties such as the Charter of the United Nations, or even treaties of a regional ambit, such as the Charter of the Organization of American States - both in cause in the Nicaraguan Application - because that would amount to bringing before the Court the entire membership of the United Nations, and the regional organization itself.

The multilateral treaty reservation has been widely criticized by publicists ever since the 1946 United States Declaration was deposited with the Secretary-General of the United Nations. Indeed several writers, including some eminent American scholars, have considered it

ambiguous, redundant and superfluous. Counsel for the United States recognized the doubts connected with the ambiguity of its formulation (hearing of 15 October 1984):

> "As the United States indicated in its Counter-Memorial, scholars discussing the reservation at the time of its inclusion in the declaration disagreed about whether the reservation required the presence before the Court of all treaty parties, or only of those treaty parties that would be affected by the Court's decision."

Moreover, at that time, there were also doubts as to the unclear wording of the proviso, especially as to whether it referred to "the treaty affected" or to "all parties affected".

In the present case the United States, while participating in its previous stages, has had the opportunity to clarify its construction of the meaning of the reservation. The United States Counter-Memorial contended in paragraph 252 (p. 105):

> "The Court may, therefore, exercise jurisdiction over Nicaragua's claims consistent with the multilateral treaty reservation only if all treaty parties affected by a prospective decision of the Court are also parties to the case."

And in paragraph 253 (p. 105) it spelled out the "specific concerns" behind the reservation:

> "The multilateral treaty reservation reflects three specific concerns: (1) the United States does not wish to have its legal rights and obligations under multilateral treaties adjudicated with respect to a multilateral dispute unless the rights and obligations of all the treaty parties involved in that dispute will also be adjudicated; (2) adjudication of bilateral aspects of a multilateral dispute is potentially unjust insofar as absent States may have sole possession of facts and documents directly relevant to the rights of the parties to the adjudication inter se; and (3) adjudication of bilateral aspects of a multilateral dispute will inevitably affect the legal rights and practical interests of the absent States."

This threefold description of the reasons inspiring the reservation is not altogether convincing. As to the first point, it would indeed be extraordinary if a State making a declaration of acceptance of the Court's jurisdiction were to append to it reservations to protect the rights and interests of third States.

In his separate opinion to the Judgment of 26 November 1984 Judge Ruda rightly observes:

> "it does not seem logical that a State submitting a declaration accepting the compulsory jurisdiction of the Court, but excluding certain matters affecting its own interests from the jurisdiction, should act on behalf of third States" (I.C.J. Reports 1984, p. 456, para. 22).

The...

The second point is equally unpersuasive. The "sole possession of facts and documents" by a third State is outside the competence of the Court to appraise. And this specific knowledge has nothing to do with participation in a multilateral treaty. It is possible that a State which is not a party to the treaty might possess such "facts and documents". Thirdly, it is certainly not true that "adjudication of bilateral aspects of a multilateral dispute will inevitably affect the legal rights and practical interests of the absent States" (emphasis added). It might, or might not, affect them. In the November 1984 Judgment the Court itself gave a specific example of a possible situation in which there would be no third State affected by the decision:

> "By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected." (I.C.J. Reports 1984, p. 425, para. 75.)

In the Judgment of 26 November 1984 the Court dealt extensively with the multilateral treaty reservation in paragraphs 72 to 76 (I.C.J. Reports 1984, pp. 424-426). Having recognized the obscurity of the wording of the proviso, and referred to the difficulties of interpretation which can be traced back to its drafting, and having weighed up the meaning of similar reservations on the part of other States, the Court found, in paragraph 73, that in no way could the reservation bar adjudication, because Nicaragua's Application relied not only on conventional law but also on violation of a number of principles of customary and general international law, such as the non-use of force, non-intervention, respect for the independence and territorial integrity of States and freedom of navigation. These principles are valid and binding in themselves, even if they have been enshrined in the provisions of multilateral treaties. The Court observes that the States to which the argument of the United States refers, the neighbours of Nicaragua, namely, Costa Rica, Honduras and El Salvador, have all made declarations of acceptance of the Court's jurisdiction and could at any time institute proceedings against Nicaragua if they felt their rights and interests to be in jeopardy. They could also resort to the incidental procedure of intervention under Articles 62 or 63 of the Statute (I.C.J. Reports 1984, p. 425). Indeed, when considering the Declaration of Intervention filed by El Salvador on 15 August 1984 - which was rejected as untimely, because of the fact that the Court was entertaining the jurisdictional phase of the proceedings -, the Court did preserve the rights of El Salvador to intervene on the merits. But El Salvador did not use these rights. Nor did Honduras and Costa Rica, the only States that could possibly be affected by a decision of the Court in the current case.

The 1984 Judgment emphasized in paragraph 75 that: "it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified" (I.C.J. Reports 1984, p. 425).

Therefore the question whether other States are affected by the Judgment could only be finally settled during the merits phase of the Judgment. That is why the Court, considering that the former

procedure of joinder of preliminary objections to the merits has been done away with as from the 1972 revision of the Rules of Court, decided to resort to Article 79, paragraph 7, of the present Rules. The Rule was used for the first time, and the Court found 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, para. 76).

The decision of the Court to apply Rule 79, paragraph 7, I submit, is sound and logical. It is only when the general lines of the Judgment to be given become clear that the States "affected" can be identified, if they exist at all. It is a curious situation: the finding as to whether there are third States parties to the multilateral treaties in question "affected" by the decision, and which they are, can be established only ex post facto. At the same time the reservation, although not having an exclusive preliminary character, remains a preliminary objection to jurisdiction, at least insofar as one of the sources of the law to be applied will be the multilateral treaties invoked by Nicaragua in its Application of 9 April 1984.

In these circumstances, the Court feels itself under the obligation to ascertain whether its jurisdiction is limited by virtue of the reservation in question (para. 47 of the present Judgment) and does so in a lengthy and exhaustive manner in paragraphs 47 to 56 of the Judgment.

It should be noted that this is a sui generis procedural situation, because although the jurisdictional phase of the case has been closed with the Judgment of 26 November 1984, one question of a preliminary character (albeit not "exclusively" so) was left pending, and the decision on that question should determine the law applicable and hence the whole structure of the Judgment.

The Court starts its examination of the problem by restricting the field to which the reservation could be applied, in relation to both the multilateral treaties involved and the States which might potentially be affected. Since Nicaragua has recognized that the duties and obligations arising from the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928 have been subsumed by the Charter of the Organization of American States, the Court considers

> "that it will be sufficient to examine the position under the two Charters [the Charter of the United Nations and the Charter of the Organization of American States], leaving aside the possibility that the dispute might be regarded as 'arising' under either or both of the other two conventions" (para. 47 of the Judgment).

On the other hand, in spite of the fact that the United States, in the jurisdictional proceedings, had listed Costa Rica, Honduras and El Salvador as States that could be "affected", the Court confines its consideration to El Salvador, because:

> "It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua." (Para. 48.)

I have no objection to the criteria chosen by the Court to restrict the area of application of the multilateral treaty reservation. In some ways it simplifies the problem, although it is undeniable that Honduras - from whose territory the contras operate - is as involved in the dispute as El Salvador, to say the least. But the crux of the question is that the whole of the United States argument rests on the use of the right of collective self-defence. El Salvador, in its Declaration of Intervention of 15 August 1984, told the Court that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise on its behalf the right of collective self-defence.

In paragraph 292, subparagraph (2) the Court

> "Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case."

The justification of collective self-defence, belatedly invoked by the United States during the proceedings on jurisdiction and admissibility in 1984, if valid, should retroact at least to December 1981 when the above-mentioned activities actually began. Obviously the rejection of the Court covers equally the same period. Therefore, collective self-defence never justified such activities and the decision of the Court in no way changes the nature and character of the acts of the United States. They were not justified by collective self-defence and they continue not to be so. Hence, if there is no change in the actual situation, I do not see how El Salvador can claim to be "affected" by the decision of the Court. In its argument Nicaragua never placed in issue the right of El Salvador to receive from the United States all kind of assistance, military or otherwise (Memorial of Nicaragua, p. 193, para. 371). Therefore, El Salvador's rights in this respect cannot be affected by a decision of the Court in favour of Nicaragua. The decision of the Court in paragraph 292, subparagraphs (3), (4), (5), (6), (7), (8), (9), (10) and (11), I submit, could in no way affect the rights or obligations of El Salvador. The same can be said of the provision in subparagraph (12), calling on the United States to cease and desist immediately from the acts in question. El Salvador preserves its rights of receiving full support from the United States for its defence. But it can hardly be argued that El Salvador can claim a right to the continuance of direct or indirect military or paramilitary actions of the United States against Nicaragua, which are unrelated in any way to the territory of El Salvador. As for subparagraphs (13) and (14) - obligation in respect of reparation to

be paid by the United States -, (15) - form and amount of reparation, to be settled by the Court - and (16) - calling on the Parties to settle the dispute by peaceful means -, they have nothing to do with El Salvador. Therefore the decision of the Court as it stands in the operative part of the Judgment could in no way "affect" El Salvador such as to warrant application of the multilateral treaty reservation. In this sense I do not concur with paragraph 51 of the reasoning. Nor do I agree with the argument contained in paragraph 53. The distinction between "adversely" affecting and otherwise, is irrelevant and beside the point. Nothing in the operative clause of the Judgment could, I submit, "affect" the rights or obligations of El Salvador either "adversely" or "favourably".

Likewise, I disagree with the conclusion in paragraph 56 that the Court is debarred from applying the Charter of the United Nations, as a multilateral treaty.

Paragraph 55 of the Judgment discusses the same problem of the application of the multilateral treaty reservation in relation to the Charter of the Organization of American States, and especially in regard to Articles 18 and 20 dealing with non-intervention and the non-use of force. The Court concludes that it must regard itself as without competence to deal with either of the two claims of breach of the OAS Charter. As to the alleged violation of Article 18 of the OAS Charter by the United States intervention in the internal or external affairs of Nicaragua, a subject disposed of by subparagraph (3) of the operative part, I fail to see by what stretch of imagination such a decision could be said to affect El Salvador.

The so-called Vandenberg Amendment applies to disputes under multilateral treaties which are also multilateral disputes. The current case is between the Applicant - Nicaragua - and the Respondent - the United States of America. Any other State which has any reason to consider that it might be affected by a Judgment of the Court, and which has jurisdictional links with the Parties in the case, and with the Applicant in particular, is free to initiate proceedings of its own or to intervene under Articles 62 and 63 of the Statute. The only relevance of the multilateral treaty reservation in the merits phase of the proceedings is, I submit, that the Court cannot ignore the problem of third States parties to multilateral treaties which might be affected by the Judgment, and should deal with it in the proper terms, namely that they are free to come before the Court to defend their rights and interests if they so desire.

Of course the Court cannot ignore the existence of a certain generalized conflict in the Central American area. Judge Ruda, in his separate opinion appended to the November 1984 Judgment, dealt with it in these words:

> "It is true that there is a complex and generalized conflict among Central American countries, but not the whole conflict, with all its economic, social, political and security aspects, is submitted to the Court, only the claims of Nicaragua against the United States. Nicaragua has not presented any claims against Honduras, El Salvador and Costa Rica." (I.C.J. Reports 1984, p. 457, para 24.)

We should abide by the categoric provision of Article 59 of the Statute, which confines the binding force of the res judicata to the parties in the case, and consequently bear in mind the fact that the expansion of the effects of the Judgment, so as to affect a third party, constitutes a departure from the general rule, and, like any exception, must therefore be founded in indisputable evidence.

For all these reasons I regret that the Court decided for the application of the multilateral treaty reservation, thereby precluding recourse to the Charter of the United Nations and the Charter of the Organization of American States as sources of the law violated by the Respondent.

I recognize that States which voluntarily deposit declarations of acceptance of the jurisdiction of the Court, pursuant to Article 36, paragraph 2, of the Statute, are free to append to the declaration whatever reservations they deem necessary. But at the same time, the Court is free, and indeed bound, to interpret declarations and appended reservations, as it has done on many occasions.

I submit that the law applied by the Judgment would be clearer and more precise if we resorted to the specific provisions in issue, and that there is nothing to prevent us from doing so.

The late regretted Judge Baxter has maintained the superiority of treaties over other sources as evidence of law in very cogent terms:

> "The most telling argument for giving the treaty that effect is that it is superior to all other forms of evidence of the law. In the first place, the treaty is clear evidence of the will of States, free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law."

And further:

> "As one looks at the present state of international law and attempts to see into the future, it should be quite clear that treaty law will increasingly gain paramountcy over customary international law." (R. R. Baxter, "Treaties and Custom", Collected Courses of the Hague Academy of International Law, Vol. 129 (1970-I), pp. 36 and 101.)

It is for the reasons set out above that I have no choice but to vote against subparagraph (1) of paragraph 292 of the Judgment. But I fully concur with the rest of the Judgment, as I firmly believe that the non-use of force as well as non-intervention - the latter as a corollary of equality of States and self-determination - are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States.

With regard to the non-use of force, the International Law Commission in its commentaries on the final articles on the Law of Treaties said:

"the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens" (International Law Commission Yearbook 1966, Vol. II, p. 247).

As far as non-intervention is concerned, in spite of the uncertainties which still prevail in the matter of identifying norms of jus cogens, I submit that the prohibition of intervention would certainly qualify as such, if the test of Article 53 of the Vienna Convention on the Law of Treaties is applied. A treaty containing provisions by which States agree to intervene, directly or indirectly, in the internal or external affairs of any other State would certainly fall within the purview of Article 53, and should consequently be considered void as conflicting with a peremptory norm of general international law.

(Signed) José SETTE-CAMARA

SEPARATE OPINION OF JUDGE NI ZHENGYU

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 acccepting 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 8 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, insofar 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 insofar 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, insofar 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, p. 3.)

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).

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

> "the right to engage in individual or collective self-defense 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).

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 Charter 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 "subsume" and "supervene" related principles of customary international law (pp. 126-128). 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, pp. 126-129), 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.)

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.)

> "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, p. 129). 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 persistenty 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, p. 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). 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

DISSENTING OPINION OF JUDGE ODA

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2. I hold that the Court could have remained seised of this case only in relation to the alleged violation by the United States of the 1956 Treaty of Friendship, Commerce and Navigation between the two Parties. From this point of view I voted in favour of subparagraph (7), but voted against subparagraph (6) because it would have been sufficient for the Court to decide on subparagraph (7) only, and against subparagraph (8) because such a decision by the Court concerning a breach of obligations erga omnes under customary international law is out of place in this Judgment. I was also unable to vote in favour of subparagraph (10), for the reason that I believed the Judgment was mistaken in bringing the United States attacks on Nicaraguan territory into relation with that Treaty and, by basing a construction upon its "object and purpose", had exceeded the jurisdiction granted by its compromissory clause. My negative vote on subparagraph (11) was cast because the attacks on Nicaraguan territory could not be related in my view to a breach of the 1956 Treaty; nor was the trade embargo to be regarded as a breach of it (Part III below).

3. I was obliged to vote against subparagraphs (2), (3), (4), (5), (9), (12) and (13), simply because I considered, as stated above, that the Court should not have pronounced on these issues in the present case unless covered by the compromissory clause of the 1956 Treaty. This does not mean, however, that I am in disagreement with all the legal arguments expounded by the Court regarding the principles of non-intervention, prohibition of the use of force and respect for sovereignty. These principles should certainly be respected, and by Nicaragua no less than the United States. In particular, my negative vote on subparagraph (9) must not be interpreted as implying that I am opposed to the Court's findings on this particular point.

I. EFFECT OF THE APPLICATION GIVEN TO THE VANDENBERG RESERVATION BY THE JUDGMENT - NICARAGUA'S APPLICATION BASED ON ARTICLE 36, PARAGRAPH 2, OF THE STATUTE SHOULD BE DISMISSED

A. Applicability of the Vandenberg Reservation

4. The present case was submitted by Nicaragua with a request for the Court to adjudge and declare:

"(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua and, in particular, its charter and treaty obligations under:

- Article 2 (4) of the United Nations Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;
- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife."

One of Nicaragua's main allegations is that the United States has violated the rules of international law under several multilateral treaties which, in one way or another, prohibit the "threat or use of force" and "intervention".

5. Unlike some older principles of international law, the particular principle concerning "threat or use of force" emerged in parallel with the birth of the United Nations towards the end of the Second World War, when the move to outlaw war in general was successfully made. The principle of non-intervention, in contrast, has a long history of application since Emile de Vattel wrote in 1758 as follows:

> "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another." (The Law of Nations, Classics of International Law, Trans., p. 131.)

Yet in ages previous to our own, some attempts were made to justify intervention within the framework of international law in time of peace, even though it could eventually be tantamount to resort to war (which in itself was not then deemed illegal). The dual system of international law in time of peace and international law in time of war was abandoned with the emergence of the outlawry of war and the principle of non-intervention, which, together with the prohibition of the threat or use of force, came to encapsulate the founding spirit of the United Nations.

6. Thus I have no doubt that the present case conspicuously falls to be considered within the framework of the United Nations system and, for that matter, that of the Organization of American States, which has pioneered and adopted similar principles. Having regard to the fact that the Court in 1984 found that it possessed jurisdiction

under Article 36, paragraph 2, of the Statute, I fully support the Court's decision that "the Court is required to apply the 'multilateral treaty reservation' contained in [the United States' declaration of acceptance of jurisdiction]" (para. 292 (1)).

B. The Judgment's Failure to Understand the Effect of the Vandenberg Reservation

7. The United States declaration read, in part:

"... this declaration shall not apply to ...

(c) 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 Court does not doubt that all parties to multilateral treaties, i.e., the Charter of the United Nations and the Charter of the Organization of American States, affected by the Judgment are not parties to the present case. Yet the Judgment states:

> "It should however be recalled that ... the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and OAS Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply." (Para. 56.)

> "In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable." (Para. 172.)

> "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content." (Para. 179.)

8. In sum, the Judgment holds that the Court can still decide the issues before it for the reason that, without reference to such multilateral treaties as the Charter of the United Nations and the Charter of the Organization of American States, the Court can apply customary and general international law which, though having been subsumed in the said multilateral treaties, exists independently.

9. It may well be contended that principles such as the non-use of force and the non-intervention now exist independently as customary and general international law. However, I cannot agree with the Judgment in its contention that the Court may entertain the Nicaraguan Application under Article 36, paragraph 2, of the Statute on the alleged assumption that the United States reservation regarding "disputes arising under a multilateral treaty" simply excludes from the jurisdiction conferred on the Court under that provision of the Statute legal disputes concerning "the interpretation of a [multilateral] treaty", or that, since the present case involves a "question of international law", the Court's entertainment of it should not be affected by that reservation inasmuch as the Court, independently of "the interpretation of a treaty", can confine itself to the application of the principles of customary and general international law.

10. I believe that the issue - which relates to applicable law - of whether, once the Court assumes jurisdiction over a case, it can apply the rules of customary and general international law apart from any applicable treaty rules, is quite different from the other issue - which relates to the Court's jurisdiction - of whether a State's declaration excludes "disputes arising under multilateral treat[ies]" (United States reservation) from "the jurisdiction of the Court, [which by nature can only be voluntarily accepted] in all legal disputes concerning (a) the interpretation of a treaty, (b) any question of international law ..." (Statute, Art. 36, para. 2). The United States declaration of acceptance of the Court's jurisdiction excluded disputes arising under multilateral treaties subject to exceptions which do not qualify my reasoning and, in any event, have not materialized in the present case.

11. The persistent use of the term "reservation" to describe the exception clauses attached by States to their declarations under Article 36, paragraph 2, of the Statute, and more especially the attachment of the term "Vandenberg Reservation" to the exception in the United States declaration relating to disputes that arise under a multilateral treaty, have surely contributed to a misconception of the inherent scope of such declarations, and of that one in particular. Because of the idealism underlying the notion of a sovereign State submitting to be judged, the so-called "acceptance of the Optional Clause" has always been imagined in terms of the ideal case, where that submission is total and "unreserved". Nevertheless, the very structure of Article 36, paragraph 2, should make it clear that, in framing a declaration, a State, guided by the categories there

suggested (the historical origins of which I shall explain in paras. 27-40), has simply to delineate the bounds of the area of legal disputes over which, subject to reciprocity, it is prepared to accept the Court's jurisdiction independently of treaty clauses or special agreements. If it is under no obligation to make any declaration at all, still less is it obliged to take the ideal case as its standard.

12. Hence the fact that exception clauses may frequently be useful as a means of delineation does not justify any presumption that a State employing them has retracted various parts of an a priori wholesale acceptance of the Court's jurisdiction; on the contrary, the instrument remains a positive indication that the State has unreservedly accepted that jurisdiction within a certain area which those exceptions have merely helped to define. Outside that area, there is simply no acceptance, not even an acceptance subject to a "reservation", and to reason as if there were is to yield to a kind of optical illusion.

13. In the present case, it seems that thinking about a certain exception in terms of a "reservation" has helped the Court to imagine that if multilateral treaties were ignored as a source of positive law, the "reservation" would lose its potency, so that the exception could be circumvented. I have explained above why I find this erroneous. The reference to multilateral treaties is merely a means of drawing the boundaries of jurisdiction so as to exclude certain disputes: there is no justification for supposing that a dispute "arising under" a multilateral treaty can nevertheless be brought under the Court's authority because (inevitably) it can also be analysed in terms of general international law. Having decided that the present dispute did "arise under" such a treaty or treaties, the Court should have concluded that only in the circumstances described by the exception itself, namely, the presence of all parties affected or specific waiver, could the boundary of acceptance of jurisdiction be widened to admit the dispute under Article 36, paragraph 2.

14. Thus, if the so-called Vandenberg Reservation is applicable in this case, and the United States acceptance of the Court's compulsory jurisdiction consequently does not extend to disputes arising under the Charter of the United Nations and the Charter of the Organization of American States, and if the Judgment yet declares that the Court can entertain the present case as admissible under Article 36, paragraph 2, as stated:

> "The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes 'arising under' the United Nations and OAS Charters" (para. 182),

the Court should have proved, not that it can apply customary and general international law independently, but that the dispute referred to it in the Applicant's claims had not arisen under these multilateral treaties. The Judgment, however, fails to do this. I must repeat my belief that, in so far as the Judgment holds the Vandenberg Reservation to be applicable, in my view, correctly, the Court should not, and indeed could not, on the basis of Article 36, paragraph 2, of the Statute, have entertained the whole dispute involving "military and paramilitary activities in and against Nicaragua" which the United States has allegedly pursued.

II. THE NON-JUSTICIABILITY OF THE PRESENT CASE - NICARAGUA'S APPLICATION BASED ON ARTICLE 36, PARAGRAPH 2, OF THE STATUTE SHOULD BE DECLARED INADMISSIBLE

A. Introduction

15. While the test of jurisdiction is whether the dispute referred for judgment lies within the scope and range of the specific competence granted to the court in question by a basic instrument, so that the possession of jurisdiction has to be assessed as a matter of priority and in terms of that instrument, the question of the admissibility of a claim calls for application of fundamental norms of the judiciary as to whether the judicial function should or should not extend to cover the issues in contention. Inasmuch as the answering of this question presupposes an adequate characterization of those issues, admissibility is not necessarily a preliminary matter, in the sense of one that can be resolved before their merits are examined. In a more important sense, however, it is always preliminary, in that no finding may be made on the merits if it remains unresolved. The Judgment states:

> "especially when the character of the objections is not exclusively preliminary because [the objections] contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (para. 41).

16. The Court, in its 1984 Judgment, rejected some grounds adduced by the United States for the inadmissibility of the dispute (I.C.J. Reports 1984, pp. 429-441). It appears to me, however, that the 1984 Judgment did not dispose of the still essential question of whether the present case is justiciable or not. Dealing with the justiciability, the Court observes that the United States did not argue that this is not a "legal dispute", and states:

> "the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine" (para. 35).

17. I believe that the Nicaraguan Application should be declared non-justiciable, since in my view the dispute at issue is one which does not fall into the category of "legal" disputes within the meaning and intention of Article 36, paragraph 2, of the Statute. It may be argued (and the present Judgment deliberately attempts to do so, see para. 32) that the interpretation of the competence of the Court as conferred in accordance with that provision has been settled by a determination of jurisdiction. However, the question as to whether this dispute should be considered as justiciable in terms of the concept of "legal disputes" within the meaning of the Statute is related to the merits of the dispute. Accordingly, it deserves and requires reconsideration at the present stage (see Section B below).

18. Furthermore, even if my contention were not well founded, it would in my view have been prudent for the Court, in the light of the merits of the present case, to find it a matter of judicial propriety not to proceed with a case so highly charged with issues central to the sensitive political relations of many States: a circumstance that undoubtedly accounts for much of the vigour with which the Respondent has first challenged, then been seen to defy, the Court's jurisdiction (see Section C below).

19. These are the positions which I have taken throughout the Court's considerations of the present case, and I regret that the Judgment has not taken them into account.

B. Limited Scope of "Legal Disputes" in Article 36, paragraph 2, of the Statute

1. The justiciability and concept of legal disputes - historical survey

20. Referring to the concept of "legal disputes" in connection with the function of the International Court of Justice, the following two provisions may be recalled:

The Charter of the United Nations, Article 36, paragraph 3

> "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

The Statute of the International Court of Justice, Article 36, Paragraph 2

> "The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

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

Looking back at the history of the settlement of international disputes by arbitration or adjudication, one may clearly see that the "legal disputes" subject to such settlement were limited in scope and, more basically, that their referral to such a settlement was always to depend ultimately on the assent of the States in dispute.

(i) The concept of "legal disputes subject to compulsory arbitration" prior to the institution of the Permanent Court of International Justice

(a) The 1899 and 1907 Conventions for the Peaceful Settlement of International Disputes

21. Following the precedents set by some arbitration clauses in bilateral treaties towards the end of the nineteenth century, and by some arbitration treaties, mainly among countries of the western hemisphere, the 1899 Convention for the Peaceful Settlement of International Disputes provided that:

> "In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle." (Art. 16) (The Proceedings of the Hague Peace Conferences (Translation of the Official Texts), The Conference of 1899, p. 238.)

Referral to arbitration was far from obligatory.

22. The 1899 Convention was amended in this regard at the Second Peace Conference in 1907 only by the addition of a new paragraph, which suggested that:

> "Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit." (Art. 38) (The Proceedings of the Hague Peace Conferences (Translation of Official Texts), The Conference of 1907, Vol. I, p. 605.)

The Second Peace Conference, held in 1907, failed to establish compulsory arbitration. A project to institute it was put to the vote by the First Commission but in the end was not found acceptable. The unsuccessful draft, which would have been added to Article 16 of the 1899 Convention, sought to provide that:

"Differences of a legal nature, and especially those relating to the interpretation of treaties existing between two or more of the contracting States, which may in future arise between them, and which it may not have been possible to settle by diplomacy, shall be submitted to arbitration, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute." (Art. 16a) (The Proceedings of the Hague Peace Conferences (Translation of Official Texts), The Conference of 1907, Vol. I, p. 537.)

23. That project suggested, however, that some differences should be "by nature subject to arbitration without the reservations mentioned in Article 16a" (Art. 16c, ibid.), and enumerated as such the following differences:

"I. Disputes concerning the interpretation and application of conventional stipulations relating to the following subjects:

1. Reciprocal free aid to the indigent sick.
2. International protection of workmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of ships.
6. Wages and estates of deceased seamen.
7. Protection of literary and artistic works.

II. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties." (Art. 16d, ibid.)

A suggestion was also made for a protocol enumerating "such other matters ... to admit of embodiment in a stipulation respecting arbitration without reserve ... on condition of reciprocity" (Art. 16e, ibid.). The British delegate accordingly proposed a protocol, with an annexed table listing the following subjects:

"1. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties.
2. Reciprocal free aid to the indigent sick.
3. International protection of workmen.
4. Means of preventing collisions at sea.
5. Weights and measures.
6. Measurement of vessels.
7. Wages and estates of deceased seamen.
8. Protection of literary and artistic works.
9. Governance of commercial and industrial companies.
10. Pecuniary claims arising from acts of war, civil war, arrest of foreigners, or seizure of their property.
11. Sanitary regulations.
12. Equality of foreigners and nationals as to taxes and imposts.
13. Customs tariffs.
14. Regulations concerning epizooty, phylloxera, and other similar pestilences.
15. Monetary systems.

16. Rights of foreigners to acquire and hold property.
17. Civil and commercial procedure.
18. Pecuniary claims involving the interpretation or application of conventions of all kinds between the parties in dispute.
19. Repatriation conventions.
20. Postal, telegraph, and telephone conventions.
21. Taxes against vessels, dock charges, lighthouse and pilot dues, salvage charges and taxes imposed in case of damage or shipwreck.
22. Private international law." ((Art. 16e) (The Proceedings of the Hague Peace Conferences (Translation of Official Texts), The Conference of 1907, Vol. I, p. 539.)

Thus we see that, despite the aim of compulsory referral to arbitration, the project, on the one hand, embodied a reservation that the disputes concerned

> "do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute"

and, on the other hand, enumerated a limited number of extremely technical and preponderantly non-political subjects of dispute as constituting those which the parties would unreservedly agree to submit to arbitration.

24. The project itself was not put to the vote at the plenary meeting and I do not need to repeat that the result of the 1907 Conference was far from successful, at least from the point of view of obligatory arbitration. It is, however, important to note that even in that project only a narrowed selection of the "differences of a legal nature, and especially those relating to the interpretation of treaties" - a selection restricted to predominantly technical matters - was suggested as falling within the ambit of compulsory arbitration. Hence it is clear that even the more idealistic drafters were inclined to consider that the "justiciable dispute" should be so restricted as to cover only some highly technical or procedural issues.

(b) Justiciable disputes in arbitration treaties early in this century

25. Four years after the 1899 Convention, but before the 1907 Second Peace Conference, the bilateral treaty of 1903 between France and Great Britain attracted the interest of the world as the first European step towards the compulsory referral of international disputes to settlement by arbitration, and this was followed by eight similar treaties concluded prior to 1907, to which in the main either Great Britain or France was a party. The number of similar bilateral treaties of arbitration concluded from 1907 to the 1920s amounts to 29. Unlike the multilateral treaty of 1899, this bilateral model set up a binding norm for the two contracting parties with regard to compulsory referral of some types of dispute to the Permanent Court of Arbitration. The 1903 treaty states that "differences which may arise

of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties", should be referred to the Permanent Court of Arbitration (Art. I). The conditions for compulsory referral were restricted by the proviso in each treaty that:

> "[the disputes] do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties" (Art. I) (British and Foreign State Papers, Vol. XCVI, p. 35).

This famous clause of four reservations concerning vital interests, independence, honour and third party interests to be attached to compulsory arbitration, which, as stated above, was also later incorporated in the 1907 project at the Hague Conference, commenced with the 1903 Treaty. It is to be further noted that in each individual case the conclusion of a special agreement was a prerequisite for

> "defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure" (Art. II).

26. In 1911 the United States Government concluded with Great Britain and France respectively the General Arbitration Treaties, which provided that:

> "All differences hereafter arising between the high contracting parties ... relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration ... or to some other arbitral tribunal as may be decided in each case by special agreement ..." (Art. 1) (American Journal of International Law, Supplement, Vol. V, pp. 253, 249.)

These treaties provided that, in cases where the parties disagreed as to whether a difference was subject to arbitration under the treaty concerned, the question should be submitted to a joint high commission of inquiry, and that, if all, or all but one, of the members of that commission decided the question in the affirmative, the case should be settled by arbitration (Art. 3). These treaties would have been highly progressive from the standpoint of the compulsory settlement of disputes, but they failed to secure the approval of the United States Senate, in particular because of the extremely novel concept of the determination of the jurisdiction of the tribunal by a third body. Yet one more attempt to institute compulsory arbitration had thus failed.

(ii) Justiciable and non-justiciable disputes under the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice

(a) The Covenant of the League of Nations

27. Plans for the post-war institution were being prepared from 1918 onwards. The peaceful settlement of international disputes was one of the main issues, and it was always considered that, while some disputes might be suitable for settlement by arbitration, others might be more properly dealt with by that worldwide institution or through conciliation by an organ to be set up by that institution. One of the earliest plans, proposed by Lord Phillimore in 1918, identified, in particular, four types of dispute suitable for settlement by arbitration, i.e., disputes concerning "the interpretation of a treaty", "any question of international law", "the existence of any fact which if established would constitute a breach of any international obligation" or "the nature and extent of the reparation to be made for any such breach", and suggested the provision reading that "arbitration is recognized by the Allied States as the most effective and at the same time the most equitable means of settling the dispute" (David Hunter Miller, The Drafting of the Covenant, Vol. II, p. 4). General Smuts, British delegate at the Paris Peace Conference, referring to "the two classes of justiciable and other disputes", also mentioned these four types of dispute (ibid., p. 56). Reference to the four types was maintained throughout several plans for the future institution of the worldwide organization.

28. The Commission on the League of Nations, set up by the preliminary conference to study the constitution of the League of Nations, commenced its work on 3 February 1919. The draft covenant, including some provisions concerning dispute settlement (Arts. 10-13) was presented. The basic idea was that the high contracting parties should "in no case resort to armed force without previously submitting the questions and matters involved, either to arbitration or to enquiry by the Executive Council" (Art. 10), and a provision was proposed:

> "Article 11. The High Contracting Parties agree that whenever any dispute or difficulty shall arise between them which they recognise to be suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration ..." (Ibid., p. 234.)

The idea of establishing a Permanent Court of International Justice was also suggested in this draft covenant (Art. 12).

29. At the second reading of the text, on 24 March 1919, Lord Robert Cecil, intending "to draw a distinction between justiciable and non-justiciable disputes" (David Hunter Miller, The Drafting of the Covenant, Vol. II, p. 348), suggested an alternative sentence which in fact had previously been proposed by Lord Phillimore more than a year earlier. Lord Robert Cecil's suggestion read:

> "If a dispute should arise between the States members of the League as to the interpretation of a Treaty, as to any question of any international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, if such dispute cannot be satisfactorily settled by diplomacy, the States members of the League recognise arbitration to be the most effective and at the same time the most equitable means of settling the dispute; and they agree to submit to arbitration any dispute which they recognise to be of this nature." (Ibid., p. 352.)

On 10 April, examining the draft covenant as amended by the Drafting Committee, Lord Robert Cecil again stated that

> "it was difficult to lay down a strict rule. For example, one could not say that the question of the interpretation of a Treaty should be submitted to arbitration in every instance. It might happen that such an interpretation would involve the honour or the essential interests of a country. In such a case the question should rather be submitted to examination by the Council of the League. It would be dangerous for the future of the principle of arbitration to impose it too strictly in a great number of cases." (ibid., p. 378.)

The final version of the draft covenant was adopted at the last meeting of the Commission on 11 April 1919.

30. The Covenant of the League of Nations contained, with regard to the arbitration or judicial settlement of international disputes, the following provisions[1]:

"Article 12

> 1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration* or to inquiry by the Council ...

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[1]The words "or judicial settlement" were inserted after the asterisks in 1924 following the establishment of the Permanent Court of International Justice anticipated and referred to in Article 14.

Article 13

1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration* and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration*.

2. Disputes as to the interpretation of a treaty, as to any questions of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration*."

On 28 April, at the Peace Conference, President Wilson of the United States explained that:

"The second paragraph of Article XIII is new, inasmuch as it undertakes to give instances of disputes which are generally suitable for submission to arbitration, instances of what have latterly been called 'justiciable' questions." ((David Hunter Miller, The Drafting of the Covenant, Vol. II, p. 700.)

Thus the League of Nations came to declare that the four types of dispute which Lord Philimore had originally suggested were generally suitable for submission to arbitration.

(b) The Statute of the Permanent Court of International Justice

31. Meeting at The Hague, the Committee of Jurists set up pursuant to the first (unquoted) sentence of Article 14 prepared a draft scheme for the institution of the Permanent Court of International Justice which, borrowing the concept of the four types of dispute, provided for the jurisdiction of the Court as follows:

"Article 34

Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, concerning:

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

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court." (P.C.I.J., Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 679.) (Emphasis added.)

32. The view advanced by the Committee of Jurists encountered objections from several delegates at the Council of the League of Nations, which dealt with the draft scheme in the course of its sessions from February to October 1920. They argued that, even if States admitted compulsory jurisdiction in the cases laid down in the suggested article, they might not go so far as to admit that any question of international law without exception could be submitted to the Court. The report presented by the French representative, Léon Bourgeois, on 27 October 1920 at the 10th Session of the Council in Brussels, read in part:

"We do not think it necessary to discuss here the advantages which would result from the system of compulsory jurisdiction proposed by the Committee of Jurists with regard to the good administration of international justice and the development of the Court's authority. But as in reality a modification in Articles 12 and 13 of the Covenant is here involved, the Council will, no doubt, consider that it is not its duty, at the moment when the General Assembly of the League of Nations is about to meet for the first time, to take the initiative with regard to proposed alterations in the Covenant, whose observance and safe keeping have been entrusted to it.

...

At the present moment it is most important in the interests of the authority of the League of Nations that differences of opinion should not arise at the very outset with regard to the essential rules laid down in the Covenant ..." (League of Nations, P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 47.)

Léon Bourgeois suggested that in The Hague draft scheme the Council replace Articles 33 and 34 by a new text, which was eventually adopted by the Council, as follows:

"Article 33

The jurisdiction of the Court is defined by Articles 12, 13 and 14 of the Covenant.

Article 34

Without prejudice to the right of the Parties, according to Article 12 of the Covenant, to submit disputes between them either to judicial settlement or arbitration or to enquiry by the Council, the Court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by Treaties in force entrusted to it or to the tribunal instituted by the League of Nations." (League of Nations, P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 47.)

33. While the Assembly was meeting from 24 November to 7 December 1920 a subcommittee of its Third Committee made a detailed study of the draft scheme of the Court and suggested:

"Whatever differences of opinion there may be on the interpretation of the Covenant with regard to the acceptance of a compulsory jurisdiction within the scope of its provisions, and upon the political expediency of adopting an unconditionally compulsory jurisdiction in international relations, the Sub-Committee was unable to go beyond the consideration that unanimity on the part of the Members of the League of Nations is necessary for the establishment of the Court, and that it does not seem possible to arrive at unanimity except on the basis of the principles laid down in the Council's draft." (Ibid., p. 210.)

The subcommittee devised in fact a modified text intended to formulate as clearly as possible the following ideas:

"1. The jurisdiction of the Court is in principle based upon an agreement between the Parties. This agreement may be in the form of a special Convention submitting a given case to the Court, or of a Treaty or general Convention embracing a group of matters of a certain nature.

2. With regard to the right of unilateral arraignment contemplated in the words ('and this without any special agreement giving it jurisdiction') in the Council's draft, the Sub-Committee, by deleting these words, has not changed the meaning of the draft. In conformity with the Council's proposal, the text prepared by the Sub-Committee admits this right only when it is based on an agreement between the Parties. In the Sub-Committee's opinion, the question must be settled in the following manner: If a Convention establishes, without any reservation, obligatory jurisdiction for certain cases or for certain questions (as is done in certain general arbitration treaties and in certain clauses of the Treaties of Peace dealing with the rights of minorities, labour, etc.) each of the Parties has, by virtue of such a treaty, the right to have recourse without special agreement (compromis) to the tribunal agreed

upon. On the other hand, if the general Convention is subject to certain reservations ('vital interests', 'independence', 'honour', etc.), the question whether any of these are involved in the terms of the Treaty, being for the Parties themselves to decide, the Parties cannot have recourse to the International Tribunal without a preliminary agreement (compromis) ..." (League of Nations, P.C.I.J., Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 211.)

The draft scheme prepared by the Council was amended by the subcommittee as follows:

"Article 36 (Brussels Art. 33)

The jurisdiction of the Court comprises all cases which the Parties refer to it and all matters specially provided for in treaties and conventions in force.

Article 37 (Brussels Art. 34)

When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."
(Ibid., p. 218.)

34. In the course of the deliberations of the Third Committee of the First Assembly, however, Mr. Fernandes, the Brazilian delegate, introduced the text adopted by the Committee of Jurists but abandoned by the Council (quoted in para. 31 above), which was accompanied by a temporary provision reading:

"Article .

In ratifying the Assembly's decision adopting this Statute, the Members of the League of Nations are free to adhere to either of the two texts of Article 33. They may adhere unconditionally or conditionally to the Article providing for compulsory jurisdiction, a possible condition being reciprocity on the part of a certain number of Members, or of certain Members, or, again, of a number of Members including such and such specified Members."
(Ibid., p. 168.)

This proposal was adopted with some amendments. The Third Committee reported in connection with Article 36 that a new provision had been added which:

"gives power to choose compulsory jurisdiction either in all the questions enumerated in the Article or only in certain of these questions. Further, it makes it possible to specify the States (or Members of the League of Nations) in relation to which each Government is willing to agree to a more extended jurisdiction." (ibid., p. 222.)

35. The text as amended by the Third Committee at its last session, on 10 December 1920, was finally adopted, with further slight changes, as Article 36 of the Statute of the Permanent Court of International Justice. Thus the Statute read, in part:

"Article 36

... The Members of the League of Nations ... may ... declare that they recognize as compulsory ipso facto and without special agreement ... the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

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

While the Covenant of the League of Nations declared, in general terms, that "disputes" as enumerated "are generally suitable for submission to arbitration", the Statute of the Permanent Court of International Justice provided for optional acceptance of the Court's jurisdiction for "legal disputes concerning" the four categories specified in the Covenant.

(iii) The concept of justiciable disputes subsequent to the inception of the Permanent Court of International Justice

36. In the post-war period, particularly during a decade beginning with the mid-1920s, a great number of bilateral treaties were concluded to unify the procedure of conciliation with the submission of various kinds of international dispute to arbitration or to the newly established Permanent Court of International Justice. In October 1925, at Locarno, Italy, where a treaty of mutual guarantee aimed at maintaining the territorial status quo resulting from the adjustment of the western frontiers of Germany was initialled, Germany negotiated arbitration treaties with Belgium, Czechoslovakia, France and Poland, respectively, in which it was stated that:

"All disputes of every kind between Germany and [the parties] with regard to which the Parties are in conflict as to their respective rights ... shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice ... " (Art. I) (League of Nations Treaty Series, Vol. 54, p. 304.)

The disputes were to "include in particular those mentioned in Article 13 of the Covenant of the League of Nations" (Art. 1) and be submitted - but only by means of a special agreement - either to the Permanent Court of International Justice or to an arbitral tribunal (Art. 16).

37. Originating with the Committee on Arbitration and Security which the Preparatory Committee of the Disarmament Conference established in November 1927, the General Act for Pacific Settlement of International Disputes was approved by the Ninth Assembly of the League of Nations in 1928 as a compendium of the results produced by a number of bilateral arbitrations or conciliation treaties. As to judicial recourse, it was agreed that "All disputes with regard to which the parties are in conflict as to their respective rights" should be submitted for decision to the Permanent Court of International Justice. It was understood, however, that these disputes would "include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice" (Art. 17) (League of Nations Treaty Series, Vol. 93, p. 351).

38. The arbitration treaties concluded by the United States in the years 1928-1930 with as many as 25 countries provided for the submission to the Permanent Court of Arbitration or to some other competent tribunal of:

> "all differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise ... which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" (Art. I) (The American Journal of International Law, Supplement, Vol. 23, p. 197).

A special agreement for the submission was first to be made by the parties in each case. In 1929 the United States concluded at Washington with 19 Latin American States the General Treaty of Inter-American Arbitration, which belonged to the same type in providing for the obligation of the contracting parties to submit to arbitration:

> "all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise ... which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law" (Art. I) (League of Nations Treaty Series, Vol. 130, p. 140).

The Treaty also provided that the "questions of juridical character" (Art. 1) would include four types of dispute specified in Article 13, paragraph 2, of the Covenant of the League of Nations. The formulation of a special agreement, to be concluded in each case, was to define the particular subject-matter of the controversy (Art. 4).

(iv) Legal disputes found suitable for settlement by the International Court of Justice

39. The United Nations set up the International Court of Justice as "the principal judicial organ of the United Nations" to "function in accordance with the annexed Statute" (Charter, Art. 92), but the principal responsibility for the maintenance of international peace and security is entrusted to the Security Council, which should as a final resort handle a dispute the continuation of which is likely to endanger the maintenance of international peace and security, while taking cognizance of the consideration that "legal disputes" should as a general rule be referred by the parties to the International Court of Justice (Charter, Art. 36, para. 3).

40. The 1945 Statute of the present Court, the relevant provision of which is quoted above (para. 20), follows the pattern of the previous Court except that declarations may be made accepting the jurisdiction of the Court "in all legal disputes concerning ..." (Art. 36, para. 2), not "in all or any of the classes of legal disputes concerning ...", and that the Optional Clause attached to the protocol of signature of the previous Statute was incorporated in the new Statute (Art. 36, paras. 3 and 4). All that the dropping of the reference to "classes" of legal dispute indicates is a realization of the redundancy of this vague expression, while the relocation of the Optional Clause is but a corollary of the permanent integration of the Court and its Statute into the system of the Charter. Consequently, any suggestion that the present Court possesses a wider jurisdiction than its predecessor ratione materiae must depend on an assumed evolution in the meaning of the term "legal disputes".

2. The difficulty of viewing the present case as concerning a "legal dispute" within the meaning of the Statute

(i) In general

41. The above survey of the developments behind the provision of Article 36, paragraph 2, of the Statute of the International Court of Justice leads me to the following observations.

42. First, the term "legal disputes" was defined in some instruments as referring to those disputes which arise

> "by virtue of a claim of right made by one against the other under treaty or otherwise [and] which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law" (e.g., the 1911 General Arbitration Treaties)

or in other cases as those "with regard to which the Parties are in conflict as to their respective rights" (e.g., the 1925 Locarno Treaties; the 1928 General Act). These definitions should not be overlooked or made light of in interpreting the term "legal disputes" as used in the Statute.

43. Secondly, the well-known reservations in the 1903 Anglo-French Treaty concerning vital interests, independence, honour and third-party interests in connection with referral to arbitration disappeared with the League of Nations. However, this was only because disputes involving such considerations were thenceforth to be submitted for examination by the Council, the League's pre-eminently political organ. In the United Nations system, it is likewise the Security Council which is entrusted with the ultimate function for the peaceful settlement of any dispute the continuance of which is likely to endanger the maintenance of international peace and security.

44. Thirdly, it should be recalled that, while the draft prepared by the Hague Committee of Jurists was being discussed at the Brussels Council, the suggestion of the compulsory referral of disputes over any point of international law met with opposition, as reflected in Léon Bourgeois's report, part of which read:

> "If this view advanced by the Jurisconsults at The Hague is adopted without modification, a considerable advance has certainly been made, in view of the terms of Article 34. What must be understood, then, by the expression 'any point of international law?' Even if the States admitted the compulsory jurisdiction in the cases definitely laid down in the Article, will they consent to go so far as to admit that any question of international law may be submitted to the Court? Objections of this nature have been raised by several Governments, which have forwarded us their remarks on the draft scheme."
> (Pp. 46-47.)

45. Fourthly, it is important to note that at the First Assembly of the League of Nations the proposal for the compulsory referral of "legal disputes" to arbitration was declared acceptable subject to its voluntary acceptance by each State, as witness the eventual Article 36 of the Statute. It follows that, despite the provision of the Statute that determination of the Court's jurisdiction should in case of doubt be in the hands of the Court (Art. 36 (6)), it is to be assumed that when voluntarily accepting compulsory jurisdiction a State (the United States in this case) will not only have had in mind its own concept of what should constitute a justiciable "legal dispute" under Article 36, paragraph 2, of the Statute but may legitimately entertain expectations that that concept will if necessary be elicited and respected by the Court.

(ii) Precedents in the previous and present Courts

46. Previous opportunities for testing this assumption have been almost non-existent, as may be demonstrated by a survey of the past practice regarding the submission of a case under the Optional Clause of the Statutes of the previous and present Courts. Of more than 20 contentious cases during the period of the Permanent Court of International Justice, the cases which were brought to the previous

Court relying on Article 36, paragraph 2, numbered only seven, among which three cases - Denunciation of the Treaty of 2 November 1865 between China and Belgium, Losinger and Legal Status of the South-Eastern Territory of Greenland - were eventually withdrawn, and the Electricity Company of Sofia and Bulgaria case was not concluded because of the Second World War. Legal Status of Eastern Greenland, Phosphates in Morocco and Panevezys-Saldutiskis Railway were the only such cases to have remained before the previous Court, and in the first of these Denmark, the respondent Party, raised no objection to the Court's jurisdiction. The objections raised in the other two were merely procedural in character; the previous Court, recognizing the objection of the Respondents, declared the applications in both cases inadmissible. There was no single case before the previous Court in which judgment on the merits was given against a challenge by a Respondent to the Court's jurisdiction under the Optional Clause of the Statute.

47. Of the ten cases brought before the present Court under Article 36, paragraph 2, prior to the present case, there were three in which objections regarding jurisdiction and admissibility were not raised by the Respondent: Fisheries, Rights of Nationals of the United States of America in Morocco and Application of the Convention of 1902 Governing the Guardianship of Infants. In the remaining seven cases: Anglo-Iranian Oil Co., Nottebohm, Certain Norwegian Loans, Right of Passage over Indian Territory, Interhandel, Aerial Incident of 27 July 1955 and Temple of Preah Vihear, the jurisdiction of the Court was disputed only for reasons of a procedural nature. The Court, after having rejected the preliminary objections raised by the Respondents, has proceeded on the merits only in the following three cases: Nottebohm, Right of Passage over Indian Territory and Temple of Preah Vihear. In these cases, the objections raised by the Respondents were of a procedural nature not related to the substantive justiciability of the dispute. Prior to the present case, therefore, there has never been an Article 36, paragraph 2, case before either the previous or the present Court where justiciability was doubtful because of the substantive nature of the dispute.

(iii) Conclusion

48. In consequence, the fact that the Court or its predecessor entertained a handful of previous cases submitted on the basis of Article 36, paragraph 2, of the Statute affords absolutely no ground for concluding that voluntary acceptance of the obligation for submission of legal disputes to the Court's jurisdiction under that Article equates with the submission of all disputes however politically charged they may be. The United States, though having voluntarily accepted the Optional Clause, appears to be of the view that the present dispute does not fall within the meaning of what is a "legal dispute" under Article 36, paragraph 2. Even if it did not explicitly contend this during the proceedings on jurisdiction, which were largely devoted to the jurisdictional position of the Applicant, its reliance on the "ongoing armed conflict" argument furnished a

clear indication that the Respondent viewed the dispute as "not susceptible of decision by the application of the principles of law" - or, in other words, that the sense of "legal dispute" had not evolved so far as to embrace the subject-matter of the application. Whether this view is right or wrong is beside the point in considering a voluntary acceptance of jurisdiction.

49. In sum, the Court should note that the meaning of "legal disputes" is not to be taken separately from the fact that the Court's jurisdiction over "legal disputes" can only be accepted voluntarily. The Court is at present not in a position, as it was in the Aegean Sea Continental Shelf case, to apply an extended concept of the law, one not contemplated at the time of the filing of the declaration, because by doing so it would risk imposing its jurisdiction in contravention of the voluntary character of that instrument, whereas in the case referred to it did so in order to be quite sure of respecting that character in the case of the Respondent's declaration.

C. Considerations of Judicial Propriety that Should have Dissuaded the Court from Pronouncing on the Nicaraguan Application on the Basis of Article 36, paragraph 2, of the Statute

1. The Court should not have adjudged the Application because of the considerations of administration of justice - a preliminary issue

50. Even if the foregoing argument (Section B above) is not considered well founded, and if the present dispute is regarded as a "legal dispute" under Article 36, paragraph 2, of the Statute from the procedural point of view, I still believe that "judicial propriety" provides another prudential ground for concluding that the Nicaraguan Application as based on that provision should be declared by the Court as non-justiciable and hence as inadmissible.

51. I do not deny that once a judicial institution is duly seised of a dispute which is not primarily legal, that dispute may be held justiciable, as a matter of principle. In many systems of domestic law, non liquet is generally rejected, even if a directly applicable rule of law is lacking, and a judicial court, in relying on the exclusion of non liquet, is in theory able to pass judgment. The French Civil Code of 1804 states:

> "Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." (Art. 4.) (Code civil des Français, édition originale et seule officielle, 1804, p. 2.)

Speaking of English law, Sir Frederick Pollock in his note on Maine's Ancient Law stated:

"[English judges] are bound to find a decision for every case, however novel it may be; and that decision, so far as it goes beyond drawing inferences of fact, will be authority for other like cases in future; therefore it is part of their duty to lay down new rules if required. Perhaps this is really the first and greatest rule of our customary law." (Maine, Ancient Law, with introduction and notes by Sir Frederick Pollock, 1906, p. 48.)

52. In the case of international law, the Statute of the Permanent Court of International Justice introduced the clause "the general principles of law recognized by civilized nations" mainly to avoid a non liquet resulting from the lack of any positive rules. The Model Rules on Arbitral Procedure prepared by the International Law Commission in 1958 state that "the tribunal may not bring in a finding of non liquet on the ground of the silence or obscurity of the law to be applied" (Art. 11) (Yearbook of the International Law Commission, 1958, Vol. II, p. 84). Here it is important to note that the exclusion of non liquet is connected with the absence of an alternative forum.

53. It is definitely not my intention to have the Court declare, as a matter of principle, that disputes relating to use of force or intervention are non-justiciable, nor to contend that the Court is incapable of dealing with the present dispute once it is properly entertained. Yet my opinion is that the fact that the Court can entertain a case once it is properly seised is a different matter from the suggestion that the Court must exercise jurisdiction. Let me quote a well-known passage from the 1963 Judgment in the case concerning the Northern Cameroons:

"In its Judgment of 18 November 1953 on the Preliminary Objection in the Nottebohm case ... the Court had occasion to deal at some length with the nature of seisin and the consequences of seising the Court. As this Court said in that Judgment: 'the seising of the Court is one thing, the administration of justice is another'. It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (I.C.J. Reports 1963, p. 29.)

54. It must be added that the Court should not allow any sentiment that States ought to accept its jurisdiction to affect its perception of the voluntary nature of such acceptance or its caution not to overstep the limits of individual acts of acceptance. Thus, for example, the phenomenon of the so-called self-judging reservation

may be objectively dubious and deplorable, but it must nonetheless be respected as a symptom of the importance attached by the declarant State to the voluntary character of its submission to the Court. It therefore behoves the Court to exercise that caution with special care in dealing with States that have made such reservations - and the United States is notoriously one. In pointing this out, however, I must not be understood as suggesting that the subject-matter of the present case belongs in any way to the exclusive domestic jurisdiction of that country; clearly it does not, and the United States has not maintained that it does.

2. The concept of the non-justiciable "political dispute" - parallelism of legal and political disputes

55. As stated above (section B, 1), it has throughout this century been considered that any dispute which a State was prepared voluntarily to submit to judicial settlement should be one where the parties are in conflict as to their respective rights, or where differences arise by virtue of a claim of right made by one against the other; and disputes such as the present one, at least where it concerns allegations of threat or use of force and intervention, have not been deemed to fall into this category. The distinction between "legal" and "non-legal" (or political) is certainly vague inasmuch as, on the one hand, a legal dispute may eventually give rise to political friction and tension and, on the other, any political dispute is almost bound to contain certain aspects of a legal nature; yet in the 60-year history of the past and present Courts, issues regarding matters of an overwhelmingly political nature have never been dealt with by way of adjudication before the Court on the basis of Article 36, paragraph 2, of the Statute.

56. The drafters of the Covenant of the League of Nations were well aware that those disputes which could have been excluded from the Court's jurisdiction in terms of the well-known four reservations of the 1903 Treaty could more properly be disposed of in the international political field, not by a neutral third party, but by a highly political organ such as the Council, as rightly pointed out by Lord Robert Cecil at the drafting of the Covenant of the League of Nations, when he stated that:

> "One could not say that the question of the interpretation of a Treaty should be submitted to arbitration in every instance. It might happen that such an interpretation would involve the honour or the essential interests of a country. In such a case the question should rather be submitted to examination by the Council of the League." (David Hunter Miller, The Drafting of the Covenant, Vol. II, p. 378.)

The League of Nations accordingly initiated a means of having its supreme political organ, that is, the Council, offer a conciliation procedure for the fundamental frictions and tensions existing among nations, apart from some differences of view over certain specific

items covered by the terms "disputes as to the interpretation of a treaty, as to any question of international law, [etc.]" (Covenant of the League of Nations, Art. 13, para. 2).

57. There can be no doubt that this parallelism was essentially maintained by the United Nations. While Article 36 of the United Nations Charter states that "legal disputes should as a general rule be referred by the parties to the International Court of Justice", this certainly should not be interpreted as implying that the term "legal disputes" covers disputes which are non-justiciable because of their overwhelmingly political nature. In other words, it is normal to assume that the term "legal disputes" refers to disputes whose primary characteristic it is to be "legal". Otherwise - since practically every dispute has a "legal" aspect as at least a secondary characteristic - there would have been no reason to include the word "legal" in the provision. Furthermore, the qualifying phrase "as a general rule" serves to stress the necessity of not jumping to the conclusion that the presence of a legal element in a dispute attracts the application of the provision. For it is well known that the phrase in question, just like "in principle", functions as a pointer to the possibility of exceptions and borderline cases. Moreover, it may be observed that, in practice, the parties to international legal disputes do not, as a general rule, refer them to the Court, while, for its part, the Security Council has almost invariably failed to make recommendations for such referral; this may be deplored, but should not be ignored as an indication of the relative cogency of the rule.

58. Under the United Nations system, where the maintenance of international peace and security falls within the functions of the Security Council, resort to force as a means of self-defence is permissible only until such time as the Security Council has taken the necessary measures, and any measures taken by the member State in the exercise of its right of self-defence must be reported immediately to the Security Council. This would mean, in my view, that a dispute in which use of force is resorted to is in essence and in limine one most suitable for settlement by a political organ such as the Security Council, but is not necessarily a justiciable dispute such as falls within the proper functions of the judicial organ.

59. I certainly am not suggesting any principle that, once a dispute has been brought before the Security Council, or considered through regional negotiations, it cannot or should not be dealt with by the Court. The 1984 Judgment was quite correct in stating that "the fact that the matter is before the Security Council should not prevent it being dealt with by the Court and both proceedings could be pursued pari passu" (I.C.J. Reports 1984, p. 433). Yet the international community, or the States Members of the League of Nations or the United Nations, have always been aware that certain disputes are more properly resolved by a means other than judicial settlement, that is, by the Council in the case of the League of

Nations and the Security Council or the General Assembly in the case of the United Nations, or by some other means. The parallel scheme pursued under the League of Nations and the United Nations is surely confirmed by a scrutiny of the precedents, in the previous and present Courts.

60. The case of United States Diplomatic and Consular Staff in Tehran has often been referred to as an instance of a highly political issue having been dealt with by the present Court. Yet the Court then stood seised of the United States Application not because of the Optional Clause, i.e., Article 36, paragraph 2, of the Statute, but on the basis of some multilateral and bilateral treaties to which both Iran and the United States were signatory parties, thus because of Article 36, paragraph 1, of the Statute. It was therefore to the subject-matter of those treaties that the Court had to look in order to determine the admissibility of the Application, and it did not have to involve itself, for that particular purpose, in any general considerations of justiciability or propriety.

3. Incomplete picture of the dispute as portrayed by the Court

(i) Lack of sufficient means for fact-finding

61. The subject-matters comprised in the dispute at issue are related to the resort to force and intervention that the United States has allegedly undertaken against Nicaragua and to the United States allegation that these measures have been taken as a means of collective self-defence against actions of Nicaragua. Yet the picture which the Court has depicted for the present conflict between the two States seems to be incomplete. The Judgment hinges to a critical extent on the mere assumptions that, while there may have been a flow of arms from Nicaragua to El Salvador prior to 1981, no significant flow of arms has occurred since that time, and that there has never been any use of force by Nicaragua against El Salvador amounting, in the Court's interpretation, to armed attack. The Judgment states:

> "The Court merely takes note that the allegations of arms-trafficking are not solidly established; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981." (Para. 153.) (Emphasis added.)

> "[The Court] can only interpret the lack of evidence of the transborder arms-flow in one of the following two ways ..." (Para. 154.) (Emphasis added.)

> "[T]he Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the

> Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period." (Para. 160.) (Emphasis added.)

The Court has thus frequently had to admit that the evidence, particularly concerning the relevant facts attributable to Nicaragua, is not sufficient.

62. The assertions in the Judgment, based on the evidence presented to the Court, may - or may not - be unchallengeable from the point of view of the Court's procedure on evidence. Be that as it may, the materials available through official publications of the United States Government suggest completely opposite facts. The 13 May 1983 Report of the Permanent Select Committee on Intelligence of the House of Representatives, presented by Nicaragua as evidence, reiterated its early finding that:

> "The insurgents [in El Salvador] are well trained, well equipped with modern weapons and supplies, and rely on the use of sites in Nicaragua for command and control and for logistical support." (P. 5.)

More concretely, the document Background Paper: Central America of 27 May 1983 stated in section III that:

> "Throughout 1981, Cuba, Nicaragua and the Soviet bloc aided in rebuilding, rearming and improving the Salvadoran guerrilla forces, which expanded their operations in the fall ... The FMLN headquarters in Nicaragua evolved into an extremely sophisticated command-and-control center - more elaborate in fact, than that used by the Sandinistas against Somoza. Guerrilla planning and operations are guided from this headquarters, where Cuban and Nicaraguan officers are involved in command and control. The guidance flows to guerrilla units widely spread throughout El Salvador. The FMLN headquarters in Nicaragua also coordinates propaganda and logistical support for the insurgents, including food, medicines, clothing, money and - most importantly - weapons and ammunition." (P. 6.)

> "During the first 3 months of 1982, arms shipments into El Salvador surged. Cuban-Nicaraguan arms flowed through Honduras into El Salvador by sea, air, and overland routes. In February, for example, Salvadoran guerrilla groups picked up a large shipment on the Salvadoran coast, near Usulutan, after the shipment arrived by sea from Nicaragua." (P. 7.)

The document Background Paper. Nicaragua's Military Build-up and Support for Central American Subversion of 18 July 1984 offered extensive accounts of "The Nicaraguan Supply Operations for the Salvadoran Guerrillas", "Sources of FMLN Armaments", "Training,

Communications, and Staging of the FMLN", "The International Connection", "The Significance of the Subversive Network" and others. The conclusions of this document read in part:

> "Guerrilla and Sandinista defectors maintain that the Nicaraguan regime provides the Salvadoran guerrillas communications centers, safehouses, storage of arms, shops for vehicles, and transportation of military supplies ...
>
> Training of Central American guerrillas has taken place in Nicaragua, Cuba, and Vietnam.
>
> Because of the subversive system involving a number of governments and terrorist organizations centered in Nicaragua, the Sandinista Government is able to threaten neighboring countries and to carry out the threats, indirectly, through one or other of the organizations." (P. 37.)

"Revolution Beyond our Borders" - Sandinista Intervention in Central America issued in September 1985, addressed to the library of the Court during the oral proceedings on the merits and mentioned in the Judgment (para. 73), reads in part:

> "The Sandinistas can no longer deny that they have engaged and continue to engage in intervention by:
>
> - Providing the arms, training areas, command and control facilities, and communications that transformed disorganized factions in El Salvador into a well-organized and -equipped guerrilla force of several thousand responsible for many thousands of civilian casualties and direct economic damages of over $1 billion." (P. 31.)

63. In addition, these elements supplied by the United States were supported in El Salvador's Declaration of Intervention filed with the Court on 15 August 1984, which stated:

> "A blatant form of Nicaraguan aggression against El Salvador is the Sandinista involvement in supply operations for the FMLN subversives. Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (P. 6, para. VIII.)
>
> "The subversives, aided and abetted by their allies in Nicaragua, have destroyed farms, businesses, bridges, roads, dams, power sources, trains and buses. They have mined our roads in an attempt to disrupt our economy and with the purpose of preventing our citizens from participating effectively in the national elections. The total of the damages produced by the subversion to the Salvadorian economy since 1979 to the end of 1983 has been conservatively estimated to amount to approximately US$800 million." (P. 12, para. XI.)

"up to this moment, Nicaragua continues to be the principal source of material assistance to the subversives (munitions, arms, medical supplies, training, etc.) in preparation for the expected general summer offensive, predicted by the very same FMLN" (p. 12, para. XIII).

64. The clear discrepancy thus revealed in the assessment of the facts mainly derives from three elements: first, that no counter-claim has ever been presented by the United States against Nicaragua (see (ii) below); secondly, that El Salvador was not allowed to intervene in this case when it wished (ibid.); thirdly, that the United States was absent from the whole of the proceedings on the merits (see (iii) below). These missing elements were of such potential importance that the Court was ill-advised to rely on certain evidence which, had these missing elements been present, would undoubtedly have been tested in a normal adversarial framework. Thus, while I am in no way attempting to suggest that conclusions disseminated by the United States Government outside the courtroom should be accepted as evidence, it is in my view beyond any doubt that the picture of the present dispute painted by the Court is far from the reality. That is clear even if one confines oneself to a scrutiny of the evidence which the United States duly submitted in 1984 together with its Counter-Memorial on jurisdiction and admissibility - evidence to which the Judgment barely alludes. I enlarge upon this view in the following subsections.

(ii) Nicaragua's Application reflecting only one side of the dispute

65. If one notes that the conflict in progress between Nicaragua and the United States is not simply one involving accusations levelled by Nicaragua against the United States, but that the accusations made by the United States against Nicaragua may be claimed to be technically not at issue in this case, brought as it is by the one side, and in the absence of formal submissions by the other, it should also be noted that the true facts may have remained hidden behind the scenes. It may be contended that such a problem could have been properly solved if the United States had presented a counter-claim in this case or El Salvador had been allowed to participate; but the actual situation to be faced is simply that the United States did not bring a counter-claim - whether it could have, under the Statute, in the present case is another matter - and that the Court, in its Order of 4 October 1984, denied El Salvador the right to participate when it wished.

66. Thus I would like here to take the opportunity of expressing regret that, with regard to the attempt of El Salvador to intervene in the earlier phase of the present case, I took a negative position towards granting that State a hearing; however, as I stated in my separate opinion attached to the Order of 4 October 1984, I did so only for "purely procedural reasons". At any rate, the situation resulting from the absence of any counter-claim by the United States and the frustration, at that stage, of El Salvador's intervention effectively precluded the Court from obtaining a complete picture of the dispute in all the ramifications needed to determine the validity of the United States claim of acting in collective self-defence.

(iii) Non-participation of the United States in the proceedings - Article 53 of the Statute

67. In the present case, Nicaragua presented a great amount of evidence to the Court and asked for five witnesses to be heard, but it would certainly not have been expected to provide evidence unfavourable to itself. Owing to the United States failure to participate in the proceedings, the evidence presented by Nicaragua was not challenged, and the witnesses were not subjected to cross-examination, although questions were put from the bench. Moreover, Nicaragua was not obliged to and in fact did not make any comment upon several relevant United States documents, some duly deposited with the Court in 1984.

68. Here I wish to consider the spirit behind the Statute relevant to this problem. What is laid down in the first paragraph of Article 53 of the Statute originates in a general rule of domestic law. In civil cases in domestic society, the obligation of the defending party to appear before and be subject to the jurisdiction of the court is, in principle, not disputed: and the rule has been established in domestic society that the simple fact of non-appearance of a defendant allows the court to deliver a judgment in favour of the plaintiff. However, inter-State issues in dispute before an international judicial court are placed in a different legal environment in that the jurisdiction of the Court is based upon the consent of sovereign States and compulsory jurisdiction is lacking. The second paragraph of Article 53 is therefore drafted so as to prevent the absolute application of the above rule of domestic law. This provision, whereby the Court is not allowed to pronounce judgment in favour of an applicant for the simple reason that the respondent has not appeared, is unique in procedure before an international judicial forum.

69. This does not however suggest that the Court is required to establish proprio motu facts on behalf of the absent respondent, or to assume the mantle of a defending counsel. The way in which the Judgment proposes to handle the evidence and information available to it may be correct under the Statute, and the Judgment is right in stating that "the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage" (para. 31). Yet Article 53 by no means prohibits the Court from endeavouring to find facts proprio motu, and the facts ascertained by the Court through the procedure of evidence under its interpretation of Article 53 of the Statute and Article 58 of the Rules of Court do not necessarily reflect the true situation of the dispute as a whole. The Court should therefore have been wary of over-facile "satisfaction" as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence.

D. Concluding Remarks on Non-Justiciability

70. The present case is characterized by the fact that the dispute at issue, not being a legal dispute within the demonstrable meaning of Article 36, paragraph 2, of the Statute, is one which the Respondent had never imagined as falling under the jurisdiction which it had voluntarily accepted. To point this out is not to nullify but to clarify Article 36, paragraph 2, of the Statute. It must be realized that, in accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute, States express their readiness to accept the Court's decision in disputes the scope of which is limited to the issue as to whether or not the right which the Applicant asserts has a ground in international law. A number of disputes of political significance which contain certain legal implications have been reported from every corner of the world for the past six decades, both prior and subsequent to the Second World War. Yet they have not been treated as justiciable disputes subject to compulsory jurisdiction before the Court or its predecessor under the Optional Clause of the Statute. How then could this particular case have come to be singled out? Is it because the Court has managed to assume jurisdiction in the present case, in spite of the objections of the United States, through a questionable loophole in Article 36, paragraph 2, of the Statute (not to speak of the questionable loophole which the Court drilled into Article 36, paragraph 5), when jurisdiction should have been based in principle on the sovereign consent or will of the respondent State?

71. A second characteristic of the present case is that the facts the Court could elicit by examining the evidence under the conditions of Article 53 of the Statute were far from sufficient to show a complete picture of the dispute, because the issues placed before the Court were limited to aspects significantly narrower than the whole.

72. Considering these two characteristics together, I came to the conclusion that it would not be consonant with judicial propriety for the Court to entertain Nicaragua's Application on the basis of the Optional Clause of the Statute. The Court's appropriation of a case against the wish of a respondent State under these circumstances will distort the genuine solution of the dispute. I neither undervalue the sincere intentions of Nicaragua in bringing a dispute of such a massive scale to the Court under the Optional Clause of the Statute nor necessarily support the activities which the United States is pursuing against Nicaragua. In my opinion, however, judicial propriety dictates that the correct manner for dealing with the dispute would have been, and still may prove to be, a conciliation procedure through the political organs of the United Nations or a regional arrangement such as the Contadora Group, and not reference to the International Court of Justice, whose function, which is limited to the purely legal aspect of disputes, has heretofore not been exceeded.

III. BREACH OF OBLIGATIONS UNDER THE 1956 TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION - THE COURT'S APPROPRIATION OF THE CASE UNDER ARTICLE 36, PARAGRAPH 1, OF THE STATUTE

A. The Court's Jurisdiction Granted by Article XXIV, the Compromissory Clause, of the 1956 Treaty

73. The contention that the Court should not be seised of the Nicaraguan Application in so far as it is based on Article 36, paragraph 2, of the Statute does not preclude the Court's seisin on the basis of Article 36, paragraph 1. The term "all matters" to be comprised by the jurisdiction of the Court under Article 36, paragraph 1, of the Statute is different from "all legal disputes" under Article 36, paragraph 2, since the former, "provided for in the Charter of the United Nations or in treaties and conventions in force", are specified in concrete terms in each instrument, no matter whether legal or political, and thus there will be no supervening question of justiciability, as I stated above (para. 60) in connection with the case of United States Diplomatic and Consular Staff in Tehran.

74. In fact, the 1956 Treaty of Friendship, Commerce and Navigation was not mentioned at all in Nicaragua's Application, even though the compromissory clause of the Treaty reads:

"Article XXIV

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

Nevertheless, considering that

> "the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial" (I.C.J. Reports 1984, p. 426),

the Court found in the operative parts of its 1984 Judgment that it had

> "jurisdiction to entertain the Application ... in so far as that Application relates to a dispute concerning the interpretation or application of the [1956] Treaty of Friendship, Commerce and Navigation" (para. 113 (1) (b)) (ibid., p. 442).

With regard to a precondition of adjustment by diplomacy, the Court was of the view in 1984 that:

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (I.C.J. Reports 1984, p. 428).

In 1984, the Court thus confirmed its jurisdiction under the 1956 Treaty on "any dispute between [Nicaragua and the United States] as to the interpretation or application of the Treaty".

B. The Court's Partial Reversion to Jurisdiction under Article 36, paragraph 2, of the Statute in Relation to the Treaty

75. If the Court remained duly seised of this case, it was in my view only because the Court's jurisdiction was granted by virtue of Article XXIV of the 1956 Treaty under Article 36, paragraph 1, of the Statute. I further believe that, irrespective of my arguments in opposition to the Judgment, expounded in Parts I and II above, to the effect that the Court should have ceased to entertain the Nicaraguan Application in so far as it is based on Article 36, paragraph 2, of the Statute, the Court has erred in its handling of this Treaty even within the bounds of the jurisdiction under Article 36, paragraph 1, of the Statue which it recognized in 1984 to be the proper basis for its consideration of this Treaty.

76. The Court first identifies "the direct attacks on ports, oil installations, etc." and "the mining of Nicaraguan ports" as activities of the United States "which are such as to undermine the whole spirit of" the 1956 Treaty (para. 275); referring to "the acts of economic pressure", the Judgment also states that

> "such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty" (para. 276).

In the Court's view these activities on the part of the United States "were violations of customary international law" (para. 274). Thus the Court attempts to dissociate these issues from the compromissory clause of the 1956 Treaty, and states instead that this particular provision (which, as I have just pointed out, the Judgment in 1984 referred to as a basis for the Court's jurisdiction) does not constitute "a bar to examination of Nicaragua's claims" (para. 274). The Judgment further states that these violations of customary international law cannot be justified under Article XXI (that is, an exclusion clause) of the Treaty.

77. The Judgment then speaks of breaches of concrete provisions of the Treaty, and maintains that

"the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty" (para. 278)

and that the trade embargo declared by the United States Government on 1 May 1985 "constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty" (para. 279). The relevant provisions, quoted in the Judgment, read:

"Article XIX

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

...

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

78. The Court comes to a conclusion that

"the United States [on the one hand] is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and [on the other hand] has committed acts which are in contradiction with the terms of the Treaty" (para. 280).

Thus the Judgment appears to be very confused, as it partially reverts to the Court's jurisdiction under Article 36, paragraph 2, of the Statute by speaking of the customary law rule not to defeat the object and purpose of a treaty despite the fact that it, quite properly, adjudges breaches of the terms of the 1956 Treaty on the basis of Article 36, paragraph 1.

C. Misconception of the Customary-Law Rule not to Defeat the "Object and Purpose" of a Treaty

79. It appears to me that the Court exceeds its powers in examining the question of a "duty not to deprive the 1956 FCN Treaty of its object and purpose" (para. 280). The "undermin[ing of] the whole spirit" (para. 275) of a treaty or "violation of the obligation not to defeat the object and purpose of" (para. 276) a treaty is not tantamount to specific breach of the treaty obligations. But it is the fulfilment of those obligations, and of those alone, that may be subject to the Court's jurisdiction under Article XXIV, the compromissory clause in the Treaty. The Court, therefore, should simply have taken a decision as to whether the United States had breached the terms of the 1956 Treaty and thus incurred responsibility for the violation of international law.

80. The Court appears to have been misled by speaking of the customary law rule concerning respect for "the whole spirit" or "the object and purpose" of the treaty. The term "the object and/or purpose of the treaty" is referred to several times in the 1969 Vienna Convention on the Law of Treaties but only for the purpose of indicating first, that a reservation to a treaty is impermissible unless it is compatible with "the object and purpose of the treaty" (Art. 19), or, second, that multilateral treaties may only be modified as between certain of the parties if the modification "does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (Art. 41), and, third, in connection with the termination or suspension of the operation of a treaty as a consequence of its breach. The Convention stipulates in the latter connection that:

"Article 60

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

...

3. A material breach of a treaty, for the purpose of this article, consists in:

...

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

Here it is important to emphasize the reference to the violation of a provision in paragraph 3 (b). All that the Convention is here seeking to establish is that there is a degree of such violation justifying termination or suspension, and that the touchstone of that degree is that the provision violated should be essential to the accomplishment of the treaty's object and purpose. There is no suggestion that the undermining of the object and/or purpose, independently of any breach of a provision, would be tantamount in itself to a violation of the Treaty.

81. Thus the Court appears to have misinterpreted the words "the object and purpose" of a treaty, as introduced by the 1969 Convention on the Law of Treaties in a completely different context. Independently of that Convention, it is noted that the Court attributes to Nicaragua an argument to the effect that abstention from conduct likely to defeat the object and purpose of a treaty is an obligation implicit in the principle pacta sunt servanda. However, the Judgment does not make it clear whether it is espousing this point of view. In any case, I would like to take this opportunity of

indicating my own understanding of this principle, which to my mind requires compliance with the letter of obligations subscribed to, and not necessarily the avoidance of conduct not expressly precluded by the terms of the given treaty. It may furthermore be asked where the jurisdiction granted by a treaty clause would ever end if it were held to entitle the Court to scrutinize any act remotely describable as inimical to the object and purpose of the treaty in question. The ultimate result of so sweeping an assumption could only be an increasing reluctance on the part of States to support the inclusion of such clauses in their treaties.

82. All this may be said without in any way condoning or minimizing the gravity of any action which does in fact thwart the purpose of a treaty.

D. Breaches of the Terms of the 1956 Treaty

1. Breaches of Article XIX of the Treaty

83. If the Court is duly seised of Nicaragua's Application on the basis of Article 36, paragraph 1, of the Statute, the Court should have more clearly declared what United States actions, unjustifiable by reference to Article XXI (to which I shall refer in paras. 85-89) of the 1956 Treaty of Friendship, Commerce and Navigation, constituted breaches of the treaty obligations incumbent upon the United States under specific provisions of that Treaty. The Judgment refers in its reasoning to a few activities of the United States as constituting breaches of the 1956 Treaty. As stated above (para. 77), the laying of mines in early 1984 and the trade embargo on 1 May 1985 are thus mentioned.

84. The Judgment does not in its reasoning identify any other types of action taken by the United States as constituting breaches of treaty obligations under the Treaty. In the operative part of the Judgment, however, the Court lists not only "laying mines" (para. 292 (7) and the "general embargo on trade" (para. 292 (11) but also "the attacks on Nicaraguan territory" (ibid.) as breaches of the United States' obligations under Article XIX of the Treaty. No reasoning is given as to how the attacks on Nicaraguan territory constituted a violation of that Article, which is exclusively devoted to matters of maritime commerce.

2. Applicability of Article XXI of the Treaty

85. The question which remains is whether, in case the United States has breached the provisions of Article XIX of the 1956 Treaty, these actions could have been justified for the reasons specified in Article XXI of the Treaty, which provides:

"1. The present Treaty shall not preclude the application of measures:

...

(c) regulating the production of or traffic in arms, ammunition and implements of war, ...

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

The Court's treatment of this provision involves, in my view, a non sequitur when it states:

> "The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be 'measures ... necessary to protect' essential security interests." (Para. 271.)

Article XXI is meant, in my view, to absolve either treaty partner from responsibility in the event of its having applied certain measures which, had they not possessed the character described, would have conflicted with any obligations imposed in any provisions of the Treaty, and not to afford "a defence to a claim under customary international law" as the Judgment states.

86. I must now, for the sake of clarity, recapitulate the argument of the Judgment in respect of Article XXI. Considering "whether the exceptions in Article XXI, paragraphs 1 (c) and 1 (d), ... may be invoked to justify the acts complained of", the Judgment includes in these acts "the direct attacks on ports, oil installations, etc.; the mining of Nicaraguan ports; and the general trade embargo of 1 May 1985" (para. 280). The "direct attacks on ports, oil installations, etc.", which were not mentioned at all as constituting breaches of the terms of the 1956 Treaty in any preceding part of the Judgment, are suddenly placed in this context.

87. As the Court finds that "laying mines" and the "general trade embargo" constitute violations of Article XIX, it has to examine whether these acts were justifiable or not under Article XXI. The Court considers that

> "the mining of Nicaraguan ports ... cannot possibly be justified as 'necessary' to protect the essential security interests of the United States" (para. 282).

With regard to the trade embargo, the Court is also "unable to find that the embargo was 'necessary' to protect those interests" (para. 282). In conclusion, the Judgment suggests that "Article XXI affords no defence for the United States in respect of any of the actions here under consideration" (ibid.). The Judgment states:

> "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests." (Para. 282.)

88. Now, whatever the situation with regard to the laying of mines (see para. 89 below), I totally fail to understand what the Court has attempted to contend in connection with the trade embargo ordered on 1 May 1985. From my point of view, the United States decision on a trade embargo, quite unlike that on laying of mines, is open to justification under Article XXI. Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty to which that State is a party, and can be suspended under certain circumstances expressly specified in that treaty. In fact, the United States, when declaring a trade embargo on 1 May 1985, did not announce its reliance on this particular provision of the Treaty, but, instead, gave notice on the same day to terminate the Treaty. Even so, I am inclined to maintain that, in principle, the trade assured by Article XIX, paragraph 3, of the Treaty, could also justifiably have been suspended in reliance on another provision, Article XXI, of the same Treaty.

89. "Laying mines" is totally different, in that it is illegal in the absence of any justification recognized in international law, while Article XXI of the Treaty, being simply one provision in a commercial treaty, can in no way be interpreted to justify a State party in derogating from this principle of general international law. I must add that this action did not meet the conditions of necessity and proportionality that may be required as a minimum in resort to the doctrine of self-defence under general and customary international law. I thus conclude that, under the jurisdiction granted to the Court by Article XXIV of the 1956 Treaty, the Court should have found the United States responsible only for violation of Article XIX by laying mines in Nicaraguan waters. It was for this reason only that I voted for subparagraph (14) in the operative clause.

IV. SUPPLEMENTARY OBSERVATIONS

90. Since I hold the view that the Court should have dismissed the Nicaraguan Application so far as it is based on Article 36, paragraph 2, of the Statute, I have refrained from making comments on the doctrines of non-use of force, non-intervention, etc., which the Court has expounded. However, I would like to express just one of my concerns, namely that the Court was so precipitate in giving its views on collective self-defence justifying the use of force which would otherwise have been illegal.

91. The term "collective self-defence", unknown before 1945, was not found in the Dumbarton Oaks proposals which were prepared by the four big Powers to constitute a basis for a general international organization in the post-war period. The deliberations on Chapter VIII, Section C, 2, of the Dumbarton Oaks proposals concerning regional arrangements were entrusted, at the San Francisco Conference in 1945, to Commission III (Security Council), Committee 4 (Regional arrangements). On 17 May 1945, in this Committee, the United States representative observed that his delegation was "now prepared to submit a formula regarding the relationship of regional agencies to the world Organization" (United Nations Conference on International Organization, Vol. 12, p. 674). This United States formula had already been announced by Stettinius, the United States Secretary of State, on 15 May 1945 as follows:

> "As a result of discussions with a number of interested delegations, proposals will be made to clarify in the Charter the relationship of regional agencies and collective arrangements to the world Organization.
>
> These proposals will:
>
> ...
>
> 2. Recognize that the inherent right of self-defense, either individual or collective, remains unimpaired in case the Security Council does not maintain international peace and security and an armed attack against a member state occurs ...
>
> The second point will be dealt with by an addition to chapter VIII of a new section substantially as follows:
>
> Nothing in this Charter impairs the inherent right of self-defense, either individual or collective, in the event that the Security Council does not maintain international peace and security and an armed attack against a member state occurs ..." (Documents on American Foreign Relations, Vol. VII, 1944-1945, p. 434.) (Emphasis added.)

92. On 23 May 1945, a Subcommittee on the Amalgamation of Amendments unanimously recommended to Committee 4:

> "2. That a new paragraph be inserted into the language of the Dumbarton Oaks Proposals, in accordance with a further suggestion in the United States proposal for the amalgamation of amendments to Chapter VIII, Section C, reading as follows:
>
> > 'Nothing in this Charter impairs the inherent right of individual or collective self-defense if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain international peace and security ...'"

(United Nations Conference on International Organization, Vol. 12, p. 848.) (Emphasis added.)

93. Committee 4, at its fourth meeting on 25 May 1945, unanimously approved the following decision:

> "That a new paragraph be inserted in the text of the Dumbarton Oaks Proposals, to read as follows:
>
> Nothing in this Chapter impairs the inherent right of the individual for collective self-defense if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain international peace and security ..." (Ibid., p. 680.) (Emphasis added.)

The emphasized part of this quotation was expressed in the French version as follows:

> "Aucune disposition de la présente Charte ne peut porter atteinte au droit naturel de tout Etat Membre de se défendre, par une action individuelle ou collective, contre une agression armée." (Ibid., p. 691.)

In connection with this decision, the Chairman, speaking as the Delegate of Colombia, made the following statement:

> "The Latin American Countries understood, as Senator Vandenberg [a delegate of the United States] had said, that the origin of the term 'collective self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimatizes the right of collective self-defense to be carried out in accord with regional pacts so long as they are not opposed to the purposes and principles of the Organization as expressed in the Charter. If a group of countries with regional ties declare their solidarity for their mutual defense, as in the case of the American States, they will undertake such defense jointly if and when one of them is attacked. And

> the right of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity through regional arrangements, with the country directly attacked." (United Nations Conference on International Organization, Vol. 12, p. 680.)

After the exchange of opinions, particularly among the Latin American delegates, "the Chairman paid tribute at this point to the work of Senator Vandenberg [of the United States] in the elaboration of the new text" (ibid., p. 682). Senator Vandenberg replied that "in his opinion the unanimity expressed by voice and vote on this question was a signpost towards a peaceful world with justice for free men in a free earth" (ibid., p. 862). Thus the concepts of individual or collective self-defence were incorporated into the United Nations Charter, at the suggestion of the United States, without much discussion. Hence Article 51 of the Charter reads:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken necessary measures to maintain international peace and security ..." (Emphasis added.)

This text is practically identical to the one adopted by Committee 4 but the French version is different:

> "Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée ..."

It is to be noted that the reflexive verb "se défendre" (corresponding to t e English "self-defence") has disappeared in this version, so that it no longer appears that the invocation of individual or collective defence is the exclusive prerogative of the State directly attacked.

94. At all events, there was certainly no discussion whether the right of collective self-defence was inherent or not. If there was any statement that the right of self-defence is inherent, this goes back to 1928, when at the time of the preparation of the 1928 Multilateral Treaty for the Renunciation of War the United States Government sent notes to various governments on 23 June 1928, which read:

> "There is nothing in the American draft of anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free

> at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." (American Journal of International Law, Supplement, Vol. 22, p. 109.) (Emphasis added.)

A fortiori, the idea that the right of collective self-defence is inherent is certainly not traceable up to 1928, and so far as the proceedings of the San Francisco Conference indicate, there was hardly any discussion on this point in 1945.

95. After recalling that

> "the Charter [of the United Nations] itself testifies to the existence of the right of collective self-defence in customary international law" (para. 193),

and that the General Assembly resolution containing the Declaration on the principles of international law concerning friendly relations and co-operation among States

> "demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law" (para. 193.),

the present Judgment states that

> "Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred." (Para. 194.)

Referring to a precondition required for the exercise of collective self-defence, the Judgment remarks:

> "Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack." (Para. 195.)

And it goes on to mention a second condition:

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

The Judgment also draws certain inferences from a further requirement imposed by the Charter of the United Nations for the exercise of the right of self-defence under Article 51, namely that:

> "measures taken by States in exercise of this right of self-defence must be 'immediately reported' to the Security Council" (para. 200).

96. The concept of collective self-defence has been the subject of extensive discussion among the scholars of international law for the past several decades. It is well known that speaking of "inherent" right of self-defence, Kelsen stated:

> "This is a theoretical opinion of the legislator which has no legal importance. The effect of Article 51 would not change if the term 'inherent' were dropped." (The Law of the United Nations, 1950, p. 791.)

Julius Stone held the view:

> "In its form as reserving a preexisting right of 'collective self-defence', Article 51 presents such insoluble problems that it may seem better to treat the term 'inherent' as otiose, and regard Article 51 as itself conferring the liberties there described." (Legal Controls of International Conflict, 1954, p. 245.)

I do not attempt to suggest that these views necessarily reflect the leading school of thought. Yet the Court should have been aware of so much discussion, either for or against, on the inherent right of collective self-defence. Attention should also be paid to the difference in connotations of the English and French texts of Article 51 of the United Nations Charter.

97. In sum even if it was necessary for the Court to take up the concept of collective self-defence - and I do not agree that it was - this concept should have been more extensively probed by the Court in its first Judgment to broach the subject.

(Signed) Shigeru ODA

DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS

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

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

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

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

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

Effect of the multilateral treaty reservation

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

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

This proposition raises some interesting problems about the relationship of customary law and the United Nations Charter in particular; and I shall first touch briefly upon these; but only briefly because, there are, two further and decisive reasons, which apply not only to the United Nations Charter but also to other relevant multilateral treaties, and show most cogently why they cannot be avoided in this case by retreating into custom.

* *

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

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

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

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

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

Even Article 51, though referring to an "inherent" and therefore supposedly pre-existing, right of self-defence, introduced a novel concept in speaking of "collective self-defence"[1]. Article 51 was introduced into the Charter at a late stage for the specific purpose of clarifying the position in regard to collective understandings - multilateral treaties - for mutual self-defence, which were part of the contemporary scene.

If...

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

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

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

But there are obvious difficulties about extracting even a scintilla of relevant "practice" on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the opinio juris which it might otherwise evidence, is surely explained by their being bound by the Charter itself[1].

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

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

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

"It...

---

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

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

And again:

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

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

That the Court has not wholly succeeded in escaping from the Charter and other multilateral treaties, is evident from even a casual perusal of the Judgment; the Court has in the event found it impossible to avoid what is in effect a consideration of treaty provisions as such. As the Court puts it, the Court "can and must take them [the multilateral treaties] into account in determining the content of the customary law which the United States is also alleged to have infringed" (para. 183). This use of treaty provisions as "evidence" of custom, takes the form of an interpretation of the treaty text. Yet the Court itself acknowledges that treaty-law and customary law can be distinguished precisely because the canons of interpretation are different (para. 178). To indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name. Of course this way of going about things may be justified where the treaty text was, from the beginning, designed to be a codification of custom; or where the treaty is itself the origin of a customary law rule. But, as we have already seen, this could certainly not be said of Article 2, paragraph 4, or even Article 51, of the United Nations Charter; nor indeed of most of the other relevant multilateral treaty provisions.

The...

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

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

* *

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

* *

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

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

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

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

* *

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

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

The principle of non-intervention and the multilateral treaty reservation

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

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

One is, however, immediately faced with the difficulty that a plea of collective self-defence is obviously a possible justification of intervention and that this is the justification which the United States has pleaded. So it is again a dispute arising under Article 51 of the United Nations Charter. If one turns to the Inter-American system of law, the same problem arises. Article 18 of the Charter of the Organization of American States deals with intervention in peculiarly comprehensive terms, in that it prohibits intervention "for any reason whatever"; it also, in Article 21, deals with force and self-defence, but in specifically treaty terms. Thus, by that article, the American States "bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof" (emphasis added). The latter phrase can only mean that self-defence in the inter-American system by definition requires recourse to multilateral treaties: such as, obviously, the Rio Treaty on Mutual Assistance, as well as the Principle of the OAS Charter (Art. 3 (f)) that: "An act of aggression against one American State is an act of aggression against all the other American States." In short, I am wholly unable to see how the issues of intervention raised in the instant case - intervention indeed by either Party, for each accuses the other of it - can be categorized as other than a dispute, or disputes, arising under multilateral treaties, and thus caught by the multilateral treaty reservation; at any rate where self-defence has formally been pleaded as a justification.

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

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

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

* *

The question of the mining of Nicaraguan ports

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

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

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

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

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

* *

The "contras" and humanitarian law

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

It is clear enough that there has been conduct - not indeed confined to one side of the civil strife - that is contrary to human rights, humanitarian law and indeed also the most elementary considerations of humanity (see the Report of Amnesty International, Nicaragua: the Human Rights Record, March 1986, AMR/43/01/86). To impute any of these acts to the United States, as acts of the United States - which is what Nicaragua asks the Court to do - would require a double exercise: there must not only be evidence of the particular acts in question, but the acts must also be imputable to the United States according to the rules governing State Responsibility in international law; which, in short, means that the unlawful acts of the contras must have been committed in such a way, or in such circumstances, as to make them in substance the acts of the United States itself. The Court's finding, made clear in the final phrase of subparagraph (9) of paragraph 292, is that no such acts can be imputed to the United States, and that this claim and charge of Nicaragua is rejected.

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

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

* *

Treaty of Friendship, Commerce and Navigation of 21 January 1956

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

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

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

> "to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 ... the Court has jurisdiction under that Treaty to entertain such claims" (I.C.J. Reports 1984, p. 392 at p. 429).

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

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

This does not mean that the principal dispute, the subject of the Nicaraguan Application, could be dealt with under the FCN Treaty jurisdiction clause; except indeed in so far as it may involve a dispute which directly concerns the "interpretation or application" of the provisions of the treaty. I am unable to accept the Nicaraguan argument, by which the treaty jurisdiction is supposed to comprise matters which could be said in general terms to be inconsistent with the "object and purpose" of an FCN treaty, but are not referred to

specific articles of the treaty. The jurisdiction clause of such a treaty could not be regarded as conferring a jurisdiction to pass upon matters external to the actual provisions of the treaty, even though such matters may affect the operation of the treaty. Suppose hostilities, or even war, should arise between parties to an FCN treaty, then the Court under a jurisdiction clause surely does not have jurisdiction to pass upon the general question of the lawfulness or otherwise of the outbreak of hostilities or of war, on the ground only that this defeated the object and purpose of the treaty; though of course it might have jurisdiction for instance to decide whether there was a "war" or hostilities, for the purposes of interpreting and applying a war clause which was a term of the treaty. If it were otherwise, there would be no apparent limit to the kinds of dispute which might in certain circumstances be claimed to come under such a jurisdiction clause. The conferment of such a potentially roving jurisdiction could not have been within the intention of the parties when they agreed the jurisdiction clause; and if the Court had asserted such a jurisdiction, this would only have discouraged future mention of the Court in such FCN treaty jurisdiction clauses. I am therefore glad to note that the Court (para. 271) bases its jurisdiction here on Article 36, paragraph 2, of the Statute; though that course is not open to me, taking the view I do on the effect of the multilateral treaty reservation.

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

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

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

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

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

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

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

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

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

There is of course, as already mentioned above, no question that the United States, "by failing to make known the existence and location of the mines", has indeed "acted in breach of its obligations under customary international law" (subpara. 8). The question, however, in relation to the 1956 Treaty, is not whether the United States acted in breach of "elementary considerations of humanity", but whether it acted also in breach of the bilateral treaty relationship with Nicaragua, having regard to the general proviso in Article XXI? Again it must be emphasized that the issue here is not simply the lawfulness or unlawfulness of the act in general international law, but whether it was also in breach of the terms of the Treaty? Certainly it is prima facie a breach of Article XIX, providing for freedom of navigation; but is it a "measure" excepted by the proviso clause of Article XXI? Although not without some

remaining doubts, I have come to the conclusion that Article XXI cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence. I have therefore voted "Yes" to subparagraph (8) of paragraph 292. (As explained above, I cannot vote in favour of subparagraph (6) because this is dependent upon being able to vote "Yes" to subparagraph (2).)

Turning now to subparagraph (10) of paragraph 292, the Court finds that the "attacks on Nicaraguan territory referred to in subparagraph (4)", are calculated to deprive the 1956 Treaty of its object and purpose. Here there is, in my view, no need to consider Article XXI, because I fail to see how these direct attacks upon Nicaraguan territory have anything to do with the treaty at all. In fact any examination of whether bombing attacks are, or are not, breaches of a treaty "based in general upon the principles of national and of most-favoured-nation treatment unconditionally accorded", might be thought not wholly free from an element of absurdity.

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

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

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

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

* *

The place of "armed attack"

Although I am of the opinion that, owing to the operation of the multilateral treaty reservation, the Court has no jurisdiction to pass upon the question of self-defence, it seems right nevertheless to comment briefly upon some passages of the Court's Judgment where it deals with these matters in a way with which I do not find myself entirely in agreement.

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

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

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

This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.

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

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The nature of collective self-defence

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

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

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

But there is another objection to this way of looking at collective self-defence. It seems to be based almost upon an idea of vicarious defence by champions: that a third State may lawfully come to the aid of an authenticated victim of armed attack provided that the requirements of a declaration of attack and a request for assistance are complied with. But whatever collective self-defence means, it does not mean vicarious defence; for that way the notion is indeed open to abuse. The assisting State is not an authorized champion, permitted under certain conditions to go to the aid of a favoured State. The assisting State surely must, by going to the victim State's assistance, be also, and in addition to other requirements, in some measure defending itself. There should be even in "collective self-defence" be some real element of self[1] involved with the notion of defence. This is presumably also the philosophy which underlies mutual security arrangements, such as the system of the Organization of American States, for which indeed Article 51 was specifically designed. By such a system of collective security, the security of each member State is meant to be involved with the security of the others; not merely as a result of a contractual arrangement but by the real consequences of the system and its organization. Thus, Article 24 of the Charter of the Organization of American States provides that:

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

This...

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

This, I believe, should not to be regarded as a mere contractual arrangement for collective defence - a legal fiction used as a device for arranging for mutual defence -; it is to be regarded as an organized system of collective security by which the security of each member is made really and truely to have become involved with the security of the others, thus providing a true basis for a system of collective self defence. This underlying philosophy of collective self-defence is well expressed in a classical definition of that concept in Lauterpacht's edition of Oppenheim's International Law (Vol. II, 1952, p. 155):

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

(Signed) Sir Robert Y. JENNINGS

27 JUNE 1986

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

Dissenting Opinion of
Judge Schwebel

(with Annex)

DISSENTING OPINION OF JUDGE SCHWEBEL

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I. INTRODUCTION

1. To say that I dissent from the Court's Judgment is to understate the depth of my differences with it. I agree with the Court's finding that the United States, by failing to make known the existence and location of the mines laid by it, acted in violation of customary international law (in relation to the shipping of third States); I agree that the CIA's causing publication of a manual advocating acts in violation of the law of war is indefensible; and I agree with some other elements of the Judgment as well. Nevertheless, in my view the Judgment misperceives and misconstrues essential facts - not so much the facts concerning the actions of the United States of which Nicaragua complains as the facts concerning the actions of Nicaragua of which the United States complains. It misconceives and misapplies the law - not in all respects, on some of which the whole Court is agreed, but in paramount respects: particularly in its interpretation of what is an "armed attack" within the meaning of the United Nations Charter and customary international law; in its appearing to justify foreign intervention in furtherance of "the process of decolonization"; and in nearly all of its holdings as to which Party to this case has acted in violation of its international responsibilities and which, because it has acted defensively, has not. For reasons which, because of its further examination of questions of jurisdiction, are even clearer today than when it rendered its Judgment of 26 November 1984, this Judgment asserts a jurisdiction which in my view the Court properly lacks, and it adjudges a vital question which, I believe, is not justiciable. And, I am profoundly pained to say, I dissent from this Judgment because I believe that, in effect, it adopts the false testimony of representatives of the Government of the Republic of Nicaragua on a matter which, in my view, is essential to the disposition of this case and which, on any view, is material to its disposition. The effect of the Court's treatment of that false testimony upon the validity of the Judgment is a question which only others can decide.

2. These are uncommonly critical words in a Court which rightly enjoys very great respect. Coming as they do from a judge who is a national of a Party to the case, I am conscious of the fact that the justification for these conclusions must be full. This opinion accordingly is long, not only for that reason but because the differences between the Court's views and mine turn particularly on the facts. The facts are in fundamental controversy. I find the Court's statement of the facts to be inadequate, in that it sufficiently sets out the facts which have led it to reach conclusions of law adverse to the United States, while it insufficiently sets out the facts which should have led

it to reach conclusions of law adverse to Nicaragua. In such a situation, where the Parties differ profoundly on what the facts are, and where the Court has arrived at one evaluation of them and I another, I believe that it is my obligation to present the factual support for the conclusions which I have reached. That cannot be done in a few pages.

3. This opinion accordingly is cast in the following form. First, it presents a summary of its salient legal conclusions. Second, it states, in abbreviated terms, the factual premises on which it is based - premises whose support is appended. Third, it analyses the principal legal questions which the case - and the Court's Judgment - pose, some of which are preliminary in character, others of which are central to the merits. Fourth and finally, it contains an appendix, in which a detailed exposition and analysis of the facts inadequately stated in the Court's Judgment is placed. The facts are relegated to an appendix not because they are secondary in importance. On the contrary, they are primary. Nevertheless I believe that ease of evaluation of this dissenting opinion will be promoted by this approach.

4. In embarking on so lengthy an opinion, it may be appropriate to recall what that late distinguished Judge of the Court, Philip C. Jessup, wrote, as he began a dissent to the Judgment in the South West Africa cases which ran to 117 printed pages:

> "This full examination is the more necessary because I dissent not only from the legal reasoning and factual interpretations in the Court's Judgment but also from its entire disposition of the case. In regard to the nature and value of dissenting opinions, I am in complete agreement with the views of a great judge, a former member of this Court - the late Sir Hersch Lauterpacht - who so often and so brilliantly contributed to the cause of international law and justice his own concurring or dissenting opinions; I refer to section 23 of his book, The Development of International Law by the International Court, 1958. He quotes, with evident approval (in note 10 on p. 66), the 'clear expression' of Charles Evans Hughes who was a member of the Permanent Court of International Justice and later Chief Justice of the United States:
>
> > 'A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.'

It is not out of disrespect for the Court, but out of respect for one of its great and important traditions, that, when necessary, I express my disagreement with its conclusions." (I.C.J. Reports 1966, pp. 325-326.)

5. I should add that, in setting out my views on the facts and law of this case, I take no position on the politics of it. I have views about the desirability and feasibility of the policies which the United States, Nicaragua, El Salvador and other States concerned have pursued and are pursuing in respect of questions at issue in this case. But I have endeavoured to separate those views from the exposition of the facts and evaluation of the law which this opinion contains. If, as is the case, on most of those questions I have concluded that, by reason of Nicaragua's prior and continuing violations of international law, responsive actions of the United States are not in violation of international law, that is by no means to infer that I believe that the pertinent policies and practices of the United States - and Nicaragua - are desirable or undesirable, workable or unworkable, politic or impolitic, sensible or insensible, humane or inhumane. I do not suggest that law and policy are divorced; far from it. Obviously law is meant to promote and does promote community policies, and conformity with the law must be measured in the light of that fundamental truth. Nevertheless, States and men are not obliged to do, or necessarily are well advised to do, all that the law permits. In my view, the proper function of a judge of this Court is limited to an appraisal of what the law permits or requires, and does not extend to passing judgment on the merits of policies which are pursued within those confines.

II. SUMMARY OF SALIENT LEGAL CONCLUSIONS

6. Without any pretence, still less actuality, of provocation, Nicaragua since 1979 has assisted and persisted in efforts to overthrow the Government of El Salvador by providing large-scale, significant and sustained assistance to the rebellion in El Salvador - a rebellion which, before the rendering of Nicaraguan and other foreign assistance, was ill-organized, ill-equipped and ineffective. The delictual acts of the Nicaraguan Government have not been confined to provision of very large quantities of arms, munitions and supplies (an act which of itself might be viewed as not tantamount to an armed attack); Nicaragua (and Cuba) have joined with the Salvadoran rebels in the organization, planning and training for their acts of insurgency; and Nicaragua has provided the Salvadoran insurgents with command-and-control facilities, bases, communications and sanctuary, which have enabled the leadership of the Salvadoran insurgency to operate from Nicaraguan territory. Under both customary and conventional international law, that scale of Nicaraguan subversive activity not only constitutes unlawful intervention in the affairs of El Salvador; it is cumulatively tantamount to an armed attack upon El Salvador. (It is striking that both Nicaragua and the United States, in their pleadings before the Court, agree that significant material support by a State of foreign armed irregulars who endeavour

forcibly to overthrow the Government of another State is tantamount to armed attack upon the latter State by the former State.) Not only is El Salvador entitled to defend itself against this armed attack; it can, and has, called upon the United States to assist it in the exercise of collective self-defence. The United States is legally entitled to respond. It can lawfully respond to Nicaragua's covert attempt to overthrow the Government of El Salvador by overt or covert pressures, military and other, upon the Government of Nicaragua, which are exerted either directly upon the Government, territory and people of Nicaragua by the United States, or indirectly through the actions of Nicaraguan rebels - the "contras" - supported by the United States.

7. While United States pressure upon Nicaragua is essentially lawful, nevertheless questions about the legality of aspects of United States conduct remain. In my view, the fundamental question is this. Granting that the United States can join El Salvador in measures of collective self-defence (even if, contrary to Article 51 of the United Nations Charter, they were not reported to the United Nations Security Council, as, by their nature, covert defensive measures will not be), those measures must be necessary, and proportionate to the delicts - the actions tantamount to armed attack - of Nicaragua. And they must in their nature be fundamentally measures of self-defence.

8. By these standards, the unannounced mining by the United States of Nicaraguan ports was a violation of international law. That mining could affect and did affect third States as against whom no rationale of self-defence could apply in these circumstances. As against Nicaragua, however, the mining was no less lawful than other measures of pressure.

9. Are United States support of the contras and direct United States assaults on Nicaraguan oil tanks, ports and pipelines, as well as other measures such as intelligence overflights, military and naval maneuvers, and a trade embargo, unnecessary and disproportionate acts of self-defence? I do not believe so. Their necessity is, or arguably is, indicated by recurrent, persistent Nicaraguan failure to cease armed subversion of El Salvador. To the extent that proportionality of defensive measures is required - a question examined below - in their nature, far from being disproportionate to the acts against which they are a defence, the actions of the United States are strikingly proportionate. The Salvadoran rebels, vitally supported by Nicaragua, conduct a rebellion in El Salvador; in collective self-defence, the United States symmetrically supports rebels who conduct a rebellion in Nicaragua. The rebels in El Salvador pervasively attack economic targets of importance in El Salvador; the United States selectively attacks economic targets of military importance, such as ports and oil stocks, in Nicaragua. Even if it be accepted, arguendo, that the current object of United States policy is to overthrow the Nicaraguan Government - and that is by no means established - that is not necessarily disproportionate to the obvious object of Nicaragua in supporting the Salvadoran rebels who seek overthrow of the Government of El Salvador. To say, as did Nicaraguan counsel, that action designed to overthrow a government cannot be defensive, is evident error, which would have come as a surprise to

Roosevelt and Churchill (and Stalin), who insisted on the unconditional surrender of the Axis Powers. In the largest-scale international hostilities currently in progress, one State, which maintains that it is the victim of armed attack, proclaims as its essential condition for peace that the government of the alleged aggressor be overthrown - a condition which some may find extreme, others not, but which in any event has not aroused the legal condemnation of the international community. Moreover, I agree with the Court that, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack upon El Salvador, collective self-defence may be legally invoked by the United States, even though the United States may possibly have an additional and perhaps more decisive motive drawn from the political orientation of the Nicaraguan Government.

10. Nevertheless, it could be maintained that the necessity of United States actions claimed to be in collective self-defence has been open to question, particularly since that time in 1983 when Nicaragua began to indicate that it was prepared to cease its support for the armed subversion of El Salvador's Government if the United States would cease both its direct support for El Salvador's Government and its pressures upon Nicaragua's. It may be maintained that, at any rate since that time, there have been peaceful means of resolving the dispute which were open and should have been exploited before the continued application of armed pressure was pursued. Whether that question of the necessity of the continued use of force is justiciable is doubtful, for reasons explained below.

11. The Court has concluded that it can adjudge the necessity of United States pressures against Nicaragua. It has further concluded that it need not make that judgment, on the ground that the pressures of the United States upon Nicaragua - the measures which the United States has taken in alleged exercise of its right of collective self-defence - cannot be in response to a prior armed attack by Nicaragua upon El Salvador, for the reason that there has been no such armed attack. Nevertheless, the Court holds that the measures taken by the United States against Nicaragua cannot in any event be justified on grounds of necessity.

12. I share none of these conclusions. The Court's statement of, and apparent understanding of, the facts that underlie its conclusion that there has been no armed attack by Nicaragua upon El Salvador essentially turn upon its conclusions that it has not been proven that the Nicaraguan Government itself was engaged in the shipment of arms to Salvadoran insurgents, still less in any related subversive acts, such as training of Salvadoran insurgents and provision of headquarters for their leadership on Nicaraguan territory, to which allegations the Court pays scant attention; that such arms shipments as there may have been through Nicaraguan territory to Salvadoran insurgents appear largely or entirely to have ended in early 1981; and that, accordingly, United States measures launched some months and maintained for some years thereafter could not have been a timely, necessary and proportionate response to such arms trafficking, if indeed there were any. These conclusions,

in turn, reflect rules of evidence which the Court has articulated for this case and purported to apply, whose application will be shown below to be inappropriate. In my view, for reasons fully expounded in the appendix to this opinion, the Court's finding of the facts on the critical question of the reality and extent of the intervention of the Nicaraguan Government in El Salvador in support of the insurgency in that country - which goes far beyond the shipment of arms - cannot be objectively sustained.

13. As to the law, the Court holds that, even if the shipment of arms through Nicaragua to Salvadoran insurgents could be imputed to the Nicaraguan Government, such shipment would not be legally tantamount to an armed attack upon Nicaragua. In the absence of armed attack, the Court holds, El Salvador is not entitled to react in self-defence - and did not - and the United States is not entitled to react in collective self-defence - and did not. I find the Court's interpretation of what is tantamount to an armed attack, and of the consequential law, inconsonant with accepted international law and with the realities of international relations. And I find its holdings as to what El Salvador and the United States actually did inconsistent with the facts.

14. The truth is that the State which first intervened with the use of force in the affairs of another State in the dispute before the Court was Nicaragua, which initiated and has maintained its efforts to subvert or overthrow the governments of its neighbours, particularly of El Salvador. In contemporary international law, the State which first undertakes specified unprovoked, unlawful uses of force against another State - such as substantial involvement in the sending of armed bands onto its territory - is, prima facie, the aggressor. On examination, Nicaragua's status as the prima facie aggressor can only be definitively confirmed. Moreover, Nicaragua has compounded its delictual behaviour by pressing false testimony on the Court in a deliberate effort to conceal it. Accordingly, on both grounds, Nicaragua does not come before the Court with clean hands. Judgment in its favour is thus unwarranted, and would be unwarranted even if it should be concluded - as it should not be - that the responsive actions of the United States were unnecessary or disproportionate.

15. The Court has arrived at very different conclusions. While I disagree with its legal conclusions - particularly as they turn on its holding that there has been no action by Nicaragua tantamount to an armed attack upon El Salvador to which the United States may respond in collective self-defence - I recognize that there is room for the Court's construction of the legal meaning of an armed attack, as well as for some of its other conclusions of law. The Court could have produced a plausible judgment - unsound in its ultimate conclusions, in my view, but not implausible - which would have recognized not only the facts of United States intervention in Nicaragua but the facts of Nicaragua's prior and continuing intervention in El Salvador; which would have treated Nicaragua's intervention as unlawful (as it undeniably is); but which would also have held that it nevertheless was not tantamount to an

armed attack upon El Salvador or that, even if it were, the response of the United States was unnecessary, ill-timed or disproportionate. Such a judgment could plausibly have held against the United States on other points as well, among them, its failure to report its actions to the United Nations Security Council and its failure to have adequate recourse to the multilateral institutions for peaceful settlement and collective security constituted by the Charters of the United Nations and the Organization of American States.

16. But the Court has proceeded otherwise. It has excluded, discounted and excused the unanswerable evidence of Nicaragua's major and maintained intervention in the Salvadoran insurgency, an intervention which has consisted not only in provision of great quantities of small arms until early 1981, but provision of arms, ammunition, munitions and supplies thereafter and provision of command-and-control centers, training and communications facilities and other support before and after 1981. The facts, and the law, demanded condemnation of these Nicaraguan actions which, even if not tantamount to armed attack, must constitute unlawful intervention. For reasons that neither judicial nor judicious considerations sustain, the Court has chosen to depreciate these facts, to omit any consequential statement of the law, and even, in effect, to appear to lend its good name to Nicaragua's misrepresentation of the facts. The Court may thereby have thrown into question the validity of a Judgment which is bound to its factual predicates. By so doing, Nicaragua's credibility has not been established, but that of the Court has been strained. Moreover, the Court has in my view further compromised its Judgment by its inference that there may be a double standard in the law governing the use of force in international relations: intervention is debarred, except, it appears, in "the process of decolonization". I deeply regret to be obliged to say that, in my submission, far from the Court, in pursuance of the requirements of its Statute, satisfying itself as to the facts and the law, it has stultified itself.

III. FACTUAL PREMISES

A. The Nicaraguan Government came to power on the back of some of the very forms of foreign intervention of which it now complains (appendix, paras. 2-7)

17. The overthrow in 1979 of the Government of President Somoza by a widespread and popularly supported rebellion, led by the fighting forces of the Sandinistas, was vitally assisted by foreign Governments. President Castro had united diverse factions of the Sandinista leadership into the nine-member directorate of comandantes which today governs Nicaragua, and Cuba supplied the united Sandinista forces with large quantities of arms, with training, and advisers in the field. Venezuela provided the Sandinistas with arms, money and logistical support. Costa Rica provided safe haven for large numbers of Sandinista forces based in its territory and was the prime channel for the extensive shipments of arms provided by third States to the Sandinistas. Panama also served as

such a channel and deployed members of the Panamanian National Guard who joined in fighting against the Somoza regime. For its part, Honduras was unable or unwilling to take effective measures against the Sandinista forces which operated from Honduran territory. Thus the Sandinistas, who today complain of foreign intervention, particularly the sending of irregulars on to their territory from safe havens of neighbouring States who are financed, trained and provisioned by a foreign State, actually came to power with the aid of these very forms of foreign intervention against the Government which they then were battling.

18. Moreover, the fall of President Somoza was facilitated by the exertion of other foreign pressures upon his Government. The United States brought its influence to bear to withhold international credits from the Nicaraguan Government. It cut off military assistance and sales to the Nicaraguan Government and persuaded other major governmental suppliers to stop selling ammunition to the Nicaraguan Government. In the Organization of American States, strong pressures were exerted upon President Somoza to step down, culminating in a resolution of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of 23 June 1979 which called for "Immediate and definitive replacement of the Somoza regime".

B. The new Nicaraguan Government achieved foreign recognition in exchange for international commitments concerning its internal and external policies, commitments which it deliberately has violated (appendix, paras. 8-13)

19. In response to the foregoing resolution - which also called for installation of a democratic government in Nicaragua which would guarantee the human rights of all Nicaraguans and hold free elections - the Junta of the Government of National Reconstruction of Nicaragua on 12 July 1979 sent to the OAS and "to the Ministers of Foreign Affairs of the Member States of the Organization" its written statement of plans for Somoza's resignation and its assumption of power. The Junta pledged that, upon the recognition by the Member States of the OAS of the Government of National Reconstruction as the legitimate Government of Nicaragua, that Government when in power would immediately proceed to enact into law and implement provisions which would meet the prescriptions of the OAS. The States Members of the OAS carried out their part of this international understanding, individually as well as collectively extending promptly the recognition which the Junta solicited. But the Sandinistas - who soon asserted and maintained exclusive control of the Junta and subsequent formations of the Nicaraguan Government - did not carry out their part. On the contrary, they violated important elements of the Junta's assurances to the OAS and its Members, and did so, as a matter of deliberate governmental policy, well before there could be any justification for such derogations on grounds of national emergency provoked by armed attacks upon the revolutionary Government.

C. The new Nicaraguan Government received unprecedented aid from the international community, including the United States (appendix, paras. 14-15)

20. The advent of the revolutionary Government in Nicaragua was welcomed virtually throughout the world. Assistance to it poured in, from East, West and Latin America. West included not only Europe but the United States which, in the first eighteen months of Sandinista rule, gave more economic aid to Nicaragua than did any other country and more than it had given in total in twenty previous years of Somoza family rule. The Carter Administration exerted itself to establish friendly relations with the new Nicaraguan Government which, for its part, adopted a national anthem which proclaims the Yankees to be "the enemy of mankind". The United States attached a critical condition to its aid, namely, that Nicaragua not assist violence or terrorism in other countries, a provision which was designed to discourage support of insurrection in El Salvador which, when the Sandinistas came to power in Nicaragua, was smoldering rather than flaring.

D. The Carter Administration suspended aid to Nicaragua in January 1981 because of its support of insurgency in El Salvador, support evidenced, inter alia, by documents captured from the Salvadoran guerrillas (appendix, paras. 16-22)

21. Confronted with convincing evidence of large-scale supply of arms by the Nicaraguan Government to the insurgents in El Salvador, culminating in their "final offensive" of January 1981, the Carter Administration in its closing days suspended economic aid to the Government of Nicaragua and resumed military aid to the Government of El Salvador. That evidence included captured documents demonstrating the involvement of Communist States, particularly Cuba, and Nicaragua in the unification, planning, training, arming and provisioning of a Salvadoran insurgency which would have its command-and-control facilities in Nicaragua.

E. The Reagan Administration terminated aid to the Nicaraguan Government while waiving the latter's obligation to repay aid already extended in the hope that its support of foreign insurgencies would cease; subsequently, it twice officially offered to resume aid if Nicaragua would stop supporting insurgency in El Salvador, offers which were not accepted (appendix, paras. 23-24)

22. The Reagan Administration in April 1981 terminated the suspended aid to the Nicaraguan Government because of the evidence of its support of insurgency in El Salvador. Because the suspension of that aid in January by the Carter Administration and urgent United States diplomatic representations, buttressed with detailed intelligence reports, had had some success in persuading the Nicaraguan Government to interrupt its provision of arms to the Salvadoran insurgents, the Reagan Administration waived repayment for which United States law provided. In August 1981,

the United States officially offered to resume aid to the Nicaraguan Government provided that it cease its by then resumed support for the rebels in El Salvador, an offer which the United States repeated in April 1982. Nicaragua accepted neither offer. Nicaragua denied that it was extending such support.

F. The Reagan Administration made clear to the Nicaraguan Government in 1981 that it regarded the Sandinista revolution "as irreversible"; its condition for co-existence was stopping the flow of arms to El Salvador (appendix, paras. 25-26)

23. Nicaragua's evidence shows that, in 1981, the United States sent then Assistant Secretary of State Thomas O. Enders to Managua where, in conversations at the highest levels of the Nicaraguan Government, he gave assurances - according to the transcript of conversation supplied by Nicaragua - that the United States Government was prepared to accept the Nicaraguan revolution "as irreversible" provided that Nicaragua stopped the flow of arms to El Salvador.

G. Before this Court, representatives of the Government of Nicaragua have falsely maintained that the Nicaraguan Government has "never" supplied arms or other material assistance to insurgents in El Salvador, has "never" maintained Salvadoran command-and-control facilities on Nicaraguan territory and "never" permitted its territory to be used for training of Salvadoran insurgents (appendix, para. 27)

24. The Foreign Minister of Nicaragua submitted an affidavit to the Court, repeatedly relied upon by Nicaragua, which avers that: "In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador." Another Minister, as a principal witness in Court for Nicaragua, testified that his Government "never" had a policy of sending arms to opposition forces in Central America. And, in the final word of the Nicaraguan Government to the Court on this vital question, the Agent of Nicaragua on 26 November 1985 wrote to the Court as follows:

> "As the Government of Nicaragua has consistently stated, it has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purpose, it has never permitted Salvadoran insurgents to establish a headquarters or operations base or command and control facility in Nicaraguan territory and has never permitted its territory to be used for training of Salvadoran insurgents."

25. It is my studied conclusion that these statements are untrue. In my view, they are demonstrably false, and, in the factual appendix to this opinion, are demonstrated to be false.

26. It is of course a commonplace that government officials dissemble. Reasons of State are often thought to justify statements which are incomplete, misleading or contrary to fact. Covert operations, by their nature, are intended to provide cover, to lend credibility to "deniability". In this very case, certain statements of representatives of the United States in the United Nations Security Council have been less than candid and have been shown to be inconsistent with other statements of the most senior representatives of the United States. Moreover, the Government of the United States has made some allegations against the Government of Nicaragua which appear to be erroneous or exaggerated or in any event unsubstantiated by evidence made public.

27. Nevertheless, there can be no equation between governmental statements made in this Court and governmental statements made outside of it. The foundation of judicial decision is the establishment of the truth. Deliberate misrepresentations by the representatives of a government Party to a case before this Court cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the Court's Judgment.

H. The Nicaraguan Government, despite its denials, in fact has acted as the principal conduit for the provision of arms and munitions to the Salvadoran insurgents from 1979 to the present day; command and control of the Salvadoran insurgency has been exercised from Nicaraguan territory with the co-operation of the Cuban and Nicaraguan Governments; training of Salvadoran insurgents has been carried out in Cuba and Nicaragua; the Salvadoran insurgents' radio station at one time operated from Nicaraguan territory; and Nicaraguan political and diplomatic support of the Salvadoran insurgency has been ardent, open and sustained (appendix, paras. 28-188)

28. The fact that the Government of Nicaragua, soon after the time the Sandinistas took power to the present day (and certainly to the period of the currency of this case before the Court), has extended material assistance to the insurgency in El Salvador is, in my view, beyond objective dispute. As the extensive exposition of the factual appendix establishes, Nicaragua has acted as the convinced conduit for the shipment of very large quantities of arms, and continuing supplies of ammunition, munitions and medicines, from Cuba, Vietnam, Ethiopia, and certain States of Eastern Europe, to the Salvadoran insurgents. Provision of arms appears to have been on a large-scale in preparation for the January 1981 "final offensive" of the Salvadoran insurgents, to have declined markedly thereafter, revived in 1982, and been irregular but not insignificant since; an important, perhaps vital, supply of ammunition, explosives and medicines appears to have been maintained relatively continuously. Nicaragua has facilitated the training

of Salvadoran insurgents in Cuba and in Nicaragua. The command-and-control centers for the military operations of the Salvadoran insurgents have operated from Nicaraguan territory and may still do so. Military as well as political leaders of the Salvadoran insurgency were based in Nicaragua, indisputably until the well-publicized murder in 1983 in Managua of a resident leading member of the Salvadoran insurgency by revolutionary rivals and the reputed suicide of a still more prominent Salvadoran insurgent leader in Managua in response to that murder. For some time after the Sandinistas took power, the radio station of the Salvadoran insurgency operated from Nicaraguan territory. Nicaraguan political and diplomatic support for the overthrow of the Government of El Salvador by Salvadoran insurgents has been ardent, open and sustained.

29. That these are the facts has been recognized in significant measure by statements of authorities of the Nicaraguan Government. In 1985, President Ortega was publicly and authoritatively quoted as stating (and has never denied stating) that: "We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador, and we're willing to accept international verification. In return, we're asking for only one thing: that they don't attack us ..." President Ortega's admission is even more probative in his original Spanish words: "... estamos dispuestos ... a suspender todo tránsito por nuestro territorio de ayuda militar u otra a los salvadorenos ..." Nicaragua can only "suspend" what is in progress. (The Court discounts President Ortega's words on grounds that are patently unpersuasive; see below, para. 149. The full text of President Ortega's remarks is found in the appendix to this opinion, paras. 30-31.) Moreover, as recently as April 1986, President Ortega gave another press interview in which he reportedly declared that Nicaragua is ready to agree to halt aid to "irregular forces" in the region in exchange for ending by the United States of its military pressure upon Nicaragua; this President Ortega is quoted as saying, would be "a reciprocal arrangement". (Ibid., para. 33.)

30. These facts of Nicaragua's material support of the insurgency in El Salvador find further substantiation in admissions by leaders of the Salvadoran insurgency, and much more explicit and emphatic support in declarations of defectors from that insurgency and from the Sandinistas. These facts are confirmed by the appraisals of diplomats from third States. They are strongly maintained by the Governments of El Salvador and Honduras, the primary current objectives of Nicaraguan policies of support of foreign insurrection and subversion. Statements of the Government of Costa Rica, and the diplomatic positions which it has taken from the time of the accession of the Sandinistas to power, comport with this evaluation of the facts.

31. The Government of the United States has consistently maintained that these are the facts, and it has provided considerable evidence in support of its contentions, virtually all of which has not been specifically or adequately refuted by Nicaragua - or the Court - in this case. That evidence includes shipments of arms en route to El Salvador seized in transit from Nicaragua through Honduras, and in Costa Rica;

captured documents of Salvadoran insurgents which reveal Nicaragua to be the immediate source of their arms; and arms, verified by their serial numbers, abandoned by the United States forces in Vietnam, which were captured from Salvadoran insurgents, after having been shipped from Vietnam to Cuba to Nicaragua before being passed on to the Salvadoran insurgents. Moreover, the Congress of the United States, which has not been fully supportive of the policies of the United States Government towards Nicaragua, has repeatedly gone on record in full support of this finding of the facts. No less probative is that leading members of the Congress of the United States who oppose support by the United States of the contras and who oppose exertion of armed pressures upon Nicaragua, and who have at their disposal the intelligence resources of the United States Government on the issue, such as Congressman Boland, have concluded that the insurgency in El Salvador:

> "depends for its life-blood - arms, ammunition, financing, logistics and command-and-control facilities - upon outside assistance from Nicaragua and Cuba ... contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency".

32. Equally, informed critics of United States policy in Central America, such as Christopher Dickey, author of With the Contras, A Reporter in the Wilds of Nicaragua, 1985, conclude that:

> "as the election results came in, with Reagan and his Republican platform the obvious winners, the Sandinistas opened the floodgates for the Salvadoran rebels. By the middle of November the Salvadorans were complaining they couldn't distribute so much matériel.
>
> You couldn't hide that many arms. Some were caught. Others were tracked through radio intercepts. And from that point on, the new Reagan administration could present proof that ... the battle for El Salvador and the battle for Nicaragua were one and the same." (At p. 75.)

As to whether the flow of arms stopped in 1981, Dickey concludes that in 1982: "In fact arms to the Salvadorans ... had not stopped. They had increased." (Ibid., p. 133.)

I. In 1979, members of the Nicaraguan National Guard escaped to Honduras, from which they harassed Nicaragua. Officers of the Argentine Army began training these counter-revolutionaries in late 1980 or early in 1981 - and continued to do so until 1984 (appendix, paras. 189-190)

33. At the fall of President Somoza in July, 1979, numbers of former members of the Nicaraguan National Guard escaped to Honduras, from which they mounted small-scale raids on Nicaragua. At a time which is not precisely established, but apparently late in 1980 or early in 1981, Argentine officers, dispatched by the then military Government of Argentina, began to train these counter-revolutionaries - contras - in Honduras and in Argentina. These Argentine officers were not withdrawn until early 1984, months after the fall of the military Government of Argentina. Thus the first State to intervene against the Nicaraguan Government was not the United States but Argentina (apparently with the support of the Government of Honduras). It is not clear whether the initial Argentine intervention was carried out with United States support. It is clear that, when the United States itself began to lend support to the contras (the very end of 1981 or early 1982), its agents co-operated with and apparently financed those of Argentina. Training of the contras appears to have remained largely in Argentine hands into early 1984.

J. In November 1981, after Nicaragua had failed to accept repeated United States requests to cease its material support for Salvadoran insurgents, the United States decided to exert military pressure upon Nicaragua in order to force it to do what it would not agree to do (appendix, paras. 169-170, 173, 110, 121-122, 128-129)

34. In November, 1981, eight months after the United States had terminated aid to Nicaragua, and three months after Nicaragua had failed to respond positively to a clear, high-level, urgent United States demand (by the Enders mission) to put an end to its material support for the Salvadoran insurgency in return for the resumption of United States aid and other inducements, the United States decided to exert military pressure upon Nicaragua in order to force it to do what it would not agree to do. The exertion of that pressure was welcomed by the Government of El Salvador, to which the United States by then was rendering large-scale material assistance to fend off rebel attacks and sustain a wounded economy. El Salvador made it clear that it regarded, and continues to regard, United States pressure upon Nicaragua as action in legitimate defence against Nicaraguan aggression and intervention against it.

K. The object of United States support of the contras was claimed by the United States to be interdiction of traffic in arms to El Salvador, though clearly that was not the purpose of the contras (appendix, paras. 156-173, and the Court's Judgment)

35. The object of the United States program was said to be interdiction of the traffic in arms and termination of the other material support rendered by Nicaragua to the Salvadoran rebels. That this

was the object of United States policy at that initial stage (at least if interdiction is understood to mean cessation) is supported not only by the thrust of the Enders mission of 1981 but by the fact that, in 1982, the United States offered to cease support of the contras if Nicaragua would cease supporting rebellion in El Salvador. Nicaragua refused, and fundamentally prejudiced United States official opinion against it by continuing to deny - in the teeth of the facts - that it was assisting the Salvadoran rebellion. However, the contras, whose forces quickly grew to embrace disillusioned Sandinistas and discontent as well as dragooned campesinos, clearly had another objective, namely, overthrow of Sandinista authority.

L. By October 1983, in apparent response to United States pressures, Nicaragua proposed four treaties which were interpreted as an offer to cease supporting rebellion in El Salvador if the United States would cease support of the contras and of the Government of El Salvador (appendix, paras. 174-178)

36. By October 1983, in apparent response to United States pressures, Nicaragua came forward with four draft treaties which were widely interpreted as an offer to cease support of rebellion in El Salvador in return not only for United States termination of support for the contras but support for the Government of El Salvador as well. The United States refused.

M. In 1983, the United States called upon Nicaragua to cut back its arms build-up, to sever its ties with the USSR and Cuba, and to carry out its pledges to the OAS and its Members for a democratic society (appendix, paras. 194-198)

37. Immediately upon taking power, and well before there was any military threat to Nicaragua, the Sandinistas began a military build-up unprecedented in Central America. Very large numbers of military advisers from Cuba, and much lesser but not insubstantial numbers from the USSR and other States of Eastern Europe, as well as Libya and the PLO, quickly established themselves in Nicaragua, and Cuban and other foreign Communist functionaries were placed in influential positions in Nicaraguan Government ministries. The substantial elements of Nicaraguan society which had opposed the Somoza regime and joined in initial support of the Junta of the Government of National Reconstruction were forced out, and elections, which the Sandinistas characterized as a "bourgeois ... nuisance", were postponed until late 1984. By 1983, the United States no longer only demanded cessation of Nicaraguan support of subversion of its neighbours and for Nicaragua to "look inwards". It called as well upon Nicaragua to cut back its arms build-up, to sever its ties to Cuba and the USSR, and to carry out its pledges to the OAS and its Members to establish a pluralistic and democratic society in which the government would be freely elected by the whole of the voting population, including the opposition forces represented by the contras and their political allies (who grew to include some of the leading democratic figures of Nicaragua).

N. By the beginning of 1984, the United States undertook direct if covert military action against Nicaragua, assaulting oil facilities and mining Nicaraguan ports (appendix, para. 199, and the Court's Judgment)

38. By the beginning of 1984, in order to increase pressure upon Nicaragua, the United States launched direct if covert military action against Nicaragua. Latin American commandos in the service of the CIA carried out assaults on Nicaraguan oil storage tanks and pipelines, and port facilities, and United States agents mined Nicaraguan ports and waters. While mining and other direct armed actions of the United States against Nicaragua ceased by the time of the Court's indication of provisional measures in May, 1984, United States support of the contras has been maintained, though subjected since mid-1984 to Congressionally-imposed interruption and limitation. Military training of contra forces by United States advisers apparently has ceased, and aid has been limited to so-called "humanitarian" (non-lethal) forms.

O. Particularly since January 1985, the United States has spoken in terms which can be interpreted as requiring comprehensive change in the policies of, or, alternatively, overthrow of, the Nicaraguan Government as a condition of cessation of its support of the contras (appendix, paras. 200-205)

39. Particularly since January 1985, when it withdrew from participation in the case before the Court, the United States has spoken in terms which can be interpreted as requiring substantial change in the policies and composition of, or, alternatively, overthrow of, the Nicaraguan Government as a condition of its cessation of support for the contras. The view of the United States appears to be that, if Sandinista authority is not diluted by processes leading to a sharing of power with the opposition, the Nicaraguan Government cannot be trusted to carry out any assurances it might give to stop subverting its neighbours. The United States has pressed for negotiations between the Nicaraguan Government and the contras, which the Nicaraguan Government has refused.

P. There is evidence of the commission of atrocities by the contras, by Nicaraguan Government forces, and by Salvadoran insurgents, and of advocacy by the CIA of actions contrary to the law of war (appendix, paras. 206-224)

40. There is evidence of the commission of atrocities in Nicaragua by the contras and, to some extent, by Nicaraguan Government forces and agents. The CIA prepared and caused publication of a manual which advocates actions by the contras in violation of the law of war. In El Salvador, atrocities have been committed by the insurgents supported by Nicaragua and by right-wing death squads.

Q. The Contadora process designed to re-establish peace in Central America embraces the democratic performance internally of the five Central American Governments (appendix, paras. 225-227)

41. The Latin American States of the Contadora Group have made, since January 1983, a sustained and intricate effort to re-establish peaceful and cooperative relations among Nicaragua, El Salvador, Honduras, Costa Rica and Guatemala. This effort is concerned not solely with issues of support of irregulars, arms trafficking, military maneuvers, foreign bases, foreign military advisers, the levels of armed forces, and external economic pressures. It is also concerned with the democratic performance internally of the five Central American Governments. The Contadora process, in which Nicaragua participates, assumes that certain political processes of the Central American States in dispute are matters of international concern, and the Contadora proposals reflect that concern.

IV. THE LAW

A. Introduction

42. This case admits of more than one appreciation of the law on many points, as the Court's Judgment, and the several opinions of judges including this dissenting opinion, demonstrate. I shall initially treat certain preliminary and procedural questions, namely, admissibility and justiciability; outstanding questions of jurisdiction as they arise under the multilateral treaty (Vandenberg) reservation to the United States acceptance of the Optional Clause and under the bilateral Treaty of Friendship, Commerce and Navigation; questions pertaining to the absence of a party to a case and of a State seeking to intervene; and last, matters of evidence. Then I shall turn to the multiple legal questions of the merits, above all, whether Nicaraguan material support of the overthrow of the Government of El Salvador is tantamount to an armed attack upon El Salvador against which the United States has justifiably joined El Salvador in reacting in collective self-defence.

B. Questions of admissibility and of justiciability

1. Political questions

43. In its Judgment of 26 November 1984, the Court declined to accede to arguments advanced by the United States purporting to demonstrate that the instant case is inadmissible (I.C.J. Reports 1984, pp. 429-441). In my dissent to the Court's Judgment, I stated:

"While I do not agree with all of the Court's holdings on admissibility, at the present stage I do not find the contentions of the United States concerning the inadmissibility of the case to be convincing. Accordingly, I have joined the Court in voting that the Application is admissible ... without prejudice to any questions of admissibility which may arise at the stage of the merits of the case." (Ibid., p. 562.)

44. That stage having been reached, it is right that I amplify my views. I may summarize them by saying that I remain largely unconvinced about the merit of United States contentions on admissibility. However, in view of the facts of the case as they have been developed during the argument of the merits, I have concluded that the better view is that one, critical element of the case is not justiciable.

45. I cannot subscribe to the contention - which the United States does not advance - that the use by a State of force in self-defence, or alleged self-defence, is a "political" and hence non-justiciable question. That contention is unpersuasive, both in customary international law and under the law of the United Nations Charter.

46. Article 51 of the Charter prescribes that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations ..." But that provision cannot reasonably be interpreted to mean that only the State exercising a claimed right of self-defence is the judge of the legality of its actions. The Charter expressly authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression ...". Clearly the Security Council is entitled to adjudge the legality of a State's resort to self-defence and to decide whether such recourse is legitimate or, on the contrary, an act of aggression. The United States fully recognizes that, and indeed does not argue that the use of force by States in self-defence is a political act unsubjected to legal appraisal by others. It rather argues that the collective responsibility for making such judgments is accorded primarily to the Security Council, and secondarily and less definitively to the General Assembly and regional organizations acting in accordance with the Security Council's authorization, but is not an authority entrusted to the Court.

47. Nevertheless, it has been and still is argued by distinguished international lawyers that the use of force in self-defence is a political question which no court, including the International Court of Justice, should adjudge. Analogies have been drawn to exercise of judicial discretion by national courts which decline to pass upon certain questions - such as the legality of the State's use of its armed forces internationally - on the ground that they are political questions entrusted to other branches of government, and it is urged that the International Court of Justice is bound to exercise, or should exercise, a like discretion.

48. Thus two distinct questions are raised by these contentions. One is whether a State's use of force in self-defence, or alleged self-defence, is, as a political question, inherently non-justiciable. The other is whether, if a State's use of force in self-defence is subject to legal judgment, the capacity to make that judgment has been entrusted to the Security Council and withheld from the Court.

49. The theoretical foundations of the first contention were subjected to searching scrutiny in the work by Hersch Lauterpacht which has never been surpassed in its fundamental field: The Function of Law in the International Community (1933). Lauterpacht recognized that:

> "It is of the essence of the legal conception of self-defence that recourse to it must, in the first instance, be a matter for the judgement of the State concerned. For if recourse to it were conditioned by a previous authorization of a law-administering agency, then it would no longer be self-defence; it would be execution of a legal decision." (P. 179.)

However, Lauterpacht pointed out, the doctrine that the legitimacy of the exercise of the right of self-defence:

> "is incapable of judicial determination ... cannot be admitted as juridically sound. If the conception of self-defence is a legal conception ... then any action undertaken under it must be capable of legal appreciation ... The right of self-defence is a general principle of law, and as such it is necessarily recognized to its full extent in international law. But it is not a right fundamentally different from the corresponding right possessed by individuals under municipal law. In both cases it is an absolute right, inasmuch as no law can disregard it; in both cases it is a relative right, inasmuch as it is recognized and regulated by law. It is recognized to the extent - but no more - that recourse to it is not in itself illegal. It is regulated to the extent that it is the business of the Courts to determine whether, how far, and for how long, there was a necessity to have recourse to it. There is not the slightest relation between the content of the right to self-defence and the claim that it is above the law and not amenable to evaluation by law. Such a claim is self-contradictory, inasmuch as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defence is in itself capable of judicial decision, and it is only the determination of States not to have questions of this nature decided by a foreign tribunal which may make it non-justiciable." (Ibid., pp. 179-180.)

50. At the Nuremberg Trials in which Lauterpacht played such a seminal role - both in the conception and composition of the Tribunal's material jurisdiction and in the arguments advanced before it by the distinguished counsel of the United Kingdom - Lauterpacht, while suffering the marshalling of the evidence of organized bestialities of unspeakable horror, nevertheless had the privilege of seeing an historic court place its jural imprimatur on the analysis which he had so cogently made:

> "It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." (Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 1946, His Majesty's Stationery Office, Cmd. 6964, p. 30.)

2. The Court's capacity to pass upon continuing uses of force

51. As to the second contention, namely, that judgment of the legality of a State's resort to self-defence is essentially entrusted to the Security Council and exceptionally withheld from the Court, it is both theoretically tenable and politically plausible. There is no inherent reason why States could not have reconstructed contemporary international organization, of which the Court is a principal organ, so as to have placed that judgmental authority only in the hands of the Security Council, or of it and other political organs such as the General Assembly and regional organizations acting under the authority of the Security Council. The question which a judge of the Court must decide is whether the authors of the Charter of the United Nations and the Statute of the Court did so.

52. At the stage of the case dealing with jurisdiction and admissibility, the United States advanced an acute analysis in support of the position that, by the terms and intent of the Charter, the design was to leave the judgment of aggression entirely to the Security Council. The United States pointed out that the essence of Nicaragua's Application to the Court is the assertion that there is currently taking place an unlawful use of force by the United States against Nicaragua's territorial integrity and political independence. Nicaragua itself unsuccessfully had sought to obtain in the Security Council days before its resort to the Court a determination that these alleged actions of the United States constituted aggression against it. (Nicaragua's communication to the Security Council of 29 March 1984 called upon it to consider "the escalation of acts of aggression currently being perpetrated against" Nicaragua (S/16449). The acts complained of in the Security Council by Nicaragua - which it denominated "further acts of

aggression" (S.PV.2525, pp. 6, 16, 18, 24, 63, 68-70, and S/PV.2529, pp. 95-96) - were the very acts of which Nicaragua's Application in the case before the Court complains. That Application itself acknowledges that Nicaragua has called the attention of the Security Council and the General Assembly "to these activities of the United States, in their character as threats to or breaches of the peace, and acts of aggression" (para. 12).) The United States observed that the fact that the Security Council had not granted relief to Nicaragua in the terms in which Nicaragua sought it was of no matter; the Court has neither the competence to reverse decisions of the Security Council nor the power to engage in functions expressly allocated to the Council.

53. The United States maintained that a complaint of "an ongoing use of unlawful armed force, was never intended by the drafters of the Charter of the United Nations to be encompassed by Article 36 (2) of the Statute of the Court". (CR 84/18, p. 67.) It argued that, while Article 24 of the Charter confers only "primary" responsibility for the maintenance of international peace and security on the Security Council, complementary responsibilities were conferred on the General Assembly and regional organizations - but not upon the Court. The Court has an express, clearly defined role under Chapter VI of the Charter with respect to the pacific settlement of international disputes. But when the case rather involves "action with respect to threats to the peace, breaches of the peace, and acts of aggression" under Chapter VII of the Charter, not a word of the Charter or the Statute suggests a role for the Court. On the contrary, as the records of the San Francisco Conference declare, it was decided "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression" (United Nations Conference on International Organization, Vol. 11, p. 17). It was the understanding of the United States in ratifying the Charter and Statute that the Statute does not "permit the Court to interfere with the functions of the Security Council or the General Assembly". (Report of the Committee on Foreign Relations, "The Charter of the United Nations", 79th Congress, 1st Session, 1945, p. 14.)

54. The United States recognized that Article 12, paragraph 1, of the Charter provides that, while the Security Council is exercising the functions assigned to it in respect of a particular dispute, the General Assembly shall not make any recommendation upon it, whereas the Court is not subject to any such express debarral; but it argued that that is because:

> "the framers of the Charter intended that, among the organs of the United Nations, only the General Assembly would have a role supplementary to that of the Security Council in the maintenance of international peace and security. It simply was never considered at the San Francisco Conference that the Court would, or should, have the competence to engage in such matters." (CR 84/19, p. 14.)

55. As to earlier cases involving the use of armed force in which there had been resort to the Court, such as the Corfu Channel and Aerial Incident cases, the United States pointed out that, in all those cases, the action complained of had already taken place.

> "In each case, the Court was called upon to adjudicate the rights and duties of the Parties with respect to a matter that was fully in the past, that was not ongoing, that was not merely one element of a continuing stream of actions." (CR 84/19, p. 14.)

56. Despite the force of these arguments and of passages in the records of the San Francisco Conference in support of them on which the United States relies, I find myself unable to agree that it was the design of the drafters of the Charter and the Statute to exclude the Court from adjudicating disputes falling within the scope of Chapter VII of the United Nations Charter, and unable to agree that the practice of States in interpreting the Charter and the Statute confirms such a design.

57. It may well be, as counsel of the United States argued, that, "It was simply never considered at the San Francisco Conference that the Court would, or should, have the competence to engage in such matters." It may well be that, had that question been squarely and searchingly engaged, there would have been a decision to exclude from the competence of the Court the authority to give judgment on matters which were before the Security Council under Chapter VII, or which involved the continuing use of armed force in international relations. Certainly the argument is plausible that no Power enjoying the veto right in the Security Council contemplated that, whereas the exercise of that right could block adoption of any charge of aggression against it in the Security Council, it held itself open to a judgment of the Court branding it as the aggressor in the very same case and on the very same facts in respect of which it had so exercised its Security Council veto.

58. But while that argument is perfectly plausible, it is, in my view, insufficient. It is insufficient because nowhere in the text of the Statute of the Court is there any indication that disputes involving the continuing use of armed force are excluded from its jurisdiction. On the contrary, Article 36 of the Statute is cast in comprehensive terms. Article 36, paragraph 1, provides that the jurisdiction of the Court "comprises all cases" which the parties refer to it and "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force". Article 36, paragraph 2, provides that States may recognize the jurisdiction of the Court "in all legal disputes" concerning:

> "(a) the interpretation of a treaty;
>
> (b) any question of international law;
>
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

These capacious terms do not exclude disputes over the continuing use of force from the Court's jurisdiction. To be sure, a State recognizing the jurisdiction of the Court under Article 36, paragraph 2, could exclude disputes involving the use of armed force, and some States have. The United States was not among them. (Nevertheless, whether the term "all legal disputes", as used in the United States adherence to the Optional Clause, was meant to embrace disputes involving the use of force may be open to question, for reasons which Judge Oda's opinion in this case sets forth.)

59. Now if one turns to the text of the Charter, of which the Court's Statute is an integral part, the picture is not so clear. There is support for the United States contentions, in the Charter's structure and terms and its travaux préparatoires. But the support is ambivalent, as the contrasting interpretations currently placed by the United States and the Court on the implications of Article 12, paragraph 1, of the Charter illustrate. I am not disposed to conclude that so far-reaching a restriction on the competence of the Court can be held to be implied by such ambiguous indications.

60. Moreover, while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression - or, as more often is the case, fail to arrive at a determination of aggression - for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.

3. United States Diplomatic and Consular Staff in Tehran case

61. These conclusions are confirmed by the arguments which the United States itself advanced in the United States Diplomatic and Consular Staff in Tehran case. It should be recalled that, promptly after the seizure of the hostages in Iran, the United States sought the assistance of the Security Council in freeing them. By letter of 9 November 1979, the United States requested the Security Council urgently to consider what might be done to secure the release of the hostages. On 25 November 1979, the Secretary-General of the United Nations, in exercise of his exceptional authority under Article 99 of the United Nations Charter to bring to the attention of the Security Council

any matter which in his opinion may threaten international peace and security, requested that the Security Council be urgently convened in an effort to seek a peaceful solution to the hostage crisis. In his address to the Council on 27 November 1979, the Secretary-General declared that the situation in Iran "threatens the peace and security of the region and could well have very grave consequences for the entire world" (S/PV.2172). On 29 November 1979, the United States filed an Application in the International Court of Justice instituting proceedings against Iran. On 4 December 1979, the Security Council unanimously adopted a resolution calling upon the Government of Iran to release the detained personnel immediately. When hearings before the Court on the concurrent request of the United States for the indication of provisional measures took place on 10 December, the President of the Court concluded his statement opening the hearings by addressing to the Agent of the United States the following question: "What significance should be attached by the Court, for the purpose of the present proceedings, to resolution 457 adopted by the Security Council on 4 December 1979?" (I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, p. 19.)

62. The answer to that question of the then Legal Adviser of the Department of State, Roberts Owen, is illuminating:

> "At this point, in response to a question raised by the President of the Court, I should make one final comment on the Court's jurisdiction. As the Court is aware, the Security Council of the United Nations has addressed the present dispute, and in resolution No. 457, adopted six days ago, the Council called upon the Government of Iran to bring about the immediate release of the hostages. In such circumstances it might conceivably be suggested that this Court should not exercise jurisdiction over the same dispute.
>
> I respectfully submit that any such suggestion would be untenable. It is, of course, an impressive fact that the 15 countries represented in the Security Council - 15 countries of very diverse views and philosophies - have voted unanimously - 15 to nothing - in favour of the resolution to which I have referred. The fact remains, however, that the Security Council is a political organ which has responsibility for seeking solutions to international problems through political means. By contrast, this Court is a judicial body with the responsibility to employ judicial methods in order to resolve those problems which lie within its jurisdiction. There is absolutely nothing in the United Nations Charter or in this Court's Statute to suggest that action by the Security Council excludes action by the Court, even if the two actions might in some respects be parallel. By contrast, Article 12 of the United Nations Charter provides that, while the Security Council is exercising its functions respecting a dispute, the General Assembly shall not make any recommendation on that dispute - but the Charter places no corresponding restriction on the Court. As Rosenne has observed at page 87 of his

treatise, The Law and Practice of the International Court of Justice, the fact that one of the political organs of the United Nations is dealing with a particular dispute does not militate against the Court's taking action on those aspects of the same dispute which fall within its jurisdiction.

To sum up on this point, the United States has brought to the Court a dispute which plainly falls within the Court's compulsory jurisdiction, and I respectfully submit that, if we can satisfy the Court that an indication of provisional measures is justified and needed in a manner consistent with Article 41 of the Court's Statute, the Court will have a duty to indicate such measures, quite without regard to any parallel action which may have been taken by the Security Council of the United Nations." (Ibid., pp. 28-29. See also pp. 33-34.)

63. At the request of the United States, the Security Council met again in late December, after it had become clear that Iran had no intention of complying with the Court's indication of provisional measures of 15 December 1979 which principally called for the immediate release of the hostages. On 31 December 1979, the Council adopted a resolution which recorded its concern over the situation "which could have grave consequences for international peace and security", recalled the view of the Secretary-General that the present crisis between Iran and the United States "poses a serious threat to international peace and security", expressly took into account the terms of the Court's Order of 15 December 1979, recalled the terms of Article 2, paragraphs 3 and 4, of the Charter, deplored the detention of the hostages contrary to the Court's Order, urgently called on Iran immediately to release the hostages, and decided to meet on 7 January 1980 "in order to review the situation and, in the event of non-compliance with this resolution, to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations".

64. Thus, in a case then actively being pursued before the Court, the Security Council found it perfectly proper to take, and to contemplate taking further, action under Chapter VII of the Charter. In the event, such further action was blocked by the exercise of the power of the veto. Nevertheless, I do not believe that this history of concurrent action of the Security Council and the Court, initiated in both forums by the United States, on a question which was seen to fall under Chapter VII of the Charter, can be reconciled with the contention of the United States in the current case that the jurisdiction of the Court cannot comprehend a case involving the continuing use of armed force because the Charter allots the entire responsibility of such cases to the Organization's political organs. As the Court held in its Judgment of 24 May 1980:

"it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the

> Court and the Security Council. Nor is there in this any cause for surprise." (United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 3, 22-23.)

The Court then cited the terms of Article 12 of the Charter.

65. It is of course true that the United States Diplomatic and Consular Staff in Tehran case did not involve a continuing use of force in international relations of the kinds at issue in the current case. But it should be recalled that the United States treated its aborted rescue mission of the hostages as "in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy", and reported that exercise to the Security Council "Pursuant to Article 51 of the Charter of the United Nations" (I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, p. 486). That was, in my view, a sound legal evaluation of the rescue attempt; there had been an armed attack upon the United States Embassy, and American hostages were being held by force of arms in conditions which the United States reasonably viewed as dangerous. In its Judgment of 24 May 1980, the Court itself, while not adjudging the legality of the rescue mission, spoke of "the armed attack on the United States Embassy by militants on 4 November 1979" (I.C.J. Reports 1980, p. 29). The situation was not, at the time of the Court's Judgment, one which, like the Corfu Channel case, was wholly in the past; the use of force against the hostages was continuing, and the threat to the peace - the Chapter VII situation - to which their detention gave rise was continuing.

66. But, while I believe that the United States Diplomatic and Consular Staff in Tehran case demonstrates that the Court can adjudge the legal aspects of a case the subject matter of which at the same time is under the active consideration of the Security Council under Chapter VII of the Charter, there is a critical distinction between the factual complexities of the United States Diplomatic and Consular Staff in Tehran case and the case now before the Court.

67. In the former case, there was no consequential dispute about the essential facts surrounding the seizure and detention of the hostages. They were proclaimed by Iran as they were condemned by the United States and the international community. Essentially uncontested, they were demonstrated by quantities of unchallenged data filed by the United States with the Court.

68. In the instant case, the situation is very different. The factual contentions of the Parties vitally differ. It is true that some allegations of Nicaragua against the United States are sustained by official admissions of the United States. But the allegations of the United States against Nicaragua are vehemently denied by Nicaragua - even if, as is shown in the appendix to this opinion, Nicaragua's denials are contradicted by its admissions and other evidence. The essential truth

of United States charges against Nicaragua has been demonstrated insofar as the facts show that it was Nicaragua which initiated armed subversion of the Government of El Salvador before the United States took responsive action in support of El Salvador against Nicaragua, and further show that Nicaragua has maintained its material support for the violent overthrow of the Government of El Salvador. Nevertheless, a critical question is left in a measure of uncertainty.

4. The incapacity of the Court to judge the necessity of continuing use of force in the circumstances of this case

69. For the United States response to Nicaragua's aggressive behaviour to be lawful, that response must be necessary. Is the Court in a position to adjudge the necessity of continued United States recourse to measures of collective self-defence? I doubt that it is, essentially because such a judgment of necessity requires the Court to pass upon whether or not the United States acts reasonably in refusing the belated professions of the Nicaraguan Government's willingness to refrain from undermining the governments of its neighbours if the United States will cease undermining it. Such a judgment, involving as it does an appraisal of the motives and good faith of Nicaragua and the United States, is exceedingly difficult for this Court now to make.

70. One may say that the United States was justified, on grounds of necessity, in exerting pressure upon Nicaragua from the end of 1981 until at least mid-1983, when it appears that Nicaragua was prepared to affirm that it would not support rebellion in El Salvador (notably but not exclusively, by its proposal of the four treaties described in the appendix, paras. 174-178), in return for United States cessation of its support for the contras and for the Government of El Salvador. Nicaragua's acceptance of the Contadora Group's Document of Objectives of 9 September 1983 may be read as embodying a similar affirmation by it. But, if these apparent facts are true, can this Court really judge, by legal criteria, whether the United States was right or wrong to reject this belated approach of Nicaragua? If the prior unlawful and prevaricating behaviour of Nicaragua had convinced the United States that Nicaragua's change of tune or tactics could not be trusted, can the United States be blamed for rejecting Nicaragua's four treaties and like subsequent Nicaraguan professions, made bilaterally and in the Contadora context, in the apprehension that, once the contras were abandoned or disbanded, and in its own good time, Nicaragua would resume its armed subversion of its neighbours? After all, the Nicaraguan Government has affirmed (in an address of one of the nine governing comandantes) that its policy of "interventionism" - this is the word Commander Bayardo Arce chose - "cannot cease". ("Commander Bayardo Arce's Secret Speech before the Nicaraguan Socialist Party (PSN)", Department of State Publication 9422, 1985, p. 4.)

71. This is a reasonable question, but I doubt that it is a justiciable question. I say this not because of what the United States has characterized as the "ongoing" character of the case and the "fluid" nature of its changing facts. The Statute of the Court rightly contemplates that the Court may deal with cases of an "ongoing" nature; if it did not, the provisions of the Statute for the indication of "any provisional measures which ought to be taken to preserve the respective rights of either party" would not make sense. Nor do I believe that the answer to the question is beyond the Court's capacity because, or essentially because, of the unwillingness of the United States to take part in the proceedings of the Court on the merits of the case. It would be difficult for the Court to establish the true motives, and the reasonableness, of the policy of a Party on a question such as this, even if it were present in Court. The Court is not in a position to subpeona the files of the Central Intelligence Agency and the White House - or the files of the Nicaraguan Government, not to speak of the files of the Government of Cuba and of other supporters of the subversion of El Salvador. It is one thing for the Nuremberg Tribunal "ultimately" (to use its term) to have arrived at a judgment of necessity after the fact and having before it as part of the evidence offered by the prosecution the captured files of the defendant. It is another for this Court to reach a confident judgment on the policies - and motives - of the States immediately concerned, the more so when not only is one Party absent and, in any event, unwilling, for security reasons, to reveal information it treats as secret, but when other States inextricably concerned also are not in Court, and apparently no more willing. The difficulties of the Court adjudicating the validity of a plea of collective self-defence in the absence not only of the United States, a Party to the case, but in the absence of others of the "collective", namely El Salvador and Honduras, which are not parties to the case, are considerable. Nor, as shown below, can El Salvador be blamed for not intervening at the stage of the merits; contrary to Nicaragua's contention, inferences against the allegations El Salvador makes cannot be drawn by its failure to appear in Court to sustain those allegations.

72. As for the Government of Nicaragua, whose Congress is not controlled by the opposition, which has no need to adopt an Intelligence Authorization Act, which is not subject to the oversight of a Select Committee on Intelligence or the revelations of an uncensored press, whose ministries act with the assistance of advisers from authoritarian regimes, whose ideology is not liberal, and whose Ministers misrepresent the facts before this Court, the difficulties of arriving at the truth in respect of its actions and, a fortiori, its motives, are compounded.

73. Moreover, if a fuller finding of the facts might arguably have put the Court in a better position to pass upon the question of the necessity of United States action in alleged self-defence, the Court has not troubled to find those facts, as pointed out below. The fact is that, if its fact-finding powers could, if used, perhaps have enabled the Court to make a more informed judgment of the necessity or lack of necessity of United States actions in collective self-defence, the Court has refrained from exercising those powers.

74. In view of all these considerations, the Court would have done well to have prudentially held that a core issue of this case - whether the United States plea of self-defence is justified - is not now justiciable. However, the Court has decided to reach a judgment on this question on the basis of such facts as have come to light, as it has found those facts.

75. In my view, the finding of facts by the Court is not only inadequate because of the singular character of the case and, perhaps, because it has failed to exert its fact-finding powers; the Court, partially because of its misapplication of the rules of evidence which it has articulated for this case, has even failed adequately to recognize and appraise the facts which do appear in the record of the proceedings and in this dissenting opinion, including the fact of the purposeful prevarication of the Nicaraguan Government. It has also failed to draw the correct legal conclusions from those facts which it gives some sign of recognizing, as by failing to apply against Nicaragua that fundamental general principle of law so graphically phrased in the term, "clean hands".

76. In these circumstances, in which I do not share the view of the Court that the question of the necessity of United States actions is now justiciable, I feel bound to express a judgment - as has the Court - on the basis of the facts which are before the Court and in the public domain, inadequate as they may be. For reasons which are set out in subsequent paragraphs of this opinion, my conclusion is that the United States has acted and does act reasonably - at any rate, not unreasonably - in deciding that its continuing exertion of armed and other pressures upon Nicaragua is necessary to constrain Nicaragua's continuing exertion of armed and other pressures upon El Salvador. If United States action is necessary, then, as a matter of law, it is proper.

77. That is not to say that - as pointed out in paragraph 5 of this opinion - I approve or disapprove of the policies which the United States is pursuing vis-à-vis Nicaragua, El Salvador or other Central American countries. My conclusion simply is that, as a matter of international law, the United States acts legally in exerting armed and other pressures upon Nicaragua with the object of inducing it to desist definitively from its armed subversion of the Government of El Salvador and of other of its neighbours.

C. The relevance and effect of the "multilateral treaty" reservation

1. The Court was and is bound to apply the reservation

78. In my view, one of the several unfounded elements of the Court's decision on jurisdiction was its treatment of the "multilateral treaty" (Vandenberg) reservation of the United States to the compulsory jurisdiction of the Court, which withholds from the Court's jurisdiction

"disputes arising under a multilateral treaty, unless (1) all the 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". For the reasons set out in my dissent, I remain convinced that the Court evaded application of that reservation (see I.C.J. Reports 1984, pp. 602-613).

79. The Court's failure to give the multilateral treaty reservation effect at the stage at which it was intended to have effect - in the jurisdictional phase - has had regrettable results. The United States cited that failure as a reason for withdrawing from the case. It also cited that failure as a reason for withdrawing from the Court's compulsory jurisdiction. In testimony before the Senate Foreign Relations Committee on 4 December 1985, the Legal Adviser of the State Department, Judge Abraham D. Sofaer, declared:

> "We carefully considered modifying our 1946 declaration as an alternative to its termination, but we concluded that modification would not meet our concerns. No limiting language that we could draft would prevent the Court from asserting jurisdiction if it wanted to take a particular case, as the Court's treatment of our multilateral treaty reservation in the Nicaragua case demonstrates. That reservation excludes disputes arising under a multilateral treaty unless all treaty partners affected by the Court's decision are before the Court. Despite Nicaragua's own written and oral pleadings before the Court - which expressly implicated El Salvador, Honduras, and Costa Rica in the alleged violations of the UN and OAS [Organization of American States] Charters and prayed for a termination of U.S. assistance to them - and statements received directly from those countries, a majority of the Court refused to recognize that those countries would be affected by its decision and refused to give effect to the reservation." (Abraham D. Sofaer, "The United States and the World Court", Department of State Current Policy No. 769, p. 3)

Not only has this argument carried the day in Washington; there may be reason to apprehend that other States which have made declarations under the Optional Clause with reservations may withdraw their declarations because of a like perception that the Court may not apply their reservations should occasion for their application arise. One State already has withdrawn its adherence, perhaps in this apprehension.

80. But while the Court avoided application of the multilateral treaty reservation at the jurisdictional stage, it did join application of the reservation to the merits in holding that "it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified" (I.C.J. Reports 1984, p. 425). Thus, as the general lines of today's Judgment became clear, the Court decided whether any States party to the four treaties relied upon by Nicaragua - most notably, the United Nations Charter and OAS Charter - will be affected by the Judgment. It has reached the conclusion that El Salvador will be affected - a correct conclusion, which, however, was no less plain at the jurisdictional stage than it is today.

81. That, indeed, it was perfectly plain at the jurisdictional stage that El Salvador (and Honduras and Costa Rica) would ineluctably be affected by the Court's Judgment, whatever its content, was, in my view, not only demonstrable in 1984 but demonstrated (see I.C.J. Reports 1984, pp. 604-608). It is demonstrated anew by the Court's endeavour in today's Judgment to explain why it is that it is apparent now that El Salvador will be affected but was not in 1984. The Court maintains that, generally speaking, if the relevant claim is rejected on the facts, a third party could not be affected by the Court's judgment. It continues:

> "If the Court were to find in the present case, for example, that the evidence was not sufficient for a finding that the United States had used force against Nicaragua, the question of self-defence as a justification for the use of force would not arise, and there would be no possibility of El Salvador being 'affected' by the decision."

82. That explanation is patently unpersuasive. In the first place, it was no less obvious in 1984 than it is today that the United States had used force against Nicaragua. By 26 November 1984, such use of force against it not only had been charged by Nicaragua; by its legislation and otherwise, the United States had officially and repeatedly acknowledged the use of force and it was obvious to all the world. For the Court to suggest otherwise is implausible in the extreme. In the second place, as I observed in 1984:

> "Nor is it persuasive to argue, as the Court does, that if it should reject Nicaragua's Application, there would be no third States that could claim to be affected by the judgment in the case. That is like saying that, if in a national court, citizen 'A' is indicted on charges of terrorism involving the smuggling of narcotics and arms, and foreigners 'B', 'C' and 'D', who are situated abroad, are named in the charges as unindicted co-conspirators, and if the court finds citizen 'A' not guilty, then foreigners 'B', 'C' and 'D' are not affected by the judgment - not affected legally, economically, morally or otherwise."

83. The Court has rightly concluded in today's Judgment that application of the multilateral treaty reservation cannot be avoided on the ground that the United States was not present in the proceedings on the merits so as to raise that objection at the stage when the Court apparently held that it could be raised. Since the Court itself had held that, when the general lines of the judgment to be given have become clear, the States "affected" can be identified, that implied that, at that stage the Court would address the issue. For its part, the United States had formally raised and fully argued an objection based on the multilateral treaty reservation and had never withdrawn or waived that objection. It remained before the Court, postponed by it to the

merits. But, more than this, for the Court to have avoided application of the reservation on the ground that the United States was not here to press it would have conflicted with the letter and spirit of Article 53 of the Statute. By reason of that mandatory provision, the Court "must", before deciding upon the claim, "satisfy itself, not only that it has jurisdiction ... but also that the claim is well founded in fact and law". Having put off a preliminary objection of a jurisdictional character on the ground that it is not of an exclusively preliminary character, the Court remained bound to examine that objection at the stage to which it had removed it, whether or not the Party which raised the objection was present to argue it. To have held the contrary would have deprived Article 53 of the Statute of its effect. It would also have run counter to what the Court held in the United States Diplomatic and Consular Staff in Tehran case in interpretation of Article 53:

> "33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, proprio motu, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case." (United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 18.)

84. Nicaragua's essential contention against application of the multilateral treaty reservation at this stage is that the argument of the United States that El Salvador, Honduras and Costa Rica will be affected by the decision in this case has been vitiated by the United States admission that it seeks overthrow of the Nicaraguan Government. Nicaragua contends that overthrow is incompatible with self-defence; hence the United States argument "simply evaporates" (Memorial of Nicaragua, p. 185).

85. This simple argument is unduly simplistic. In the first place, it is by no means established that the United States seeks the overthrow of the Nicaraguan Government (appendix to this opinion, paras. 23-26, 157-159, 200-205). Second, if, arguendo, one assumes that the purpose of United States military and paramilitary activities in and against Nicaragua is the overthrow of its Government, it does not follow that that necessarily is incompatible with, and constitutes an abandonment of, the argument of self-defence. In some, indeed most, instances, overthrow of the aggressor government might be an unnecessary and disproportionate act of self-defence, but in others it may be necessary and proportionate. It depends on the facts (if they can be found).

86. The official position of the United States has been and remains that it does not seek the overthrow of the Government of Nicaragua, and that the pressures which it continues to exert upon that Government are lawful measures of collective self-defence taken in support of El Salvador. Contrary to the contentions of Nicaragua before the Court, the United States has abandoned neither of these positions. While Nicaragua maintains that, with its withdrawal from the case, the United States no longer spoke of collective self-defence as the legal justification for its exertion of pressures upon Nicaragua, "Revolution beyond our Borders", published by the Department of State in September, 1985, some nine months after the announcement of United States withdrawal from the Court's proceedings, re-affirms that justification. As recently as 15 January 1986, Secretary of State Shultz, in a public address entitled, "Low-Intensity Warfare: the Challenge of Ambiguity", maintained that the Nicaraguans:

> "have committed aggression against their neighbors and provided arms to terrorists like the M-19 group in Colombia, but cynically used the International Court of Justice to accuse us of aggression because we joined with El Salvador in its defense" (Department of State, Current Policy No. 783, p. 1).

87. Since the multilateral treaty reservation is a reservation in force which limits the extent of United States submission to the Court's jurisdiction, the Court is bound to apply it and thus to revert to the question which it postponed in its Judgment of 26 November 1984: will El Salvador, Honduras and Costa Rica, or any of them, be affected by the Judgment of the Court in this phase of the case?

88. It is plain that the Court's Judgment, which holds in favour of Nicaragua's essential claims and against the essential defence of the United States, must affect El Salvador, Honduras and Costa Rica. They are affected not only legally, but politically, militarily, economically and morally (it will be observed that the multilateral treaty reservation does not specify "legally affected"). The very pleadings of Nicaragua reinforce that conclusion. As I pointed out in my dissent to the Judgment of 26 November 1984:

> "The very first numbered paragraph of its Application claims that the United States has installed more than '10,000 mercenaries ... in more than ten base camps in Honduras along the border with Nicaragua ...' ... Nicaragua has also alleged that there are 2,000 United States-supported 'mercenaries' operating against it from Costa Rica ... and that the Government of Costa Rica is acting in concert with the United States ... Moreover, in the recent oral argument in this phase of the proceedings, the Agent of Nicaragua alleged that, in this dispute, the United States has bases, radar stations, spy planes, spy ships - the armies of El Salvador and Honduras at its service ..."; that is to say, Nicaragua has alleged that

the United States acts in concert with Honduras and El Salvador. It is accordingly plain that, if the pleadings of Nicaragua are to be accepted for these purposes as accurate, and if Nicaragua were in a decision of the Court to be accorded the remedies which it seeks, Honduras, Costa Rica and El Salvador necessarily would be 'affected' by the Court's decision. Point (g) of what Nicaragua in its Application ... requests the Court to adjudge and declare makes this particularly clear. Nicaragua requests that the Court hold that the United States

> 'is under a particular duty to cease and desist immediately ... from all support of any kind - including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support - to any nation ... engaged or planning to engage in military or paramilitary actions in or against Nicaragua ...'

It is a fact that the United States is heavily engaged in supporting Honduras and El Salvador with training, arms, finances, etc. Nicaragua itself in its Application and pleadings alleges that Honduras and El Salvador are engaged in military or paramilitary actions in or against Nicaragua, in concert with the United States. Honduras and El Salvador, in their communications to the Court, maintain that actually it is Nicaragua which has engaged and is engaging in a variety of acts of direct and indirect aggression against them, including armed attacks. In short, Nicaragua seeks a judgment from the Court requiring the United States to cease and desist from actions which Nicaragua claims are unlawfully directed against Nicaragua, with the assistance of Honduras, Costa Rica and El Salvador, whereas the United States, Honduras and El Salvador claim that these very actions are conducted in collective self-defence against Nicaraguan acts of aggression. The judgment which the Court reaches on this critical point accordingly must 'affect' not only the United States but Honduras and El Salvador, and - in view of Nicaragua's allegations - Costa Rica as well."

89. While the final submissions of Nicaragua in the case are cast in general terms, they do not derogate from the foregoing analysis. The Court is requested to adjudge and declare that:

> "the United States has violated the obligations of international law indicated in the Memorial ... and to state in clear terms the obligations which the United States bears to bring to an end the aforesaid breaches of international law ..." (CR 85/27, p. 78).

The Court has responded positively to the substance of Nicaragua's request. The essence of the contentions of Nicaragua is to brand the United States as in violation of its obligations not to use force against and not to intervene against Nicaragua, and, correspondingly and necessarily, the essence of Nicaraguan contentions entails rejection of the United States defence that it acts in collective self-defence. But El Salvador and Honduras support the claim that the United States acts in collective self-defence, not only verbally, but by their actions in the field. El Salvador and Honduras necessarily are affected by the Court's treatment of the United States claim to act in collective self-defence, and would be whether the Court rejected - or upheld - that claim. To have held otherwise, on the ground that the only Parties to the instant case are the United States and Nicaragua and that the Court's Judgment will be directed to and bind them alone, would have been patently unconvincing. It not only would have vitiated the multilateral treaty reservation but run counter to the sense of Articles 62 and 63 of the Statute, which recognize and provide for the possibility that States not parties to a case "may be affected" by the decision in the case.

90. Nicaragua further argues that neither El Salvador nor Costa Rica nor Honduras could be "affected" by a decision in this case, since "no legitimate" rights or interests of those States would be prejudiced by an adjudication of Nicaragua's claims against the United States. That is a question-begging argument. Perhaps it is Nicaragua's view that neighbouring States have no right or interest in resisting Sandinista-supported insurgencies; that their best interests lie in submitting to the imposition of what Commander Bayardo Arce proclaims to be "the dictatorship of the proletariat" (Arce, loc. cit., p. 4). But clearly that is not a view shared by the Governments of El Salvador, Honduras and Costa Rica; they appear to believe that it is right to resist Nicaragua's support of subversion. Whether they may "legitimately" do so depends on the facts characterizing and the law governing the actions of Nicaragua and the facts and law involved in responsive actions of the United States, El Salvador, Honduras and Costa Rica. It does not depend upon a preclusive or conclusory determination of what is legitimate.

2. The relationship of customary international law to the reservation

91. The substantial Nicaraguan argument in respect of the multilateral treaty reservation is that claims based on customary and general international law, and on bilateral treaties, are not covered by the proviso and so are before the Court for determination. While the matter is by no means that simple - as my dissent to the Judgment of 26 November 1984 indicated in paragraphs 85-90 - Nicaragua is correct in pointing out that the Court held in paragraph 73 of that Judgment that principles such as "the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated".

92. Having given further consideration to the problem of the relationship between the principles and provisions of the United Nations Charter and the OAS Charter, on the one hand, and of customary international law, on the other - as to which I expressly reserved my position in paragraph 90 of my dissent to the Court's Judgment of 26 November 1984 - I have reached the following conclusions.

93. This is a case in which the Parties, the United States and Nicaragua, both are Members of the United Nations and of the Organization of American States. They are bound by the Charters of those Organizations. The cardinal principles of international law which today govern the use of force in international relations are found in the United Nations Charter, and, insofar as States of the Americas are concerned, the cardinal principles of international law binding them which govern intervention in the affairs of other American States are found in the Charter of the Organization of American States. The multilateral treaty reservation withholds from the jurisdiction of the Court 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. It has been shown that El Salvador, Honduras and Costa Rica must be affected by the decision of the Court, a conclusion which the Court itself in substance belatedly has accepted, and those States are not parties to the case. It follows that the Court cannot, in adjudicating the claims of Nicaragua, rely upon and apply the principles and provisions of the United Nations and OAS Charters. Can the Court nevertheless give genuine effect to the multilateral treaty reservation by applying those very principles and provisions, by finding that those principles and provisions, or some of them, form part of customary international law?

94. The argument that the principles if not the provisions of the United Nations Charter governing the use of force in international relations have been incorporated into the body of customary international law is widely and authoritatively accepted, despite the fact that the practice of States manifests such irregular support for the principles of law which the Charter proclaims. Indeed, it could even be argued that the practice, in contrast to the preachment, of States indicates that the restrictions on the use of force in international relations found in the Charter are not part of customary international law.

95. However, even if the argument is accepted - and it is generally accepted - that Charter restrictions on the use of force have been incorporated into the body of customary international law, so that such States as Switzerland, the Koreas, and diminutive States are bound by the principles of Article 2 of the Charter even though they are non-Members, the fact remains that Nicaragua and the United States <u>are</u> Members of the United Nations (and the OAS as well). Since they are bound by their Charters, it would be an artificial application of the law to treat them as if they were not bound, but bound only by customary international law,

which, however, is essentially the same - not, presumably, in embracing a procedural proviso such as reporting to the Security Council under Article 51, but the same insofar as the content of Article 2, paragraph 4, is concerned. That would be an application of the law of this case - which includes the multilateral treaty reservation - which would avoid rather than apply that reservation. Since Article 2, paragraph 4, and Article 51 (and comparable provisions of the OAS Charter as well as those dealing with intervention) are the specific and governing legal standards to which the Parties in this case have agreed, and since the multilateral treaty reservation debars the Court from applying to the dispute those standards as expressed in those treaties, I conclude that the Court lacks jurisdiction to apply both those treaties and their standards to this dispute.

96. I so conclude whether or not it is correct to hold that these principles also form what is contemporary customary international law on the use of force in international relations. If, as the International Law Commission has put it, "The principles regarding the threat or use of force laid down in the Charter are ... rules of general international law which are to-day of universal application", and "Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (Yearbook of the International Law Commission, 1966, Vol. II, pp. 246, 247), and if, as counsel for Nicaragua argued, these provisions of Article 2, paragraph 4, are the "embodiment of general principles of international law" (CR 84/8, p. 62), then there is little ground for the Court considering the dispute before it apart from the terms of Article 2, paragraph 4. It is of course true that the same provision of law may be found in customary international law and in a treaty. Codification of a customary norm in a treaty does not necessarily displace the custom, and certainly the incorporation of a provision of a universal treaty into the body of customary international law does not displace the treaty. But in the case before the Court, the Court is confronted with a reservation to its jurisdiction which, by the weight of its jurisprudence of more than sixty years, it is bound to apply so as to give it effect rather than deprive it of effect. As Judge Sir Hersch Lauterpacht put it in respect of the Court's jurisdiction:

> "... the established practice of the Court - which, in turn, is in accordance with a fundamental principle of international judicial settlement - [is] that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt" (case of Certain Norwegian Loans, Judgment, I.C.J. Reports 1957, p. 58).

Thus the Court is bound to give substantive effect to the multilateral treaty reservation. It is not free to avoid its application by an argument which, if technically defensible, in real terms would vitiate a limitation which the United States has imposed upon the jurisdiction of the Court. Accordingly, while recognizing that there is room for the contrary conclusion which the Court has reached, I conclude that the generally accepted essential, even if incomplete, identity of Charter principles and principles of customary international law on the use of

force in international relations, rather than authorizing the Court to apply those customary principles to the central issues of this case, precludes the Court from doing so by reason of the limitations imposed upon the Court's jurisdiction by the multilateral treaty reservation.

97. Such a preclusion does not, however, extend to questions of freedom of navigation, as to which customary international law long antedates the Charter and has not been subsumed by it.

98. Nor can it be persuasively argued that the sweeping provisions of the OAS Charter concerning intervention constitute customary and general international law. There is no universal treaty which has incorporated those provisions into the body of general international law. There is hardly sign of custom - of the practice of States - which suggests, still less demonstrates, a practice accepted as law which equates with the standards of non-intervention prescribed by the OAS Charter. State practice in the Americas - by States of Latin America as by others - does not begin to form a customary rule of non-intervention which is as categoric and comprehensive as are the provisions of the OAS Charter. Thus it may be contended that, in this case, the Court can apply such customary international law of non-intervention as there is, a customary international law which is much narrower than that which the OAS Charter enacts for the parties to it. The essence of that law long has been recognized to prohibit the dictatorial interference by one State in the affairs of the other. It accordingly may be argued that the Court is not debarred by the thrust of the multilateral treaty reservation from considering whether the measures taken by the United States against Nicaragua, direct and indirect, constitute dictatorial interference in the affairs of Nicaragua.

99. But it may be argued to the contrary that, where, as here, the United States and Nicaragua (and the "affected" States) are bound by the terms of the OAS Charter, and where the provisions of that Charter embrace not only dictatorial interference but much more pervasive proscription of intervention, the greater includes the lesser; that, since the OAS Charter sets out between the Parties, and as among them and the States affected, the specific and governing legal standards, and since the multilateral treaty reservation debars the Court from application of those standards, it withholds from the Court jurisdiction to pass upon complaints of intervention in this case, all of which must fall within the capacious terms of the OAS Charter. In my view, the latter argument, while open to challenge, is the stronger. Moreover, the complaints of intervention in this case are so intimately involved with the complaints of the unlawful use of force - the facts that underlie both causes of action correspond so closely - that the artificiality of treating the Court as having jurisdiction to deal with charges of intervention and not having jurisdiction to deal with charges of the unlawful use of force reinforces this conclusion.

D. The question of jurisdiction under the Treaty of Friendship, Commerce and Navigation

100. In its Judgment of 26 November 1984, the Court held that, in addition to its having jurisdiction under the Optional Clause of the Court's Statute, it had jurisdiction, "limited as it is", by reason of the terms of the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (I.C.J. Reports 1984, p. 426). The Court noted that that Treaty contains a compromissory clause providing that:

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

The Court observed that Nicaragua claimed that certain provisions of the Treaty had been violated by the United States and it concluded:

> "Taking into account these Articles of the Treaty of 1956, particularly the provision ... for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties ... as to the 'interpretation or application' of the Treaty ... Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or application of the Articles of the Treaty of 1956 ... the Court has jurisdiction under that Treaty to entertain such claims."

101. Quite apart from the failure of Nicaragua and the Court at that stage sufficiently to relate Nicaragua's claims against the United States for the unlawful use of force to the terms of this commercial treaty, this apparently plausible holding of the Court was plausible only because the Court failed to refer to the terms of Article XXI (1) (d) of the Treaty, which provides that:

> "1. The present Treaty shall not preclude the application of measures: ...
>
> (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests ..."

In this regard, my dissent to the Court's Judgment of 26 November 1984 concluded:

> "Now it cannot be argued - and Nicaragua did not argue, nor does the Court hold - that, since the Treaty 'shall not preclude the application of measures' ... which are necessary to fulfil the obligations of a Party for the maintenance of international peace and security or to protect its essential security interests, these very exclusions entitle the Court to assume jurisdiction over claims based on the Treaty that relate to ... the maintenance of international peace and security or essential security interests. It is clear that, where a treaty excludes from its regulated reach certain areas, those areas do not fall within the jurisdictional scope of the treaty. That this preclusion clause is indeed an exclusion clause is demonstrated not only by its terms but by its travaux préparatoires, which were appended to the United States pleadings in the case of United States Diplomatic and Consular Staff in Tehran. A list of a score of Treaties of Friendship, Commerce and Navigation, including that with Nicaragua, is found at page 233, which is followed by a 'Memorandum on Dispute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China' which contains the following paragraph:
>
> > 'The compromissory clause ... is limited to questions of the interpretation or application of this treaty; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject-matter - and in some cases almost identical language - has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the "essential interests of the country in time of national emergency", are specifically excepted from the purview of the treaty.
> >
> > In view of the above, it is difficult to conceive how Article XXXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed.' (At p.235; emphasis supplied.)

A second memorandum, entitled 'Department of State Memorandum on Provisions in Commercial Treaties relating to the International Court of Justice', similarly concludes, first with respect to the scope of the jurisdiction accorded to the Court under FCN treaties, and second with respect to national security clauses:

> 'This paper [of the Department of State] ... points out a number of the features which in its view make the provision satisfactory ... These include the fact that the provision is limited to differences arising immediately from the specific treaty concerned, that such treaties deal with familiar subject-matter and are thoroughly documented in the records of the negotiation, that an established body of interpretation already exists for much of the subject-matter of such treaties, and that such purely domestic matters as immigration policy and military security are placed outside the scope of such treaties by specific exceptions.' (Ibid., p. 237; emphasis supplied.)

Article XXI of the Treaty thus serves to indicate that the parties to the Treaty acted to exclude from its scope the kind of claim ('restoration of international peace and security' and protection of 'essential security interests') which Nicaragua seeks to base upon it."
(I.C.J. Reports 1984, pp. 635-637.)

102. Nicaragua's Memorial on the merits, and Nicaragua's counsel in extensive and detailed oral argument on various provisions of the Treaty, had remarkably little to say about Article XXI (1) (d). Not a word was said about the travaux préparatoires just quoted. As for the Treaty provision itself, Nicaragua's Memorial submits:

> "One party to a treaty, however, cannot absolve itself of all responsibility for violations of the provisions of the treaty by simply invoking an exculpatory provision. It is for the Court and not for the Parties to determine the validity of such assertions.
>
> ...
>
> Article XXI (1) (d) cannot be invoked to justify the activities of the United States. This provision refers implicitly to the provisions in the United Nations Charter relating to the maintenance of international peace and security. Nicaragua has shown ... that the military and paramilitary activities conducted by the United States in and against Nicaragua are completely incompatible with these provisions of the Charter." (Memorial of Nicaragua, pp. 221-222.)

103. In oral argument, Nicaraguan counsel dismissed the significance of Article XXI (1) (d). As to whether the measures which the United States has pursued against Nicaragua are necessary to fulfil its obligations for the maintenance of international peace and security, Nicaraguan counsel said that the preconditions of application of that provision "are obviously not met in this case". As to whether the measures which the United States has pursued against Nicaragua are

necessary for the United States to protect its essential security interests, counsel professed to deal with this question by translating "essential security interests" as "vital interests" and then by claiming that this provision deals with a "state of necessity" (ignoring the fact that another provision of the Treaty deals with the right of the Parties "to apply measures that are necessary to maintain public order and protect the public health, morals and safety"). Nicaraguan counsel gave no weight to the contentions of the United States that the policies of Nicaragua towards its neighbours and Nicaragua's intensifying integration with Soviet-led States constitutes, in the view of the United States, a challenge to its "essential security interests". For its part, the Court considers that United States mining of Nicaraguan ports, and its direct attacks on Nicaraguan ports and oil installations as well as its trade embargo, "cannot possibly" be justified as "necessary" to protect the essential security interests of the United States. The Court also holds that a State - in this case, the United States acting under Article XXI (1) (d) of the Treaty - can have no "obligations" to act in collective self-defence, apart from obligations imposed by decisions of the Security Council taken on the basis of Chapter VII of the United Nations Charter or required by the OAS under Articles 3 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).

104. There is room for dispute over whether the measures taken by the United States against Nicaragua which are at issue in this case are measures "necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests". That question, insofar as it relates to such obligations, is examined in a later section of this opinion. It may be observed at this juncture, however, that the Court's holding that the only obligations to act in collective self-defence are those required by the United Nations Security Council or the OAS not only derives from a misreading of the relevant treaty law. If the Court were correct - and it is not - then the obligations of the Parties to the NATO and Warsaw Treaties, among others, would be illusory. Under Article 5 of the North Atlantic Treaty, for example:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

(To like effect, see Article 4 of the Treaty of Friendship, Co-operation and Mutual Assistance signed at Warsaw on 14 May 1955.) As for the Court's conclusion that direct United States pressures against Nicaragua "cannot possibly" be justified as "necessary" to protect essential security interests of the

United States, it may be said that, insofar as the Court, or any court, is suited to make such a judgment, this Court's judgment appears to have been made in disregard of Nicaragua's subversion of its neighbours which surely affects essential security interests of the United States (see I.C.J. Reports 1984, pp. 195-199). (It may be recalled that Lauterpacht, in The Function of Law in the International Community, concluded that it is "doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security ..." (At p. 188.))

105. What is in any event clear is that Article XXI of the Treaty provides that "the present Treaty shall not preclude the application of such measures". The application of such measures is not regulated by the Treaty; the preclusion clause is an exclusion clause. In my view, where a treaty excludes from its regulated reach certain areas, those areas do not fall within the jurisdictional scope of the Treaty. "In the face of such explicit language, it is difficult to see how any tribunal could use the Treaty to subject to its own jurisdiction matters that had been expressly excluded." (W. Michael Reisman, "Has the International Court Exceeded its Jurisdiction?", American Journal of International Law, Vol. 80, 1986, pp. 130-131.) That this Treaty's preclusion clause is indeed an exclusion clause is indicated not only by its terms but by the quoted travaux préparatoires. Thus - apart from the Treaty's essentially commercial concerns - I remain of the view that the Treaty fails to provide a basis of jurisdiction for the Court in this case, certainly for the central questions posed by it, unless, at any rate, United States reliance upon Article XXI (1) (d) is, on its face, without basis.

106. However, the Court has reached another conclusion, essentially founded in the position that a dispute over the validity of United States characterization of the measures it has taken as measures falling within the scope of Article XXI (1) (d) is a dispute over "the interpretation or application of the present Treaty" and, as such, falls within the Court's jurisdiction. If one accepts that position as correct, then one is brought back to the paramount problem of the case: are the measures taken by the United States against Nicaragua justifiable as measures of collective self-defence or as measures necessary to protect its essential security interests? That question, in turn, can only be decided in accordance with the governing provisions of the United Nations Charter. The multilateral treaty reservation to the Court's jurisdiction under Article 36, paragraph 2, of the Statute has no effect upon the Court's jurisdiction to decide a dispute arising under a bilateral treaty on which a party relies pursuant to Article 36, paragraph 1 of the Statute. This commercial Treaty contains no provisions like Article 2, paragraph 4, or Article 51 of the Charter; the Treaty itself provides no basis for the Court's making a judgment on the use of force and of intervention in international relations. The Court accordingly is not invested with jurisdiction to pass upon the issues at the core of this case by the terms of the bilateral Treaty of Friendship, Commerce and Navigation. At most, the Treaty provides a basis for the Court's jurisdiction - "limited as it is", in the Court's words (or what were the Court's words in 1984) - to pass upon the legality of measures

relating to the terms of the treaty, such, arguably, as the United States mining of Nicaraguan ports and the imposition of the trade embargo. However, in reaching such judgments, the Court will be bound to apply Charter provisions to the determination of the question of whether the United States is absolved of breach of the Treaty by reason of the Treaty's not precluding the application of measures "necessary to fulfill" its "obligations for the maintenance or restoration of international peace and security" or to "protect its essential security interests". As indicated elsewhere in this opinion, in my view the actions of the United States vis-à-vis Nicaragua are in essential accord with the obligations which it has undertaken under the Rio Treaty for the maintenance or restoration of international peace and security, and consistent with the Charter as well.

E. The effect of the absence of El Salvador

107. Before turning to the question of the effect on the Court's procedures of the absence of the United States from this stage of the proceedings, observations on the absence of El Salvador are in order. From the outset of the case, the United States maintained that the immediate object of Nicaraguan activities tantamount to armed attack is El Salvador, and the United States presented an affirmative defence essentially based on the contention that it acts in collective self-defence with El Salvador. On 15 August 1984, El Salvador filed a Declaration of Intervention under Article 63 of the Statute which, while supporting these United States contentions, sought to show why, under the treaties on which Nicaragua relied in its Application, the Court lacked jurisdiction in the case. At the time, the logic of El Salvador's claim to intervene under Article 63 in the jurisdictional phase of the proceedings was summarized in the following way:

> "First, El Salvador claims to be acting in collective self-defence with the United States to resist Nicaraguan intervention and aggression;
>
> Second, the United States claims to be acting in collective self-defence with El Salvador to resist Nicaraguan intervention in and aggression against El Salvador;
>
> Third, El Salvador itself, by reason of the terms of its adherence to the Court's compulsory jurisdiction, is not subject to the Court's jurisdiction in this class of matter involving claims of aggression, self-defence, etc., and El Salvador does not consent to the Court's jurisdiction;
>
> Fourth, the Court cannot adjudge the legality of the actions of the United States of which Nicaragua complains without in effect adjudging the legality of the actions of El Salvador, for the United States and El Salvador act jointly in collective self-defence against Nicaragua;

> Fifth, since the Court cannot exercise jurisdiction either in the absence of El Salvador whose rights are at issue, or where Nicaragua directly seeks to bring El Salvador before the Court in this class of matter, it equally cannot exercise jurisdiction where the effect of Nicaragua's action against the United States - were the Court to assume jurisdiction over it - would be indirectly to bring El Salvador's rights before the Court in the very class of matter which El Salvador's adherence to the Court's compulsory jurisdiction excludes." (My dissenting opinion to the Court's Order of 4 October 1984, I.C.J. Reports 1984, p. 227.)

El Salvador then also reserved the right in a later, substantive phase of the case to address the interpretation and application of the conventions to which it is a party which had been invoked by Nicaragua.

108. This was only the second time in the history of the Court in which a State sought to intervene under Article 63 of the Statute and the first in which it sought to do so at the jurisdictional stage of the proceedings. El Salvador's request was significant and substantial, but it posed a number of questions, which the Court would have done well to have elucidated at the oral hearings which were contemplated under Article 84 of the Rules of Court, which provides that, if "an objection is filed to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding".

109. However, the then President of the Court caused to be issued, on 27 September 1984, a press release which in effect indicated that El Salvador's request to intervene would be denied. That release was issued even before the Court had met to deliberate on the request. (See in this regard Judge Oda's separate opinion, I.C.J. Reports 1984, p. 221, and my dissenting opinion, ibid., pp. 232-233.)

110. When the Court met, it promptly issued an Order denying El Salvador's request to intervene. It failed to accord El Salvador a hearing on its request, despite the terms of Article 84 (and despite El Salvador's request for a hearing). While Nicaragua had voiced objections to El Salvador's request, it purported not to have filed "an objection", a view which the Court in effect appears to have adopted. (See I.C.J. Reports 1984, pp. 227-233.) In denying El Salvador a hearing and summarily dismissing its request, the Court's conclusory Order provided the barest statement of reasons - so bare that the Order may be regarded as virtually unreasoned.

111. These proceedings have been the subject of extensive analysis by an authority on the Court's procedures, Jerzy Sztucki, Professor of International Law at the University of Uppsala. He not only finds the failure to accord El Salvador a hearing and indeed to permit it to

intervene at the stage of jurisdiction procedurally and legally unfounded. Professor Sztucki has felt constrained to record his conclusion that "the Court's decision might reinforce the suspicion - noticeable in other aspects of the Nicaragua case - of politicization of judicial proceedings and anti-Western bias". ("Intervention under Article 63 of the I.C.J. Statute in the Phase of Preliminary Proceedings: The 'Salvadoran Incident'", American Journal of International Law, Vol. 79, October 1985, pp. 1005, 1036.)

112. It may reasonably be assumed that the procedures of the Court's treatment of El Salvador's Declaration of Intervention influenced El Salvador's decision not to exercise its right of intervention at the stage of the merits - a decision which necessarily had great impact on the content and tenor of the proceedings on the merits, and which may have had like impact on the shaping of the Court's Judgment (as surely has the absence of the United States).

113. Nicaragua has contended that, by reason of El Salvador's failure to intervene at the stage of the merits, an inference should be drawn against the truth of the facts which El Salvador alleges in its Declaration of Intervention. In my view no such inference can reasonably be drawn, particularly because of the manner in which the Court treated El Salvador's Declaration. In the circumstances, for this and other reasons - notably, the withdrawal of the United States - it would have been surprising if El Salvador had chosen to intervene at the stage of the merits. In any event, it was legally free to intervene or not to intervene. But it does not follow from El Salvador's choosing not to intervene that its factual and legal contentions must be discounted. But, as will be shown, not only does Nicaragua contend that they should be discounted; in the course of the Court's Judgment, El Salvador's factual and legal contentions are discounted.

F. The effect of the absence of the United States

1. Events bearing on the absence of the United States

114. In its statement of 18 January 1985 withdrawing from these proceedings - a statement which itself attracts the criticism expressed in the opinions accompanying today's Judgment of Judges Jennings and Lachs - the United States, in addition to rejecting the Court's holdings on jurisdiction and admissibility, cited as a cause of its withdrawal the Court's having "summarily" rejected El Salvador's application "without giving reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules". (International Legal Materials, Vol. XXIV, No. 1, January 1985, p. 248.) As another cause of its withdrawal, the United States statement more generally criticized, "The haste with which the Court proceeded to judgment on these issues - noted in several of the separate and

dissenting opinions ..." (Ibid. See I.C.J. Reports 1984, pp. 207, 474, 616.) In a letter of 19 April 1984, the United States earlier expressed its concern at the convoking of the oral hearings on provisional measures at a date which did not afford it sufficient opportunity, within the meaning of Rule 73, paragraph 3 of the Rules of Court, to be fairly "represented" at the hearing "since there is manifestly inadequate time to develop fully its presentation ...".

115. On 27 December 1984, some three weeks before a decision by the United States to withdraw from the case was announced, the then President of the Court gave an interview to the Associated Press in The Hague, in which President Elias is reported to have stated, with respect to the United States 1984 notification relating to its 1946 adherence to the compulsory jurisdiction of the Court: "It is not acceptable in a civilized system of international law that any nation withdraws without notice from a solemn undertaking like that." President Elias continued, according to the Associated Press report: "If a State withdraws its acceptance of our jurisdiction without notice, that leads to anarchy and disorder." He is quoted as adding: "A State that defies the Court will not get away with it. Although some States try to show that they do not care, they do in reality." The report continues that, although President Elias conceded that the potential politicization of the Court "is a very, very important issue", the Court was not being used as a propaganda forum in the Nicaragua-United States case. "It is often said that the current dispute between the United States and Nicaragua is a purely political affair. But it is a question of aggression; a breach of legal rights and duties between States. Nicaragua was entitled to bring the case before the Court, and that has been our ruling. If it had been a purely political case, without legal matters we can deal with, we would have thrown it out immediately." The then President is also quoted by Associated Press as stating that, while the Court has no enforcement powers, it "can help develop a world public order and make that a real force" through its rulings. He is reported to have discounted the United States claim that proceedings in Court would jeopardize the Contadora process, pointing out that the United States obtained a World Court ruling on United States hostages in Tehran while bilateral negotiations were being conducted. "We sided with the Americans that time", he said, according to the Associated Press story. "And that is one of the reasons we declared the Nicaraguan complaint admissible. We cannot rule blatantly against ourselves." President Elias is reported also to have stated that the United States-led invasion of Grenada was "contrary" to "behaving according to the rule of law". "Smaller nations wonder what happened to the rule of law when the United States can behave like this", commented President Elias on the 1983 Grenada invasion, the Associated Press story reports. He is quoted as continuing: "Modern international law will not tolerate the gunboat diplomacy of the past centuries." Dr. Shabtai Rosenne has written:

"Public comment on a pending case by any judge, let alone the President, is absolutely unprecedented and contrary to all standards of judicial propriety ... That interview, which was given before the United States announced its intention not to participate in further proceedings ... and indeed may have precipitated it, was reported in the Press." (S. Rosenne, "The Changing Role of the International Court", Israel Law Review, Vol. 20, 1985, pp. 182, 196 (note 33).)

2. The meaning of Article 53 of the Statute

116. Article 53 of the Court's Statute provides:

"1. Whenever one of the parties does not appear before the Court, or fails to defence its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

117. What is the proper meaning and interpretation of Article 53? It is clear that the Court can render a judgment in the absence of a party. Before doing so, it must "satisfy itself" - indeed, it "doit s'assurer" - not only that it has jurisdiction "but also that the claim is well founded in fact and law." As the Court held in the Corfu Channel case, it must "convince itself" that the appearing party's submissions are well founded. (I.C.J. Reports 1949, p. 248.) To say (as did Nicaragua's counsel), that an objection to those submissions must be proved by the party that raises it is beside the point; the real point is that the Court must be convinced. If as in the current case, the Defendant has raised objections, the Applicant, if it is to succeed, must convince the Court of the inadequacy of those objections.

118. It is equally true that, if a claim is to be held to be well founded in fact and law, it can be so only if a sufficient affirmative defence to the claim is not well founded in fact and law. If such an affirmative defence is well founded in fact and law, then the claim must fail, however compelling it may be in the absence of that affirmative defence. That is elementary. If a claim by A is that B assaulted him, but B pleads by way of affirmative defence that he caught A in the act of assaulting their neighbor, C, and came to C's defence in the course of which he struck A no harder than necessary to stop A from assaulting C, it cannot be held that A's claim is well founded in fact and law unless B's affirmative defence is shown not to be well founded. That, in my view, is an ineluctable interpretation of Article 53. It is one which is critical for the disposition of the current case.

119. The fact that the United States has chosen (to my particular regret) not to take part in the proceedings on the merits does not alter the foregoing conclusions. However regrettable its absence may be, a party does not transgress the Statute by absenting itself from the Court's proceedings (see H.W.A. Thirlway, Non-appearance before the International Court of Justice (1985), pp. 64-82). In abstaining from taking part in these proceedings on the merits, the United States is doing what Article 53 contemplates that a party might: it has not appeared before the Court, and has failed to defend its case - not the whole of its case, but part of its case, in that, while in previous phases of the case it has advanced an affirmative defence on the merits, it has not submitted written or oral pleadings to the Court in this phase which fully support that defence. These are the very circumstances in which the Court must discharge its burden of satisfying itself that the claim is well founded in fact and law.

120. In order to satisfy itself both as to the validity of the claim and the defence to the claim, the Court need not content itself with the pleadings of the appearing party. Indeed, if it is not satisfied by those pleadings, it is not entitled to content itself with those pleadings. In the current case, there is a good deal in the pleadings of both Parties that bears on contested issues of the merits, for the reason that the United States did participate in previous phases of the case and submitted extensive pleadings and annexes, among which is much factual and legal material supporting its charges of aggressive intervention by Nicaragua against its neighbours (in particular Annexes to the Counter-Memorial [on jurisdiction and admissibility] submitted by the United States of America, Nos. 42-105, 110, especially Ann. 50. See also two important documents submitted in 1984 by the United States pursuant to Art. 50 of the Rules of Court: Department of State, "Communist Interference in El Salvador, Documents Demonstrating Communist Support of the Salvadoran Insurgency" (1981); and Department of State and Department of Defence, Background Paper: Nicaragua's Military Build-up and Support for Central American Subversion (1984). The annexes and documents just referred to contain much of the data later restated in the State Department's September 1985 publication entitled "Revolution Beyond Our Borders" - Sandinista Intervention in Central America). Furthermore, in the pleadings of Nicaragua there is much that runs counter to its claims. That is to say, Nicaragua has submitted hundreds of articles from the press and extensive excerpts from the laws and Congressional debates and executive statements of the United States, elements of which contradict the contentions of Nicaragua. It is not apparent why this material should not have been given appropriate weight by the Court together with passages in the very same material which are supportive of Nicaragua's contentions. But, quite apart from what the United States and Nicaragua have pleaded, there is material which Nicaragua has not pleaded but which is of the same character as that which it has, that is to say, still other articles from the press and still other passages from Congressional debates, etc. It would have been implausible for the Court to be prepared to consider the evidentiary weight, such as it is, of Article A from The New York Times, because it is one of hundreds of clippings submitted by Nicaragua, but exclude the evidentiary weight of article B, such as it is, from The New York Times, because it was not submitted by Nicaragua, or, for that matter, by the United States.

121. Rather, if the Court, in order to "satisfy itself", finds it necessary to have recourse to United Nations documents, newspaper articles, Congressional debates, books and articles of scholars, and other material in the public domain - including publications of and documents released by the United States Government - that bear on the facts and law of the case, it is not only entitled but required to do so, whether or not they are found in the pleadings of the Parties. Equally, if the Court or judges of the Court are not satisfied with the pleadings of the appearing Party on questions of fact and law, they are entitled - if not obliged - to put questions to the Agent, counsel or witnesses as may be appropriate.

122. What about the status of "Revolution beyond our Borders"? The foregoing analysis suggests and the practice of the Court indicates that the Court is entitled to take account of such a publication even though it is not an official pleading of the Government of the United States duly submitted to the Court. It would, again, have been implausible for the Court to weigh the quantities of the evidence submitted by Nicaragua, embracing as it does, among other items, newspaper articles which recount activities of governments and policies of governments, but exclude an official and highly pertinent statement of a government Party to the case. The implausibility of such a course would have been heightened by the fact that that publication has appeared in the form of a United Nations document, to which Nicaragua has issued an official rebuttal.

123. Moreover, the practice of the Court demonstrates repeated reliance on irregular communications from States parties to a case and reliance even on documents and statements of a non-appearing State which are not addressed to the Court and which are published after the closure of oral hearings. No less than fifteen judgments and orders of the Court have referred to communications and material emanating from a non-appearing State. In addition, many separate and dissenting opinions refer to communications and material of non-appearing States.

124. In the Nuclear Tests cases, the Court not only took account in its Judgment of statements emanating from a non-appearing State; those statements were not addressed to the Court, and some of them - those that were crucial - were issued after the closure of oral argument. The Court there held that it "is bound to take note of further developments, both prior to and subsequent to the close of oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all of the available facts." And the Court referred to and critically relied upon public statements of French authorities concerning future nuclear tests, even though "It is true that these statements have not been made before the Court, but they are in the public domain... It will clearly be necessary to consider all these statements..." The Court continued that, while conscious of the importance of the principle expressed in the maxim audi alteram partem, "it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings..." (I.C.J. Reports 1974, pp. 263-265.)

125. Thirlway's study, Non-appearance before the International Court of Justice, sets out the travaux préparatoires of Article 53 in extenso. They in fact are not extensive (loc. cit., pp. 22-26). They emphasize the purport of Article 53, namely that judgment can be given for the claimant in the absence of the defendant only when the plaintiff produces "the most proofs" and establishes his case "most completely" (p. 24). Thirlway records that the United States member of the Advisory Committee of Jurists which drafted the Statute of the Permanent Court, the eminent statesman, Elihu Root, was accompanied by James Brown Scott, the distinguished international lawyer who was the Secretary of the Carnegie Endowment for International Peace. Scott apparently sat at the table of the Committee as if he were a member and assisted Root throughout the sessions (see Philip C. Jessup, Elihu Root, 1939, Vol. II, pp. 419, 426). Scott wrote a report for the Board of Trustees of the Endowment published in 1920, which contains the following passage about the exercise of jurisdiction by the Court under Article 53 of the Statute, which Thirlway's book quotes:

> "The essential condition for the exercise of jurisdiction in such a case is and must be, that the plaintiff, although proceeding ex parte, should present its case as fully as if the defendant were present, and that the court be especially mindful of the interests of the absent defendant. This does not mean that the court shall take sides. It does mean, however, that the court, without espousing the cause of the defendant, shall, nevertheless, act as its counsel. There is an apt French phrase to the effect that 'the absent are always wrong'. The Court must go on the assumption that the absent party is right, not wrong until the plaintiff has proven him to be wrong." (At p. 25.)

Now, if the Court is to be "fully mindful of the interests of the absent defendant" and indeed to "go on the assumption that the absent party is right, not wrong until the plaintiff has proven him to be wrong", it follows that, in the instant case, the Court cannot hold for Nicaragua unless it proves that the affirmative defence advanced by the United States is unfounded. For the reasons submitted above, that follows even if one does not accept Scott's interpretation of Article 53. however, Scott's interpretation reinforces that conclusion. But Scott's interpretation goes further, because it places on the appearing State the burden of proof - it is the appearing State which must prove the absent party wrong and the Court is to assume "that the absent party is right, not wrong until the plaintiff has proved him to be wrong".

126. However accurately Scott may be presumed to have expressed the intent of the drafters of Article 53 of the Statute, there is room for hesitation in accepting his apparent conclusion that Article 53 shifts the burden of proof. Such a conclusion might operate as an inducement to States to absent themselves from Court, in the belief that they would find themselves in a more advantageous position if absent than present. The practice of defendants absenting themselves from the Court which has particularly and repeatedly obtained since Iceland did not appear in the

Fisheries Jurisdiction case in 1972 cannot conduce to the Court's standing and effectiveness, and indeed represents one of the most disturbing developments in the history of the Court. Moreover, as suggested at the outset of this section, considerations of burden of proof are beside the point, because the real point is that, where objections are raised to the appearing party's contentions, that party must convince the Court that those objections are unfounded if the Court is to meet the standard which Article 53 imposes.

127. In my view, the correct interpretation of Article 53 is that it affords the appearing State no advantage beyond that which it enjoys by reason of the non-appearing State's absence. If, in a given case, such as the one before the Court, the non-appearing party (or the Court or a judge) raise an affirmative defence to the claim, the appearing party must demonstrate that the defence is not good in order to prevail. The absence of the non-appearing party sometimes will, and sometimes will not, tend to make such a showing easier rather than more difficult. It is significant that Nicaragua has made just such an effort to show that the affirmative defence of the United States is not well founded on the facts and in law; the issue has been engaged, and rightly engaged. Quite another question is whether Nicaragua's effort has succeeded.

G. The Court's treatment of the evidence

1. The title of the case

128. The very title of the case suggests that, from the outset, the case has been misperceived by the Court. That misperception, in my view, has impregnated its evaluation of the evidence; it sheds light on the approach of the Court to the case, which has been one which, in my perception, has concentrated on the apparent delicts of the United States while depreciating the alleged delicts of Nicaragua. The title of the case embraces the essential thesis of Nicaragua (and the essential words of its Application: cf., paras. 26 (a) and 26 (g)): that it concerns, and exclusively concerns: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). However, equally at the outset, the United States informed the Court of its contrary thesis, namely, that the substantive focus of the Court's concern - if it were to engage the substance of the case, which the United States contested - should be the activities by Nicaragua in supporting Salvadoran and other rebels in and against El Salvador and other neighbouring States. While concentrating on challenging the Court's jurisdiction and the admissibility of the claims, the United States consistently pleaded, by way of an affirmative defence, that its activities in and against Nicaragua were and are justified as acts of collective self-defence undertaken in support of El Salvador. It is accordingly remarkable that the Court should have adopted, and persisted in maintaining, a title of the case which so obviously and exclusively reflects the focus of Nicaragua. Such a stance by the Court is unprecedented.

129. Thus if one looks at the list of titles of all the cases which have previously been dealt with by this Court, conveniently found in the Court's Yearbooks, one cannot find a listing which is comparable. Take, for example, the first case, entitled: Corfu Channel (United Kingdom v. Albania). If that case had been entitled as the current case is, it would have read something like: Mining activities in the Corfu Channel against the United Kingdom. But the Court chose a neutral formula, which recognized implicitly that Albania might have had a defence to the claim of the United Kingdom. It did so in the case which, perhaps more than any other of this Court, has elements in common with the substance of the current case, concerning as it did uses of force and questions of intervention. In the list of the 70-odd cases of this Court, none is entitled so as to embrace only the contentions of the claimant and inferentially exclude those of the defendant - apart from the instant case.

130. In its traditional approach, this Court has acted as courts customarily do. Cases are normally entitled, "Jones v. Smith", not "Smith's Trespass on Jones's Property". Indeed, the objectivity and restraint of some legal systems are so marked that the names of the parties to a case are not revealed in the report, the case being known by its number or pagination in the particular volume of the reports.

131. In a letter to the Registrar of 27 April 1984, the Agent of the United States referred to the title of the case and stated "that the United States regards the title given to the case as prejudicial". He requested that "the title be replaced by one that is neutral". He elaborated these contentions in a letter of 2 May 1984. The Court took no positive action in response to his request, despite the obvious infirmities of the title.

c. The failure to use the Court's authority to find the facts

132. In the Nuclear Tests cases, the Court rightly held that: "In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts." (I.C.J. Reports 1974, p. 263.) In the instant case, the Court in its Judgment on jurisdiction and admissibility of 26 November 1984, observed in response to contentions of the United States about the difficulties of finding the facts in a situation of the ongoing use of force in which security considerations are constraining, that the Court "enjoys considerable powers in the obtaining of evidence" (I.C.J. Reports 1984, p. 437). Under its Statute, the Court does enjoy such powers, as is illustrated by the terms of Article 49 and Article 50. Given the controversy that surrounded charges by the United States of Nicaragua's support of foreign insurrection and Nicaragua's adamant denial of those charges - despite the evidence in support of those charges that came to light in the oral hearings - it might have been thought that the Court would have chosen to make use of those

considerable powers in the obtaining of evidence to which it drew attention at the jurisdictional stage. It could, for example, under Article 50 of the Statute, have entrusted an appropriate commission of judges or another organization with the task of carrying out a fact-finding enquiry in the territories of Nicaragua, the United States, El Salvador, Honduras, Costa Rica, Guatemala and Cuba, an enquiry which could have sought access to probative data which certain governments claimed to possess, and which could have examined knowledgeable persons who were unable or unwilling otherwise to appear before the Court.

133. It may particularly be recalled in this regard that the Government of the Republic of El Salvador, in its 1984 Declaration of Intervention, affirmed that it had "positive proof" of the passage by Nicaragua of arms to Salvadoran subversives which earlier had been delivered to the Sandinistas. (Declaration of Intervention, p. 8.) In a press conference, President Duarte also spoke of evidence which he was prepared to submit to the International Court of Justice. Referring to "tangible evidence ... that Nicaragua is sending weapons to El Salvador ...", President Duarte maintained that "the evidence does exist ... We are going to submit all this evidence to the court at The Hague when the time comes." (Press conference of 30 July 1984, Foreign Broadcast Information Service (FBIS), Daily Report, Latin America, reproduced in Annexes to the Counter-Memorial submitted by the United States of America [on jurisdiction and admissibility], Ann. 54, pp. 1, 5.) El Salvador's Declaration of Intervention also maintains that, "The general headquarters" of the Salvadoran rebels "near Managua is the command centre which directs guerrilla operations and co-ordinates the logistical support, including the provision of munitions, clothes and money ..." (at p. 4), that Nicaragua "provides houses and hideouts to the subversives of the FMLN, and communications fcilities of the same group are located in northwest Nicaragua. These facilities are used to pass instructions and messages to subversive units in El Salvador." (At p. 6.) Moreover:

> "since mid-1980 the Sandinista National Liberation Front has made available to the Salvadorian guerrillas training sites in Nicaraguan territory ... managed by Cuban and Nicaraguan military personnel ... located in El Paraiso, Jocote Dulce, Bosques de Jilao, and at Kilometre 14 on the South Highway. The first two locations are situated in the southern suburbs of Managua; the second two are outside the city." (Ibid.)

El Salvador's Declaration makes a number of specific allegations of this kind. (At pp. 4, 6, 8, 10.) Furthermore, the Declaration of Intervention maintains that El Salvador not only repeated in 1984 its requests to the United States to assist it in collective acts of self-defence, but that such requests were earlier made by El Salvador's Revolutionary Junta of Government and the Government of President Magana, that is to say, perhaps as early as October 1979. (At p. 12.)

134. Not only did the Court fail to decide to carry out an enquiry pursuant to Article 50, for reasons, particularly related to the posture of the United States, which may have had some justification. Quite

without justification, it even failed to request El Salvador to transmit the "positive proof" of Nicaraguan subversion which El Salvador claimed to possess. The Court goes so far as to hold that there is no evidence that El Salvador ever requested, before Nicaragua brought these proceedings, that the United States give it assistance in collective self-defence. But it failed to invite El Salvador to transmit evidence in support of its official claim to the Court that it had made such requests years earlier. Just as, in its adoption of a title of the case, the Court seemed essentially to concern itself with Nicaragua's allegations rather than with the defence of the United States to those allegations, so the Court displayed little interest in taking the steps it might have taken to establish or disestablish the facts bearing upon the allegations of the United States and El Salvador - and this despite its obligation under Article 53 of the Statute to "satisfy itself" that the claim is well founded in fact.

3. The Court's articulation and application of evidential standards

135. As the Court rightly observes in today's Judgment, one of its chief difficulties has been the determination of the facts relevant to the dispute. Those difficulties have been compounded by the absence of the United States from the proceedings on the merits. Insofar as evidential problems have prejudiced the establishment of the factual contentions of the United States, it has been the United States which has exacerbated its - and the Court's - difficulties by absenting itself. At the same time, there is ground for concluding that the United States withdrew from the proceedings not only because of its unwillingness to accept the Court's holdings on jurisdiction and admissibility but because of its reaction to certain procedural actions of the Court (see its statement of 18 January 1985, loc. cit., and paragraph 114 of this opinion). For its part, the Court in today's Judgment affirms that, when equality between the parties to a case "is complicated by the non-appearance of one of them, then a fortiori the Court regards it as essential to guarantee as perfect equality as possible between the parties".

136. That affirmation must be measured against the performance of the Court. The Court in today's Judgment has set out rules of evidence which, while appearing reasonable, on reflection are, in my view, open to question. More than this, I find that the Court's treatment in practice of evidential problems has not been such as to produce "as perfect equality as possible between the parties".

137. The Court refers to the fact that it has before it documentary information of various kinds from various sources. It states that it will treat press articles and extracts from books "with great caution", that, "even if they seem to meet high standards of objectivity", the Court regards "them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material

additional to other sources of evidence". Nevertheless, "public knowledge of a fact may ... be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge".

138. As to statements emanating from high-ranking official political figures, they "are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission." The Judgment maintains that "neither Article 53 of the Statute, nor any other ground, could justify a selective approach", in view of the elementary duty to ensure equality between the Parties. However, the Court cannot treat such sources as having the same value irrespective of whether the text is found in an official or unofficial publication and irrespective of whether it has been translated. The Court also holds that it is the facts occurring up to the close of the oral proceedings on the merits of the case on which its Judgment shall be based.

139. But while these criteria appear to be reasonable enough, and indeed calculated to produce perfect equality between the Parties, are they what they appear to be? It is the fact that these rules of evidence when applied will cut in favour of a government of the nature of that of the Government of Nicaragua and against a government of the nature of that of the Government of the United States. Given the relatively open, democratic character of administrative, Congressional and public processes in the United States, it is not difficult to find official acts and admissions of that Government, signed, sealed and delivered. Correspondingly, given the relatively closed and authoritarian character of the Government of Nicaragua, such certified governmental acts are not to be found and any such admissions are not reported in the pages of Nicaragua's controlled and censored press. To be sure, the Court is not well positioned to take account of such considerations. But that does not detract from the fact that they exist.

140. As for the Court's choice of the date of the oral hearings as the date for excluding further facts on which its Judgment shall be based, it may be noted that what appears to be the most pertinent Court precedent is precisely to the contrary. (Nuclear Tests cases, I.C.J. Reports 1974, pp. 263-265; see para. 124 of this opinion.)

141. In view of the inherent constraints to which this Court is subject, however, one might view its evidential approach as appropriate or at any rate inescapable, if in practice it were applied in ways which produced, insofar as possible, that perfect equality between the parties at which the Court aims. In fact, the concrete application of the rules of evidence which the Court has enunciated for this case has been prejudicial to the confirmation of the contentions of the United States. I have regretted to arrive at this unhappy conclusion, for the reasons set out in the following paragraphs.

142. There is a large quantity of probative documentary material which the United States duly filed with the Court in 1984 in support of its claims of Nicaraguan material support of the armed insurgency in El Salvador. Some of that material is contained in "Communist Interference in El Salvador, Documents Demonstrating Communist Support of the Salvadoran Insurgency", a selection of documents claimed to have been captured from Salvadoran insurgents summarized in paragraphs 16-20 of the appendix to this opinion. While there is room for challenge of some details of a White Paper of the United States analyzing these documents (Annex 50 to the United States Counter-Memorial), the documents themselves have been recognized as genuine by informed critics of United States policy in Central America (appendix to this opinion, paras. 19, 151). No question about their authenticity has been raised in Court or by the Court. In its pleadings and oral argument, Nicaragua apparently made no specific reference to these documents. The Court in today's Judgment makes no more than passing reference to them, principally observing that, since these documents almost invariably use code-names (such as "Lagos" - lakes - for Nicaragua), the Court cannot draw judgments from these documents without further assistance from United States experts who might have been called as witnesses had the United States appeared in the proceedings. The Court fails to note that the collection of documents is prefaced by chronological and organizational keys, and that each document is prefaced by a glossary of explanation of its coded words. Glossary A which introduces document A, for example, as its first item, reveals that "Fidel" is "Fidel Castro". Moreover, an appendix to Nicaragua's pleadings - i.e., Nicaragua's evidence - contains an explanation of the code-words as well as a revealing commentary on the documents themselves by Congressman C. W. Bill Young; see the Nicaraguan Memorial, Annex E, Attachment 1, pages 37 ff. In my view, with exertion of modest effort, the meaning of these documents is readily apparent. They profoundly inculpate Nicaragua. The United States also filed with the Court in 1984 a Background Paper: Nicaragua's Military Build-Up and Support for Central American Subversion, loc. cit., a compilation of factual data and analysis referred to in paragraphs 77, 168 of the appendix. The Court fails to deal seriously with this data and its analysis as well. The sole fact that the Court finds it appropriate to establish in drawing upon this latter publication is that the United States conducted overflights of Nicaraguan territory, a fact shown by the aerial photographs of Nicaraguan installations which the Background Paper contains. The Court does not find it suggestive, still less probative, to observe that one of those photographs of the Rio Blanco Military Camp in Nicaragua shows the Salvadoran "FMLN" logo emblazoned on the grounds. The Court also omits to refer to photographs in that publication of weapons and documents said to have been captured in March 1983 from a group of Salvadoran guerrillas intercepted in Honduras, including a photograph of a document on which "FSLN" and "FMLN" are clearly inscribed (loc. cit.)

143. These documents are important for what they reveal. They are also important in the framework of the Court's evidential approach. The Court excludes large quantities of data which confirm United States charges of Nicaraguan material support of the insurgency in El Salvador, apparently on the ground that such press reports, books, etc. can be

introduced only insofar as they corroborate other evidence. These press articles, books, Congressional reports - and published admissions of the President and other officials of Nicaragua - do corroborate the contents of these documents, which are such other evidence. But since the Court discounts those documents, it apparently feels justified in excluding data which otherwise, under its rules of evidence, could be admitted in corroboration of facts established by those documents.

144. The Court's Judgment, in so professing "great caution" in treating press reports and extracts from books, maintains that they can do no more than contribute, "in some circumstances", to corroborating the existence of a fact. Which circumstances? In practice, it turns out, very largely the circumstances of corroboration of contentions of Nicaragua. The Judgment more than once finds it appropriate to cite press sources to this end. How is it that so little of the very large body of newspaper, Congressional and other reports which sustain contentions of the United States - many of which reports were introduced into evidence by Nicaragua - are used by the Court to corroborate contentions of the United States? Presumably, by the criteria which the Court advances, because they do not corroborate facts independently established. But such a presumption is just that - a presumption, and one quite unfounded in this case.

145. Consider not only the documentary data referred to above which is corroborated by these press and Congressional and other reports. Consider the dossier of data assembled and attached in the appendix to this opinion which shows, in so many ways, with such richness of detail, from so many sources - some adverse to the interests of the United States Government in this case - that the Nicaraguan Government has been engaged since 1979 in a sustained effort to overthrow the Government of El Salvador through material assistance to armed insurgency in that country. That data corroborates facts independently established; it demonstrates the reality, actuality and extent of that Nicaraguan effort. That cornucopia of corroboration can best be appreciated by a reading of the appendix. But what salient facts independently established - in addition to facts found in the two United States documents referred to above - does that data corroborate?

146. Nicaragua's premier witness - who counsel for Nicaragua treated more as an expert than a witness - on the issue of whether Nicaragua had been engaged in sending arms to the Salvadoran insurgents, Mr. David MacMichael, admitted in Court in response to my questions that "it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency" (appendix, para. 76). He acknowledged that, when the former Democratic Secretary of State, Edmund Muskie, declared in January 1981 that the arms and supplies being flown into El Salvador for the use of the Salvadoran insurgents were sent with the knowledge and help of the Nicaraguan authorities, Mr. Muskie spoke the truth (ibid.).

He acknowledged that military leaders of the Salvadoran insurgency are based in Nicaragua (ibid., para. 73). He testified to all this and more, and did so on the basis of his own examination of the evidence. He did not offer hearsay evidence. Mr. MacMichael claimed to have examined all the data, raw and finished, that the intelligence resources of the United States had collected on the question of Nicaraguan support for the Salvadoran insurgency for the 1979-1983 period (until he left the CIA's employ early in 1983). It is true that he could do no more than offer his own opinion of that material, and the Court is correct in its apparent allusion to that effect. But his opinion for the period from the accession of the Sandinistas to power in July 1979 to the Spring of 1981 is corroborated by a variety of probative sources, as the appendix to this opinion establishes. Moreover, the conclusions of Mr. MacMichael to which reference has just been made were shaken neither by Nicaragua nor by any Member of the Court. Indeed, after these admissions were elicited, Nicaraguan counsel, who had earlier directly examined Mr. MacMichael at length, were conspicuous in their failure to recall him for further questioning in an effort to regain the ground which he had so dramatically cut out from under Nicaragua's case.

147. Mr. MacMichael also testified that, after early 1981, it could not be shown that Nicaragua had shipped arms to the Salvadoran insurgency (a conclusion arguably qualified by his affirmation that a shipment of arms destined to transit Nicaragua had been seized in Costa Rica in 1982). While the masses of material collected in the appendix to this opinion do show that the flow of arms was suspended in the Spring of 1981, they also show that it revived, most sharply in 1982, and was sustained, apparently in irregular and lesser measure, thereafter. That is to say, that material does not corroborate Mr. MacMichael's opinion for the post-Spring 1981 period. That is hardly reason to exclude material which does corroborate his testimony for the pre-Spring 1981 period. Nor is it reason to exclude material for the post-1981 period, which is significant in so strongly indicating that Nicaragua's contentions for the post-1981 period also are false, not least because that material, while it does not corroborate Mr. MacMichael's opinion for the post-1981 period, otherwise has substantial corroboration - including corroboration by the admissions of the President of Nicaragua. It will be recalled that the Court holds that admissions by high-ranking political figures are of "particular probative value".

148. It is important to recall what the Court's Judgment omits to observe, namely, that these "solemn declarations" of Nicaragua's witness, Mr. MacMichael, for the pre-1981 period, squarely contradict those of the Foreign Minister of Nicaragua, and of another star witness, Commander Carrión, who is one of the nine governing comandantes of Nicaragua. Indeed, Commander Carrión contradicted himself, testifying before the Court that Nicaragua "never" had a policy of sending arms to foreign insurgents while at the same time Nicaragua submitted his affidavit to the Court which maintained that Nicaragua had not sent such arms to the insurgents in El Salvador "in a good long time" (appendix, para. 55). It should also be observed that, while Nicaragua heavily relied, and the Court relies, on an affidavit of Mr. Edgar Chamorro, a

defector from the contras, the Court fails to point out that, not only does other evidence (press reports) submitted by Nicaragua fail to corroborate elements of Mr. Chamorro's testimony, but such evidence contains statements of Mr. Chamorro which contradict elements of his testimony.

149. While I have no doubt that the Court has endeavored to achieve a perfect equality between the Parties in its treatment of the evidence, I regret that I am forced to conclude that its reach has exceeded its grasp. To take another striking example, the Court, as noted, maintains that it has avoided "a selective approach" in treating press statements, including those of figures of the highest political rank. Yet the Court relies upon press statements of President Reagan, while it fails to give weight to President Ortega's admissions in press interviews in January 1985 and April 1986 that Nicaragua is willing to suspend its material aid to the insurgents in El Salvador on the condition that the United States ceases its material aid to the contras (supra, para. 29, and appendix, paras. 30-33). These reiterated statements of President Ortega have been published in 1985 in The New York Times and in Madrid's ABC (in their original Spanish), and, in other terms but to like effect, in 1986 in The Wall Street Journal. Not only is Nicaragua not known to have requested correction of these reports; not only have these newspapers not run such corrections; in the case of The New York Times, it has been confirmed that President Ortega's admission - run off in more than a million copies - has not been the subject of communication by the Nicaraguan Government. This statement of President Ortega published in The New York Times was quoted in the United Nations General Assembly by the representative of El Salvador; its authenticity, and its import, were not denied by the representative of Nicaragua, who otherwise took part in the debate. Nevertheless, the Court finds the 1985 statement of President Ortega insignificant because, it speculates, it may mean no more than that Nicaragua is willing to suspend movement of arms through Nicaragua to the Salvadorans provided that the United States shows Nicaragua the routes of that movement. What is the basis for this speculation? That a request to this effect was made by President Ortega to Mr. Enders in 1981, more than three years earlier, a request which Mr. Enders declined on the ground that the United States could not share its intelligence information with Nicaragua. The Court also concludes that President Ortega's statement cannot mean what it says, since it is inconsistent with the reiterated official policy of Nicaragua, inconsistent with its firm denials that it has provided arms to the Salvadoran insurgents. But the significance of any admission is its inconsistency with the professed position of the party. Moreover, President Ortega made a like admission a year later in an interview with The Wall Street Journal. It is obvious that President Ortega's unambiguous affirmation that Nicaragua is willing to suspend transit through its territory of military aid to the Salvadorans in return for cessation of attacks upon Nicaragua is, as the representative of El Salvador pointed out to the General Assembly of the United Nations, "an eloquent confession" (A/40/PV.90, p. 83). Has the Court's treatment of this confession been such as to guarantee perfect equality between the Parties?

150. It must be recognized that any endeavour to rescue the credibility of Nicaragua's case cannot have been easy. On the one hand, the Court pronounces itself satisfied that, between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in Nicaragua. On the other hand, the Court concludes:

> "... the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period".

151. That remarkable conclusion calls for observations with which this opinion is replete; two will suffice at this juncture. The first is that the evidence which the Court is prepared to consider which has led it to this conclusion is subject to the infirmities which have just been described. In view of all the evidence which the Court has chosen to exclude or discount, its inability to find Nicaragua responsible for the flow of arms is somewhat more comprehensible. Second, however, that is far from saying that this critical conclusion of the Court is credible. I find it incredible - an exigent evaluation which is justified even by the evidence which the Court recounts and accepts.

152. Thus the Court acknowledges that, in the meeting between Commander Ortega and Assistant Secretary of State Enders on 12 August 1981, it emerges that the Nicaraguan authorities had immediately taken steps, at the request of the United States, to bring to a halt or prevent various forms of support to the armed opposition in El Salvador.

> "This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport. The promptness with which the Nicaraguan authorities closed off this channel is a strong indication that it was in fact being used, or had been used for such a purpose."

This reasonable conclusion of the Court is supported by an amplitude of evidence, in addition to that provided in the transcript of the Ortega/Enders exchange. It is supported by detailed data about the use of the airport at Papalonal provided by the United States in a Background Paper duly filed with the Court in 1984 (loc. cit., pp. 20-21) and subsequently amplified in "Revolution Beyond Our Borders" (loc. cit, pp. 18-19). The United States there shows how an undeveloped agricultural dirt airstrip of 800 meters on a former sugar plantation not far from Managua was speedily turned into a lengthened, hardened, graded military facility fully suitable for the handling of aircraft capable

of carrying military cargo (appendix to this opinion, para. 58). The United States produced aerial photographs of the Papalonal installations and their usage ("Revolution Beyond Our Borders", loc. cit., pp. 28-29) - whose procurement, while so obviously defensive, the Court finds nevertheless to be a violation of Nicaraguan sovereignty. I read out in Court details of this evidence in putting questions to Nicaragua's Agent and counsel (CR 85/25, pp. 12-13); they made no attempt to refute that evidence. Apparently they found that evidence to be irrefutable. Nicaragua's witness, Mr. MacMichael, earlier had agreed that Papalonal airport had been used for the dispatch of aircraft carrying weapons to the insurgents in El Salvador; perhaps that is why the Nicaraguan Agent and counsel found it prudent not to pursue the question. As noted, Mr. MacMichael stated that when former Secretary of State Muskie made charges to this effect, declaring that arms were being flown to Salvadoran insurgents from Nicaragua "certainly with the knowledge and to some extent the help of Nicaraguan authorities", he spoke the truth (CR 85/26, p. 40; see this opinion's appendix, para. 76). Mr. MacMichael confirmed that defectors from Nicaragua and a crashed and captured aircraft in El Salvador from Papalonal contributed to establishing as a fact the use of the facilities at Papalonal to fly arms to the Salvadoran insurgency (ibid.). Not only the Ortega/Enders transcript but an admission by President Ortega in an interview with a correspondent of The New York Times confirms the employment of Papalonal for the shipment of arms to the insurgents in El Salvador (appendix, paras. 57-58).

153. Despite all this, the Court finds itself able to conclude that it still remains to be proved that any aid to the insurgents in El Salvador is imputable to the authorities of Nicaragua. It repeats that the Government of Nicaragua cannot be held "responsible for any flow of arms" at any time to the insurgency in El Salvador. It thus infers, for example, that the Government of Nicaragua, before the representations of the United States Ambassador, did not know of the existence of the airport at Papalonal, and was not party to its employment. The Court would have the world believe that a substantial military airport not far from Managua could be designed, built, brought into operation and used for months for many flights carrying arms to Salvadoran insurgents, all without the knowledge and support of the Nicaraguan Government. These are its conclusions. Mine are that the Court, in so sustaining the credibility of Nicaragua's case, has strained the credibility of the Court.

H. The Nicaraguan Government's material support of insurgency in El Salvador is legally tantamount to an armed attack by Nicaragua upon El Salvador

154. The facts demonstrating the reality, actuality and extent of actions of the Nicaraguan Government in materially supporting insurgency in El Salvador have been sketched above and are presented in detail in the appendix to this opinion (paras. 28-188). Are those actions legally tantamount to an armed attack by Nicaragua upon El Salvador? The Court - in a decision fundamental to its Judgment - has concluded that they are not.

155. As to the Court's conclusions of law to this effect, it may be observed that the Court has taken one position, while I have taken another, which latter position, however, is essentially shared by (a) Nicaragua, (b) the United States, (c) El Salvador, and (d) forty years of progressive development of the law and of authoritative interpretation of the governing principles of the United Nations Charter. In my view, the Judgment of the Court on the critical question of whether aid to irregulars may be tantamount to an armed attack departs from accepted - and desirable - law. Far from contributing, as so many of the Court's judgments have, to the progressive development of the law, on this question the Court's Judgment implies a regressive development of the law which fails to take account of the realities of the use of force in international relations: realities which have unfortunately plagued the world for years and give every sign of continuing to do so - whether they are recognized by the Court or not. I regret to say that I believe that the Court's Judgment on this profoundly important question may detract as much from the security of States as it does from the state of the law.

156. In its Memorial on the merits of the case, Nicaragua set out the accepted law on the question. It applied that law to what it sees as the facts of United States support of the contras. But, since Nicaragua, together with Cuba, has participated so pervasively in the organization, training, arming, supplying and command and control of the insurgent forces in El Salvador, its analysis is no less pertinent to the question of whether its actions are tantamount to armed attack upon El Salvador.

157. Nicaragua concluded that the "use by a State of armed groups of ... irregulars to carry out acts of armed violence against another state violates the prohibition on the use of force contained in Article 2 (4) ..." It maintains that, "The writings of jurists, the actions of the United Nations and the positions taken by the United States itself are in agreement" on this position, and that that "position finds support, as well, in the pronouncements of the Court". (Nicaraguan Memorial, para. 227.) The law which Nicaragua marshals in support of this conclusion is stated in the Nicaraguan Memorial in the following terms, which merit extensive quotation:

> "228. That the direction and control of armed bands by a State is attached to that State for purposes of determining liability, is an elementary principle of international law. Among the many authorities that could be cited for the proposition, only a few of the most prominent are mentioned here. The principle has been codified in draft form by the International Law Commission. Article 8 of the draft articles on State Responsibility reads:
>
> > 'The conduct of a person or group of persons shall also be considered as an act of the State under international law if (a) it is established that such persons or group of persons was in fact acting on behalf of that state;...'

Yearbook of the International Law Commission 1974, Volume II, Part II, page 277. Commenting on this provision in the Third Report on State Responsibility to the International Law Commission, former Special Rapporteur, Judge Roberto Ago, writes:

> 'The attribution to the State, as a subject of international law, of the conduct of persons who are in fact operating on its behalf or at its instigation is unanimously upheld by the writers on international law who have dealt with this question.'

Yearbook of the International Law Commission 1971, Volume II, Part I, page 266. Judge Ago continues:

> '... private persons may be secretly appointed to carry out particular missions or tasks to which the organs of the State prefer not to assign regular State officials; people may be sent as so-called "volunteers" to help an insurrectional movement in a neighbouring country- and many more examples could be given'.

Yearbook of the International Law Commission 1971, Volume II, Part I, page 263.

229. Brownlie supports this view. In International Law and the Use of Force by States, he notes that although 'the terms "use of force" and "resort to force" are frequently employed by writers these terms have not been the subject of detailed consideration'. His own analysis, based on a survey of the literature, follows:

> 'There can be little doubt that "use of force" is commonly understood to imply a military attack, an "armed attack", by the organized military, naval, or air forces of a state; but the concept in practice and principle has a wider significance. ... governments may act by means of completely "unofficial" agents, including armed bands, and "volunteers", or may give aid to groups of insurgents on the territory of another State.'

International Law and the Use of Force by States, 1963, page 361. Brownlie notes that although sporadic operations by armed groups might not amount to armed attack

> 'it is conceivable that a co-ordinated and general campaign by powerful bands or irregulars, with obvious or easily proven complicity of a government of a state from which they operate would constitute an "armed attack"'.

Ibid., pages 278-279.

231. Rosalyn Higgins also takes the position that use of irregulars to carry out armed attacks against another state is, 'from a functional point of view,' a use of force. Higgins, 'The Legal Limits to the Use of Force by Sovereign States, United Nations Practice,' 34 British Yearbook of International Law 269 (1961), page 278. She develops the historical background for the growing emphasis on indirect uses of force in U.N. practice. At San Francisco, she points out, the focus was on conventional methods of armed attack, but 'the unhappy events of the last fifteen years' necessitated a substantial reevaluation of the concept of the use of force. (Ibid., pp. 288-289.) Thus, the 'law-making activities' of the General Assembly and the International Law Commission defining and outlawing indirect aggression did not take place 'in vacuo', but arose from a combination of the continuing efforts to define aggression, the Nuremburg principles, and the stream of incidents confronting the Security Council and the General Assembly. (Ibid., page 290.)

232. Rifaat also describes this evolving recognition of the dangers of indirect uses of force. Since 1945, he writes, states have with growing frequency used armed bands and other covert uses of force in an attempt to circumvent the prohibitions of Article 2 (4).

> 'States, while overtly accepting the obligation not to use force in their mutual relations, began to seek other methods of covert pressure in order to pursue their national policies without direct armed confrontation.
>
> The incompatibility of the classical external armed aggression with the present rules regulating international relations, led to the development of other methods of covert or indirect aggression.'

Rifaat, International Aggression, 1979, page 217. These other methods include 'subversion, fomenting of civil strife, aiding armed bands or the sending of irregulars to assist rebel groups in the target state' ...

233. Thus, there is now a substantially unanimous modern view concerning indirect use of force through armed groups of mercenaries or irregulars. Whatever legal doubts may have existed prior to World War II were dispelled by the events of the post-war period. If the prohibition on the use of force in Article 2 (4) was to have any meaning, it would have to cover this new and dangerous mode of military activity by armed mercenaries and irregulars. As Novogrod writes, 'to argue that direct and indirect aggression could not equally be violations of article 2 (4) of the Charter would be to make a fetish of literalism'. Novogrod, 'Indirect Aggression', page 227.

2. The Position of the United States

234. The United States has consistently been among the most forceful advocates of this view that the use of armed groups by a State to carry out military activities against another State amounts to a use of force. Again, it is sufficient to select only a few of the most salient among a multitude of authorities.

235. As early as 1947, U.S. Representative Austin, in a statement to the Security Council, condemned the support provided to guerrillas in Greece:

> 'I do not think that we should interpret narrowly the "Great Charter" of the United Nations. In modern times, there are many ways in which force can be used by one State against the territorial integrity of another. Invasion by organized armies is not the only means for delivering an attack against a country's independence. Force is effectively used today through devious methods of infiltration, intimidation and subterfuge.
>
> But this does not deceive anyone. No intelligent person in possession of the facts can fail to recognize here the use of force, however devious the subterfuge may be. We must recognize what intelligent and informed citizens already know. Yugoslavia, Bulgaria and Albania, in supporting guerrillas in northern Greece, have been using force against the territorial integrity and political independence of Greece. They have in fact been committing acts of the very kind which the United Nations was designed to prevent, and have violated the most important of the basic principles upon which our Organization was founded.'

2 U.N. SCOR (147th and 148th mtg.), pages 1120-1121 (1947).

236. In a study prepared for the Legal Adviser's Office of the U.S. State Department in 1965, Richard Baxter concluded:

> 'Although the sending of volunteers might be regarded as a form of "indirect aggression," the conduct of the responsible state may be so blatant that "indirect aggression" would be a misnomer. There is a spectrum of conduct from the departure of individual volunteers from the territory of a neutral State, which is not a violation of the State's duty of neutrality, to outright State participation under the fiction of volunteers. A definition of "use of force" would have to specify when State responsibility is engaged.'

Study of the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1965, pages 1-12.

237. Again in 1969, the same view was expressed by John Lawrence Hargrove, U.S. Representative to the Special Committee on the Question of Defining Aggression:

> 'The Charter speaks in Article 2, paragraph 4, of the "use of force" in international relations; it does not differentiate among the various kinds of illegal force, ascribing degrees of illegality according to the nature of the techniques of force employed. Articles 1 and 39 of the Charter speak of "aggression"; similarly, they altogether fail to differentiate among kinds of aggression on the basis of methods of violence which a particular aggressor may favor. There is simply no provision in the Charter, from start to finish, which suggests that a State can in any way escape or ameliorate the Charter's condemnation of illegal acts of force against another State by a judicious selection of means to its illegal ends.'

Statement by John Lawrence Hargrove, United States Representative to the Special Committee on the Question of Defining Aggression, 25 March 1969, Press Release USUN-32 (69), page 5.

238. The same view was espoused in 1973 by Judge Schwebel, who was the United States Representative to the Special Committee on the Question of Defining Aggression. Writing a year before the Definition was adopted, he argued 'that the Charter of the United Nations makes no distinction between direct and indirect uses of force' and that the 'most pervasive forms of modern aggression tend to be indirect ones'. 'Aggression, Intervention and Self-Defence in Modern International Law', 135 Hague Recueil (1973), II, page 458.

...

3. United Nations Practice

239. The consistent practice of the United Nations confirms the proposition that substantial involvement in the activities of armed insurgent groups is a violation of the prohibition on the use of force in Article 2 (4).

240. The United Nations concerned itself almost from the beginning with the definition and elaboration of the concept of 'the use of force' contained in the Charter. A series of resolutions and other actions defining or condemning the use of force and aggression show a gradual evolution from the general characterization of support for insurgent groups as unlawful to specific condemnations invoking Article 2 (4). The Draft Declaration on the Rights and Duties of States, adopted by the International Law Commission in 1949, imposed a duty:

> 'to refrain from fomenting civil strife in the territory of another state, and to prevent the organization within its territory of activities calculated to foment such civil strife'.

Article 4, Report of the International Law Commission, 6 U.N. GAOR Supp. (No. 10), page 10, U.N. Doc A/925 (1949). Similarly, the Commission's Draft Code of Offences against the Peace and Security of Mankind included among the enumerated offenses:

> '(4) The incursion into the territory of a State from the territory of another State by armed bands for a political purpose.
>
> (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organised activities calculated to foment civil strife in another State.'

International Law Commission, Report, 9 U.N. GAOR, Supp. (No. 9), page 11, U.N. Doc. A/2693 (1954).

241. The General Assembly, too, has repeatedly condemned the use of force by acting through insurgent groups. In its 1950 Peace Through Deeds Resolution, the Assembly denounced "the intervention of a state in the internal affairs of another state for the purpose of changing its legally established government by a threat or use of force.' G.A. Resolution 380 (V).

> 'Whatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a Foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world.'

See also Essentials of Peace Resolution, G.A. Resolution 290 (IV); 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Resolution 2131 (XX).

242. The Assembly's position on the use of armed insurgent groups is further refined in the 1970 Declaration on Friendly Relations and Cooperation between States, G.A. Resolution 2625 (XXV), adopted without vote on 24 October 1970. ...

243. The first principle enunciated in the Declaration is the prohibition against the use of force, cast in the language of Article 2 (4). Subsumed under this principle are the very forms of involvement with the activities of armed bands that appear in this case:

> 'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'

244. According to Judge Lachs, 'indirect means of attacking States were barred' by this Declaration. 'The Development and General Trends of International Law in Our Time', 169 Hague Recueil (198)), IV, page 166. Similarly, former President Jiménez de Aréchaga asserts that the 1970 Declaration constitutes an 'important interstitial development of some of the implications of Article 2 (4).' He finds the origins of the 1970 Declaration in the increasing use of methods of indirect aggression since 1945, in the sense of 'the sending of irregular forces or armed bands or the support or encouragement given by a government to acts of civil strife in another State'. Recognizing that 'these acts may involve the use of force', he argues that the purpose of the Declaration was simply to prevent states from doing 'indirectly what they are precluded by the Charter from doing directly'. 159 Hague Recueil (1979) I, page 93.

245. The United Nations development culminated with the adoption in 1974 of Resolution 3314 (XXIX), a Definition of Aggression endorsed by the Sixth (Legal) Committee, and adopted by the General Assembly by consensus on December 14, 1974.

246. Article 1 of the Definition defines aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State'. Thus the Definition of Aggression is again directly and explicitly related to the use of force prohibited by Article 2 (4) of the Charter. Article 3 specifies certain acts that shall 'qualify as aggression', i.e., that constitute the use of force in violation of Article 2 (4). Among these, and of specific application in the present context, Article 3 (g) includes:

> 'The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.'

247. The Soviet Union proposed including subparagraph 3 (g) under the separate label of 'indirect aggression'. Draft proposal submitted by the U.S.S.R., U.N. General Assembly Special Committee on Question of Defining Aggression, U.N. Doc. A/Ac.134/L. 12. In the final Definition, however, subparagraph 3 (g) was included without differentiating it from other, more overt forms of aggression. The Special Committee accepted the proposition that the U.N. Charter provides no basis for distinguishing between a state using force by acting on its own and a state using force by acting through armed insurgent groups. See Report of the Sixth Committee, U.N. Doc. A/8929, page 5 (1974); see also Stone, Conflict through Consensus, 1977, page 89. The Definition condemns the sending of armed bands as a use of force on the same plane as direct invasion, bombardment, blockade, and other traditional notions of armed aggression. See ibid., page 75; see also Ferencz, 'A Proposed Definition of Aggression', 22 International and Comparative Law Quarterly (1973), at page 421; 1981 Declaration on the Inadmissibility of Intervention in the Internal Affairs of States, 36 U.N. GAOR 78, U.N. Doc. A/Res/36/103 (1981)." (Emphasis supplied.)

158. On this, as Nicaragua's Memorial points out, Nicaragua and the United States are in agreement. As the United States has officially observed in connection with the current dispute:

> "A striking feature of the public debate on the conflict in Central America is the degree to which all parties concerned accept the principle that a nation providing material, logistics support, training and facilities to insurgent forces fighting against the government of another state is engaged in a use of force legally indistinguishable from conventional military operations by regular armed forces ... The critical element

> of the debate, therefore, is not the identification of the applicable legal standard, but the determination of the facts to be measured against that undisputed legal standard." ("Revolution Beyond Our Borders", loc. cit., p. 1.)

159. For its part, El Salvador, in its Declaration of Intervention, maintains that:

> "... Nicaragua has been converted into a base from which the terrorists seeks the overthrow of the popularly elected Government of our nation. They are directed, armed, supplied, and trained by Nicaragua to destroy the economy, create social destabilization, and to keep the people terrorized and under armed attack by subversives directed and headquartered in Nicaragua ... The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980." (At p. 4.)

160. In today's Judgment, the Court acknowledges that the views of the parties to a case as to the law applicable to their dispute are very material, particularly when their views are concordant. The Court also does not deny that the Parties to this case agree on the definition of the acts which may constitute an armed attack. Nevertheless, on the critical question of whether a State's assistance to foreign armed irregulars who seek to overthrow the government of another State may be tantamount to an armed attack by the former State upon the latter, the Court arrives at a conclusion which is discordant with the agreed views of both Parties.

161. The Court's conclusion is inconsonant with generally accepted doctrine, law and practice as well. The Court's conclusion is inconsistent with the views of Professor Brownlie which Nicaragua's Memorial quotes that a "use of force" may comprise not merely an organized armed attack by a State's regular forces but the giving of "aid to groups of insurgents on the territory of another State". It is inconsistent with his conclusion that a general campaign by irregulars with the complicity of the government of the State from which they operate may constitute an "armed attack". It is inconsistent with what Nicaragua's Memorial describes as "a substantially unanimous modern view concerning indirect use of force ...". It is inconsistent with the position which the United States has maintained since 1947 that one State's support of guerrillas operating against another is tantamount to an armed attack against the latter's territorial integrity and political independence. It is inconsistent with what Nicaragua rightly observes is a consistent practice of the United Nations holding that "substantial involvement" in the activities of armed insurgent groups is a violation of "the prohibition on the use of force in Article 2 (4)". It is inconsistent with repeated declarations of the United Nations expressive of the international legal duty of States to refrain from fomenting civil

form of aggression which the General Assembly has denominated the gravest of all crimes against peace and security ...". It stent with the terms of the "Friendly Relations" Declaration, Court treats as an authoritative expression of customary nal law - a declaration which, in its interpretation of paragraph 4 of the Charter, holds that, "Every State has the frain from organizing, instigating, assisting or participating civil strife or terrorist acts in another State ... when the nvolve a threat or use of force." It is inconsistent with the of Judge Lachs that "indirect means of attacking States were this Declaration. It is inconsistent with the conclusion of nez de Aréchaga that this Declaration, "an important al development of some of the implications of Article 2 (4)", indirect aggression, including the support given by a to acts of civil strife in another State. Such acts, he , "may involve the use of force and States should not be to do indirectly what they are precluded by the Charter from ctly ...". And the Court's conclusion is inconsistent with the intent of the United Nations Definition of Aggression on which agua and the Court rely.

The Court's conclusion is inconsistent with the General Assembly's Definition of Aggression

While the conclusion which the Court has reached on this ls inconsistent with the large and authoritative body of State and United Nations interpretation to which the Nicaraguan adverts, the Court is not the first to maintain that acts of version - of "indirect aggression" - by one State against annot be tantamount to armed attack. In the long debates that y culminated in the adoption by the United Nations General of the Definition of Aggression, opinion on this question was The Soviet Union, a leading proponent of the adoption of a n of aggression, in its draft definition enumerated among the armed aggression (direct or indirect)":

"The use by a State of armed force by sending armed s, mercenaries, terrorists or saboteurs to the territory nother State and engagement in other forms of subversive vity involving the use of armed force with the aim of oting an internal upheaval in another State ..."
719, p. 8; emphasis supplied.)

s - Australia, Canada, Italy, Japan, the United Kingdom Inited States - proposed that the use of force in onal relations, "overt or covert, direct or indirect" by gainst the territorial integrity or political nce of another State may constitute aggression when by means including:

"(6) Organizing, supporting or directing armed bands or egular or volunteer forces that make incursions or ltrate into another State;

(7) Organizing, supporting or directing violent civil strife or acts of terrorism in another State; or

(8) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State." (Ibid., pp. 11-12.)

163. In marked contrast to these approaches of "East" and "West", thirteen small and middle Powers put forward a draft definition of aggression which did not include indirect as well as direct uses of force. Their definition spoke only of "the use of armed force by a State against another State". Their list of acts of aggression conspicuously failed to include acts of force effected by indirect means. The Thirteen Power draft further specified, in a section which did not list acts of aggression, that:

"When a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter." (Ibid., p. 10.)

That provision was complementary to a further proviso that:

"The inherent right of individual or collective self-defence of a State can be exercised only in the case of the occurrence of armed attack (armed aggression) by another State ..." (Ibid., p. 9.)

164. As Professor Julius Stone - widely recognized as one of the century's leading authorities on the law of the use of force in international relations - concluded in respect of the Thirteen Power proposals:

"... to take away the right of individual and collective self-defence ... was, of course, the precise purpose of the Thirteen Power provision ... It sought to achieve this purpose, both by withholding the stigma of aggression, and by express statement. Acceptance of such a provision would have been at odds with the Charter and general international law as hitherto accepted in a number of respects.

First ... international law imputed responsibility to a State knowingly serving as a base for such para-military activities, and gave the victim State rather wide liberties of self-defence against them.

> Second, none of the Charter provisions dealing with unlawful use of force, whether armed or not, offers any basis for distinguishing between force applied by the putative aggressor, or indirectly applied by him through armed bands, irregulars and the like ...
>
> Third ... the General Assembly has more than once included at least some species of 'indirect' aggression within its description of 'aggression' ...
>
> Fourth, it may be added that from at least the Spanish Civil War onwards, the most endemic and persistent forms of resorts to armed force ... have been in contexts caught as 'aggression' by the Soviet and Six Power drafts, but condoned more or less fully by the Thirteen Power Draft." (Julius Stone, Conflict through Consensus, 1977, pp. 89-90.)

It will be observed that the essential legal rationale of the Judgment of the Court in the current case appears to be well expressed by these Thirteen Power proposals which Professor Stone characterized as "at odds with the Charter and general international law ...".

165. The Thirteen Power proposals were not accepted by the United Nations Special Committee on the Question of Defining Aggression. They were not accepted by the General Assembly. On the contrary, the General Assembly by consensus adopted a Definition of Aggression which embraces not all, but still the essence of, the proposals of the Six Powers and the Soviet Union. Its list in Article 3 of the acts which shall "qualify as an act of aggression" includes:

> "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." (Emphasis supplied.)

As Professor Stone's examination of the proceedings of the Special Committee demonstrates, on this question:

> "... it was the view of the Six which prevailed. This is that such activity is a case of aggression simpliciter, giving rise like any other direct aggression to response by self-defence under general international law and under Article 51 of the Charter." (Loc. cit., p. 75.)

Or, as the apparent author of Article 3 (g), Ambassador Rossides of Cyprus, put it, Article 3 (g) included in the Definition "a form of indirect aggression ... in so far as such indirect aggression amounted in practice to an armed attack" (1479th meeting of the Sixth Committee of the General Assembly, 18 October 1974, A/C.6/SR.1479, para. 15).

166. It has been demonstrated above and in the appendix to this opinion that the Nicaraguan Government is "substantially involved" in the sending of armed bands, groups and irregulars to El Salvador. Nicaragua apparently has not "sent" Nicaraguan irregulars to fight in El Salvador, but it has been "substantially involved" in the sending of leadership of the Salvadoran insurgency back and forth. As has been shown by the admissions of a principal witness of Nicaragua, Mr. MacMichael, and other evidence (see paras. 73, 87-92, 95-96, 99-112, 105, 108, 116, 120, 124-126, 143-145, 149, 186, 188 of the appendix to this opinion), leadership of the Salvadoran insurgency has been established in and operated from Nicaragua, and moved into and out of El Salvador from and to its Nicaraguan bases with the full support of the Nicaraguan Government, a situation which in substance equates with Nicaragua's "sending" of that leadership to direct the insurgency in El Salvador. As Professor Stone concludes, while Article 3 (g) "requires there to have been a 'sending' into the target State, it inculpates the host State not merely when that State did the sending, but also when it has a 'substantial involvement therein'" (loc. cit., pp. 75-76). Nicaragua's substantial involvement further takes the forms of providing arms, munitions, other supplies, training, command-and-control facilities, sanctuary and lesser forms of assistance to the Salvadoran insurgents. Those insurgents, in turn, carry out acts of armed force against another State, namely, El Salvador. Those acts are of such gravity as to amount to the other acts listed in Article 3 of the Definition of Aggression, such as invasion, attack, bombardment and blockade. The many thousands of El Salvadorans killed and wounded, and the enormous damage to El Salvador's infrastructure and economy, as a result of insurgent attacks so supported by Nicaragua is ample demonstration of the gravity of the acts of the insurgents.

167. It accordingly follows not only that the multiple acts of subversive intervention by Nicaragua against El Salvador are acts of aggression, and that those acts fall within the proscriptions of the Definition of Aggression. It is also important to note that the Definition - contrary to the Thirteen Power proposals - designedly says nothing about prohibiting a State from having recourse to the right of individual or collective self-defence when that State "is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State". That prohibitive proposal proved unacceptable to the international community. Rather, it is plain that, under the Definition, and customary international law, and in the practice of the United Nations and of States, a State is entitled in precisely these circumstances to act in individual and collective self-defence. To be entitled to do so, it is not required to show that the irregulars operating on its territory act as the agents of the foreign State or States which support them. It is enough to show that those States are "substantially involved" in the sending of those irregulars onto its territory.

168. The significance of the Definition of Aggression - or of any definition of aggression - should not be magnified. It is not a treaty text. It is a resolution of the General Assembly which rightly recognizes the supervening force of the United Nations Charter and the

supervening authority in matters of aggression of the Security Council. The Definition has its conditions, its flaws, its ambiguities and uncertainties. It is open-ended. Any definition of aggression must be, because aggression can only be ultimately defined and found in the particular case in the light of its particular facts. At the same time, the Definition of Aggression is not a resolution of the General Assembly which purports to declare principles of customary international law not regulated by the United Nations Charter. The legal significance of such resolutions is controversial, a controversy which is not relevant for immediate purposes. This resolution rather is an interpretation by the General Assembly of the meaning of the provisions of the United Nations Charter governing the use of armed force - the use of armed force "in contravention of the Charter". As such, of itself it is significant. Weighed as it should be in the light of the practice and the doctrine which the Nicaraguan Memorial assembles - which may be extensively amplified to the same effect - the Definition cannot be dismissed. In substance, however, the Court's Judgment - while affirming that the Definition of Aggression reflects customary international law - does dismiss both the import of the Definition of Aggression and the State practice and doctrine which on this paramount point is reflected by the Definition.

169. While in effect the Court does depreciate the General Assembly's Definition of Aggression, it does not do so in terms. On the contrary, the Court maintains that:

> "it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, paragraph (g) of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."

170. The Court's reasoning is open to criticism, in terms of the Definition of Aggression and under customary international law - not to speak of the realities of modern warfare. Article 3 (g) does not confine its definition of acts that qualify as acts of aggression to the sending of armed bands; rather, it specifies as an act of aggression a State's "substantial involvement" in the sending of armed bands. That provision is critical to the current case. As pointed out in paragraph 166 of this opinion, and detailed in its appendix, Nicaragua has been pervasively, not merely substantially, involved in many aspects of the sending of armed groups of insurgents to El Salvador - and especially involved in the sending of the leadership of those insurgents, a leadership based in Nicaragua - even if Nicaragua itself has not simply sent such armed bands from its territory to that of El Salvador. It is one thing to send; it is another to be "substantially involved" in the sending.

171. Moreover, let us assume, arguendo, that the Court is correct in holding that provision of weapons or logistical support to rebels of themselves may not be tantamount to armed attack (an assumption which I do not share, not least because the term "logistic support" is so open-ended, including, as it may, the transport, quartering and provisioning of armies). It does not follow that a State's involvement in the sending of armed bands is not to be construed as tantamount to armed attack when, cumulatively, it is so substantial as to embrace not only the provision of weapons and logistical support, but also participation in the re-organization of the rebellion; provision of command-and-control facilities on its territory for the overthrow of the government of its neighbour by that rebellion; provision of sanctuary for the foreign insurgent military and political leadership, during which periods it is free to pursue its plans and operations for overthrow of the neighbouring government; provision of training facilities for those armed bands on its territory and the facilitation of passage of the foreign insurgents to third countries for training; and permitting the rebels to operate broadcasting and other communication facilities from its territory in pursuance of their subversive activities. The fact is that this pervasive and prolonged support by the Nicaraguan Government of the insurgency in El Salvador has been a major, perhaps the critical, factor in the transformation of what, before 1979, were largely sporadic if serious acts of insurgent terrorism into an organized and effective army of guerrillas which to this day poses the gravest challenge to the Government and people of El Salvador.

J. The question of whether measures in self-defence may be taken only in case of armed attack

172. The Court has found that there has been no armed attack by Nicaragua upon El Salvador and - in my view, wrongly - no action by Nicaragua tantamount to an armed attack upon El Salvador. The Court rightly observes that the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised in this case, and that the Court accordingly expresses no view on that issue. Nevertheless, its Judgment may be open to the interpretation of inferring

that a State may react in self-defence, and that supportive States may react in collective self-defence, only if an armed attack occurs. It should be observed that, if that is a correct interpretation of the Court's Judgment, such an inference is obiter dictum. The question of whether a State may react in self-defence to actions other than armed attack was not in issue in this case. The United States contended that Nicaragua had intervened and continues to intervene in El Salvador and other neighbouring States in order to foment and sustain armed attacks upon the Governments of those States, and that its subversive intervention in the governing circumstances was and is tantamount to armed attack. Nicaragua denied and denies all such intervention, while accusing the United States of direct and indirect armed attacks against it. Both Nicaragua and the United States agree that the material support by a State of irregulars seeking to overthrow the government of another State amounts not only to unlawful intervention against but armed attack upon the latter State by the former. They essentially differed not on the law but on the facts. The question of whether a State is justified in reacting in self-defence against acts not constituting or tantamount to an armed attack was not engaged.

173. For my part, I have not pursued this important question because on this I am in agreement with the Parties: the critical problem in this case, properly viewed, essentially is not one of law but of fact; and the highly important question of whether a State may act in self-defence in the absence of armed attack was not argued, and understandably so. Nevertheless, I wish, ex abundanti cautela, to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs ..." I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51. While I recognize that the issue is controversial and open to more than one substantial view, I find that of Sir Humphrey Waldock more convincing than contrary interpretations:

> "Does Article 51 cut down the customary right and make it applicable only to the case of resistance to armed attack by another State? This does not seem to be the case. The right of individual self-defence was regarded as automatically excepted from both the Covenant and the Pact of Paris without any mention of it. The same would have been true of the Charter, if there had been no Article 51, as indeed there was not in the original Dumbarton Oaks proposals. Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective understandings for mutual self-defence, particularly the Pan-American treaty known as the Act of Chapultepec. These understandings are concerned with defence against external aggression and it was natural for Article 51 to be related to defence against 'attack'.

Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an 'armed attack'. Thus, it would, in my view, be no breach of the Charter if Denmark or Sweden used armed force to prevent the illegal arrest of one of their fishing vessels on the high seas in the Baltic. The judgment in the Corfu Channel Case is entirely consistent with this view ..." (C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", Recueil des Cours, Vol. 81 (II), 1952, pp. 496-497. Accord: D. W. Bowett, Self-Defence in International Law, 1958, pp. 182-193; Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order, 1961, pp. 232-241; Oscar Schachter, "The Right of States to Use Armed Force", Michigan Law Review, 1984, Vol. 82, pp. 1620, 1634.)

K. The Court's views on counter-intervention and its implied support for "wars of liberation"

174. When the Court's Judgment comes to deal with questions of intervention, it finds that the United States has committed "a clear breach of the principle of non-intervention" by its support of the contras. The Court at the same time finds it possible - remarkably enough - to absolve Nicaragua of any act of intervention in El Salvador, despite its multiple acts of intervention in El Salvador in support of the Salvadoran insurgents. The Court goes on to reach the following conclusion:

> "On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot ... produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, involving the use of force."

175. While this conclusion may be treated as obiter dictum in view of the fact that there is no plea of counter-intervention before the Court, it is no more correct because it is unnecessary. In my view, its errors are conspicuous. The Court appears to reason this way. Efforts

by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, if they are not or do not amount to an armed attack upon State B, give rise to no right of self-defence by State B, and hence, to no right of State C to join State B in measures of collective self-defence. State B, the victim State, is entitled to take counter-measures against State A, of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.

176. In my view, the Court's reasoning, certainly as it applies to the case before the Court, is erroneous for the following reasons: (a) A State is not necessarily and absolutely confined to responding in self-defence only if it is the object of armed attack. (b) Armed attack in any event is not only the movement of regular armed forces across international frontiers; it is not only the sending by State A of armed bands across an international frontier to attack State B or overthrow its government; it is, as the Definition of Aggression puts it, "substantial involvement therein" - for example, the very sort of substantial involvement which Nicaragua's multifaceted involvement in promoting and sustaining the Salvadoran insurgency illustrates. (c) In a case such as the case before the Court, where Nicaragua has carried out and continues to carry out the acts of support of armed insurgency against the Government of El Salvador which El Salvador and the United States have charged and the appendix to this opinion establishes, the Government of El Salvador has had the choice of acting in self-defence or capitulating. Lesser measures of counter-intervention could not suffice. It has chosen to act in self-defence, but it lacks the power to carry the battle to the territory of the aggressor, Nicaragua. (d) In such a case, El Salvador is entitled to seek assistance in collective self-defence. Such assistance may in any event take place on the territory of El Salvador, as by the financing, provisioning and training of its troops by the United States. But, as shown below, contemporary international law recognizes that a third State is entitled to exert measures of force against the aggressor on its own territory and against its own armed forces and military resources.

177. I find the Court's enunciation of what it finds to be the law of counter-intervention as applied to this case unpersuasive for all these reasons. More generally, I believe that it raises worrisome questions. Let us suppose that State A's support of the subversion of State B, while serious and effective enough to place the political independence of State B in jeopardy, does not amount to an armed attack upon State B. Let us further suppose that State A acts against State B not only on its behalf but together with a Great Power and an organized international movement with a long and successful history of ideology and achievement in the cause of subversion and aggrandizement, and with the power and will to stimulate further the progress of what that movement regards as historically determined. If the Court's obiter dictum were to be treated as the law to which States deferred, other Great Powers and other States would be or could be essentially powerless to intervene effectively to preserve the political independence of State B and all other similarly situated States, most of which will be small.

According to the Court, State B could take counter-measures against State A, but whether they would include measures of force is not said. What is said is that third States could not use force, whether or not the preservation of the political independence - or territorial integrity - of State B depended on the exertion of such measures. In short, the Court appears to offer - quite gratuitously - a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival.

178. The disturbing implications of the Court's construction of the scope of lawful counter-intervention are much magnified by another of the Court's apparent asides. In discussing the nature of prohibited intervention, the Court, in paragraph 206 of its Judgment, notes that there have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. It then interposes: "The Court is not here concerned with the process of decolonization; this question is not in issue in the present case." The Court goes on to consider whether States have a general right to intervene directly or indirectly, with or without armed force, in support of the internal opposition of another State whose cause appears particularly worthy by reason of the political and moral values with which it is identified. The Court rightly observes that for such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

179. Yet the implication, or surely a possible implication, of the juxtaposition of the Court's statements is that the Court is of the view that there is or may be not a general but a particular right of intervention provided that it is in furtherance of "the process of decolonization". That is to say, by these statements, the Court may be understood as inferentially endorsing an exception to the prohibition against intervention, in favour of the legality of intervention in the promotion of so-called "wars of liberation", or, at any rate, some such wars, while condemning intervention of another political character.

180. In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized; the right of peoples to struggle to achieve these ends is universally accepted; but what is <u>not</u> universally recognized and what is <u>not</u> universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion. This is true whether the struggle is or is proclaimed to be in pursuance of the process of decolonization or against colonial domination. Moreover, what entities are susceptible of decolonization is a matter of dispute in many cases. What is a colony, and who is the colonizer, are the subjects of sharply differing views. Examples of what may be contentiously characterized -

though not necessarily unreasonably characterized - as colonies may be readily assembled. But for present purposes, it is enough to point out that the lack of beauty is in the eye of the beholder.

181. For reasons both of principle and practicality, leading States for years have gone on record in support of the considerations recalled in the previous paragraph. It is not to be expected that their view of the law, or the content of the law, will be influenced by an acknowledged and ambiguous dictum of the Court on a topic of which no trace can be found in the pleadings of the Parties. Perhaps the best that can be said of this unnecessary statement of the Court is that it can be read as taking no position on the legality of intervention in support of the process of decolonization, but as merely referring to a phenomenon as to which positions in the international community differ. Even so, it is difficult to find justification for the Court raising so contentious a question, the more so when it acknowledges that that question is not in issue in the present case.

L. El Salvador is entitled to act in self-defence against Nicaraguan armed attack

182. If, as has been shown, El Salvador not only "considers itself under the pressure of an effective armed attack on the part of Nicaragua" (Declaration of Intervention, p. 2), but in actual fact - and accepted law - is under the pressure of an effective armed attack on the part of Nicaragua, it follows that El Salvador may invoke and implement, as against Nicaragua, "the inherent right of individual or collective self-defence" which it is recognized to possess by Article 51 of the United Nations Charter. It is entitled to do so not only in accordance with Article 51 of the United Nations Charter but in accordance with the pertinent Inter-American principles which are described below. It is no less so entitled under the principles of customary international law. The existence under customary international law of what Article 51 refers to as the "inherent right of individual or collective self-defence" is unquestioned. As Lauterpacht observed, "The right to use force ... in self-defence constitutes a permanent limitation of the prohibition of recourse to force in any system of law". (H. Lauterpacht, Oppenheim's International Law, Vol. II, Seventh Edition, p. 187.) "The right of self-defence is a general principle of law, and as such it is necessarily recognized to its full extent in international law." (H. Lauterpacht, The Function of Law in the International Community, pp. 179-180.)

183. This is made the clearer by a measure of supposition. Let us suppose, arguendo, that, while Nicaragua is Nicaragua, El Salvador is a State the size of one of the major States of Latin America - say, a State many times the area and population and several times the armed strength which El Salvador actually enjoys. Let us suppose further that El Salvador, so enlarged, was the victim of the very acts of forceful intervention which it has been shown that Nicaragua has in fact been "substantially involved" in since 1979. Could it be supposed that

such an enlarged El Salvador would not only have, but would not itself forcefully exercise, its right of self-defence directly against Nicaragua? If El Salvador has seemed restrained, if it has not protested quite as soon as and as loudly and formally as it otherwise might have, if it has not itself attempted to attack the warehouses, safehouses, training sites, and command-and-control facilities which Salvadoran insurgents have enjoyed in the territory of Nicaragua, has not that been not because of El Salvador's lack of legal standing but its lack of power? In short, any questions that may legitimately be raised about El Salvador's acting in self-defence against the established aggression of Nicaragua are not questions of El Salvador's legal entitlement.

184. Rather, the questions that should give rise to discussion are: may, in this case, the United States lawfully act in collective self-defence with El Salvador against Nicaragua? If it may do so, may it do so only on the territory of El Salvador, or may it carry the defence to the territory of Nicaragua? If it may so carry its defence, have the measures it has employed been necessary and proportionate to the armed attack of Nicaragua upon El Salvador? What follows from the failure of the United States to report those measures to the Security Council? If the United States is found to have acted in collective self-defence, is its so doing a sufficient defence to charges that it has violated its responsibility under international law towards Nicaragua?

M. The United States is entitled to act in collective self-defence with El Salvador

1. The position of El Salvador

185. El Salvador maintains:

> "... our nation cannot, and must not, remain indifferent in the face of this manifest aggression and violent destabilization of the Salvadorian society which oblige the State and the Government to legitimately defend themselves. For that reason we have sought and continue to seek assistance from the United States of America and from other democratic nations of the world; we need that assistance both to defend ourselves from this foreign aggression that supports subversive terrorism in El Salvador, and to alleviate and repair the economic damage that this conflict has created for us." (Declaration of Intervention, p. 4., emphasis added.)

It further maintains:

> "XII. Faced with this aggression, we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and

> we have therefore, requested support and assistance from abroad. It is our natural inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States Congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Ibid., p. 12, emphasis added.)

And El Salvador concludes:

> "In the opinion of El Salvador ... it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining the legitimacy or the legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua ...
>
> Any case against the United States based on the aid provided by that nation at El Salvador's express request, in order to exercise the legitimate act of self-defence, cannot be carried out without involving some adjudication, acknowledgment, or attribution of the rights which any nation has under Article 51 of the United Nations Charter to act collectively in legitimate defence." (Ibid., p. 14, emphasis added.)

186. Nicaragua contends in its observations of 10 September 1984 on El Salvador's Declaration of Intervention that that Declaration

> "includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted that it is under armed attack from Nicaragua."

The Court adopts this contention of Nicaragua, and concludes that the evidence available supports the view that no request was made to the United States to come to the assistance of El Salvador (or Honduras or Costa Rica), in the exercise of collective defence against a supposed armed attack by Nicaragua, prior to El Salvador's Declaration of Intervention of 15 August 1984.

187. The difficulty with the contention of Nicaragua and the concurring conclusions of the Court are that they are not adequately supported by the facts. As shown by the quotations reproduced in the appendix to this opinion, at paragraphs 110, 116, 117, 118, 121, 128 and 129, El Salvador repeatedly claimed to be under armed attack from Nicaragua well before it filed its Declaration of Intervention, and it more than once gave public indication that it accordingly sought assistance from the United States.

188. The Court in otherwise concluding fails to refer to the statements by El Salvador quoted in the paragraphs of the appendix just cited, but it refers to other statements in which no such declarations and requests are found. The Court adds:

> "The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr Enders, the latter is reported to have referred to action which the United States might take
>
> > 'if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty' [NUS 85/25 ter, p. 5].
>
> This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance."

189. But while the Court believes that some significance should be attached to this report, I believe that the Court has misread the terms of the Inter-American Treaty of Reciprocal Assistance (the "Rio Treaty") to which Mr. Enders referred. That Treaty contains two quite distinct provisions under which the United States might extend protection to El Salvador. One is found in Article 3, paragraphs 1 and 2 of which provide:

> "1. The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.
>
> 2. On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken."

Mr. Enders' quoted remark obviously did not refer to an armed attack under Article 3, for he spoke at that point only of the building up of the arms race in Central America in which Nicaragua has taken so marked a lead. (See, in support of this conclusion, the further passage from the Ortega/Enders transcript quoted in the appendix, para. 157.) To what provision of the Rio Treaty then did Mr. Enders refer? Presumably, to article 6, which provides:

> "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

It is plausible that, in the view of El Salvador and the United States, which the OAS Organ of Consultation might be brought to share, an extraordinary emplacement of arms in Nicaragua might be seen as a fact or situation that might endanger the peace (as was the case in the Cuban missile crisis). But this reference of Mr. Enders is, in my view, of no significance in weighing the authenticity of the claims of El Salvador that it made requests to the United States for assistance in meeting what it viewed as Nicaraguan actions tantamount to an armed attack against it before and after 12 August 1981.

190. As observed above, if the Court had reason to doubt the accuracy of El Salvador's claims in this regard, it would have been perfectly possible for the Court to request El Salvador to supply evidence in support of the claims which its Declaration of Intervention made to the Court. The Court rather has chosen to draw a questionable inference from a memorandum of conversation supplied by Nicaragua, while overlooking statements in the public domain by El Salvador which are supportive of its claims. The Court finds it appropriate to take various claims by Nicaragua and witnesses testifying on its call at their face value, while refusing to credit the claim of a State, otherwise supported by some evidence in the public domain, that it has been under armed attack for years and has requested assistance in meeting that attack.

191. Moreover, in the Court's view, apparently the only kind of declaration that a State is under armed attack which counts is one formally and publicly made; and the only kind of request for assistance that appears to count is one formally and publicly made. But where is it written that, where one State covertly promotes the subversion of another by multiple means tantamount to an armed attack, the latter may not informally and quietly seek foreign assistance? it may be answered that it is written in Article 51 of the United Nations Charter that measures

taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council. That answer, which is not insubstantial, nevertheless is, in my view, insufficient, for reasons explained below (see paras. 221-227 of this opinion).

2. The position of the United States

192. For its part, the United States, speaking through its Secretary of State, submitted an affidavit to this Court which declares:

> "I hereby affirm that the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and that the United States considers its policies and activities in Central America, and with respect to Nicaragua in particular, to be in full accord with the provisions of the Charter of the United Nations. Pursuant to the inherent right of collective self-defense, and in accord with its obligations under the Inter-American Treaty of Reciprocal Assistance, the United States has provided support for military activities against forces directed or supported by Nicaragua as a necessary and proportionate means of resisting and deterring Nicaraguan military and paramilitary acts against its neighbors, pending a peaceful settlement of the conflict. I further affirm that the overthrow of the Government of Nicaragua is not the object nor the purpose of United States policy in the region. Our position in this respect is clear and public. As President Reagan stated in a published letter to Senator Baker of April 4, 1984:
>
> > 'The United States does not seek to destabilize or overthrow the Government of Nicaragua; nor to impose or compel any particular form of government there.
> >
> > We are trying, among other things, to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreements with their neighbors on peace in the region.
> >
> > We believe that a pre-condition to any successful negotiations in these regards is that the Government of Nicaragua cease to involve itself in the internal or external affairs of its neighbors, as required of member nations of the OAS.'"

3. The pertinence of provisions of the Inter-American Treaty of Reciprocal Assistance

193. Provisions of the Rio Treaty are pertinent to the answer to the question of whether the United States is entitled to act in collective self-defence with El Salvador. The Rio Treaty was not invoked by Nicaragua in its Application or

argument, with the result, in my view, that the dispute has not arisen under that multilateral treaty, which accordingly is not, or arguably is not, within the reach of the multilateral treaty reservation. In any event, the essential consideration is that El Salvador, Nicaragua and the United States are Parties to the Rio Treaty and are bound by it.

194. While it was concluded after the entry into force of the United Nations Charter, the Rio Treaty was negotiated in pursuance of the Act of Chapultepec. That Act, concluded at the Inter-American Conference on Problems of War and Peace of 1945, established the principle that an attack against any American State would be considered an act of aggression against all other American States. Article 51 of the United Nations Charter was drafted essentially in response to the insistence of the Latin American States that the possibility of action in individual and collective self-defence pursuant to the Act of Chapultepec be preserved.

> "The drafting history shows that article 51 was intended to safeguard the Chapultepec Treaty which provided for collective defense in case of armed attack. The relevant commission report of the San Francisco Conference declared 'the use of arms in legitimate self-defense remains admitted and unimpaired'. ... When article 51 was adopted in 1945, it was intended to legitimize the security arrangement of the Chapultepec Act ... That treaty declared, in effect, that aggression against one American state shall be considered an act of aggression against all. This was expressly referred to at the San Francisco Conference as the reason for collective self-defense in article 51 ... When a state comes to the aid of another, the legal issue is not whether the assisting state has a right of individual defense but only whether the state receiving aid is the victim of an external attack." (Oscar Schachter, loc. cit., pp. 1633-1634, 1639.)

Speaking for the Latin American States, the Foreign Minister of Colombia thus placed on record at San Francisco, as an authoritative interpretation of Article 51, the following understanding:

> "The Latin American Countries understood, as Senator Vandenberg had said, that the origin of the term 'collective self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimatizes the right of collective self-defence to be carried out in accord with the regional pacts so long as they are not opposed to the purposes and principles of the Organization as expressed in the Charter. If a group of countries with regional ties declare their solidarity for their mutual defense, as in the case of the American states, they will undertake such defence jointly if and when one of them is attacked. And the right of defense is not limited to the country which is the direct victim of aggression but extends

to those countries which have established solidarity, through regional arrangements, with the country directly attacked. This is the typical case of the American system. The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter." (UNCIO documents, Vol. 12, pp. 680-681.)

195. The Rio Treaty thus concluded pursuant to the Act of Chapultepec and in accordance with the United Nations Charter contains the provisions quoted in paragraph 189 of this opinion. It will be observed that, under Article 3, on the request of the attacked State, "each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation" arising from treating an attack against an American State as an attack on all the American States. It may do so until the Organ of Consultation of the OAS or the United Nations Security Council has taken the measures necessary to maintain international peace and security. By way of contrast, if an American State is affected by "an aggression which is not an armed attack ... the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim ..." (Art. 6).

196. In implementation of the Rio Treaty, as well as its inherent right recognized by Article 51 of the United Nations Charter, El Salvador has resisted Nicaragua's armed attack by acting in self-defence, and, equally, the United States has determined "the immediate measures which it may individually take in fulfillment of the obligation" it has undertaken to treat an attack on any American State as an attack on all (including itself). By the terms and intent of the Rio Pact, the United States is entitled individually to determine such measures until the OAS and the United Nations Security Council have acted; it does not require the prior authorization either of the OAS or of the Security Council. In so doing, the United States fulfils an obligation which it has undertaken to act in collective self-defence (contrary to the Court's untenable view). As the former Director of the Legal Department of the OAS has written:

"While under the United Nations Charter self-defense is only a right, under article 3 of the Treaty self-defense is both a right and an obligation. The reason for the difference is that the Treaty is based on a commitment to

reciprocal assistance." (Francisco V. Garcia Amador, "The Rio de Janeiro Treaty: Genesis, Development, and Decline of a Regional System of Collective Security", Inter-American Law Review, Vol. 17, 1985, pp. 1, 11-12.)

197. While, as Dr. Garcia Amador's analysis shows, the OAS system of collective security has a mixed record, and while the Rio Treaty itself is the subject of significant revisions which have not yet come into force, it should be observed that the OAS has interpreted and applied the Rio Treaty on related occasion in ways that are supportive of the current interpretation of its legal obligations which the United States advances. In response to Cuba's repeated efforts to overturn certain governments of Latin America during the 1960s, the Organ of Consultation of the Inter-American System met and adopted resolutions which recognized that such subversive activities could give rise to exercise of the right of individual and collective self-defence. Thus Resolution I of the Ninth Meeting of Consultation of 1964 reads in part as follows:

"The Ninth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

HAVING SEEN the report of the Investigating Committee designated on December 3, 1963, by the Council of the Organization of American States, acting provisionally as Organ of Consultation, and

CONSIDERING:

That the said report establishes among its conclusions that 'the Republic of Venezuela has been the target of a series of actions sponsored and directed by the Government of Cuba, openly intended to subvert Venezuelan institutions and to overthrow the democratic Government of Venezuela through terrorism, sabotage, assault, and guerrilla warfare'; and

That the aforementioned acts, like all acts of intervention and aggression, conflict with the principles and aims of the inter-American system,

RESOLVES:

1. To declare that the acts verified by the Investigating Committee constitute an aggression and an intervention on the part of the Government of Cuba in the internal affairs of Venezuela, which affects all of the member states.

2. To condemn emphatically the present Government of Cuba for its acts of aggression and of intervention against the territorial inviolability, the sovereignty, and the political independence of Venezuela.

> 5. To warn the Government of Cuba that if it should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the Organization, the member states shall preserve their essential rights as sovereign states by the use of self-defense in either individual or collective form, which could go so far as resort to armed force, until such time as the Organ of Consultation takes measures to guarantee the peace and security of the hemisphere." (Inter-American Institute of International Legal Studies, The Inter-American System, 1966, pp. 168-169.)

Paragraph 5 of the foregoing resolution is a clear holding that, under the law in force among the Members of the OAS, the very kind of actions of Nicaragua at issue in this case justify the use of armed force in individual or collective self-defence.

4. The position under the United Nations Charter and customary international law

198. United States action is as clearly in essential conformity with Article 51 of the United Nations Charter as it is in essential conformity with the Rio Treaty - except that it has failed to report immediately to the Security Council the measures taken in exercise of its right of collective self-defence. (The Rio Treaty also recognizes the supervening authority of the Security Council.) The implications of that failure will be considered below. But before leaving the Inter-American System, it should also be noted that the Charter of the Organization of American States, as revised, provides that, "An act of aggression against one American State is an act of aggression against all the other American States" (Art. 3). And Article 27 provides:

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

199. Lauterpacht, in observing that the right "of self-defence against physical attack must be regarded as a natural right both of individuals and of States", referred to Article 51 of the Charter and continued:

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

> and independence are deemed vital to the safety and independence of the State thus resisting - or participating in forcible resistance to - the aggressor. Such extension of the notion of self-defence is a proper expression of the ultimate identity of interest of the international community in the preservation of peace. It is also a practical recognition of the fact that - in the absence of an effective machinery of the United Nations for the suppression of acts of aggression - unless such right of collective self-defence is recognised the door is open for piecemeal annihilation of victims of aggression by a State or States intent upon the domination of the world. In that sense collective self-defence is no more than rationally conceived individual self-defence." (H. Lauterpacht, Oppenheim's International Law, Vol. II, Seventh Edition, (1952) pp. 155-156.)

The United States has officially declared itself to be of the view that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States ..." (Executive Order of the President of 1 May 1985 (Nicaraguan Supplemental Annex B, Attachment 1). In his address of 16 March 1986, President Reagan spoke of:

> "a mounting danger in Central America that threatens the security of the United States ... I am speaking of Nicaragua ... It is not Nicaragua alone that threatens us, but those using Nicaragua as a privileged sanctuary for their struggle against the United States. Their first target is Nicaragua's neighbors."

200. If the United States (and El Salvador) were to be adjudged not under the Charters of the United Nations and the OAS and the pertinent Inter-American Treaties, but under customary international law, it is equally clear that the United States and El Salvador are entitled to join together in exercising their inherent right of collective self-defence, and to do so without the prior authorization of international organizations, universal or regional. In the pre-United Nations Charter era - or, at any rate, in the pre-Pact of Paris and pre-League of Nations era - States were free to employ force and go to war for any reason or no reason. When the use of force could be initiated so unrestrainedly, it was not conceivable that the use of force in self-defence was constrained. Particularly where a State was the victim of armed attack, it and its allies were perfectly free to respond in self-defence. (It should be recalled that the narrow criteria of the Caroline case concerned anticipatory self-defence, not response to armed attack or to actions tantamount to an armed attack.) As for the state of international law in the years 1920-1939, the judgments of the International Military Tribunals of Nuremberg and Tokyo took the view that the general ban on the use of armed force was indefeasibly subject to an exception permitting lawful recourse to armed force for self-defence, provided that the conditions justifying action in self-defence obtained.

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N. Considerations of necessity and proportionality

201. Considerations of the necessity and proportionality of United States measures against Nicaragua have been initially examined in paragraph 9 of this opinion. It has been concluded, for reasons set forth above in paragraphs 69-77, that the better view is that the question of the necessity of those measures currently is not justiciable. The Court has taken another view, and concluded that both the direct and indirect actions of the United States against Nicaragua cannot be justified as necessary measures of collective self-defence. If the question is to be adjudged, and the Court has adjudged it, the question of necessity essentially turns on whether there were available to the United States peaceful means of realizing the ends which it has sought to achieve by forceful measures. As Judge Ago put it in a report to the International Law Commission:

> "The reason for stressing that action taken in self-defence must be necessary is that the State attacked ... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion ..." ("Addendum to the eighth report on State responsibility", Yearbook of the International Law Commission, 1980, Vol. II, Part One, p. 69.)

202. The Salvadoran rebels in early 1979 were relatively weak; as Annex 50, page 2 to the Counter Memorial of the United States indicates, before 1980 the diverse guerrilla groups in El Salvador were ill-coordinated and ill-equipped; they were armed with pistols, hunting rifles and shotguns. (Nicaragua offered no evidence to rebut these contentions.) By January 1981, with the benefit of a larger measure of unity achieved with the particular assistance of Cuba, and with the aid of a massive infusion of arms, mainly channelled through Nicaragua, as well as training in Cuba and Nicaragua and coordination and command exercised from Nicaragua, the insurgents were able to mount their "final offensive". They have been able to maintain a significant, well supplied level of hostilities since. It is obvious that the Government of El Salvador, faced with a large-scale insurgency continuously so fueled by foreign intervention, particularly of Nicaragua and Cuba, had no means of dealing with the internal and external attack upon it other than recourse to armed force. If the Government of El Salvador had declined to fight the insurgents, and if it had confined itself to a readiness to negotiate with them, that Government would have been overthrown years ago. The Government of El Salvador also found that it was unable to resist foreign-supported insurgents effectively without foreign assistance; it requested the assistance of the United States. The United States

responded in January 1981 by resuming the provision of arms and training to the forces of the Government of El Salvador and by provision of increased economic and financial aid. Subsequently, about a year later, the United States further responded by exerting armed pressure upon the source of much of El Salvador's travail, Nicaragua. Were the measures applied by the United States against Nicaragua necessary? El Salvador itself was not strong enough to apply them, but it welcomed those measures as measures which would diminish the effectiveness of Nicaraguan intervention against it (see the appendix to this opinion, paras. 121, 128-129).

203. In my view, the decision of the United States in late 1981 that the exertion of armed pressures upon Nicaragua was necessary was not unreasonable. For more than a year, the United States had endeavoured to assist El Salvador in suppressing insurgency and Nicaraguan intervention in support of that insurgency by assistance to El Salvador confined to El Salvador, and by diplomatic representations to the Government of Nicaragua. Both courses of action had proved insufficient. The insurgency in El Salvador was contained but not suppressed; the human and material damage inflicted by it continued to be unacceptably severe. Nicaragua had not sufficiently responded, positively and definitively, to United States requests, warnings or inducements (such as the prospect of resumed economic assistance). On the basis of many months of unhappy experience, the United States could reasonably have reached the conclusion late in 1981 that there was no prospect of winding down the insurgency in El Salvador without cutting off foreign intervention in support of it, and no prospect of Nicaragua's terminating its intervention unless it were forced to do so. In circumstances where an aggressor State cannot be persuaded to cease its aggressive intervention, it is not unreasonable to seek to force the aggressor State to cease its aggressive intervention.

204. However, it could be argued that the United States, after the failure of the Enders mission and its other diplomatic representations, should, before embarking on measures of force, have had recourse to multilateral means of peaceful settlement, notably those of the Organization of American States and the United Nations. That is a substantial argument. Presumably the judgment of the United States was that such recourse would have been ineffective. However plausible such a judgment might have been, it may nevertheless be maintained that it should have exhausted those multilateral remedies. But its failure to do so is mitigated by several factors.

205. In the first place, the United States has maintained diplomatic relations with the Nicaraguan Government and a readiness to negotiate with it (see, for example, the proposals for peaceful settlement it made to Nicaragua in 1982, even after its support for the contras was underway; appendix to this opinion, para. 171). There have been recurrent rounds of bilateral negotiations between the United States and Nicaragua since the United States undertook measures of force. In the second place, the United States took part in a substantial multilateral

effort at peaceful settlement which Nicaragua rebuffed (appendix, para. 172). Third, the United States gave active support from its launching in 1983 to the Contadora process - or maintained that it did so (opinions differ on the genuineness of United States - and Nicaraguan - support of Contadora). The Contadora process, which has been emphatically endorsed by the OAS and the United Nations, has been treated by both Organizations as the preferred, priority route of settlement, to which they should both defer. In the fourth place, the United Nations Security Council has been recurrently seized by Nicaragua of what it claims to be a bilateral dispute with the United States, and the United States has taken an active part in the Security Council's handling of the matter. To be sure,it has more than once exercised its power of veto to block resolutions desired by Nicaragua (and, at other times, it has voted for relevant resolutions). But the failure of the Security Council to adopt a resolution is not be be equated with the failure of the Security Council to take up a dispute or situation or to consider a charge of a threat to the peace, breach of the peace or act of aggression.

206. There remains room for challenging the necessity of the measures involving the use of force undertaken by the United States. But given the difficulties that beset adjudging that question at this juncture, which have been described above, and in view of the foregoing considerations, I do not find that it can be concluded that those measures have, as a matter of law, been unnecessary.

207. The Court's holding that United States measures against Nicaragua cannot be justified as necessary is particularly based on the following consideration. The Court observes that these United States measures were only taken, and began to produce their effects, several months after the major offensive (of January 1981) against the Government of El Salvador by the insurgents had been completely repulsed. The Court concludes that it was possible to "eliminate" the main danger to the Government of El Salvador without the United States embarking on activities in and against Nicaragua. Thus the Court concludes that "it cannot be held that these activities were undertaken in the light of necessity".

208. In my view, this conclusion of the Court is as simplistic as it is terse. It fails to take sufficient account of the facts. It is true that the results of the conspiracy among Cuba, Nicaragua and other States to arm and support the Salvadoran insurgency in order to overthrow the Government of El Salvador reached its initial material peak in preparation for the "final offensive" of January 1981, and that that offensive failed. It is true that, thereafter, in early 1981, after the Nicaraguan Government had been caught, so to speak, red-handed in its massive shipment of arms and other support of the Salvadoran insurgency, it suspended shipment of arms - for a time. But it is also true that, by the time in August, 1981 that Mr. Enders demanded of Commander Ortega that Nicaragua definitively cut off its material support of the Salvadoran insurgency, the flow of arms, ammunition, explosives, etc. through Nicaragua to the El Salvadoran insurgency had resumed, and that

Nicaraguan provision to that insurgency of command-and-control facilities, training facilities and other support continued unabated. It is also the fact that, in 1982, shipment of arms through Nicaragua to the insurgents rose again very sharply, and has irregularly continued at varying, apparently lower, levels since. For its part, the Government of El Salvador continued to be hard pressed by well-armed and supplied insurgent assaults, in 1981, and 1982 and in subsequent years, and is to this day. Thus the apparent inference of the Court - that there was no continuing need by El Salvador for United States assistance which took the form of its activities in and against Nicaragua - is open to the most profound question. The Court may opine that the main danger to El Salvador had been "eliminated" before the United States intervened, but the Government of El Salvador, and the thousands of Salvadorans who have suffered and died since January 1981 as a direct and indirect result of civil strife fueled by foreign intervention, may be presumed to have another view. The Court's assumption appears to be that El Salvador may be indefinitely bled by an insurgency provisioned by Nicaragua, and that neither El Salvador nor an ally acting in its support may exert responsive measures directly upon the primary immediate and continuing conduit for that insurgency's arms, ammunition, explosives and medicines, Nicaragua. The Court appears to be open to the argument that, when the insurgents can, with the use of such Nicaraguan-supplied material, mount a massive "final offensive", there might be ground for treating such a United States response against Nicaragua as necessary, but not otherwise. But whether any such excursion into military analysis really reflects the Court's belief is not clear - or more compelling than its reasoning in support of its conclusion that United States activities cannot be sustained in the light of necessity.

209. Indeed, the imputation of the Court's opinion is that, while arguably the United States might have been justified in responding promptly and overtly to Nicaragua's support of the January 1981 "final offensive" of the Salvadoran insurgents by the use of force against Nicaragua, it cannot possibly be justified in the covert application of force a year later. In my view, that is an especially curious conclusion for the Court to reach. In the period between January 1981 and the authorization by President Reagan of the application of armed pressures against Nicaragua towards the end of that year, the United States mounted a serious effort to settle its dispute with Nicaragua through peaceful means. It tried, notably through the Enders mission, to persuade Nicaragua to cease its activities in support of the overthrow of El Salvador's Government. Only when that effort failed, did the United States have recourse to forceful measures. Is the United States really to be faulted for taking the time to pursue prior recourse to measures of peaceful settlement?

210. Moreover, where is it prescribed that, in response to covert measures of aggression, defensive measures must be overt? The implausibility of such a position - which seems to be that of the Court - is the greater when one recalls that covert measures may in some circumstances be more modest, and more readily terminated, than overt applications of the use of force. Would the loss of life in Nicaragua really have been less, and the strength of the United States legal case greater, if, rather than resorting to support of the contras and the

covert mining of Nicaraguan ports and attacks on oil stocks, the United States Air Force, in January 1981, had carried out air attacks on Nicaraguan military (and Salvadoran insurgent) bases in Nicaragua, on Nicaraguan airports and sea ports and had endeavoured to interdict the flow of certain ground and sea and air transport from Nicaragua?

211. It is even clearer that the measures of the United States have not been disproportionate. It was concluded at the outset of this opinion that, on their face, the measures taken by the United States, in their object and character, appear to be proportional to those of Nicaragua's intervention in El Salvador. For its part, the Court holds that United States mining of Nicaraguan ports and attacks on ports, oil installations, etc., do not satisfy the criterion of proportionality. "Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid." That may be clear to the Court, but, for the reasons set out in paragraph 9 of this opinion, it is not clear to me. On the contrary, these United States measures appear to be patently proportionate to the very similar measures of depredation in El Salvador of the Salvadoran insurgents to which these United States measures were a response.

212. Moreover, for the test of proportionality to be met, there by no means must be perfect proportionality. As Judge Ago has rightly written:

> "The requirement of the proportionality of the action taken in self-defence, ... concerns the relationship between that action and its purpose, namely ... that of halting and repelling the attack .... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain. Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the

specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.

Within these limits and in this sense, the requirement of proportionality is definitely confirmed by State practice. The occasional objections and doubts expressed about it have been due solely to the mistaken idea of a need for some kind of identity of content and strength between the attack and the action taken in self-defence. It must be emphasized once again that, without the necessary flexibility, the requirement would be unacceptable. As indicated at the beginning of this paragraph, a State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end." (Loc. cit, p. 69.)

213. Judge Ago adds:

"There remains the third requirement, namely that armed resistance to armed attack should take place immediately, i.e. while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence." (Ibid., p. 70.)

214. As observed above, the requirement of immediate response to armed attack which Judge Ago sets out is equally met in the instant case by the United States. There is no question of measures of force being exerted in 1982 or later in response to aggressive acts which occurred only in the period from the summer of 1979 to the winter of 1981. Rather, as is shown in the appendix to this opinion, successive acts of aggressive intervention by Nicaragua in El Salvador have continued

at least into 1985, if not to the present day. They were continuing when the United States mounted its responsive armed pressures. Moreover, insofar as the question of the timing of the initial application of armed pressures against Nicaragua is concerned - and this is a question which the Court raises - not only was it reasonable for the United States to pursue possibilities of peaceful settlement before applying such pressures. The modalities of pressure which it chose by their nature took time to organize. The contras could not be armed and trained overnight. Again it may be asked, would it have been legal for the United States Air Force to have bombed Nicaraguan bridges in January 1981 whereas it was illegal for the contras to have blown those bridges with United States support in March 1982?

O. Measures of collective self-defence may lawfully extend to Nicaraguan territory

215. If it be granted that the United States is entitled to take measures in collective self-defence in support of El Salvador, must those measures be confined to the territory of El Salvador or may they lawfully be applied - as in fact they have been applied - to the territory of Nicaragua itself?

216. The question of whether a State suffering armed attack, or actions tantamount to armed attack, must confine its defence to its own territory is a question which has more pre-occupied scholars than statesmen. Learned opinion is divided, but State practice, I believe, is not so indeterminate.

217. Thus one may contrast the views of Professor Oscar Schachter with those of Professor John Norton Moore. Professor Schachter, in addressing the permissible limits of counter-intervention, observes that a principle has "been proposed" for placing limits on counter-intervention, namely, "that the counter-intervention should be limited to the territory of the state where the civil war takes place". He continues:

> "This territorial limitation on counter-intervention has been observed in nearly all recent civil wars. However, it apparently has been abandoned by the United States insofar as its 'counter-intervention' on the side of the El Salvador regime has extended to support of anti-Sandinista forces fighting on Nicaraguan soil. The United States had justified this action under the collective self-defense provision of article 51, presumably on the ground that Nicaragua has engaged in an armed attack on El Salvador. The United States also 'counter-intervened' against Nicaragua by mining approaches to Nicaraguan ports." (Loc. cit., p. 1643.)

Professor Moore replies:

"This 'proposed rule' is not international law and should not be. As has been seen, most scholars have long supported the proposition that intensive 'indirect' aggression is an armed attack permitting a defensive response under Article 51 of the UN Charter and customary international law. Since the traditional rule has long been that assistance to a government at its request within its own boundaries is lawful even in the absence of an armed attack, the very purpose of the determination of an armed attack is to permit proportional defensive measures against the attacking state. There is no evidence that its draftsmen intended to limit Article 51 as suggested by this proposed rule or that states party to the Charter have adopted any such rule. Contrary to Professor Schachter's suggestion that this proposed limitation 'has been observed in nearly all recent civil wars,' the United States specifically rejected it in the Vietnam War when the argument was made that it was impermissible to respond against North Vietnam as a defense to its 'indirect' aggression against South Vietnam. It seems also to be rejected widely elsewhere, including in French, Soviet, Chinese and Israeli state practice.

As a policy matter, the only purpose of such a rule would be to seek to reduce conflict by reducing the potential for territorial expansion. The rule might be more likely, however, to encourage conflict and 'indirect' aggression by convincing states that such aggression is free from substantial risk: if it works, they will win; if it fails, there is no significant risk and they can try again. As this possibility suggests, the right of defense under customary international law and the Charter is a right of effective defense; that is, a right to take such actions as are reasonably necessary to end the attack promptly and protect the threatened values. Why should El Salvador and other Central American states be required to accept an endless secret war against them? ... The real check, when the proper scope of the defensive right is in issue, is the well-established requirement of necessity and proportionality." ("The Secret War in Central America and the Future of World Order", American Journal of International Law, January 1986, Vol. 80, pp. 190-194.)

218. As I read State practice since the United Nations Charter came into force, it indicates that self-defence, individual and collective, may carry the combat to the source of the aggression, whether direct or indirect. Thus in the Korean War, 1950-1953, the United Nations was not of the view that international law confined its response to North Korean aggression against the Republic of Korea to the territory of the Republic of Korea. On the contrary, United Nations forces advanced into the territory of the Democratic People's Republic of Korea; and, to this day, a sliver of territory of what had been North Korea remains under the control of the Republic of Korea. In repeated instances since the

mid-1950's, Israel has responded to foreign support of irregular forces operating against it by striking at what it claims to have been the foreign bases of those forces. Clearly Israel has not been of the view that international law confined it to responsive action within its territory or within territory under its control. In 1958, during the Algerian War, France was not of the view that international law confined its response to support for Algerian insurgents to the territory of French Algeria. On the contrary, it acted against what it maintained was a rebel base at Sakiet-Sidi-Youssef in Tunisia. In 1964, the United Kingdom, in bombing Harib Fort in the territory of the Yemen Arab Republic, maintained that it acted lawfully in doing so, in view of prior acts of aggression against the Federation of South Arabia for whose defence and foreign relations the United Kingdom then was responsible. The United Kingdom was not of the view that it was confined to a defensive response within the territory of the Federation. During the decade of intense American involvement in the Vietnam War, the United States was not of the view that international law confined its response to North Vietnam's support for Vietnamese insurgents to the territory of the Republic of Vietnam. On the contrary, it carried out bombing and mining in the territory and waters of the Democratic Republic of Vietnam. Subsequently, the People's Republic of China, in responding to Vietnamese assistance to a faction which took power in Democratic Kampuchea - that is, to what China saw as the Vietnamese invasion of Kampuchea - was not of the view that international law confined its response to the territory of Kampuchea. On the contrary, China took action against the territory and armed forces of the Socialist Republic of Vietnam in Vietnam. Equally, Vietnam, in the prosecution of its suppression of Kampuchean resistance, has not been of the view that it was restricted to the territory of Kampuchea. On the contrary, it has penetrated the territory of Thailand, where Kampuchean resistance forces have taken refuge. In taking armed action against Iran in 1979, Iraq proffered as one justification alleged Iranian support for subversion in Iraqi territory. But Iraq did not confine itself to repelling such subversion within its territory. Nor has Iran confined its reaction against Iraq to its own territory; on the contrary, it has pushed into Iraqi territory. The Soviet Union and Afghanistan, in responding during the last few years to alleged assistance from the territory of Pakistan to resistance forces in Afghanistan, have not been of the view that international law confined their response to the territory of Afghanistan; there have been air raids on the territory of Pakistan. Nicaragua itself has not confined its response to contra attacks to the Nicaraguan territory where they have occurred; it has carried the battle to Honduran territory where contras reportedly are based. It has not confined itself to hot pursuit, but apparently has launched pre-emptive strikes against contra bases in Honduras.

219. What matters in this context is not whether one agrees or disagrees with the legality of the cited acts of the United Nations, Israel, France, the United Kingdom, the United States, China, Vietnam, Iraq, the Soviet Union, Afghanistan, and Nicaragua. It is by no means suggested that all of these actions are of the same legal value; some were clearly lawful, others clearly not. But what is significant is that these actions, whose legality has been affirmed by those carrying them

out, provide ample and significant State practice indicating that what is proposed as a limitation upon self-defence and counter-intervention is not today applied as a rule of international law. It is not generally accepted State practice.

220. Nevertheless, if the proposed rule is not the accepted rule, should it be? Should the response of a victim of direct or indirect aggression, and a State or States lending it support in its resistance to that aggression, be confined to the territory of the victim? The purpose of such a principle would be to constrict conflict by reducing the actuality of and potential for its territorial expansion. That is an appealing purpose. But the drawbacks of implementing such a principle appear to outweigh its attractions. For a result of confining hostilities to the territory of the victim would be to encourage victimization; potential aggressors would be the likelier to estimate that their aggression will be free of significant cost. The potential aggressor might reason that it has little to lose in launching covert aggression, as by concealed support of insurgents operating against the government of a neighbouring State. If the aggression succeeds, the aggressor's purposes are achieved; if not, the aggressor cannot suffer in its territory. If it has done no more than lend substantial support to foreign insurgents, it is those insurgents alone who will take the punishment. The aggressor may lose its material investment in the foreign insurgency but no more; it will not suffer deterrence of its forces, on its territory, with incidental damage to its people and possessions. Thus if one attempt at foreign armed subversion fails, another can be attempted at a more propitious time. Or, indeed, the aggressor can carry on its support of a foreign insurgency continuously, relatively secure in the "rule" of international law that it is immune from a defensive response on its territory directed at its forces. In short, such a rule would encourage rather than deter aggression. Thus it would not succeed even in its purpose of confining the potential for the territorial expansion of hostilities. International law is better left as it is, confining the scope of permissible self-defence, individual and collective, by the provisions of the United Nations Charter and the norms of necessity and proportionality.

P. The failure of the United States to notify the Security Council of measures of self-defence

221. 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 and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The United States did not notify the Security Council when, in December 1981 or early 1982, it began to lend support to the contras. Nor did it notify the Security Council of subsequent actions, such as the attack on Nicaraguan oil facilities or the mining of Nicaraguan ports. Does this failure of the United States import that the measures taken by it were not "measures taken ... in exercise of this right of self-defence"?

222. In my view, no such imputation need necessarily be made, for a number of reasons. In the first place, the right of self-defence is an inherent right; the Charter provides that nothing in the present Charter shall impair that inherent right - and that may be said to include the requirement of reporting such measures to the Security Council. Second, if the aggression in question - that of Nicaragua - is covert (as it is), and the response to that aggression is covert (as it initially was, however imperfectly), it could hardly at the same time have been reported to the Security Council. A State undertaking covert action cannot at the same time publicly and officially report that action to the Security Council. Does it follow from the reporting requirement of Article 51 that aggressors are, under the regime of the Charter, free to act covertly, but those who defend themselves against aggression are not? That would be a bizarre result. A more reasonable interpretation of Charter obligations is that, where a State commits aggression, a profound violation of its international legal obligations, and where it commits that aggression covertly, it cannot be heard to complain if a State or States acting in self-defence to that aggression respond covertly. Ex injuria jus non oritur: no legal right can spring from a wrong.

223. In the third place, it is by no means clear that, by the intent of the United Nations Charter, and the inference of the reporting requirement, covert actions in self-defence are prohibited. Defensive measures may be overt or covert, and have been in wars fought before and after the entry into force of the United Nations Charter. In the Korean War, United Nations support for paramilitary and covert operations was not regarded as illegal by the United Nations. During the covert hostilities conducted by Indonesia against Malaysia in 1965, the United Kingdom not only provided direct assistance to Malaysia but also reportedly provided covert assistance to guerrilla and insurgent forces operating against President Sukarno's forces within Indonesia. Any such measures were not reported to the Security Council, but they would not appear to have been any the less defensive for that. Thus it appears that, in resisting aggression, covert measures have been and legitimately may be used, which could not, by their nature, be reported to the Security Council without prejudicing the security and effectiveness of those measures.

224. In the fourth place, a State acting in self-defence may choose to act covertly not because it doubts - or necessarily doubts - the legality of its action but for other quite respectable reasons. In the current case, for example, it appears important to the Government of Honduras not to admit officially what is unofficially clear: that the contras have bases in Honduras. Apparently the Government of Honduras has not wished, and does not wish, to commit itself openly and officially

to hostile relations with Nicaragua, despite its forthright denunciations of Nicaraguan policies. If the United States had proceeded overtly, and concurrently reported to the Security Council, that might have created problems which Honduras would have viewed as substantial. Or, again, in the view of the United States, the possibilities of reaching a diplomatic accommodation with Nicaragua might have been greater if the pressures exerted upon Nicaragua were covert rather than announced. The United States may also have acted covertly rather than overtly for reasons related to Congressional oversight or for domestic political reasons. But such considerations do not necessarily suggest that United States motivations or measures were not defensive. For all these reasons, the failure of the United States to report its measures to the Security Council does not necessarily suggest that these measures were not defensive or that its own perception of those measures was that they were not taken in the exercise of its right of collective self-defence.

225. It should be added that, while the United States failed to report measures it describes as taken in collective self-defence to the Security Council, more than once in Security Council debates flowing from complaints by Nicaragua against it, the United States indicated that it was joining in defensive measures against Nicaragua's prior and continuing acts of aggression. It did so well before Nicaragua brought the instant case to the Court. For example, as early as March, 1982, shortly after heightened contra activity assisted by the United States began, Nicaragua made a complaint to the Security Council, at which Coordinator Ortega appeared for Nicaragua. Ambassador Kirkpatrick made a detailed and vigorous reply. The usual charges by Nicaragua and the United States, which are now familiar, were exchanged. The United States indicated in the Security Council debate that it had taken certain responsive action "to safeguard our own security and that of other States which are threatened by the Sandinista Government" (see S/PV.2335, p. 48). While that action particularly related to overflights, the United States thus inferred that this action was in individual and collective self-defence. Since the United States exertion of armed pressure upon Nicaragua then actually was covert, it could hardly have been expected that the United States would have explicitly enumerated its measures in support of the contras as measures of self-defence. It spoke in general terms.

226. In further response to a complaint of Nicaragua, Ambassador Kirkpatrick similarly stated in the Security Council on 2 April 1982 that, while it was attached to the principle of non-interference, "None of this means that the United States renounces the right to defend itself, nor that we will not assist others to defend themselves ..." (S/PV.2347, p. 7) The context of this statement again suggests reference by the United States to a right of collective self-defence against Nicaragua's actions in El Salvador. In a like vein, in the Security Council on 25 March 1983, Ambassador Kirkpatrick maintained, in respect of Nicaragua's renewed complaint:

> "Thus it is legitimate for communist Governments to train and arm guerrillas and make war on their non-communist neighbours. It is illegitimate for non-communists to attempt to defend themselves or for others to help them to do so." (S/PV.2423, pp. 53, 54-55.)

Again, on 9 May 1983 in the Security Council, Ambassador Kirkpatrick asserted that:

> "The Government of Nicaragua has come again to us, demanding of the United Nations international protection while it destabilizes its neighbours. It is claiming that a people repressed by foreign arms of a super-Power has no right to help against that repression." (S/PV.2431, p. 62.)

Once more, if in guarded terms, the United States may be said to have recognized El Salvador's right to ask for and for it to give it assistance in meeting Nicaragua's acts of aggression. Again, on 3 February 1984, the United States in the Security Council affirmed that, "We do intend to continue to co-operate with our friends in Central America ... in defence of freedom ..." (S/PV.2513, p. 27). And on 30 March 1984, the United States, after denouncing Nicaragua's continued support of guerrillas in other countries, principally El Salvador, claimed that Nicaragua came before the Security Council "seeking to prevent its neighbours from defending themselves against Nicaraguan-based efforts at the subversion and overthrow of neighbouring countries" (S/PV.2525, p. 41).

227. All this said, there remains, under the Charter of the United Nations, a literal violation of one of its terms. The term in question is a procedural term; of itself it does not, and by the terms of Article 51, cannot, impair the substantive, inherent right of self-defence, individual or collective. The measures of the United States in assisting El Salvador by, among other means, applying force against Nicaragua, are not transformed from defensive into aggressive measures by the failure to report those measures to the Security Council. But there is nevertheless a violation of an important provision which is designed to permit the Security Council to exert its supervening authority in a timely way. Even if Nicaragua, by reason of its prior and continuing acts of covert intervention and aggression, may reasonably be deemed to be debarred from complaining of responsive covert measures of the United States, the international community at large, as represented by the Security Council, has an interest in the maintenance of international peace and security which should not be pre-empted by the failure of a State to report its defensive measures to the Security Council.

228. It must be recalled, however, that, if the legality of the actions of the United States in this case are to be adjudged not under the United Nations Charter and the other treaties on which Nicaragua has relied, but, by reason of the multilateral treaty reservation of the United States, under customary international law, customary international

law knows nothing of an obligation of a State to report to the Security Council. Accordingly, in the case before the Court, it may in any event be concluded that the United States cannot be held in violation of an international legal obligation by reason of having failed to report defensive measures to the Security Council.

229. The Court's Judgment appears to rest upon another argument in respect of reporting under Article 51 of the United Nations Charter, namely, that, since El Salvador never claimed that it was acting in self-defence until it filed its Declaration of Intervention in this case in 1984, and since the United States never claimed that it was acting in collective self-defence until the pendency of these proceedings, it is too late for them, or at any rate the United States, to make such claims now. Whether the Court is on sound factual ground in reaching this conclusion has been challenged above (paras. 186-190).

230. In any event, does the body of international law contain such a statute of limitations? By the terms of Article 51, measures taken by Members of the United Nations in exercise of their right of individual or collective self-defence "shall be immediately reported to the Security Council". But does it follow that, if they are not, those measures may not later be claimed to be measures of self-defence? I do not believe so, because such a conclusion would invest a procedural provision, however important, with a determinative substantive significance which would be unwarranted. A State cannot be deprived, and cannot deprive itself, of its inherent right of individual or collective self-defence because of its failure to report measures taken in the exercise of that right to the Security Council.

Q. If United States reliance on a claim of self-defence is well founded, it constitutes a complete defence to virtually all Nicaraguan claims

231. Where a State is charged with an unlawful use of force, but actually has employed force in self-defence, that State is absolved of any breach of its international responsibility. In my view, that is the situation of the current case.

232. Thus Judge Ago, in preparation of the International Law Commission's draft articles on State responsibility, proposed, under the rubric "Circumstances precluding wrongfulness", the following provision:

"Article 34. Self-defence

> The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations."
> (Yearbook of the International Law Commission 1980, Vol. II, Part One, p. 70.)

That this provision is a correct statement of the international law of the matter is demonstrated in Judge Ago's detailed commentary on the article (ibid., pp. 51-70).

233. The International Law Commission itself adopted the proposals and reasoning of Judge Ago, its draft article reading:

"Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations." (Yearbook of the International Law Commission 1980, Vol. II, Part Two, p. 52.)

The Commission's commentary to this article in part provides:

"(1) This article relates to self-defence only from the standpoint and in the context of the circumstances precluding wrongfulness ... Its sole purpose is to indicate that, when the requisite conditions for a situation of self-defence are fulfilled, recourse by a State to the use of armed force with the specific aim of halting or repelling aggression by another State cannot constitute an internationally wrongful act, despite the existence at the present time, in the Charter of the United Nations and in customary international law, of the general prohibition on recourse to the use of force. ... The article merely takes as its premise the existence of a general principle admitting self-defence as a definite exception, which cannot be renounced, to the general prohibition on recourse to the use of armed force, and merely draws the inevitable inferences regarding preclusion of the wrongfulness of acts of the State involving such recourse under the conditions that constitute a situation of self-defence.

...

... the effect of a situation of self-defence underlying the conduct adopted by the State is to suspend or negate altogether, in the particular instance concerned, the duty to observe the international obligation, which in the present case is the general obligation to refrain from the use or threat of force in international relations. Where there is a situation of self-defence, the objective element of the internationally wrongful act, namely the breach of the obligation not to use force, is absent and, consequently no wrongful act can have taken place." (Ibid., pp. 52, 60.)

R. The mining of Nicaraguan ports was unlawful in regard to third States but lawful in respect to Nicaragua

234. It is uncontested that Nicaraguan ports or waters were the objects of mining in 1984. Evidence refuting Nicaraguan claims that agents of the United States Government carried out the mining has not been presented to the Court or appeared in the public domain. On the contrary, there is evidence of admissions by the President of the United States and other officials of the United States Government of the involvement of the United States in the laying of small-scale mines in the waters of Nicaraguan ports.

235. It is not clear whether the mine-laying was designed to interrupt commercial shipping or whether it may have had a belligerent purpose, such as the interruption of shipments of arms from Communist countries to Nicaragua for trans-shipment to El Salvadoran insurgents, or both. The mines were not designed to inflict significant damage and did not. But they did damage the ships of a number of States. Moreover, Nicaraguan shipping and personnel incurred losses in the course of sweeping the mines, and Nicaraguan commerce was prejudiced.

236. Mines have been extensively used in warfare in the course of the Twentieth Century. Under certain conditions, their use is contemplated by The Hague Convention relative to the laying of automatic submarine contact mines of 1907, to which Nicaragua and the United States are parties. A belligerent is entitled, under international law, to take reasonable measures (a fortiori, within the internal waters of the opposing belligerent) to restrict shipping, including third flag shipping, from using the ports of its opponent. Thus the use of mines in hostilities is not of itself unlawful. That today is so whether the hostilities are declared or undeclared; a state of war or of belligerency need not exist. If the use of force by the United States against Nicaragua is lawful, then the use of mining as a measure of such use of force may, in principle, be lawful, provided that its usage comports with measures taken in the exercise of the right of collective self-defence.

237. As Judge Ago pointed out in the passages from his Report to the International Law Commission quoted in paragraph 212 of this opinion, measures taken in self-defence, to be proportional, need not mirror offensive measures of the aggressor. Moreover, it may be noted that, as Honduras charged in its protest note to Nicaragua of 30 June 1983, Nicaragua apparently has mined Honduran roads with a resultant loss of life (Counter Memorial of the United States, Ann. 61); the mining of roads in El Salvador by Salvadoran insurgents, using land-mines and explosives reportedly provided by or through Nicaragua, is a commonplace. The consequential casualties far exceed those caused by the mining of Nicaraguan ports. Thus the fact that Nicaragua may have confined itself to land mining, or to assisting in the laying of land mines, and to no more than threatening the mining of foreign ports

(see the appendix, paras. 119, 136), does not of itself render United States mining of Nicaraguan ports, as a measure in the exercise of its right of collective self-defence, disproportionate, or otherwise unlawful - as against Nicaragua.

238. However, as against third States whose shipping was damaged or whose nationals were injured by mines laid by or on behalf of the United States, the international responsibility of the United States may arise. Third States were and are entitled to carry on commerce with Nicaragua and their ships are entitled to make use of Nicaraguan ports. If the United States were to be justified in taking blockade-like measures against Nicaraguan ports, as by mining, it could only be so if its mining of Nicaraguan ports was publicly and officially announced by it and if international shipping were duly warned by it about the fact that mines would be or had been laid in specified waters. However, no such announcement was made by the United States in advance of or upon the laying of mines; international shipping was not duly warned by it in a timely, official manner. It appears that the contras did issue warnings about the mining of Nicaraguan ports (see "The Mining of Nicaraguan Ports and Harbors, Hearing and Markup before the Committee on Foreign Affairs", House of Representatives, Ninety-Eighth Congress, Second Session, on H. Con. Res. 290, pp. 31, 40). But it is questionable whether third States and their shipping should have been expected to take seriously such warnings from the contras. It might be argued that warnings by the contras might mitigate the responsibility of the United States; I do not believe that they would erase it.

239. The obligation incumbent upon a State of notifying the existence of a minefield laid by it or with its knowledge was affirmed by the Court in the Corfu Channel case, (I.C.J. Reports 1949, pp. 4, 22), not on the basis of The Hague Convention of 1907:

> "which is applicable in time of war, but on certain general and well recognized principles, namely, elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

The United States did not discharge that obligation of notification vis-à-vis third States.

240. As against Nicaragua, however, a further factor comes into play, in addition to those specified above. Nicaragua stands in violation of that most pertinent obligation which the Court set forth in the Corfu Channel case, namely, its "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". Since Nicaragua has violated and continues to violate that cardinal obligation, and commenced its violation of that obligation years before the mining and maintained that violation during the period of the

mining and thereafter, Nicaragua cannot be heard to complain, as against it, of the mining of its ports. As Judge Hudson concluded in his individual opinion in the case of Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70, page 77:

> "It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party ... a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."

And as Judge Anzilotti in his dissenting opinion in the same case concluded:

> "I am convinced that the principle underlying this submission (inadimplenti non est adimplendum) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute." (Ibid., p. 50.)

Dr. C. Wilfred Jenks has observed that: "Judge Hudson's view that this principle was applicable was shared by the majority of the Court (ibid., p. 25) and by Judge Anzilotti (ibid., p. 50)." (C. Wilfred Jenks, The Prospects of International Adjudication, 1964, p. 326, note 30.) The Court held:

> "In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past." (At p. 25.)

S. The United States has not unlawfully intervened in the internal or external affairs of Nicaragua

241. Relying on the same factual allegations which it has advanced against the United States in respect of the use of force against it, Nicaragua also maintains that the United States stands in breach of its obligations under the Charter of the Organization of American States, as contained in Articles 18, 19, 20 and 21, and under customary international law. The essence of its claim is that the United States has unlawfully intervened in the internal and external affairs of Nicaragua by attempting to change the policies of its Government or the Nicaraguan Government itself.

242. In view of the comprehensive and categorical injunctions of the OAS Charter against intervention, and the much narrower but significant rules of non-intervention of customary international law, Nicaragua's prima facie case appears to be considerable. On analysis, however, it is inadequate, and for two reasons (in addition to those posed by the multilateral treaty reservation). The first of those reasons goes a long way towards countering Nicaraguan contentions of unlawful intervention. The second vitiates them.

243. It has been shown that, in order to extract from the OAS and its Members their recognition of the Junta of National Reconstruction in place of the Government of President Somoza, the Junta, in response to the OAS resolution of 23 June 1979, gave undertakings to the OAS and its Members to govern in accordance with specified democratic standards and policies (see paras. 8-13 of the appendix to this opinion). It has also been shown that the Nicaraguan Government has failed so to govern, and has so failed deliberately and willfully, as a matter of State policy. (Ibid.)

244. It is accepted international law that a government is liable for the acts of successful revolutionaries - their torts and their contracts. (Cf. the Award of William H. Taft, Sole Arbitrator, in the Tinoco case, 1923, United Nations Reports of International Arbitral Awards, Vol. I, p. 375.) As Nielsen put it:

> "A government is liable for acts of successful revolutionists. The rule of responsibility applies to the redress for tortious acts as well as to contractual obligations entered into by revolutionists, who succeed in coming into control of a state or in throwing off the authority of an established government." (F. K. Nielsen, International Law Applied to Reclamations, 1933, p. 32.)

It is equally accepted that insurgent communities may conclude treaties (see the "Draft articles on the law of treaties with commentaries", Report of the International Law Commission on the work of its eighteenth session, Yearbook of the International Law Commission, 1966, Vol. II, pp. 188-189). The "rule ... found to be established in the practice of States and accepted by writers ..." by Dr. Hans Blix is that:

> "A revolutionary government is competent under international law to conclude treaties on behalf of the state it purports to represent ... provided only that it appears to wield effective authority, so that there seems to be a high degree of likelihood that it will be able in fact to fulfil the obligations it is prepared to undertake ..." (Hans Blix, Treaty-Making Power, 1960, p. 146.)

245. The Permanent Court of International Justice in its advisory opinion on Nationality Decrees Issued in Tunis and Morocco (P.C.I.J., Series B, No. 4, pp. 7, 24) dealt with what is a matter of domestic jurisdiction in classic terms:

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations ... it may well happen that, in a matter which ... is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by the rules of international law."

There is nothing to debar a State - or a revolutionary junta entitled to bind the State - from undertaking obligations towards other States in respect of matters which otherwise would be within its exclusive jurisdiction. Thus, under the Statute of the Council of Europe, every Member of the Council of Europe "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" (Art. 3). Any Member which has seriously violated Article 3 may be suspended from its rights of representation. The history of the Council of Europe demonstrates that these international obligations are treated as such by the Council; they may not be avoided by pleas of domestic jurisdiction and non-intervention.

246. The Nicaraguan Junta of National Reconstruction, by the undertakings it entered into not only with the OAS but with its Members, among them, the United States (which individually and in consideration of those undertakings treated with the Junta as the Government of the Republic of Nicaragua), has not dissimilarly placed within the domain of Nicaragua's international obligations its domestic governance and foreign policy to the extent of those undertakings. Thus, what otherwise would be "the right" of Nicaragua "to use its discretion is nevertheless restricted by obligations" which it has undertaken towards those States, including the United States. It follows that, when the United States demands that Nicaragua perform its undertakings given to the OAS and its Members, including the United States, to observe human rights, to enforce civil justice, to call free elections; when it demands that the Junta perform its promises of "a truly democratic government ... with full guaranty of human rights" and "fundamental liberties" including "free expression, reporting" and trade union freedom and "an independent foreign policy of non-alignment" (appendix to this opinion, paras. 8-11), the United States does not "intervene" in the internal or external affairs of Nicaragua. Such demands are not a "form of interference or attempted threat against the personality of the State" of Nicaragua. They are legally well grounded efforts to induce Nicaragua to perform its international obligations.

247. The Court, however, has found that, by its 1979 communications the OAS and its Members, Nicaragua entered into no commitments. It may be observed that that conclusion is inconsistent not only with the views of the United States quoted in the Court's Judgment, but apparently with the views of Nicaragua (appendix to this opinion, para. 53). In my view,

the commitment of Nicaragua is clear: essentially, in exchange for the OAS and its Members stripping the Somoza Government of its legitimacy and bestowing recognition upon the Junta as the Government of Nicaragua, the Junta extended specific pledges to the OAS and its Members which it bound itself to "implement" (appendix, paras. 8-13, especially para. 10). I am confirmed in that conclusion by the former Director of the Department of Legal Affairs of the OAS, Dr. F. V. Garcia Amador, who has characterized the pledges of the Junta in question as constituting "its formal obligation". In his view,

> "These obligations included the installation of a democratic government to be composed of the principal groups which had opposed the previous regime and the guarantee to respect the human rights of all Nicaraguans, without exception. The requirements imposed by the Meeting [the Seventeenth Meeting of Consultation of the Ministers of Foreign Affairs in 1979] were not unexpected, especially in view of the Resolution of June 23, 1979 which proposed the '[i]mmediate and definitive replacement of the Somoza regime' in order to resolve the situation in Nicaragua." (Loc. cit., p. 40.)

248. It is of course obvious that the Junta did not, by its written undertakings to the OAS and its Members, conclude an international agreement in treaty form. But, as the Vienna Convention on the Law of Treaties recognizes (Art. 3), and as the Permanent Court of International Justice held in the Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53, pages 22 and 71, an international commitment binding upon a State need not be made in written, still less particularly formal, form. The question is simply, did the authority of the State concerned give an assurance, or extend an undertaking, which, in the particular circumstances, is to be regarded as binding upon it? When a revolutionary government, soliciting recognition, has given assurances to foreign governments, such assurances have repeatedly been treated by foreign governments as binding the revolutionary government and its successors. I do not see why the assurances of the Junta were not binding, made as they were, not only to the OAS but to its "Member States"; assurances which the Junta affirmed it "ratified", which it characterized as a "decision", which it intimated it took "in fulfillment of the Resolution of the XVII Meeting of Consultation of Ministers of Foreign Affairs of the OAS adopted on 23 June 1979", and which it affirmed it "will immediately proceed ... to Decree, [which] Organic Law ... will govern the institutions of the State" in pursuance of a Program which the Government of National Reconstruction will "Implement". As the Inter-American Commission on Human Rights recognized, the OAS deprived the Somoza Government of legitimacy. The OAS offered recognition to the Junta on bases which the Junta accepted. The Junta in reply indeed prescribed that, immediately following its installation inside Nicaragua, "the Member States of the OAS ... will proceed to recognize it as the legitimate Government of Nicaragua" and that it in turn "will immediately proceed" to decree its Fundamental Statute and Organic Law and implement its Program. (Appendix, para. 10.) The OAS and its Members performed; the Government of Nicaragua did not. Not only was the creation of an international obligation clear; so was its breach.

249. It does not follow, however, that the United States is entitled to use any means whatever to persuade Nicaragua to perform its international obligations. Under the regime of the United Nations Charter, and in contemporary customary international law, a State is not generally entitled to use force to require another State to carry out its international legal obligations; a State may use force only in response to the lawful injunctions of the United Nations and of regional organizations acting in conformity with the Purposes and Principles of the United Nations, and in individual or collective self-defence.

250. This brings us to the second, and dispositive, consideration. The United States claims that the measures of force which it has exerted, directly and indirectly, against Nicaragua, are measures of collective self-defence. If that claim is good - and, for the reasons expounded above, I believe that it is - it is a defence not only to Nicaraguan charges of the unlawful use of force against it but of intervention against it. That is demonstrated by the terms of the OAS Charter. Articles 21 and 22 provide:

"Article 21

> The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defence in accordance with existing treaties or in fulfillment thereof.

Article 22

> Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20."

As has been shown above, the use of force by the United States comports not only with the United Nations Charter but with the Rio Treaty - one of the "existing treaties" to which Articles 21 and 22 of the Charter of the OAS refer. The "measures adopted for the maintenance of peace and security in accordance with existing treaties" by the United States and El Salvador, in exercise of their inherent right of collective self-defence, thus "do not constitute a violation of the principles set forth in Articles 18 and 20" of the OAS Charter. Nor do they transgress customary international law. If a State charged with intervention actually acted in collective self-defence, its measures are treated not as unlawful intervention but as measures of justified counter-intervention or self-defence.

T. The United States has not violated its obligations towards Nicaragua under the Treaty of Friendship, Commerce and Navigation

251. If, as concluded above, the Court lacks jurisdiction to pass upon Nicaraguan complaints brought under the bilateral Treaty of Friendship, Commerce and Navigation (this opinion, paras. 100-106), it

cannot properly find that the United States has violated obligations under that Treaty owing to Nicaragua. If it has jurisdiction, then it is appropriate to consider, as the Court does, claims by Nicaragua of breach of that Treaty.

252. A principal theme of Nicaragua's claims is that the Treaty is not just a commercial treaty, but a treaty of friendship, and that the acts of the United States in supporting the contras, assaulting oil facilities, mining Nicaraguan ports, etc., are hardly friendly. That latter conclusion is clearly correct. At the same time, Nicaragua's counsel made no reference to prior, unfriendly acts of Nicaragua, which, if friendship really is to be understood (contrary to my understanding) as the stuff of the Treaty, may be said to have engaged Nicaragua's responsibility under it.

253. Can the adoption by the Nicaraguan Government of a national anthem, from the time of its taking power in 1979, which contains the line, "We shall fight against the Yankee, enemy of humanity", despite representations by the United States, be viewed as a friendly act, consistent with what Nicaragua maintains is of the essence of the Treaty? (See Lawrence E. Harrison, "The Need for a 'Yankee Oppressor'", in Mark Falcoff and Robert Royal, editors, Crisis and Opportunity, U.S. Policy in Central America and the Caribbean, 1984, p. 436.) Was the anti-United States propaganda regularly printed in the official Sandinista newspapers from the time of the revolution's taking power, including the eighteen months when the United States was Nicaragua's principal donor of economic aid, friendly? (Ibid., p. 437.) Were the pervasive political attacks publicly made by Ministers of the Nicaraguan Government upon the United States from the time the Sandinistas took power friendly? (Ibid.) Indeed, can the policies of open and ardent support for the overthrow of the Government of El Salvador, an ally of the United States, which have been proclaimed and pursued by the Nicaraguan Government be viewed as friendly? If the Treaty's preambular reference to "strengthening the bonds of peace and friendship" is to be treated as imposing upon the Parties obligations of friendly behaviour toward each other, as Nicaragua maintains and as the Court appears in qualified measure to agree, how is it that the Court has overlooked these prior and continuing violations of the Treaty by Nicaragua? Perhaps on the ground of its holding that there is a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts "tending to defeat the object and purpose of the Treaty". But even that narrower creative category, in my view, constitutes an unwarranted and injudicious extension by the Court of the jurisdiction afforded it under a treaty of this kind.

254. In any event, the conclusion that the United States is in violation of obligations towards Nicaragua under the Treaty is unfounded, for the reason that the Treaty does not preclude a Party's application of measures "necessary to fulfill the obligations of a Party for the maintenance of international peace and security, or necessary to protect

its essential security interests". It has been shown above that the United States reasonably maintains that its measures in support of El Salvador, including its measures directed against Nicaragua, are necessary to fulfill the obligations which the United States has under the Rio Treaty to treat an attack upon El Salvador as an attack upon the United States. Moreover, the United States has contended that its measures are necessary to protect its essential security interests, a contention which cannot be dismissed in view of the increasing integration of Nicaragua into the group of States led by the Soviet Union, and Nicaragua's continuing subversion of its neighbours. If the United States is justified in invoking either the proviso relating to measures for the maintenance of peace, or the proviso relating to essential security interests, either of itself provides a sufficient defence to claims of its violation of the Treaty, however plausible such claims (such as those in respect of mining and the trade embargo) may appear to be under specific provisions of the Treaty.

255. Yet the Court holds that the United States cannot be deemed to have acted (in the exertion of its pressures upon Nicaragua) under the provision of Article XXI of the Treaty which specifies that the Treaty does not preclude measures necessary to fulfil "the obligations" of a Party for the maintenance or restoration of international peace and security. The Court declares:

> "The Court does not believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence."

The Court so states after maintaining that measures necessary "to fulfill the obligations of a Party for the maintenance or restoration of international peace and security" must signify measures which the State in question "must take in performance of an international commitment ..." But the Court fails to say why such a commitment is lacking in this case. As shown above, the United States is bound by precisely such a commitment under the Rio Treaty.

256. It may be added that there is no principle or provision of international law or of the general principles of law which prohibits a right from also being an obligation. A citizen may have the right to vote; in many countries, he also bears an obligation to vote. A citizen may have the right to serve in his country's armed forces; he may also have that obligation. A State may have the right to engage in collective self-defence if another State is a victim of armed attack; but it also may have assumed a treaty obligation towards that State to undertake measures of collective self-defence. Indeed, the very concept of collective security imports that States have an obligation as well as a right to assist other States in resisting aggression. In the instant case, the United States has assumed such an undertaking vis-à-vis El Salvador by the terms of the Rio Treaty. Accordingly, the United States at once both enjoys a right and bears an obligation (a conclusion sustained by Dr. Garcia Amador's authoritative interpretation of the Rio Treaty; supra, para. 196). Its assistance to El Salvador to repel

Nicaragua's support of the armed subversion of El Salvador thus falls squarely within the terms of the Rio Treaty and of the 1956 bilateral Treaty.

U. Responsibility for violations of the law of war

257. The Court has correctly concluded that international legal responsibility for violations of the law of war by the contras cannot be imputed to the Government of the United States. In my view, for like reasons, international legal responsibility for violations of the law of war by the insurgents in El Salvador cannot be imputed to the Government of Nicaragua. However, Nicaragua is responsible for any violations of the law of war committed by its forces, of which there is some evidence (appendix to this opinion, paras. 13, 28, 206, 224, and the sources there referred to).

258. Nevertheless, the Court finds that, by publishing and disseminating to the contras the manual entitled, "Psychological Operations in Guerrilla Warfare", the United States "has encouraged" persons or groups of persons in Nicaragua "to commit acts contrary to customary international humanitarian law".

259. Customary international law does not know the delict of "encouragement". There appears to be no precedent for holding a State responsible for breach of the Geneva Conventions for the Protection of War Victims of 1949 by reason of its advocacy of violations of humanitarian law, though it may reasonably be maintained that a State which encourages violations of that law fails to "ensure respect" for the Geneva Conventions, as by their terms it is obliged to do. Judge Ago pointed out in his "Seventh Report on State Responsibility" submitted to the International Law Commission that it would be "unduly facile" to make comparisons between incitement by a sovereign State to commit an internationally wrongful act and the legal concept of "incitement to commit an offence" in internal criminal law. This latter legal concept "has its origin and justification in the psychological motives determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated". Judge Ago concluded that international law did not "know of any cases in which, at the juridical level, a State has been alleged to be internationally responsible solely by reason of such incitement." (Yearbook of the International Law Commission, 1978, Vol. II, Part One, p. 55, paras. 62, 63.)

260. As the Court's Judgment and examination of the manual in the appendix to this opinion make clear, the manual advocates some acts in conformity with the law of war and some acts in gross violation of it. While it is not established that such advocacy was the considered policy of the United States - on the contrary, it appears to have been the ill-considered effort of one or a few subordinates - such advocacy is reprehensible. Whether or not the Government of the United States may be

held responsible under international law for the publication of the manual on the ground of "encouragement", what is beyond discussion is that no government can justify official advocacy of acts in violation of the law of war. I have voted for the relevant operative paragraph of the Judgment for that reason.

261. At the same time, such advocacy, such as it was, and indeed the numerous and heinous violations of the law of war attributed to some of the contras of which there is evidence, but not attributed to the United States, do not transform defensive measures of the United States into aggressive measures, and not only because of the absence of attribution. The difference between the law governing the right to use force internationally, and the law governing the manner in which such force may be exerted, is no less important because it is fundamental. In the Second World War, the Governments of the States allied as the United Nations acted in lawful individual and collective self-defence against the aggression of the Axis Powers. But that is not to say that no violations of the law of war were committed by United Nations forces, even if, in comparison with the unparalleled and deliberate war crimes of Germany in particular, United Nations violations were modest. Yet such violations of the law of war by United Nations forces did not transform their defensive struggle into an aggressive one.

V. As the State which first used armed force in contravention of the Charter, the aggressor is Nicaragua

262. The Government of the Republic of Nicaragua has come before the Court alleging that it is the victim of unlawful acts of the use of force and of intervention. At the same time, it has been demonstrated that (a) the Nicaraguan Government came to power on the back of some of the very forms of foreign use of force and intervention of which it now complains; (b) since coming to power, it has violated the undertakings which it gave to the OAS and its Members, some of whom facilitated its taking power; (c) the Nicaraguan Government has itself committed acts tantamount to an armed attack upon El Salvador, and engaged in multiple acts of intervention in El Salvador and other neighbouring States; and that (d) these aggressive acts of the Nicaraguan Government were committed "first", that is, they were committed before the United States undertook the responsive actions of which Nicaragua complains. In the light of these considerations, the boldness of the Nicaraguan case is remarkable.

263. The Definition of Aggression adopted by the General Assembly of the United Nations on 14 December 1974 not only provides that among the acts that qualify as acts of aggression is, "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State ... or its substantial involvement therein" but that, "The first use of armed force by a State

in contravention of the Charter shall constitute prima facie evidence of an act of aggression..." This interpretation of Charter obligations is consistent rather than inconsistent with customary international law.

264. It is plain in this case that the first international use of armed force - consisting of Nicaragua's "substantial involvement" in the "sending" of armed bands to El Salvador which have carried out acts of armed force against El Salvador - was committed by Nicaragua. Sandinista involvement with the arming, training, and command and control of the Salvadoran insurgents, whose leadership has frequently been "sent" from Nicaragua to El Salvador and back, has been shown to go back to 1979, to have reached an early peak in January 1981, and to have fluctuated since. Nicaragua's own evidence establishes no exertions of force, indirect or direct, by the United States against Nicaragua before December 1981 or early 1982. Thus the prima facie aggressor in this case is Nicaragua.

265. It is significant that Nicaragua denies not the foregoing legal analysis but the facts on which it is based. Nicaragua does not argue that what appears to be prima facie aggression was not aggression because its support of the insurgency in El Salvador was in response to prior provocation or attack, or threat of imminent attack, by El Salvador. Nicaragua does not argue that it may legally attempt to overthrow the Government of El Salvador in pursuance of what some might say is a "war of liberation". Rather, it inferentially acknowledges that, if in fact it did engage in acts of armed intervention against El Salvador, tantamount to armed attack, before the United States engaged in responsive acts of armed intervention against it, it, Nicaragua, and not the United States, is the aggressor. Presumably that is why Nicaragua has officially denied so strenuously in Court what its leaders, its counsel and its witnesses in effect or in terms have admitted: that Nicaragua was substantially involved in the arming of the Salvadoran rebels, in particular for their "final offensive" of January 1981. While it may not have fully appreciated the point while it was not engaged in litigation over it, apparently it now fully appreciates that, to admit its involvement as having taken place, on the scale in which it took place, and as having taken place when it took place, is to concede that it should have lost its case.

W. The misrepresentations of its representatives in Court must prejudice rather than protect Nicaragua's claims

266. How has Nicaragua sought to deal with this dilemma? By calculated, reiterated misrepresentation. On the one hand, its Ministers - who, under international law, have authority to engage the responsibility of the State (as does the Nicaraguan Agent) - have sworn before the Court that Nicaragua has "never" supplied arms or other material assistance to insurgents in El Salvador (see para. 24 of this opinion). On the other hand, it has been shown that Nicaragua has

supplied arms and other material assistance to insurgents in El Salvador (paras. 28-32, 133, 146-153 of this opinion and its appendix, paras. 28-188).

267. How does the Court deal with the misrepresentations of the representatives of a Party before the Court? I regret to say, in my view by excluding, discounting, and depreciating the facts of Nicaraguan material support of the Salvadoran insurgency, by holding that such support as there was cannot be imputed to the Nicaraguan Government, and by concluding that, even if it were true that Nicaragua had, apparently some years ago, given support to or permitted support to be given to the Salvadoran insurgency, such support is not tantamount to an armed attack by Nicaragua against El Salvador. The Court goes further, by failing even to hold that the facts of Nicaraguan material support of the overthrow of the Government of El Salvador constitute unlawful intervention by Nicaragua in the internal affairs of El Salvador. Apparently, in the view of the Court, it is unlawful for the United States to intervene in Nicaragua's affairs with the object of overthrowing its Government or affecting its policies, but it is not unlawful - at any rate, it does not say it is unlawful - for Nicaragua to intervene in El Salvador's affairs with the object of overthrowing its Government or affecting its policies - and this despite the fact that Nicaragua's intervention antedates that of the United States. The Court:

> "considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to intervention by the one State in the internal affairs of the other ...".

The Court applies that faultless conclusion to the United States (despite its legal defences to that conclusion). It holds that the United States has committed "a clear breach of the principle of non-intervention". But the Court fails to apply this principle of international law to Nicaragua, despite the fact that Nicaragua's support of assistance to armed bands in El Salvador is all too obvious (and despite the fact that Nicaragua has no defence, and has offered no defence, for its intervention other than falsely denying its reality). How does the Court justify this remarkable application of the law? In effect, by adopting the purport of Nicaragua's representations as its own. Thus, whatever the intention of the Court is, the result of its Judgment is that, rather than prejudicing Nicaragua's claims, the calculated, critical misrepresentations of Nicaragua's representatives have served to protect and promote them.

X. Nicaragua's unclean hands require the Court in any event to reject its claims

268. Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible - but ultimately responsible - for large numbers of deaths and widespread destruction in

El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.

269. As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the "clean hands" doctrine in the Diversion of Water from the Meuse case. The basis for its so doing was affirmed by Judge Anzilotti "in a famous statement which has never been objected to: 'The principle ... (inadimplenti non est adimplendum) is so just, so equitable, so universally recognized that it must be applied in international relations ...'" (Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures, 1984, pp. 16-17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in reciting maxims of equity which exercised "great influence in the creative period of the development of Anglo-American law", "Equality is equity", and "He who seeks equity must do equity". A court of equity "refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper" (citing Halsbury's Laws of England, 2nd edition, 1934, p. 87). Judge Hudson noted that, "A very similar principle was received into Roman law ... The exceptio non adimpleti contractus ..." He shows that it is the basis of articles of the German Civil Code, and is indeed "a general principle" of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue a like activity - an enjoinder which should have been found instructive for the current case. He held that, "The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so." (Loc. cit., pp. 77-78. And see the Court's holding, at p. 25.) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

270. The "clean hands" doctrine finds direct support not only in the Diversion of Water from the Meuse case but a measure of support in the holding of the Court in the Mavrommatis Palestine Concessions case, P.C.I.J., Series A, No. 5, pages 6, 50, where the Court held that "M. Mavrommatis was bound to perform the acts which he actually did perform in order to preserve his contracts from lapsing as they would otherwise have done." (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti's conclusion in the Legal Status of Eastern Greenland, Series A/B, No. 53, page 95, that "an unlawful act cannot serve as the basis of an action at law". In their dissenting opinions to the Judgment in United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pages 3, 53-55, 62-63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the Factory at Chorzow case, P.C.I.J., Series A, No. 9, p. 31, when it held that "one party cannot avail himself

of the fact that the other has not fulfilled some obligation ... if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question ...") The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng, "is generally upheld by international tribunals" (Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1958, p. 155). Cheng cites, among other cases, the Clark Claim, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking: "Can he be allowed, so far as the United States are concerned, to profit by his own wrong? ... A party who asks for redress must present himself with clean hands ..." (John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been a Party, 1898, Vol. III, at pp. 2738, 2739). Again, in the Pelletier case, 1885, the United States Secretary of State "peremptorily and immediately" dropped pursuit of a claim of one Pelletier against Haiti - though it had been sustained in an arbitral award - on the ground of Pelletier's wrongdoing: "Ex turpi causa non oritur: by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied." (Foreign Relations of the United States, 1887, pp. 593, 607.) The Secretary of State further quoted Lord Mansfield as holding that: "The principle of public policy is this: ex dolo malo non oritur actio." (At p. 607.)

271. More recently, Sir Gerald Fitzmaurice - then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court - recorded the application in the international sphere of the common law maxims: "He who seeks equity must do equity" and "He who comes to equity for relief must come with clean hands", and concluded:

> "Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality - in short were provoked by it." (Sir Gerald Fitzmaurice, "The General Principles of International Law", Recueil des Cours, 1957-II, Vol. 92, p. 119. For further recent support of the authority of the Court to apply a "clean hands" doctrine, see Oscar Schachter, "International Law in the Hostage Crisis", American Hostages in Iran, 1985, p. 344.)

272. Nicaragua is precisely such a State which is guilty of illegal conduct. Its conduct accordingly should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary locus standi to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality - "in short were provoked by it".

(Signed) Stephen M. SCHWEBEL

V. FACTUAL APPENDIX

1. This appendix provides data in support of the factual premises set forth in Section III of this opinion. It concentrates on the facts concerning allegations against Nicaragua, because those allegations are in particular controversy and have been insufficiently investigated by the Court. Thus this appendix principally examines the facts relating to the existence, character, duration and maintenance of material support by Nicaragua of insurgencies in neighbouring States, notably El Salvador. To the extent that other factual premises are generally accepted, they are not developed in like detail.

A. The Sandinistas Came to Power on the Back of Some of the Very Forms of Intervention of Which They Now Complain

2. The gravamen of Nicaragua's complaint is that it is the victim of aggression and intervention by the United States. The Government of the Republic of Nicaragua maintains that it is the lawful, recognized Government of that State; that that State is entitled, under contemporary international law, to be free from the threat or use of force against its territorial integrity or political independence; and that its Government is free to pursue the policies it adopts, without foreign intervention designed to affect those policies or the composition and maintenance of the Government which adopts them. It claims that the United States is employing the threat and use of force against its political independence and that the United States is intervening in Nicaragua in order to overthrow its Government.

3. In view of these charges, it is instructive to recall that the current Government of the Republic of Nicaragua came to power assisted by some of the very forms of the foreign use of force and the very kinds of foreign intervention of which it now complains. There is no ground for questioning the right of revolution within a State. But the fact is that the Sandinista revolution did not take place only within a State; it was not a purely domestic product. On the contrary, while essentially Nicaraguan in origins, fighting forces and popular support, the revolution which took power in Nicaragua in 1979 was, in important measure, organized, trained, armed, financed, supported and sustained by foreign States which were antipathetic to the Government of Nicaragua then in power. That Government, dominated for decades by the Somoza family, was recognized throughout the world as the Government of the Republic of Nicaragua. It had been in power for a very long time. Its representatives were signatories to the Charters of the United Nations and the OAS. No less than the current Government of the Republic of Nicaragua, it was the Government entitled to the protection of the principles and practice of international law. (The OAS ultimately arrived at the conclusion, a few weeks before the downfall of the Somoza Government, that it was not so entitled, apparently because of its human rights violations. Whether or not this decision was justified in international law, it was an unprecedented decision, not in conformity with the prior practice of States.)

4. The...

4. The Sandinista National Liberation Front (Frente Sandinista de Liberacion Nacional - the FSLN) was founded by three Nicaraguans in Honduras on 23 July 1961, with the example, encouragement and support of President Fidel Castro in evidence (see David Nolan, FSLN: The Ideology of the Sandinistas and the Nicaraguan Revolution, 1984, pp. 22-23). Its membership during the first 15 years of its struggle was small. During the period of the long stay in Cuba of one of its three founders and its first Secretary-General, Carlos Fonseca Amador, the main evidence of its existence appears to have been an infrequent communiqué issued from Havana. The influence of the Cuba of President Fidel Castro appears to have been no less significant in the formative years of the FSLN than it is today. By 1975, the FSLN had split into three factions, advocating distinct strategies for seizing power. On 26 December 1978, it was announced in Havana that the three factions of the Sandinista Front had agreed to merge their forces politically and militarily, a merger in which President Fidel Castro is reputed to have played a central role. In March 1979, Havana Radio announced the establishment of the unified Sandinista directorate of nine members, three from each faction (the nine Comandantes de la Revolucion who govern Nicaragua today).

5. Meanwhile, on the ground in Nicaragua, a charismatic new leader had suddenly emerged. On 22 August 1978, Sandinista guerrillas led by Edén Pastora Goméz - known as "Commander Zero" - seized the National Palace in Managua, taking some 1,500 hostages whom they exchanged for 58 political prisoners (including FSLN co-founder and sole survivor, Tomás Borge Martinez, today Minister of the Interior). Opposition to the Somoza Government earlier had been sparked as never before by the murder of the editor of La Prensa, Pedro Joaquin Chamorro, on 10 January 1978. It was further energized by Edén Pastora's exploit, breaking out into open insurrection in September 1978. Edén Pastora, though not one of the inner circle of nine, was named Chief of the Sandinista Army in October 1978. His substantial forces, well armed and based in Costa Rica and operating with the tacit support of its Government, engaged Somoza's troops in inconclusive battles. More significantly, by the summer of 1979, Sandinista guerrillas were seizing towns and battling in the main cities in north and central Nicaragua; these relatively small guerrilla forces had the active support of the population; assaults and uprisings were taking place at many points; and Somoza's National Guard, much of whose forces were in the south to deal with Pastora's, had difficulty in dealing with the multiplicity of recurrent Sandinista attacks elsewhere. The United States had cut off the supply of arms, ammunition and spare parts to President Somoza's Government two years before and it discouraged other governments from filling the gap. On 29 May, Pastora's forces launched an offensive from Costa Rica. In the face of pressure from members of the OAS to resign, deprived of the political as well as material support of the United States, challenged by widespread assaults in the north and center and Pastora's offensive from the south, Somoza resigned and fled the country on 17 July. His hard-pressed National Guard collapsed, and the Junta of National Reconstruction in which the Sandinistas played such a portentous part took power.

6. Numbers of the Sandinista guerrillas who fought so tenaciously to overthrow the Somoza Government were trained in Cuba (as was acknowledged in his testimony by Commander Carrión, Hearings of 13 September 1985).

It is not to be expected that the leadership of the Sandinistas, some of whom had spent long periods in Cuba, received no training during their stays. A number of Cuban military advisers took part in the Sandinista final offensive of mid-1979. Large quantities of arms were shipped to the Sandinistas, at the outset primarily by Venezuela (today one of the Contadora Group) and, later, by Cuba. These arms were mostly flown into Costa Rica, where they were distributed to Sandinista forces who were based in Costa Rica with the support of the Costa Rican Government. An investigation subsequently conducted by the Costa Rican National Assembly established that, from December 1978 until July 1979, there were at least 60 flights into Costa Rica with arms, ammunition and other supplies for the Sandinista guerrillas, largely provided by Cuba. (Asamblea Legislativa, San José, C.R., Comision de Asuntos Especiales, Informe sobre el Trafico de Armas, Epe. 8768.) That report also established that, after the triumph of the Sandinistas, some of those same, undistributed arms were shipped from Costa Rica to El Salvador. Panama also supplied some arms to the Sandinistas, and members of the Panamanian National Guard fought with the Sandinistas. These facts are well known, essentially uncontested and recorded by various sources (e.g. Shirley Christian, Nicaragua, Revolution in the Family, 1985, pp. 29, 32, 78-81, 88-97.) Less well known are the details of the provisioning of Sandinista guerrillas who operated out of Honduras. It is clear that they were a significant force which was tolerated by Honduras even if they did not enjoy from the Government of Honduras the positive support which the Government of Costa Rica extended in the south (see the statement of the representative of Honduras at the 39th Session of the United Nations General Assembly, A/39/PV.36, p. 77, infra, para. 138). All of these foreign operations were, like those of the United States in support of the contras, "covert". Neither Cuba nor Venezuela nor Panama nor Costa Rica openly announced or justified their activities; there were no declarations of war; there was no reporting to the Security Council; there was not even a claim that prior aggressive acts of the Government of Nicaragua had provoked their actions so patently designed to assist in the overthrow the Government of Nicaragua.

7. In his testimony, Commander Carrión estimated that, in 1979, Sandinista forces totalled somewhere between 3,000 and 4,000 armed men (Hearings of 13 September 1985). He acknowledged that about a third of that total had been based in Costa Rica (ibid.). He depreciated the impact of those forces on the outcome of the struggle, which may or may not be correct (Christian reports that Somoza's best troops were sent to the south to oppose the forces led by Edén Pastora). While understandably emphasizing the achievements of the guerrillas in Nicaragua, who were supplied, he maintains, by arms purchased on the weapons market, Commander Carrión did not say where the Sandinistas inside Nicaragua secured the money to purchase those arms. But in any event Commander Carrión's testimony essentially comports with than confutes the facts, namely, that Cuba played a key role in the creation, organization, training and supply of the Sandinista revolution, a revolution which was also significantly aided by Venezuela, Costa Rica and Panama. Whatever one's views about the relative merits and demerits of the Somoza and Sandinista Governments, the fact remains that the Sandinista revolution was the beneficiary of some of the very forms of intervention for which it now feels justified in indicting the United States. This intervention was vigorously, if covertly, supported

by several Latin-American Governments which are proponents of the principles of non-intervention. Moreover, the Organization of American States itself withdrew recognition from the Nicaraguan Government, a Government still in power which was represented in the Organization, and offered it to a Junta of which the FSLN was a leading element, in return for assurances extended by the Junta - another act of intervention, though unarmed and disclaimed as such.

B. The New Nicaraguan Government Achieved Foreign Recognition in Exchange for International Pledges Concerning Its Internal and External Policies, Commitments Which It Deliberately Has Violated

8. On 23 June 1979, the Seventeenth Meeting of Consultation of the Ministers of Foreign Affairs of the Organization of American States adopted an extraordinary resolution which, in the words of a Report of the Inter-American Commission on Human Rights:

> "for the first time in the history of the OAS and perhaps for the first time in the history of any international organization, deprived an incumbent government of a member state of the Organization of legitimacy, based on the human rights violations committed by that government against its own population" (OAS, Report on the Situation of Human Rights in the Republic of Nicaragua, 1981, p. 2).

The resolution called for a solution to the armed conflict then raging in Nicaragua, which it described as a "serious problem ... exclusively within the jurisdiction of the people of Nicaragua ...", "on the basis of the following":

> "1. Immediate and definitive replacement of the Somoza regime.
>
> 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza regime and which reflects the free will of the people of Nicaragua.
>
> 3. Guarantee of the respect for human rights of all Nicaraguans without exception.
>
> 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom and justice." (OEA/Ser.F/II.17.)

9. In response to the foregoing resolution, on 12 July 1979, while President Somoza remained in office, the Junta of the Government of National Reconstruction of Nicaragua sent to the Secretary-General of the OAS "and to the Ministers of Foreign Affairs of the Member States of the Organization" a document containing its "Plan to Secure Peace". The Junta wrote:

"We have developed this Plan on the basis of the Resolution of the XVII Meeting of Consultation on June 23, 1979, a Resolution that was historic in every sense of the word...We are presenting to the community of nations of the hemisphere in connection with our 'Plan to Secure Peace' the goals that have inspired our Government ever since it was formed ... and we wish to ratify some of them here:

I. Our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration ... and the Charter of Human Rights of the OAS ...

...

III. Our decision to enforce civil justice in our country ...

...

V. The plan to call the first free elections our country has known in this century ...

It is now up to the Governments of the Hemisphere to speak, so that the solidarity with the struggle our people has carried forward to make democracy and justice possible in Nicaragua can become fully effective.

We ask that you transmit the text of this letter to the Ministers of the OAS ..." (NUS 85/25, emphasis added.)

10. The "Plan of the Government of National Reconstruction to Secure Peace" continues that "that hemispheric solidarity that is vital if this plan is to be carried out will come about in fulfillment of the Resolution of the XVII Meeting of Consultation of Ministers of Foreign Affairs of the OAS adopted on 23 June 1979" (emphasis added). It sets out "Stages of the Plan", including: Somoza submits his resignation; the Government of National Reconstruction is installed;

"Immediately following the Government of National Reconstruction's installation inside Nicaragua, the Member States of the OAS ... will proceed to recognize it as the legitimate Government of Nicaragua ... The Government of National Reconstruction will immediately proceed to ... Decree the Fundamental Statute by which the Government of National Reconstruction will be provisionally governed ... Decree the Organic Law that will govern the institutions of the State ... Implement the Program of the Government of National Reconstruction ..." (NUS 85/25; emphasis supplied.)

11. Attached to this letter to the OAS of the Junta was the Junta's Programme, Organic Law and Law of Guarantees. The Programme, dated 9 July 1979, is both broad and detailed. It promises a "truly democratic government of justice and social progress..." with "full guaranty of human rights" and "fundamental liberties" including "free expression,

reporting and dissemination of thought", trade union freedom, "an independent foreign policy of non-alignment" and a great deal more (Counter-Memorial of the United States, Ann. 67). The Organic Law or Basic Statute (ibid., Ann. 68), enacts into Nicaraguan law that, "The immediate objective and principal task of the Government of the Republic shall be to implement its programme of government published on 9 July 1979." To that end, it adopts as "Basic Principles" the rights enunciated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and International Covenant on Legal and Political Rights, and proclaims "unrestricted freedom of oral and written expression ..." Among various provisions dealing with the Junta, the Council of State, and so forth, it provides that, "As soon as National reconstruction permits general elections shall be held for the purpose of appointing a National Assembly." The Statute on the Rights and Guarantees of the Nicaraguan People (Law of Guarantees) (ibid., Ann. 69) sets out a detailed statement of civil and economic rights, including abolition of the death penalty and proscription of torture, the right to individual liberty and personal security, the right to strike, and so forth.

12. The Members of the OAS carried out their part of this international bargain, this international unilateral contract, extending promptly their individual recognition to the Government of National Reconstruction as "the legitimate Government of Nicaragua" which the Junta expressly solicited. But the FSLN - which soon asserted and maintained exclusive control of the Junta and subsequent formations of the Nicaraguan Government - did not carry out its part of the bargain it concluded with the OAS and its Members. The governance of Nicaragua is hardly "truly democratic"; far from human rights and fundamental liberties being "fully guaranteed", there is substantial evidence of arbitrary arrest and arbitrary trial, and indications of even graver deprivations; there is like evidence of commission of atrocities by the armed forces of the Nicaraguan Government, particularly against Miskito and other Indians; freedom of the press and trade union freedom are harshly curtailed in Nicaragua and have been since the Sandinistas took power; far from acting as a non-aligned State, Nicaragua has almost ritually joined Cuba in support of the international positions of the Soviet Union; and elections were put off until 1984 and then were held under conditions which apparently assured that the rule of the Sandinistas could not be challenged whatever the popular will.

13. It would unduly extend the length of what is in any event a regrettably long opinion to provide details of these conclusions and complete documentation in support of them. It is recognized that there is room for difference of opinion on the legal conclusions that may be derived from the conjunction of the OAS Resolution of 23 June 1979 and its performance by the Members of the OAS, on the one hand, and the acceptance of that resolution by the Junta and the Nicaraguan Government's non-performance of the terms of its acceptance, on the other. The law of those questions has been treated above. But what is beyond dispute, as a matter of fact, is that the Sandinista Front, virtually from the outset of its taking power, violated important elements of the Junta's assurances to the OAS, and did so well before there could be any justification for such derogations on grounds of

national emergency provoked by contra and United States attacks. Such violations have continued to the present day, during the ebbs and flows of contra and United States pressures; to an extent difficult to estimate, they may have been stimulated by those pressures. Among the many sources that may be cited in support of these conclusions are: "Comandante Bayardo Arce's Secret Speech before the Nicaraguan Socialist Party (PSN)", published by a number of sources including Department of State Publication 9422 of March 1985; Amnesty International, Nicaragua, The Human Rights Record, 1986; Robert S. Leiken, "The Battle for Nicaragua", The New York Review of Books, 13 March 1986, Volume XXXIII, No. 4; Shirley Christian, Nicaragua: Revolution in the Family, 1985; Douglas W. Payne, The Democratic Mask: The Consolidation of the Sandinista Revolution, 1985; David Nolan, FSLN: The Ideology of the Sandinistas and the Nicaraguan Revolution, 1984; and Department of State, "Broken Promises: Sandinista Repression of Human Rights in Nicaragua", 1984.

C. The New Nicaraguan Government Received Unprecedented Aid from the International Community, Including the United States

14. When the Sandinistas took power in July 1979, the Carter Administration extended itself to assist the Junta and establish friendly relations. After a meeting of 15 July 1979 between a State Department representative and Sandinista leaders in which the United States promised support, Junta member Sergio Ramírez Mercado is reported to have said: "At this moment I think that there is no point of disagreement between us." ("Nicaragua Rebels Say U.S. Is Ready to Back Regime Led by Them", the New York Times, 16 July 1979, p. 1.) Secretary of State Cyrus Vance declared: "By extending our friendship and economic assistance, we enhance the prospects for democracy in Nicaragua. We cannot guarantee that democracy will take hold there. But if we turn our back on Nicaragua, we can almost guarantee that democracy will fail." (The Washington Post, 28 September 1979.)

15. In the first 18 months of post-Somoza governance, the United States - as the largest single provider of economic assistance to Nicaragua during that period - supplied to the Nicaraguan Government some $108 million in direct aid, including relief supplies, particularly large quantities of food and medicine immediately after Somoza's fall, said to be valued at about $25 million; it supported $262 million in loans of the Inter-American Development Bank and World Bank to the Nicaraguan Government from mid-1979 to the end of 1980; it facilitated the renegotiation by United States banks of large amounts of Nicaraguan debt; it offered Nicaragua the assistance of the Peace Corps; it offered military training to Nicaraguan forces at United States bases in Panama; and President Carter amicably received the Co-ordinator of the Junta, Daniel Ortega, at the White House. Other States and international organizations also extended generous amounts of economic aid to the new Nicaraguan Government, the total of Western aid from July 1979 to the end of 1982 exceeding $1.6 billion. The value of military, economic and other aid extended during this period to Nicaragua by Cuba and the Soviet Union, as well as by States allied with the USSR such as the German Democratic Republic, Viet Nam, Ethiopia and Bulgaria, is not easily calculated, but clearly it was substantial. Nicaragua also received

military...

military assistance from Libya (the incident of "medical supplies" found on Libyan aircraft which landed in Brazil en route to Nicaragua may be recalled) as well as other sources, such as the PLO.

D. The Carter Administration Suspended Aid to Nicaragua Because of Its Support of Insurgency in El Salvador, Support Evidenced, inter alia, by Documents Captured from Salvadoran Guerrillas

16. In the case of the United States, however, a condition was attached to the rendering of aid, at the initiative of the United States Congress: a requirement that the President certify that Nicaragua was not supporting terrorism or violence in other countries before appropriated funds could be disbursed (Special Central American Assistance Act of 1979, Section 536 (g), Public Law 96-257, approved 31 May 1980). By September, 1980, evidence of Nicaraguan aid to insurgents in El Salvador was substantial enough to lead to representations by the United States Ambassador and to a visit in October to Managua of Deputy Assistant Secretary of State James Cheek. Mr. Cheek informed the Nicaraguan Government that assistance to the Salvadoran rebels would compel the United States to terminate its aid programme and would prejudice United States-Nicaraguan relations; and he apparently furnished the Nicaraguan Government with some details of the flow of arms through Nicaragua to El Salvador. Subsequently captured documents of Salvadoran insurgents which were deposited with the Court by the United States in 1984 indicate that this demarche was taken seriously by the Nicaraguan Government, which for a time suspended shipments of arms while, it is alleged, it endeavoured to identify and eliminate the source of United States intelligence information.

17. In a reply to a question of the Court, the Nicaraguan Government denies that any such conversations with a State Department representative took place (NUS 85/25, p. 2). This appears to be one of a number of misleading statements by Nicaragua to the Court. Among the various sources that confirm the visit to Managua of Mr. Cheek and conversations by him and the United States Ambassador of this substance at this time with the Nicaraguan Government, are Christian, op. cit., page 194, as well as Department of State, "Revolution Beyond Our Borders", Sandinista Intervention in Central America, (Special Report 132, US Dept. of State, September 1985) (hereafter cited as "Revolution Beyond Our Borders"), pages 20-21, which describes these meetings of Mr. Cheek with Co-ordinator Ortega, Foreign Minister D'Escoto and Commanders Arce, Wheelock and Humberto Ortega.

18. The captured documents referred to, which were "recovered from the Communist Party of El Salvador in November 1980 and from the Peoples' Revolutionary Army (ERP) in January 1981" (Ann. 50 to the Counter-Memorial [on jurisdiction and admissibility] of the United States, p. 2), were published by the Department of State under the title, "Communist Interference in El Salvador: Documents Demonstrating Communist Support of the Salvadoran Insurgency", 23 February 1981. These documents, if genuine, not only confirm Mr. Cheek's conversations in Managua. They also demonstrate the Salvadoran insurgents' appreciation of:

"a...

> "a security problem beginning with a meeting ... with one James Cheek ... he manifested knowledge about shipments via land through Nicaragua; in small vehicles and ... attempts by sea. They raise the question of possible bad management of the information on the part of personnel working on this ... they are going to carry out an investigation ... and it seems very strange to us that a gringo official would come ... to practically warn about a case such as this. If it were true that they have detected something concrete, it is logical that they would hit us ... not that they would warn us ..." (Doc. J, p. 94.)

(It may be noted that the provision of such sensitive intelligence data to Nicaragua provoked Congressional criticism. See the statement of Congressman C. W. Bill Young reproduced in the Nicaraguan Memorial, Ann. E, Att. 1, p. 40.)

19. The authenticity of these captured documents, and, more, the accuracy of a State Department White Paper construing them (see Ann. 50, loc. cit.), generated controversy in the press soon after their publication in 1981. The United States Government refuted that criticism in detail and maintains that the documents are authentic (Department of State, "Response to Stories Published in the Wall Street Journal and the Washington Post about Special Report No. 80", 17 June 1981, and "Revolution beyond Our Borders", p. 5, note 2, which maintains that: "The authenticity of these documents ... have since been corroborated by new intelligence sources and defectors."). That conclusion is sustained by informed critics and supporters alike of United States Administration policy towards Nicaragua. Christopher Dickey, whose critical book, With the Contras: A Reporter in the Wilds of Nicaragua, 1985, evidences an intimate knowledge of elements of the facts at issue in the current case, concludes that "the source documents themselves appear very much in line with what Salvadoran insurgent leaders and representatives as well as Sandinistas told me privately in Managua in October 1983 and May 1984" and treats the documents as genuine (pp. 281-282, 73-74). Former United States Ambassador to El Salvador Robert E. White, a vigorous critic of the policies of President Reagan towards Nicaragua and El Salvador, has declared the captured documents to be genuine (infra, para. 151). A supporter of United States policy towards Nicaragua, who has produced a detailed, documented study of the extent of what he views as aggression by the Nicaraguan Government against El Salvador, Honduras and Costa Rica, treats the captured documents as genuine and draws much illuminating detail from them showing the pervasive involvement of the Nicaraguan Government in the arming, supply, training and direction of the insurgency in El Salvador (Robert F. Turner, Nicaragua v. United States: A Look at the Facts, in press. Mr. Turner's study is stated to be based in part upon research done under contract to the Department of State and indicates access to diplomatic communications.) Turner's study contains a wealth of additional factual data in support of his conclusions, among them that the Nicaraguan Government has played and continues to play the pivotal role in sustaining the Salvadoran insurgency, acting as the chief conduit for funds, ammunition, and supplies as well as a training and command centre.

20. In the written and oral proceedings, Nicaragua did not refute or specifically refer to these captured documents. The Judgment of the Court virtually takes no account of them. They provide graphic and substantial support for United States allegations concerning Nicaraguan, Cuban, Vietnamese, Ethiopian and other provision of arms and ammunition in great quantities to the Salvadoran insurgents, "which all would pass through Nicaragua" (Doc. G, p. 8). The documents describe the role of President Fidel Castro in unifying the Salvadoran insurgency (Doc. A); recount the "magnificent" support by the "socialist camp" of that insurgency (Doc. C, p. 2); record assurances by the Sandinista leadership of provision of headquarters in Nicaragua for the Salvadoran insurgency "with all measures of security" (Doc. D, p. 4); record as well the assumption by Nicaragua of "the cause of E.S. [El Salvador] as its own" (Doc. D, p. 5); provide details about Vietnamese, Ethiopian and other "socialist" assurances of shipment of many tons of arms to the Salvadoran insurgency (Docs. E, F); show that Nicaragua agreed to absorb arms of Communist manufacture and to provide the Salvadoran insurgents with Western-manufactured arms from its own stocks in their place (Doc. G); recount that 130 tons of arms and other material (a fraction of the total) had arrived in Nicaragua for shipment to El Salvador (Doc. I); indicate suspension of Nicaraguan weapons deliveries to El Salvador in September 1980 in response to United States protests (Doc. J); and record provision by the Sandinista National Liberation Front to the Salvadoran guerrillas of a schedule for resumed shipments of arms (Doc. K). As the documents recount:

> "It is impressive how all countries in the socialist bloc fully committed themselves to meet our every request and some have even doubled their promised aid. This is the first revolution in Latin America to which they have committed themselves unconditionally with assistance before the seizure of power." (Doc. K, p. 4; see the translation provided in "Revolution Beyond Our Borders", at p. 7, as well as other references therein to these captured documents, at pp. 5-7.)

These documents are striking in their demonstration of the influence of the Nicaraguan Government over the Salvadoran insurgency, not only in matters of provision of arms but of strategy and tactics (see Docs. K, R). As will be shown below, the contents of these documents have received corroboration from a number of sources.

21. The aid agreement between the United States and Nicaragua was not signed until 17 October 1980, although much of the funds had been disbursed by that time. The Nicaraguan Government claimed in the Cheek conversations which took place before signature that it was not sending arms to the insurgents in El Salvador. On 12 September 1980, in an effort to maintain good relations with the Nicaraguan Government, to give it the benefit of its growing doubts, and despite the disturbing intelligence reports which were the basis of the Cheek mission, President Carter certified to Congress that there was not evidence of aid and support by the Nicaraguan Government of terrorism and violence in other countries. This decision is said to have been taken on the basis that the information then available was not "conclusive" in respect of Nicaraguan Government involvement in terrorist activities (see Presidential Determination No. 80-26 of 12 September 1980, reproduced in

the Weekly Compilation of Presidential Documents, Vol. 16, No. 37, p. 1712, quoted in NUS 85/25, and "Revolution Beyond Our Borders", op. cit., p. 20). But, contrary to the inference drawn by Nicaragua in NUS 85/25, to which the Court's Judgment appears to give credence, this does not convey the true picture of "the views of the United States Government at the end of 1980 concerning supposed support by Nicaragua to El Salvadoran opposition forces ..." (emphasis added). "Not until late December or early January", Shirley Christian reports then United States Ambassador Pezzullo informed her, "did the United States get a fuller picture of how much Nicaragua was helping the Salvadoran guerrillas" (op. cit., p. 194).

22. In January 1981, in the light of that fuller picture, the Carter Administration suspended certain aid deliveries. As the New York Times put it:

> "The United States suspended payments to Nicaragua from a $75 million economic support fund last week because of evidence that left-wing guerrillas in El Salvador have been supplied with arms from Nicaragua, an official source said today." ("The U.S. Halts Nicaragua Aid Over Help for Guerrillas", the New York Times, 23 January 1981, p. A3.)

Nevertheless, the withholding of arms shipments from Nicaragua to Salvadoran insurgents in September 1980 served the Sandinistas well, for it enabled them to extract the great bulk of the economic aid which had been authorized by the United States Congress. Their resumption of arms shipments on a very large scale for the Salvadoran insurgents' "final offensive" lost them a remaining tranche but, more important, prejudiced the possibilities of future direct United States aid (which had already been programmed) as well as United States support in multilateral institutions. It was later to prove far more broadly prejudicial still.

E. The Reagan Administration Terminated Aid to the Nicaraguan Government While Waiving the Latter's Obligation to Return Aid Already Extended in the Hope That Its Support for Foreign Insurgencies Would Cease; Subsequently, It Twice Officially Offered to Resume Aid if Nicaragua Would Stop Supporting Insurgency in El Salvador, Offers Which Were Not Accepted

23. In view of evidence of Nicaraguan support for the Salvadoran insurgency, President Reagan made a determination on 1 April 1981 terminating assistance to Nicaragua. The statement then issued by the Department of State nevertheless declared:

> "This Administration has made strong representations to the Nicaraguans to cease military support to the Salvadoran guerrillas. Their response has been positive. We have no hard evidence of arms movements through Nicaragua during the past few weeks, and propaganda and some other support activities have been curtailed. We remain concerned however that some arms traffic may be continuing and that other support very probably continues.

> Important U.S. security interests are at stake in the region. We want to encourage a continuation of recent favorable trends with regard to Nicaraguan support for the Salvadoran guerrillas. We also want to continue to assist moderate forces in Nicaragua which are resisting Marxist domination, working toward a democratic alternative and keeping alive the private sector.
>
> Recognizing the Nicaraguan response to date and taking into account our national security interests in the region the President has decided to use his special authority under section 614 (a) (1) of the FAA to maintain outstanding fully disbursed ESF loans to the Government of Nicaragua - that is, not to call for their immediate repayment.
>
> We are considering a resumption of P.L.-480 and later development assistance if the favorable trends there continue. We do not rule out the eventual resumption of ESF assistance at a later time should the situation in Nicaragua improve." (Documents on American Foreign Policy, 1981, Doc. 687, p. 1298.)

That is to say, in view of the fact that the Nicaraguan Government had made a "positive response" to United States representations, apparently by again suspending arms shipments to the Salvadoran guerrillas, President Reagan waived the provision of United States law that required immediate repayment of economic support loans made to Nicaragua because of the violation of the conditions of their extension, and he held out the possibility of resumed economic assistance to Nicaragua should recent favourable trends continue. This hardly appears to have been the policy determination of a President who, from the outset, as Nicaragua claims, had designed the pretext of Nicaraguan support of Salvadoran guerrillas in order to justify overthrow of the Nicaraguan Government.

24. Thus, at that time, and subsequently, the United States informed Nicaragua that it would be prepared to resume aid if the Nicaraguan Government stopped its efforts to subvert other States in the region and limited its already exceptional military build-up. On 12 August 1981, then Assistant Secretary of State Thomas O. Enders informed the most senior leaders of the Nicaraguan Government in Managua that the United States would be prepared to resume aid to it if it would cease support of insurgency in neighbouring States. The offer was not accepted.

F. The Reagan Administration Made Clear to the Nicaraguan Government in 1981 That It Regarded the Sandinista Revolution "as irreversible"; Its Sole Condition for Co-existence Was Stopping the Flow of Arms to El Salvador

25. The Nicaraguan Government has provided on its own initiative a record of one of several conversations with Mr. Enders in Managua in August 1981, and its own interpretation of that important exchange (NUS/25). It may be useful initially to quote the impressions of that exchange received by the then Ambassador of Nicaragua in Washington:

"During...

"During my first days in my new post, I received the impression that the United States would not tolerate a leftist military victory in El Salvador. In addition, some remarks by the U.S. Ambassador to Nicaragua, Lawrence Pezzullo, hammered persistently on my mind. Ambassador Pezzullo, I venture to say, had developed sincere feelings of sympathy for my country. It was one day in the spring of 1981 - some time after the failure of the Salvadoran guerrillas' January 'final offensive' - when he pleaded, amicably and candidly, that the government in Managua refrain from aiding insurrection in the neighboring nations. The Ambassador stressed that this was important for Nicaragua's own well-being.

In August of 1981, the Assistant Secretary of State for Inter-American Affairs, Thomas Enders, met with my superiors in Managua, at the highest level. His message was clear: in exchange for non-exportation of insurrection and a reduction in Nicaragua's armed forces, the United States pledged to support Nicaragua through mutual regional security arrangements as well as continuing economic aid. His government did not intend to interfere in our internal affairs. However, 'you should realize that if you behave in a totalitarian fashion, your neighbours might see you as potential aggressors'. My perception was that, despite its peremptory nature, the U.S. position vis-à-vis Nicaragua was defined by Mr. Enders with frankness, but also with respect for Nicaragua's right to choose its own destiny. He indicated that there was a fork in the road: one way leading to friendship between the United States and Nicaragua; the other to separation between the two countries. Maybe, he said, Nicaragua had already advanced along this second route. However, it was not too late to discuss an understanding." (Arturo J. Cruz, "Nicaragua's Imperiled Revolution", Foreign Affairs, Summer 1983, pp. 1041-1042.)

26. Another, less diplomatic perspective on the Enders' conversation is given by Edén Pastora:

"When Daniel Ortega told Fidel Castro of the FSLN talks with Thomas Enders, ... he said that Enders had confided privately that as a U.S. representative, he had come to Managua not to defend the rights of the democratic opposition, but rather to insist that the FSLN meddling in El Salvador must stop ... Enders had come to Nicaragua as President Reagan's representative to say that Nicaragua had been given up as lost - that it was the problem of the Democratic Party in the U.S., and that the Republicans' problem was not Nicaragua, but El Salvador, which they had no intention of losing. Furthermore, Enders had told Daniel that the Nicaraguans could do whatever they wished - that they could impose communism, they could take over La Prensa, they could expropriate private property, they could suit themselves - but they must not continue meddling in El Salvador, dragging Nicaragua into an East-West confrontation, and if they continued along these lines, Enders said, they would be smashed."
(Edén Pastora Gomez, "Nicaragua 1983-1985: Two Years Struggle Against Soviet Intervention", Journal of Contemporary Studies, Spring/Summer 1985, pp. 10-11.)

So...

So much again for the central Nicaraguan contention in this case that the object of the United States from the outset of the Reagan Administration has been the overthrow of the Government of Nicaragua! Whether or not Edén Pastora's recollection of what Daniel Ortega told Fidel Castro about what Mr. Enders said privately to Commander Ortega is accurate, the record of the Ortega/Enders conversation supplied by Nicaragua confirms the essential point. The second sentence of Mr. Enders' exchange with Commander Ortega quotes Mr. Enders as flatly declaring that the United States sees the Sandinista revolution "as irreversible" (NUS 85/25ter, p. 1; see below paras. 156-168, especially para. 157).

G. Before This Court, Representatives of the Government of Nicaragua Have Maintained That the Nicaraguan Government Has "never" Supplied Arms or Other Material Assistance to Insurgents in El Salvador, Has "never" Maintained Salvadoran Command and Control Facilities on Nicaraguan Territory and "never" Permitted Its Territory to Be Used for Training of Salvadoran Insurgents

27. As observed in the body of this opinion, the Nicaraguan Government has repeatedly, comprehensively and categorically denied that it, as a Government, has sent arms and other material support to the insurgency in El Salvador, or supported insurgency in other countries of Central America. The denials contained in testimony given to the Court, and in official communications of the Nicaraguan Government to the Court, are of the greatest importance to these proceedings. These leading examples of Nicaragua's multiple, unqualified denials will suffice:

(a) The affidavit of Miguel D'Escoto Brockmann, Foreign Minister of Nicaragua, of 21 April 1984, annexed to the Nicaraguan Application and subsequently repeatedly reaffirmed in Court by the Nicaraguan Government, attests:

> "I am aware of the allegations made by the government of the United States that my government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the government of El Salvador. Such allegations are false, and constitute nothing more than a pretext for the U.S. to continue its unlawful military and paramilitary activities against Nicaragua intended to overthrow my government. In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador." (Nicaraguan Application, Ann. B.)

(b) In sworn testimony before the Court, Commander Carrion declared: "My Government has never had a policy of sending arms to opposition forces in Central America." (Hearings of 13 September 1985.)

(c) In answer to questions, the Agent of Nicaragua affirmed in a letter to the Registrar of 26 November 1985:

> "As the Government of Nicaragua has consistently stated, it has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purpose, it has never permitted Salvadoran

insurgents to establish a headquarters or operations base or command and control facility in Nicaraguan territory and has never permitted its territory to be used for training of Salvadoran insurgents." (NUS 85/27, p. 2.)

H. The Nicaraguan Government, despite its denials, in fact has acted as the principal conduit for the provision of arms and munitions to the Salvadoran insurgents from 1979 to the present day; command and control of the Salvadoran insurgency has been exercised from Nicaraguan territory with the co-operation of the Cuban and Nicaraguan Governments; training of Salvadoran insurgents has been carried out in Cuba and Nicaragua; the Salvadoran insurgents' radio station at one time operated from Nicaraguan territory; and Nicaraguan political and diplomatic support of the Salvadoran insurgency has been ardent, open and sustained

28. Evidence tending to show, and in some cases showing, material support by the Nicaraguan Government of the insurgency in El Salvador is substantial. No one bit of it, of itself, is conclusive. In view of the situation obtaining in Nicaragua, that is not surprising. Nicaragua is not democratically governed; the opposition is not in control of the Congress; there is no Select Committee on Intelligence, no Boland Amendment restricting the objects of Nicaraguan activity in El Salvador, no Freedom of Information Act which obliges the Nicaraguan Government to release reports of its activities, no uncensored press which prints reports revealing information which the government wishes to conceal. The Nicaraguan Government does not need to adopt legislation authorizing covert activities in El Salvador and other Central American States; and far from issuing a public Executive Order prohibiting political assassination, there are charges that it has issued a secret Order authorizing political assassination, which is alleged to have been implemented hundreds of times (see, "Inside the Sandinista Regime: A Special Investigator's Perspective", published by the Department of State, 1985. It contains detailed allegations by Alvaro José Baldizon Aviles, until recently Lieutenant, Nicaraguan Ministry of the Interior, attached to the Ministry's Special Investigations Commission, who defected from Nicaragua carrying allegedly official documents which support his allegations, the most vital of which is reproduced in the foregoing publication. An article about Mr. Baldizon Aviles' charges was published in the Washington Post, 19 September 1985, p. A26. See also Robert S. Leiken's article, loc. cit., p. 52, which reports his interview with Baldizon and the comments on Baldizon's charges by the director of Americas Watch. The assassination on 17 November 1980 by Sandinista agents of Jorge Salazar, Acting President of the Nicaraguan Superior Council of Private Enterprise (COSEP), has been charged by COSEP. See "The Nicaraguan Revolutionary Process", a study made by COSEP in 1983, revised, translated and updated by the Nicaraguan Information Center in January, 1985, pp. 3-4. That charge is accepted as accurate by informed students of the Nicaraguan revolution. See Christian, op. cit., pp. 181-184, and Dickey, op. cit., pp. 80-82.) In the nature of the governmental system in power in Nicaragua, and in view of the many advisers occupying positions in Nicaraguan Government ministries who come from foreign totalitarian régimes, it may be expected that evidence of

acts which its Government has reason to conceal will not easily come to light. Nevertheless, despite these considerations, evidence of what the Nicaraguan Government denies is considerable - and sufficient.

1. Admissions by authorities of the Nicaraguan Government

29. The Court rightly gives particular weight to admissions of fact by a party to a case which are contrary to its interests. It is the more striking that, in this case, a Party which has denied a critical fact so categorically and comprehensively as Nicaragua has nevertheless made a number of significant admissions. While those admissions do not take the form of acts of Congress, signed by the President and printed in Nicaragua's equivalent of the Congressional Record, they are, in the governing circumstances, more than suggestive.

30. The President of Nicaragua, Commander Daniel Ortega Saavedra, granted an interview in January 1985 to a distinguished Peruvian novelist, Mario Vargas Llosa, who subsequently published an account of his month's stay and many interviews in and conclusions about Nicaragua, "In Nicaragua", the New York Times Magazine, 28 April 1985. In the interview, President Ortega is quoted as assuring Mr. Vargas that "our internal tensions will be resolved. That's not the hard part." President Ortega continued:

> "The hard part is negotiation with the United States. There's the root of all our problems. President Reagan has not renounced the idea of destroying us. He seems to negotiate, but then he pulls back ... He wants us to surrender.
>
> We've said that we're willing to send home the Cubans, the Russians, the rest of the advisers. We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador, and we're willing to accept international verification. In return, we're asking for only one thing: that they don't attack us, that the United States stop arming and financing ... the gangs that kill our people, burn our crops and force us to divert enormous human and economic resources into war when we desperately need them for development." (At p. 17; emphasis supplied.)

Now President Ortega was not writing a State paper, he was talking - just as President Reagan, at his famous press conference, did not write a State paper about the modalities of Nicaragua's adjustment of its policies but spoke of Nicaragua's saying "uncle". That was a revealing remark; no less is President Ortega's. And what does President Ortega say? He is quoted - not reported, but quoted - by a writer of high reputation in a newspaper of unexcelled reputation as stating the following:

> "We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador, and we're willing to accept international verification. In return, we're asking for only one thing: ... that the United States stop arming and financing ... the gangs that kill our people ..."

Now President Ortega would not speak of stopping the movement of military aid through Nicaragua to El Salvador if such movement were not in progress. One cannot stop what has not started. One cannot stop what does not continue. The United States indubitably is arming the contras; that must stop; "in return", President Ortega says, Nicaragua is willing "to stop" the movement of its military aid through Nicaragua to El Salvador. How truly all that rings!

31. Of course, if one is intent on minimizing any admissions of Nicaragua, while maximizing admissions of the United States, one may find reason to minimize this admission. President Ortega and Mr. Vargas spoke in Spanish; the whole of Vargas' article is translated from Spanish. One may suggest that there was an error in translation. Such a speculation, however, is laid to rest by President Ortega's words in the original Spanish, which were:

> "Lo difficil es la negociación con Estados Unidos. De alli viene todo el problema. El presidente Reagan no renuncia a acabar con nosotros y, por eso, aparenta negociar, pero luego de marcha atrás, como en Manzanillo. No quiere negociación. Quiere que nos rindamos. Hemos dicho que estamos dispuestos a sacar a los cubanos, soviéticos y demás asesores; a suspender todo tránsito por nuestro territorio de ayuda militar u otra a los salvadorenos, bajo verificacion internacional. Hemos dicho que lo único que pedimos es que no nos agredan y que Estados Unidos no arme y financie, jactándose de ello ante el mundo, a las bandas que entran a matarnos, a quemar las cosechas, y que nos obligan a distraer enormes recursos humanos y económicos que nos hacen una falta angustiosa para el desarrollo." (This Spanish text of the quotation of President Ortega's original words is found in a Spanish version of the Vargas Llosa article in Madrid's ABC, 12 May 1985, under the title "El Sandinista, Tranquilo"; emphasis supplied.)

Or one may suggest that, since the quotation is printed in a newspaper, one must assume that it may be in error. Or one may suggest that, since the writer is a novelist, he made it up. Or one may suggest that, if President Ortega said it, he did not mean it.

32. But, if one is interested in an objective assessment of what the Chief of a State is authoritatively quoted as having said, then it will not be possible to pass off this admission of President Ortega. Moreover, if this quotation as translated into English is in any measure inaccurate, there is every reason to conclude that the Nicaraguan Government would have required the publication of a correction, which, by standing policy of the New York Times, would promptly have been published. No such correction has been requested or published (letter of 31 December 1985 of Martin Arnold, Deputy Editor, the New York Times Magazine, to me). As the representative of El Salvador, who read out the quoted remarks of President Ortega, declared to the General Assembly of the United Nations, "This is an eloquent confession" (A/40/PV.90, p. 83). President Ortega's words in their original Spanish are even more inculpatory, admitting as they do that Nicaragua could "suspend" the provision of arms to the Salvadoran insurgents. The quotations of

Nicaraguan spokesman which follow may reasonably be appraised in the light of President Ortega's admission, in 1985, that military aid is moving through Nicaragua to El Salvador - a process which, he admits, Nicaragua has not stopped but could.

33. Those quotations will be presented in chronological order. But first, it is of interest to note that, as recently as April 1986, President Ortega made a second public statement which reinforces the thrust of that just quoted. In an article by Clifford Krauss in the Wall Street Journal of 18 April 1986, at page 2, there is a report of an interview which President Ortega granted in Managua on 16 April 1986 in which he declared that Nicaragua is ready to negotiate and sign with the United States a mutual security treaty that would convert Central America into "a neutral zone" free of East-West competition. The article continues:

> "In proposing a bilateral treaty with the U.S., Mr. Ortega said Nicaragua is ready to agree to a withdrawal of all foreign military advisors and a halt to aid for 'irregular forces' in the region. In exchange, he said, the U.S. would have to end its military pressure on Nicaragua and cease military maneuvers in the region. He called the proposed treaty 'a reciprocal arrangement'."

It will be observed that President Ortega affirms that Nicaragua is ready to agree to a halt in aid for irregular forces in the region, and that this agreement on Nicaragua's part would be in exchange for the ending of United States military pressure upon Nicaragua. This would be what President Ortega called a "reciprocal arrangement". The ineluctable imputation is that Nicaragua is prepared to stop its continuing aid to irregular forces if the United States is prepared to stop its exertion of military pressure upon Nicaragua. If the Court is correct in concluding that there cannot be imputed to Nicaragua the sending of military aid to Salvadoran irregulars at any time, and certainly not after early 1981, how is it that President Ortega in 1985 and 1986 has publicly made statements so at odds with the Court's conclusion? Who may be presumed to be better informed on this question, President Ortega or the Court?

34. In 1969, the FSLN published the first detailed statement of its goals. The Sandinistas declared that they stood for fifteen policies, including: "14. Struggle for a 'true union of the Central American peoples within one country,' beginning with support for national liberation movements in neighboring states." (Quoted in Nolan, loc. cit., p. 37.)

35. In September 1979, shortly after the Sandinistas took power, the National Directorate of the FSLN called an assembly to enable "intermediate leadership cadres" to directly exchange views with the leadership. As a result of those exchanges, general guidelines were drawn up and a report of the three-day meeting - the so-called "72-hour Document" - was circulated among Sandinista membership. The report is of interest. For example, as early as September 1979, when the United States was sending Nicaragua more aid than any other Western State, the report states that "the real enemy that we would have to

confront...

confront was the imperialist power of the United States, the treachery and demagoguery of the reactionary local bourgeoisie being less important". As early as September 1979, when more elements of pluralism remained than are vital today, the "72-hour Document" asserted: "We can assert without fear of error that Sandinism represents the sole domestic force." Of particular interest to the large build-up of Nicaraguan armed forces then beginning is the report's conclusion that "the defeated National Guard cannot possibly organize an attack on us for the time being" and that none of Nicaragua's neighbours would dare to back the National Guard; the report indicated that there was no need for large armed forces to deal with the non-existent prospect of armed counter-revolution. As to foreign policy, the 72-hour Document declares:

> "The foreign policy of the Sandinist People's Revolution is based on ... the principle of revolutionary internationalism. The goal of the FSLN's foreign policy is to consolidate the Nicaraguan revolution, because this will help strengthen the Central American, Latin American and worldwide revolution ... our general approach to foreign policy [is to] ... help further the struggles of Latin American nations against fascist dictatorships and for democracy and national liberation ... we should underscore the need to counteract the aggressive policy of the military dictatorships in Guatemala and El Salvador by taking proper advantage of the internal frictions there, while stressing our differences with Honduras and the friendly conduct of Costa Rica and Panama." ("Analysis of the Situation and Tasks of the Sandinista People's Revolution", 5 October 1979. English translation contained in unclassified Department of State airgram A-103 from Managua of 26 December 1979.)

36. In January 1980, Minister of the Interior Tomas Borge, at a ceremony in Havana marking the 21st anniversary of the Cuban revolution, declared:

> "Nicaragua must express its solidarity with the other Latin American peoples struggling against or defeating imperialism or trying to shake off the yoke of foreign masters ... That is what we must learn from our Cuban brothers, who, despite their limitations and their poverty, have been generous with our people. Tomorrow, if necessary, we may have to take the food out of our mouths to express solidarity with other Latin American brothers with the same affection, firmness, and solidarity that the Cubans have shown." (Panamanian News Agency ACAN, 4 January 1980.)

37. In June 1980, Commander Borge, addressing a North Korean audience, declared that "the Nicaraguan revolutionaries will not be content until the imperialists have been overthrown in all parts of the world ..." (FBIS, North Korea, 12 June 1980, p. D16).

38. On 10 January 1981, with the launching of the "final offensive" by Salvadoran guerrillas to overthrow the Government of El Salvador, the guerrillas, broadcasting from a clandestine radio station located in

Nicaragua, proclaimed that "the decisive hour has come ... for the seizure of power" (FMLN-FDR, El Salvador on the Threshhold of a Democratic Revolutionary Victory, pp. 82-83). Radio Managua took up the call, broadcasting:

> "A few hours after the FMLN General Command ordered a final offensive to defeat the regime established by the military-Christian Democratic junta, the first victories in the combat waged by our forces began being reported." ("Revolution Beyond Our Borders", p. 9.)

39. A few days before, Nicaraguan Foreign Minister D'Escoto had had the following broadcast exchange:

> "[Question] Mr. Foreign Minister, could you tell us something about the rumors that Nicaraguan combatants are participating in the Salvadoran people's liberation struggle?
>
> [Answer] I am not in a position to deny that there are Nicaraguans there. I would even find it very strange if there were no Nicaraguans - Nicaraguans who have lived in El Salvador for a long time, plus others who may have gone to El Salvador more recently.
>
> A short time ago, however, we heard a report that referred to Nicaraguan mercenaries. If there are any Nicaraguan mercenaries, they would have to be national guardsmen hired by the Salvadoran Army. The term mercenary is not applicable when referring to a liberation group. In any event, the only thing that has been confirmed is the presence of U.S. mercenaries, who are fighting against the Salvadoran people." (FBIS, Panama City Televisora Nacional, 7 January 1981.)

A few days later, the Nicaraguan Foreign Minister amplified his views. An AFP dispatch broadcast on 14 January 1981 (FBIS, Central America, 15 January 1981, p. 17) reported:

> "Nicaraguan Foreign Minister Miguel d'Escoto described here this afternoon a report that two barges full of guerrillas from Nicaragua had landed in El Salvador as a 'complete invention'.
>
> D'Escoto added that his government cannot prevent Nicaraguans from 'voluntarily joining the defense of the Salvadoran people'.
>
> 'I said in Ecuador that it is not unusual for Nicaraguan guerrillas to be in El Salvador participating in the struggle the Salvadoran people are waging for their liberation', d'Escoto stressed.
>
> ...
>
> D'Escoto said that 'a difference must be made between a mercenary, who struggles in another country for a salary or for pay, and a guerrilla, who struggles out of solidarity with a people pursuing their liberation or ideals'."

40. Also in January 1981, another comandante, according to Managua Radio Sandino (FBIS, Central America, 29 January 1981, p. 11) spoke as follows on the theme "El Salvador Will Overcome":

> "Commander of the Revolution Carlos Nunez, member of the National Directorate of the Sandinist National Liberation Front, has unmasked the international reactionary press in its campaign of falsehoods and silence regarding our revolution. He spoke at the opening of the First International Meeting of Solidarity with Nicaragua, called 'El Salvador Will Overcome'.
>
> One of the main points of his speech was that it is an internationalist duty to disseminate the news of our situation. He also said the common struggle of all the peoples for their liberation, independence and sovereignty against the common enemy is the groundwork for mutual solidarity and internationalism of the nations.
>
> Regarding the Nicaraguan people's contribution to the general struggle of the brother countries, Nunez stressed that this is the cause of the anxiety and desperation of Yankee imperialism."

41. In an interview with the Caracas magazine Bohemia of 20-26 April 1981, the following exchange with Commander Borge appears:

> "[Question] The U.S. Government insists that Nicaragua has become a bridgehead for the shipment of weapons to El Salvador by the Cubans and Soviets.
>
> [Answer] They say that we are sending weapons to El Salvador but they have not offered any real proof. But let us suppose that weapons have reached El Salvador from here. This is possible. More than that, it is possible that Nicaraguan combatants have gone to El Salvador, but this cannot be blamed on any decision of ours. Our solidarity with that country and that people are part of the consolidation of our revolutionary process."

42. On 19 July 1981, Commander Borge spoke at ceremonies marking the second anniversary of the victory of the Nicaraguan revolution (FBIS, Central America, 21 July 1981, pp. 9-10), declaring:

> "This revolution goes beyond our borders. Our revolution was always internationalist from the moment Sandino fought in La Segovia. With Sandino were internationalists from all over the world ... With Sandino was that great leader of the Salvadoran people, Farabundo Marti ... All the revolutionaries and particularly all the people of Latin America know that our people's hearts are with them and beat with them. Latin America is within the heart of the Nicaraguan revolution and the Nicaraguan revolution is also within the heart of Latin America. This does not mean that we export our revolution.

It is sufficient - and we cannot avoid this - that they take our example ... The revolutionary process will advance ... when we speak of mixed economy, pluralism and national unity, it is within the context of the revolution and not against the revolution ..."

43. In February 1982, at the Fifth Permanent Conference of Latin American Political Parties (Managua Domestic Service, 21 February 1982), Commander Borge asked:

"How can a patriot be indifferent to the fate of his Latin American brothers? ... How can we keep our arms folded in the face of the crimes that are being committed in El Salvador and Guatemala? How can one be decent, simply decent, in this continent without showing solidarity for the efforts of these heroic people? ... From the wounds of only one of the Latin American peoples flows the blood of all Latin America. This explains once again why we Sandinistas show solidarity with all peoples who are fighting for their liberation. If we are accused of expressing solidarity, if we are forced to sit in the dock because of this, we say: We have shown our solidarity with all Latin American peoples in the past, we are doing so at present and will continue to do so in the future."

44. The extremity of the political and diplomatic - as well as logistic - support by the Nicaraguan Government of the insurgents in El Salvador was illustrated in 1981 by two exceptional events in the General Assembly of the United Nations. In addressing the General Assembly on 8 October 1981, Commander Ortega declared that he was the bearer of a specific proposal for the solution of the crisis in El Salvador:

"conveyed to us by Salvadorian patriots. But first we should like to say that there is among us, accompanying the delegation of Nicaragua, the President of the Democratic Revolutionary Front of El Salvador and member of the Joint Political Commission for the Farabundo Marti Front for National Liberation ... Comrade Guillermo Ungo." (A/36/PV.29, p. 27.)

Commander Ortega then read out the authorization of the Salvadoran insurgents, addressed to him, to convey their proposals to the General Assembly, and proceeded to read out their detailed proposals - this in the presence of one of the leaders of that insurgency, who was at the General Assembly accompanying the Nicaraguan delegation. Commander Ortega, in a wide-ranging and throughgoing assault on the United States for its "Acts of aggression, interference, pressure and blackmail" which "never cease" (ibid., pp. 24-25), also affirmed, apparently in his role as spokesman both for the revolutionaries of Nicaragua and of El Salvador:

"Our...

"Our peoples are ready to respond as Sandino did to any attempt at direct or indirect aggression, either in Nicaragua or in El Salvador. We all know that the threat of invasion is directed first and foremost against those two peoples." (Ibid., p. 26.)

45. In response, President Duarte observed that the Nicaraguan representative in the General Assembly:

"appeared to be more the spokesman of an armed group - whose main activity in El Salvador has been to wage a campaign of terrorism, sabotage, destruction and death, whose victim is not some enemy they try in vain to create, but rather the whole Salvadorean people - than the representative of his country's Government." (A/36/PV.33, p. 12.)

President Duarte continued:

"It is a surprise to no one that the Sandinist Government was the only one inclined to fulfil so dishonourable a mission, for from the beginning it has been the chosen instrument, with its territory serving as the base for arms supply, refuge and support for the armed groups and as a sounding board for their campaigns of false propaganda. Thus, in the tragic Salvadorean conflict, the Nicaraguan Government can hardly be considered as a spokesman communicating a peace proposal in good faith." (Ibid., p. 113.)

The representative of El Salvador who quoted to the General Assembly the foregoing statement of President Duarte also observed that, for Nicaragua "to point out publicly from this rostrum that a person who is active in the opposition of another country is physically seated in the seats assigned to the delegation of Nicaragua to the United Nations" invites the General Assembly to become a "forum for chaos or a political circus" (ibid., p. 116).

46. In 1982, Commander Borge said in a message to the Continental Conference for Peace, Human Rights and Self-Determination of El Salvador:

"The struggle of the Salvadoran people is the struggle of all honest men and women of the continent ... This is a struggle of all those who feel duty bound to support a brave David facing a criminal and arrogant Goliath, it is the continuation of the struggle of Sandino, Farabundo Marti, Che Guevara, and Salvador Allende." (Radio Sandino, 21 January 1982.)

47. When asked in 1983 how he would respond to Ambassador Jeane Kirkpatrick's statement that, since the revolution triumphed in Nicaragua, domino-like "it will be exported to El Salvador, then Guatemala, then Honduras, then Mexico", Commander Borge is quoted as replying: "That is one historical prophecy of Ronald Reagan's that is absolutely true!" (Claudia Dreifus, "Playboy Interview: The Sandinistas", Playboy, September 1983, p. 192.)

48. In 1983, Commander Humberto Ortega Saavedra, Nicaraguan Minister of Defence, was quoted as stating: "Of course we are not ashamed of helping El Salvador. We would like to help all revolutionaries." (Michael Kramer, "The Not-Quite War", New York, 12 September 1983, p. 39.)

49. In 1983, Commander Bayardo Arce was quoted as stating: "We will never give up supporting our brothers in El Salvador." (Ibid.) He had as early as 1980 promised "unconditional assistance to the revolutionary process in Guatemala and El Salvador" (as quoted in "Revolution Beyond Our Borders", op. cit., p. 5).

50. In 1983, Commander Arce also declared that: "internationalism will not bend ... while Salvadorans are fighting to win their liberty, Nicaragua will maintain its solidarity" (Christopher Dickey, "Leftist Guerrillas in El Salvador Defend Cuban Ties," the Washington Post, 11 March 1983).

51. According to the Declaration of Intervention of El Salvador, in July 1983, the Nicaraguan Foreign Minister admitted Nicaraguan support of insurgency in El Salvador:

> "IX. Nicaraguan officials have publicly admitted their direct involvement in waging war on us. Foreign Minister Miguel d'Escoto, when pressed at a meeting of the Foreign Ministers of the Contadora Group in July 1983, by our Foreign Minister, Dr. Fidel Chavez Mena, on the issue of Nicaraguan material support for the subversion in El Salvador, shamelessly and openly admitted such support in front of his colleagues of the Contadora Group. That statement, made in those particular circumstances, is significant, inasmuch as the interventionist attitude of the Nicaraguan Government, in its eagerness to export subversion, not only manifests itself in relation to El Salvador, but also has had to do with countries such as Colombia, Costa Rica, Honduras and other Latin American countries, with some of which it has had serious problems. This is because Nicaragua, as Nicaragua itself recognized officially, has been converted into the centre of exportation of revolution to all of the countries in the area." (At p. 10.)

52. The Declaration of Intervention of El Salvador further affirms that Nicaraguan Chief of State Ortega, during a recent interview by German television, publicly stated that he "could meet with President Duarte, but that would not impede the fact of continuing support to the Salvadorian guerrillas". The Declaration of Intervention construes the foregoing statement by then Co-ordinator Ortega as "a self-confession of intervention" which states "the official position in that regard of the Government of Nicaragua ..." (at p. 11).

53. In May 1984, Commander Arce made a speech before the Political Committee of the Nicaraguan Socialist Party, the text of which was printed in La Vanguardia, Barcelona, 31 July 1984. The speech is of

particular interest in its contemptuous treatment of the Nicaraguan elections ("a bourgeois ... nuisance") and its admission that the Sandinistas never had any intention of fulfilling their pledges to the OAS and others of political pluralism, international non-alignment and a mixed economy. Commander Arce describes as "commitments" the programme of the Nicaraguan Government to implement these three principles. He speaks of Nicaragua's "dictatorship of the proletariat". Of immediate interest to the question of whether or not Nicaragua is pursuing a policy of interventionism, Commander Arce had this to say:

> "Imperialism asks three things of us: to abandon interventionism, to abandon our strategic ties with the Soviet Union and the socialist community, and to be democratic. We cannot cease being internationalists unless we cease being revolutionaries.
>
> We cannot discontinue strategic relationships unless we cease being revolutionaries. It is impossible even to consider this.
>
> Yet the superstructure aspects, democracy as they call it, bourgeois democracy, has an element which we can manage and even derive advantages from for the construction of socialism in Nicaragua. What are those advantages, what was it we explained to the party leadership? The main thing about the elections, as far as we are concerned, is the drafting of the new constitution. That is the important thing. The new constitution will allow us to shape the juridical and political principles for the construction of socialism in Nicaragua.
>
> We are using an instrument claimed by the bourgeoisie, which disarms the international bourgeoisie, in order to move ahead in matters that for us are strategic. On the one hand, it allows us to neutralize the aggressiveness of imperialism, while on the other it is going to provide us with a tool for moving ahead on substantive aspects of our revolution.
>
> ...
>
> Let them vote for everything that has been done in the revolution, for literacy, adult education, confiscations, nationalization of the banks and foreign trade, free education, the Soviet and Cuban military advisers, the internationalism of the revolution. Let them vote for all that. That is the reality of our revolution and everything we have done has that dynamic behind it."

Thus Commander Arce affirms that Nicaragua "cannot ... abandon interventionism ..." He does not, in this speech, specify the content of Nicaraguan interventionism. But he himself elsewhere said that, "while Salvadorans are fighting ... Nicaragua will maintain its solidarity ..." And the content of Nicaraguan interventionism is elsewhere made clear not only by Nicaraguan official statements but a good deal more evidence. (The Arce speech was extensively reported in the international press. An English translation of the full text of Arce's speech was published in Department of State publication 9422, March 1985, which lists its press

coverage. The speech is alleged to have been tape-recorded without Commander Arce's knowledge and then published in La Vanguardia; according to The Economist of 23 August 1984, and the Washington Post, 12 August 1984, p. A-1, President Ortega acknowledged the authenticity of the speech.)

54. Edén Pastora, now an opponent of the Nicaraguan Government, was, for a time, the most famous of Nicaraguan comandantes though never one of the nine, and he served as a Vice-Minister at the outset of post-Somoza rule. Counsel for Nicaragua emphasized his independence from CIA influence. His contribution to an American scholarly journal is of special significance:

> "When the Managua government, personified by the nine top Communists, was planning the insurrection in El Salvador, I was a participant in the meetings of the National Leadership; I was in effect the tenth member of the National Leadership without having formally been so designated. With care and much diplomacy, I told the rest of the leaders that I did not agree with the idea of launching the Salvadorans into an insurrection ..." (Edén Pastora Goméz, loc. cit., pp. 9, 10.)

55. The Memorial of Nicaragua on the merits, Annex I, contains, as Attachment 3, the Report of Donald Fox, Esq., and Professor Michael J. Glennon to the International Human Rights Law Group and the Washington Office on Latin America concerning Abuses Against Civilians by Counter Revolutionaries Operating in Nicaragua of April 1985. Appended to that report are a number of statements given to Messrs. Fox and Glennon and apparently reproduced verbatim by them. One of those statements is by Luis Carrión, Deputy Minister of the Interior, apparently given in early 1985 (it does not carry a date). In his statement, submitted in evidence in this proceeding by the Government of Nicaragua, Commander Carrión is quoted as saying the following:

> "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time. That's why Reagan had said the reason for supporting the Contras is not to stop the flow of arms - it is to overthrow the government of Nicaragua!" (At p. 34.)

The contradictions between the statement just quoted of Commander Carrion, introduced into evidence by Nicaragua, and his verbal testimony in Court, introduced into evidence by Nicaragua, are obvious. In Court, Commander Carrion swore that his Government "never" had a policy of sending arms to Salvadoran insurgents. But in his statement to Messrs. Fox and Glennon, the Commander maintains that "we" - which in context can only mean the Government of Nicaragua - "are giving no support" to the rebels in El Salvador, not that "we" never did; a conclusion which is reinforced by his next sentence: "We haven't sent any material aid to them in a good long time" (emphasis supplied). Now "any material aid" must embrace arms, which surely is one form of material aid. That is made the clearer in the reference to "the flow of arms" in the last sentence quoted of the Commander's statement. When

Commander Carrión affirms that such aid has not been sent to the Salvadoran insurgents "in a good long time", he imports that, at one time, aid was sent and that "we" sent it. That is to say, he infers in this statement that any statement that aid "never" was sent by the Nicaraguan Government to Salvadoran insurgents is false; that, on the contrary, at one time, the Nicaraguan Government did have a policy of sending arms to the insurgency in El Salvador.

56. In an interview with the New York Times in Managua on 16 July 1985, President Ortega is reported to have "conceded that Nicaraguan territory had once been used to ship weapons to guerrillas in El Salvador ..." The report of the interview continues:

> "Soon after the White House meeting President Carter criticized the Sandinistas, after accusations arose that they were sending weapons to revolutionaries in El Salvador.
>
> Mr. Ortega said that members of the Nicaraguan armed forces had aided such shipments but that they had done so without Government sanction." (The New York Times, 18 July 1985, p. A10.)

57. Quotations, apparently from this same interview of 16 July 1985 with President Ortega, were given in a subsequent dispatch of 17 September 1985. That report quotes President Ortega as follows:

> "There were times when we were finding groups of 40 to 50 of our army soldiers ready with knapsacks and weapons on their way to El Salvador, but, we said, 'we have had to detain them and to punish them'.
>
> Mr. Ortega said that at one point, the first United States Ambassador to the Sandinista Government, Lawrence Pezzullo, presented him with evidence that an airstrip in the western province of Leon was being used to transport arms to Salvadoran rebels. He said, 'we took necessary measures so this airstrip would not continue to be used for this type of activities'". (The New York Times, 17 September 1985, p. 2.)

58. It will be noted that, in this interview, President Ortega declares, in respect of the use of the airstrip in the Western province of Leon (see the discussion below of the use of the airstrip at Papalonal) that: "We took necessary measures so this airstrip would not continue to be used for this type of activities." (Emphasis supplied.) That is a clear admission that the airstrip had been used for those activities. What activities? As will be demonstrated, the shipment by air of arms to Salvadoran insurgents. Could the activities at Papalonal have been an excursion of free enterprise, a caper by ardent young guerrillas acting without the knowledge and support of the Nicaraguan Government? The answer to that question is self-evident, but is further elucidated by evidence of the United States which I read into the record of the oral hearings in connection with questions addressed by me to the Agent and counsel of Nicaragua. That evidence (Hearings of 18 September 1985) reads as follows:

"The...

"The principal staging area came to be an airfield at Papalonal. The pattern and speed of construction at Papalonal, which is in an isolated area 23 nautical miles northwest of Managua, lacking adjacent commercial or economic activity, made clear its military function. In late July 1980, this airfield was an agricultural dirt airstrip approximately 800 metres long. By December, photography revealed a lengthened and graded runway with hard dispersal areas, and storage buildings under construction. By January 1981, the strip had been lengthened to 1,200 metres. A turnaround had been added at each end. A dispersal parking area with three hardstands had been constructed at the west end of the runway. Three parking aprons had been cleared, and three hangar or storage buildings, each about 15 metres wide, had been constructed on the aprons.

On January 2, 1981, a C-47 was observed at Papalonal for the first time. Two C-47's were observed in February. These C-47's and DC-3's ... were used to ferry larger cargos of arms from Papalonal to areas of guerrilla infiltration in southeastern El Salvador. Several pilots were identified in Nicaragua who regularly flew the route into El Salvador. Radar tracking also indicated flights from Papalonal to southeastern El Salvador.

On January 24, 1981, a C-47 dropped arms by parachute in the vicinity of a small strip in southeastern El Salvador. On January 24, 1981, a Cessna from Nicaragua crashed upon takeoff after unloading passengers at an airfield in El Salvador close to where the C-47 airdrop occurred. A second plane, a Piper Aztec, sent to recover the downed crew, was strafed on the ground by the Salvadorn Air Force. The pilot and numerous weapons were captured. The pilot stated he was an employee of the Nicaraguan National Airlines (LANICA) and that the flight originated from Sandino International Airport in Managua." (Department of State, "Revolution Beyond Our Borders", pp. 7-8.)

59. This evidence of the reconstruction and usage of the Papalonal airstrip was not refuted by Nicaragua, though it was placed before its Agent and counsel in the course of the oral hearings. That evidence is difficult to reconcile with the imputation by President Ortega in his interview with the New York Times that the employment of Papalonal to supply the Salvadoran insurgency was effected without the knowledge and support of the Nicaraguan Government. It may well be that, after the United States Ambassador drew to Commander Ortega's attention the knowledge of the United States that the airstrip was being used for the ferrying of arms to Salvadoran insurgents, the airstrip was closed down. But that hardly supports any claim that it was not built up and employed by the Nicaraguan Government for the purposes for which it was actually used.

60. It should also be noted that the photographs of Papalonal taken from the air, which presumably buttressed the representations of the United States to Commander Ortega, one of which is reproduced in "Revolution Beyond Our Borders", at page 8, were taken by United States

aircraft which conducted overflights of Nicaraguan territory, about which Nicaragua has strongly protested. The defensive - and thus legal - nature of such overflights is indicated, however, by the fact that they were so useful in demonstrating to Commander Ortega himself an internationally illegal use of the territory of Nicaragua about which he professed to be unaware.

61. The Papalonal airstrip will be further examined in connection with the testimony of Nicaragua's leading witness. But at this juncture, it is of interest to quote Dickey's conclusions:

> "The Carter administration, in the last days of its term, had suspended what was left of the $75 million in aid it won for the Sandinistas a year before. There had been little choice. Certainly there would have been no way to certify, after the Salvadoran 'final offensive,' that the Sandinistas were not abetting other rebel movements. The Nicaraguans had acted with incredible indiscretion. Years later Salvadoran dissidents and rebel leaders who were in Managua and Havana at the time would shake their heads when they recalled how they even trained acrobats for the victory parade through San Salvador. Edén Pastora would remember the Salvadoran guerrilla commanders decked out in well-pressed uniforms directing their triumph - then watching their defeat - from a command center at the house of Somoza's mistress. By January 14, U.S. intelligence had picked up an avalanche of incriminating evidence, including a truck with a roof full of M-16s rolling through Honduras. The game was over and the chits were being called in. 'You people are just irresponsible,' Ambassador Pezzullo told Borge and Daniel Ortega when he saw them at a cocktail party. 'We've got you red-handed.' And the Sandinistas knew it. They began taking measures to recoup. By March they had shut down the airfield at Pamplonas that had been used to supply the Salvadorans. The airplanes were decommissioned, the pilots dispersed." (Loc. cit., p. 105. The quotation of Ambassador Pezzulo's remarks is drawn from an interview with the Ambassador (p. 290). See also, for further detailed descriptions of Nicaraguan arms shipments to Salvadoran insurgents, p. 75. See also, Christian, op. cit., pp. 193-196.)

Dickey finds not only that the Nicaraguan Government's supply of arms to the Salvadoran rebels for the January 1981 offensive is incontrovertible. He reports that, in 1982, shipments of arms to the Salvadorans "had not stopped. They had increased" (at p. 133).

62. That Nicaraguan provision of arms to the Salvadoran insurgents, which halted for a time after the January 1981 offensive and then resumed, did indeed increase in 1982 is borne out by the following passage from "Revolution Beyond Our Borders", pages 10-11:

> "With Cuba as a main source, Nicaraguan supplies of arms to FMLN units were stepped up to make possible an offensive to disrupt a peaceful vote in the March 28, 1982, Constituent Assembly elections.

In the first 3 months of 1982, shipments of arms into El Salvador reached the highest overall volume since the "final offensive" in 1981. The Nicaraguan-based arms flow into El Salvador utilized both sea and overland routes through Honduras. In February 1982, for example, a large shipment of arms arrived by sea from Nicaragua to the Usulutan coast. Early in March 1982, a guerrilla unit in El Salvador received several thousand sticks of TNT and detonators (five sticks of TNT are sufficient to blow up an electrical pylon).

In addition to small arms and vitally needed ammunition, guerrilla supply operations in 1982 provided greater quantities of heavier weapons, including 57 mm recoilless rifles and M-72 antitank weapons, thus significantly increasing guerrilla firepower."

2. Admissions by witnesses appearing on behalf of the Nicaraguan Government

63. Commander Carrión's admission in his role as witness for his Government has been set forth above. Two other witnesses for the Nicaraguan Government also made significant admissions.

64. The report of Messrs. Fox and Glennon referred to above - the report which was the basis of Professor Glennon's testimony - reaches a conclusion consistent with Commander Carrion's admission which is reproduced in that report: it states that "the Sandinista Government maintains that it has not supplied arms to the Salvadoran guerrillas for some time" (Memorial of Nicaragua, Ann. I, Att. 3, p. 6; emphasis supplied). It is obvious that that statement is inconsistent with the sworn statements of Minister D'Escoto and Vice-Minister Carrion that the Nicaraguan Government "never" has supplied arms to the Salvadoran guerrillas.

65. Much more significant still were the admissions of Mr. David MacMichael, a former intelligence analyst of the CIA called by Nicaragua as a premier witness. On direct examination by Nicaraguan counsel, the following exchange took place:

"Q.: So you were familiar with the intelligence information that the United States Government collected with respect to arms or weapons trafficking between Nicaragua and rebels in El Salvador?

A.: Yes, I was.

Q.: All right. I want to direct your attention now to the period of your employment with the Agency. Was there any credible evidence that during that period, March 1981 to April 1983, the Government of Nicaragua was sending arms to rebels in El Salvador?

A.: No.

Q.: Was...

Q.: Was there any substantial evidence that during this period arms were sent from or across Nicaraguan territory to rebels in El Salvador with the approval, authorization, condonation or ratification of the Nicaraguan Government?

A.: No, there is no evidence that would show that.

Q.: Was there any substantial evidence that during the same period, any significant shipments of arms were sent with the advance knowledge of the Government of Nicaragua from or across its territory to rebels in El Salvador?

A.: There is no such substantial evidence, no.

Q.: Was there any substantial evidence that during that period significant quantities of arms went to El Salvador from Nicaragua?

A.: From Nicaragua, that is originating in Nicaragua, no.

Q.: Was there substantial evidence of shipments of arms from other countries in the region to the El Salvador guerrillas?

A.: Yes, there was.

Q.: Could you give us some examples please?

A.: I think the best known of these is the evidence developed on 15 March 1982, when there was a raid on an arms depot in San José, Costa Rica, at which time a considerable quantity of arms, well over a hundred rifles, automatic weapons of various sorts, other ordnance, mines and so forth, were captured there along with a significant number of vehicles - more than half a dozen I believe - that were used to transport these arms, or were designed for transporting them. Documents were captured with the people captured there - a multinational group I would say - which indicated that certainly more than half a dozen shipments of arms had already been made from that depot. The reason I failed to tell you on your previous question, Mr. Chayes, was that it would appear to me that if arms were shipped from San José, Costa Rica, by vehicle, they must have in some way had to get across Nicaragua." (Hearings of 16 September 1985.)

Two observations may be made on the foregoing exchange. First, Nicaraguan counsel's questions contained qualifying adjectives - was there any "credible" evidence, was there any "substantial" or "convincing" evidence of "significant" shipments of arms - which may be taken as qualifying the answers. More than that, on initial, direct examination, Mr. MacMichael affirmed that "there was" substantial evidence of shipment of arms to the El Salvador guerrillas from other countries of the region (specifically, Costa Rica) "across Nicaragua".

66. The comments of the United States Permanent Representative to the United Nations made in the Security Council days after the very event in question are of interest. Ambassador Kirkpatrick declared on 25 March 1982:

"On 15 March 1982 the Costa Rican judicial police announced the discovery of a house in San Jose with a sizable cache of arms, explosives, uniforms, passports, documents, false immigration stamps from more than 30 countries, and vehicles with hidden compartments - all connected with an ongoing arms traffic through Costa Rican territory to Salvadoran guerrillas. Nine people were arrested: Salvadorans, Nicaraguans, an Argentine, a Chilean and a Costa Rican. Costa Rican police so far have seized 13 vehicles designed for arms smuggling. Police confiscated some 150 to 175 weapons, from mausers to machine-guns, TNT, fragmentation grenades, a grenade-launcher, ammunition and 500 combat uniforms. One of the captured terrorists told police that the arms and other goods were to have been delivered to the Salvadoran guerrillas before 20 March, 'for the elections'." (S/PV.2335, p. 46.)

67. Immediately after the foregoing exchange, the direct examination of Mr. MacMichael continued as follows:

"Q.: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA - 6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadoran rebels from Nicaragua at any time?

A.: Yes, I did.

Q.: When was that?

A.: Late 1980 to very early 1981.

Q.: And what were the sources of that evidence?

A.: There were a variety of sources: there was documentary evidence, which I believe was codable, there were - and this is the most important - actual seizures of arms shipments which could be traced to Nicaragua and there were reports by defectors from Nicaragua that corroborated such shipments.

Q.: Does the evidence establish that the Government of Nicaragua was involved during this period?

A.: No, it does not establish it, but I could not rule it out.

Q.: At that time were arms shipments going to the El Salvadoran insurgents from other countries in the region?

A.: Yes, they were.

Q.: Could you give us examples?

A.: There were shipments at that time which could be traced to Costa Rica; there were shipments at that time that could be traced as having come through or via Panama.

Q: And...

Q.: And did the evidence of arms traffic from Nicaragua, if any, come to an end?

A.: The evidence of the type I have described disappeared. They did not come in any more after very early 1981, February/March at the latest.

Q.: You say at some time, just about the time you got to the Agency, the evidence stopped coming in: did it ever resume?

A.: As I have testified, no." (Hearings of 16 September 1985.)

These admissions - on direct examination - are remarkable. Nicaragua's own witness affirms that he saw evidence that, from "late 1980 to very early 1981", "arms" were "going to the Salvadoran rebels from Nicaragua". And Mr. MacMichael relies on what to sustain that conclusion? Documentary evidence, actual seizures of arms, and corroborating reports of defectors. Did that evidence "establish that the Government of Nicaragua was involved during this period?" Mr. MacMichael replies: "No, it does not establish it, but I could not rule it out."

68. Finally, on direct examination, Professor Chayes had this summarizing exchange with Mr. MacMichael:

"Q.: Now to summarize your testimony. You had access to and review, in your professional capacity and as part of your duties for the Central Intelligence Agency between March 1981 and April 1983, of the intelligence information on the subject of arms supply to the Salvadoran rebels, is that correct?

A.: That is correct.

Q.: That includes intelligence information from all the sources of intelligence that we have catalogued earlier in your testimony?

A.: Yes, it does.

Q.: In the intelligence information you reviewed, you found no convincing evidence of the supply of arms to the Salvadoran rebels by the Nicaraguan Government or the complicity of the Nicaraguan Government in such supply?

A.: I did not find any such evidence.

Q.: I would like to ask you, in your capacity as a professional intelligence analyst, does the absence of such evidence have any significance in evaluating the question of Nicaraguan supply of the Salvadoran rebels?

A.: I would say that it casts serious doubt on the proposition that the Nicaraguan Government is so involved.

Q.: Will...

Q.: Will you state again your overall conclusion as to the existence of arms traffic from Nicaragua to the Salvadoran insurgents?

A.: I do not believe that such a traffic goes on now or has gone on for the past four years at least, and I believe that the representations of the United States Government to the contrary are designed to justify its policies toward the Nicaraguan Government." (Hearings of 16 September 1985; emphasis supplied.)

69. The subsequent comments of the Nicaraguan Agent on the purport of Mr. MacMichael's testimony before the Court are of interest. In his letter of 26 November 1985 (NUS 85/25), Ambassador Arguello Gomez stated the following:

"To briefly summarize that testimony and evidence: the Government of Nicaragua has never supplied arms or other war materials to El Salvadoran insurgents or authorized the use of Nicaraguan territory for such purpose. This does not mean that persons sympathetic to the insurgents have not, without the approval of the Nicaraguan Government and contrary to its policy, sent small quantities of arms from or through Nicaraguan territory to the insurgents; however, the Nicaraguan Government has acted diligently to prevent and stop such arms trafficking to the best of its ability. The testimony of Mr. David MacMichael, a former CIA official called as a witness by Nicaragua, was that some arms shipments to El Salvadoran insurgents emanated from Nicaraguan territory at the very beginning of 1981, but that these shipments ceased, and did not resume, after March 1981. He saw no evidence of any other shipments between April 1981 and April 1983, when his employment with the CIA ended. Mr. MacMichael testified that the evidence 'did not establish' that the Nicaraguan Government was responsible for the arms shipments at the very beginning of 1981, and Nicaraguan Government witnesses have told the Court that the Government had no involvement or responsibility as regards those or any other shipments. See, e.g., Hearings of 16 September 1985." (NUS 85/25, pp. 3-4.)

70. It may be asked whether this characterization of the testimony of Mr. MacMichael is within the bounds of advocacy, for while it is true that Mr. MacMichael there concluded, on direct examination, that the evidence "did not establish" Nicaragua's complicity, he also said that he "could not rule it out" - and he said more. But what is extraordinary about this statement of the Nicaraguan Agent is that it simply ignores Mr. MacMichael's answers in response to questions from the Court. As shown below, Mr. MacMichael's answers to those questions (a) directly contradict the continuing contentions of Nicaragua that it has "never supplied arms or other war material to El Salvadoran insurgents or authorized use of Nicaraguan territory for such purpose" and (b) demonstrate that either Foreign Minister D'Escoto and Commander Carrión misrepresented the facts in their sworn submissions to the Court, or,

alternatively...

alternatively, demonstrate that Mr. MacMichael's testimony is so fundamentally flawed as to be treated as impeached. The Court could have chosen between treating the affirmations of Messrs. D'Escoto and Carrión as truthful and those of Mr. MacMichael as untruthful, or treating the latter as truthful and the former as untruthful. Since, however, among many other elements of evidence, Commander Carrión tripped himself up by also submitting an affidavit to the Court which is consistent with Mr. MacMichael's testimony, and inconsistent with his own and with Foreign Minister D'Escoto's, the correct conclusion appears to be that Mr. MacMichael spoke truthfully.

71. Now let us look at the relevant exchanges with Mr. MacMichael referred to in the preceding paragraph. The first was as follows:

> "Judge Schwebel: My first question is this. You stated that you went on active duty with the CIA on 6 March 1981 and left on 3 April 1983, or about that date. Am I correct in assuming that your testimony essentially relates to the period between March 1981 and April 1983, at least insofar as it benefits from official service?
>
> Mr. MacMichael: That is correct ... and I have not had access since I left to classified materials, and I have not sought access to such material.
>
> Q.: Thus, if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?
>
> A.: I think I have testified ... that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.
>
> Q.: Would you rule it 'in'?
>
> A.: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling 'in' than ruling 'out'."
> (Hearings of 16 September 1985.)

It will be observed that Mr. MacMichael does not squarely sustain the opinion attributed to him by the Nicaraguan Agent that the evidence "did not establish" Nicaragua's complicity; rather his "inclination would be more towards ruling 'in' than ruling 'out'". It will also be observed that Mr. MacMichael refers to facts within his own knowledge; he avers that he reviewed "the immediate past intelligence material" for the 1979-1981 period.

72. I then asked Mr. MacMichael whether he could explain how it was that Congressman Boland, who, as Mr. MacMichael acknowledged, saw essentially the same intelligence data as Mr. MacMichael, arrived at the conclusion that, "contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency" (ibid., p. 31). Mr. MacMichael hazarded explanations examined below (paras. 146, 154-155), in answer to what he described as a "very important question". This exchange then ensued:

"Q.: Thank you so much, Mr. MacMichael, and that raises in my mind this question: let us suppose for a moment that your thesis is correct and that the arms flow from Nicaragua to El Salvador in the period of your tenure had substantially or entirely ceased. Let us assume for the moment that there were shipments of arms from Nicaragua to the El Salvador insurgents for the big offensive at the beginning of 1981, that, as Commander Carrión has testified, by the end of 1981 the CIA's support for the contras was in place. You come aboard I think in March 1981 and you are there until 1983, and during at least much of this period the contra operation was being funded actively and was in place, is it not a plausible supposition that far from being ineffective the contras were most effective, and that the very reason why the Nicaraguan Government stopped sending arms, if indeed it did, was because of the pressure of the contras? It could see that it was a counter-productive policy because it had produced United States funding of the contras where United States démarches had produced nothing. Is that plausible?

A.: I think it is plausible ... and I would go on with my response, if you desired me to do so. It is my proposition indeed, and my opinion if I may say so, that the alleged flow of arms from Nicaragua to the Salvadoran insurgents ceased, that no credible substantial evidence of such an arms flow existed in the time that I was examining it, and you propose, if I understand your question, that an explanation for this would be the excellent and effective interdiction and preventive work of this contra force.

Q.: No, if I may make myself a bit clearer, I am not suggesting that the contras were necessarily effective in interdicting arms flows. They may have been somewhat effective, they may have been ineffective, I frankly do not know, but my suggestion of a plausible explanation of the events you have described is that Nicaragua had perceived that a policy of sending arms to insurgents in El Salvador had a price, and they feared it might have an even greater price, and therefore they stopped sending arms, if indeed they did, on which I take no position. I am just offering a hypothesis.

A.: Thank you. The statement I was going to make ... is, assuming that that is correct, it is then very difficult to explain why through the whole period the United States Government continued to maintain that this flow of arms went on, if indeed it had stopped as a result of the Nicaraguan Government's recognition of the perils it faced in continuing

to...

to involve itself, or appeared to involve itself. It is indeed strange to me that the United States Government continued to claim it went on.

Q.: I quite agree, if indeed it had stopped. I said that I am speaking in terms of a hypothesis." (Hearings of 16 September 1985.)

It is an instructive exchange, for it confirms Mr. MacMichael's acceptance of the fact that Nicaragua had shipped arms to the Salvadoran insurgents before March 1981; and indicates his acceptance of the hypothesis that the reason why the arms flow might have ceased in the period March 1981-April 1983 was because the Nicaraguan Government had come to feel the pressures exerted upon it because of its subversion of El Salvador (such an hypothesis would also apply to a slowing, or a more effective concealment, of arms trafficking as it would to its cessation).

73. The exchange then resumed in these terms:

"To turn to another aspect of these facts, Mr. MacMichael, is it a fact that leaders of the Salvadoran insurgency are based in Nicaragua and regularly operate without apparent interference from Nicaraguan authorities in Nicaragua?

A.: I think the response to that question would have to be a qualified yes, in that political leaders and, from time to time, military leaders, of the Salvadoran insurgency have reported credibly to have operated from Nicaragua, that this was referred to frequently by the United States Government as a command and control headquarters, and that such an action could certainly be defined as one unfriendly toward the Government of El Salvador recognized by the United States. I have confined my testimony to the charge of the arms flow." (Ibid.)

74. An extended exchange then ensued as to the plausibility of Cuba sending arms to the Salvadoran insurgency through Nicaragua. Mr. MacMichael declined to draw conclusions, but acknowledged that such Cuban activities were "plausible" (ibid., p. 39).

75. Thereupon there was this exchange:

"Q.: Mr. MacMichael, have you heard of Radio Liberàcion?

A.: I have heard of Radio Liberacion, yes.

Q.: What is it? Can you tell the Court, please?

A.: It was a predecessor of the basic Radio Venceremos which is used by the FMLN in El Salvador. I believe that at one time a radio broadcast under the title of 'Radio Liberacion' was supposed to have originated from Nicaraguan soil.

Q.: Did...

Q.: Did they in fact originate from Nicaragua, to the best of your knowledge?

A.: To the best of my knowledge I think I would say yes, that is the information I have." (Hearings of 16 September 1985.)

Thus Mr. MacMichael acknowledged broadcasting from Nicaragua by the Salvadoran insurgents. (The FBIS has published the monitorings of many such broadcasts. For example, on 9 January 1981, Radio Liberacion, operating out of Nicaragua, boasted that the new United States President - the "cowboy President" - would come to office too late to stop the guerrilla victory in El Salvador. FBIS, Central America, 12 January 1981.)

76. At that point, the following crucial exchange took place between Mr. MacMichael and myself:

"Q.: Have you heard of an airfield in Nicaragua at Papalonal, or an airstrip?

A.: Yes, I have.

Q.: Are you aware of the fact that the United States Government under the Carter Administration made representations to the Nicaraguan Government about the use of that airfield as a principal staging area for the airlift of arms to insurgents in El Salvador?

A.: Yes, I recall that very well.

Q.: In an interview with the Washington Post published on 30 January 1981, the outgoing Secretary of State, Edmund Muskie, stated that arms and supplies being used in El Salvador's bloody civil war were flown from Nicaragua 'certainly with the knowledge and to some extent the help of Nicaraguan authorities'. Now as you know the Administration for which Mr. Muskie spoke had given more than $100 million in aid to the Sandinista Government since it took power.

A.: That is correct.

Q.: ... Do you think that Mr. Muskie was speaking the truth?

A.: Oh yes, in that case. For example, I spoke earlier under direct questioning from Mr. Chayes regarding information that had existed for that period - late 1980 to very early 1981 - and when I mentioned defectors I had in mind as a matter of fact some persons who ... stated under interrogation following their departure from Nicaragua that they had assisted in the operations out of Papalonal in late 1980 and very early 1981, and as I say, I am aware of this; there was also an interception of an aircraft that had departed there - that had crashed or was unable to take off again from El Salvador where it landed - and I think that was in either very early January or late December 1980 and this was the type of evidence to which I referred, which disappeared afterwards.

Q.: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency. Is that the conclusion I can draw from your remarks?

A.: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion." (Hearings of 16 September 1985.)

77. The foregoing exchange calls for the following observations. First, Mr. MacMichael confirms that the Carter Administration made representations to Nicaragua about the use of the airstrip at Papalonal to fly arms to Salvadoran insurgents (see in this regard, President Ortega's statement to the New York Times quoted in paragraph 57 of this appendix). Second, he agrees that President Carter's Secretary of State spoke truthfully in accusing Nicaragua of knowing about and supporting the supply of arms to the Salvadoran insurgency. (If Mr. Muskie spoke truthfully, then it follows that various spokesmen of the Nicaraguan Government in this case have spoken untruthfully in saying the opposite on that precise point.) Third, the description of the facts surrounding the operations out of Papalonal given by Mr. MacMichael closely corresponds with the account given of those very operations by the United States ("Revolution beyond our Borders", pp. 18-19, 28-29) - an account, much of which was read out in Court (see para. 58 above), which is incompatible with the reiterated claim of the Nicaraguan Government that it "never" participated in the shipment of arms to Salvadoran insurgents (see also, Background Paper: Nicaragua's Military Build-Up and Support for Central American Subversion, pp. 21-22, submitted by the United States to the Court with its Counter-Memorial, and the statement of Ambassador Kirkpatrick of 25 March 1982 in the Security Council about the role of Papalonal airstrip, S/PV.2335, pp. 42-43). Fourth, and most important of all, Mr. MacMichael agrees that "it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency". That affirmation undermines the bedrock assertions of the position of the Nicaraguan Government in this case. If what Mr. MacMichael takes as the fact is the fact then it necessarily - not possibly but necessarily - follows that Foreign Minister D'Escoto, Commander Carrión and the Nicaraguan Agent have sworn and spoken contrary to the fact.

3. Admissions by Nicaraguan counsel

78. Contrary to the practice of the Court, and the import of Article 53 of the Rules of Court, the Nicaraguan Government released the substance of its pleadings to the press before they were made public by the Court (see the New York Times of 7 May 1985, at p. A16, which contains a detailed summary of the Nicaraguan Memorial on the merits, not released by the Court until the opening of oral argument in September). Perhaps then it should not have been surprising that, shortly before the merits of the case were argued in Court, Professor Chayes and Mr. Reichler gave an interview to Shirley Christian of the New York Times by which readers were informed of what "the Government of Nicaragua

will try to prove in proceedings opening at the World Court next week ..." (the New York Times, 8 September 1985, p. 23). That article contains the following passages:

> "Addressing a longstanding United States accusation, the lawyers for Nicaragua said they would acknowledge that the Managua Government supplied weapons to Salvadoran guerrillas for the big January 1981 offensive against the United States-backed Government in El Salvador. But they will argue that there is no credible evidence of sustained arms shipments since then."

After some paragraphs, the article concludes:

> "The lawyers said their key witness to rebut the United States charge that the Sandinistas were aiding the Salvadoran guerrillas, the initial reason the Administration used for backing the contras, would be David MacMichael, a former CIA analyst. Mr. MacMichael has previously given Congressional testimony saying the Administration's case is weak.
>
> American officials have said the Sandinistas tacitly acknowledged several years ago that aid might be going from Nicaragua to the Salvadoran guerrillas but maintained it was from individuals.
>
> Mr. Reichler said he 'strongly advised' Nicaragua that it should not undertake the court suit if it were still involved in arms traffic to El Salvador.
>
> 'They assured us from the beginning that they had nothing to hide,' he said."

79. Thus we have counsel for Nicaragua, according to this report, (a) acknowledging that the Nicaraguan Government supplied weapons to the Salvadoran insurgents for their January 1981 final offensive; (b) maintaining that there is no "credible" evidence of "sustained" arms shipments since; (c) stating that they advised the Nicaraguan Government not to bring suit if it were "still" involved in such traffic and (d) characterizing Mr. MacMichael as their "key witness". It is interesting to note that when that key witness testified, he declared to be the fact what Nicaraguan counsel said that they would acknowledge as the fact.

80. In a further article of 14 September 1985, also written by Shirley Christian, the following lines are found:

> "American lawyers for the Nicaraguan Government, whose suit now being heard in The Hague charges aggression by the United States because of its support for Nicaraguan rebels, have acknowledged that weapons were shipped to El Salvador before the January 1981 guerrilla offensive there but say there is no 'credible evidence' of a sustained flow since April 1981. They also say there is no proof that the Nicaraguan

> Government itself was responsible for the arms that were shipped in late 1980 and early 1981." (The New York Times, 14 September 1985, p. 3.)

While the article of 8 September 1985 contains admissions which, if accurately reported, contradict the position of the Nicaraguan Government that it "never" sent arms to Salvadoran rebels, the article of 14 September is less damaging to Nicaraguan credibility. It reaffirms that Nicaraguan counsel have acknowledged that weapons were shipped to El Salvador for the 1981 final offensive and reiterates that there is no "credible" evidence of a "sustained" flow thereafter. But it adds that counsel also say, not that it is not true, but that "there is no proof" that the Nicaraguan Government itself was responsible for the arms that were shipped in late 1980 and early 1981.

81. In his letter to the Court of 15 October 1985, the Nicaraguan Agent stated the following:

> "Nicaragua's counsel have never stated or implied that the Government of Nicaragua supplied arms to rebels in El Salvador or condoned the supply of arms by others from Nicaraguan territory. Any newspaper article purporting to attribute such statements or implications to Nicaragua's counsel is inaccurate."

No explanation is proffered of what Nicaraguan counsel actually said, or of in what precise respects the two articles reporting their statements are "inaccurate".

82. In his peroration to the Court, Professor Chayes equivocated: "Nicaragua produced concrete and credible evidence all of which shows that it was not supplying arms to El Salvador either now or in the relevant past" (Hearings of 19 September 1985). What, it must be asked, is "the relevant" past? But it must first be observed that Nicaragua presented no evidence - apart from self-serving affirmations by the Nicaraguan Foreign Minister, Commander Carrión and the Nicaraguan Agent - about what it is doing "now". It presented the evidence of Mr. MacMichael, which, to the extent that it is of value, can be so only for the period in which he claims to have had access to the intelligence data, namely, mid-1979 to April 1983. April 1983 is not "now". And as for the past, the admissions of Nicaraguan leaders and of its witnesses of themselves demonstrate the falsity of any such claim unless, arguably, the period before April 1981 is excluded as not being "relevant". And what reason is there for concluding that it is not relevant, except that to do so suits Nicaragua's case? If one considers the motivations of the United States, the actions of Nicaragua before April 1981 demonstrably are relevant, for they led, among other things, not only to support of the contras, but to (a) the resumption of United States arms aid to the Government of El Salvador, which had been suspended; (b) the suspension of economic aid to the Government of Nicaragua by the Carter Administration and (c) the termination of economic aid to the Government of Nicaragua by the Reagan Administration. A number of reports indicate that a critical factor in leading the United States to support the contras, and in persuading the United States that the Sandinista

Government cannot be trusted, was not only the shipment of arms for the "final offensive" - an offensive which neither the Governments of El Salvador nor the United States found irrelevant - but the persistence of the Nicaraguan Government in dissembling about what it actually had been doing, before January 1981 and thereafter: a persistence which the Nicaraguan Government has maintained in Court (see, e.g., Roy Gutman, "Nicaragua: America's Diplomatic Charade", Foreign Policy, Fall 1984, p. 6: "Haig's distrust of the Nicaraguans stemmed from their denial of furnishing aid to the Salvadoran guerrillas in early 1981." See also, Alexander M. Haig, Jr., Caveat, 1984, pp. 88-89, 103, 109, 122-123.)

83. For his part, Professor Brownlie offered the following "hypothesis":

> "The hypothesis concerns a small State and a period of five or six years. In the first year of the five or six-year period we will assume that there is evidence of arms moving across the frontier of that small State into a neighbouring State. If it appeared that the Court believed that such a set of facts justified the type of coercion brought to bear by the United States over a period of four or five years, long after the original hypothetical traffic in arms had ceased, and that it could justify the massive use of a variety of forms of coercion over that period of four or five years; in my submission that would be virtually a return to the concept visible in the 1930s in Europe, the diplomacy of provocation, where some original event is taken as a justification for a long sequence of coercion." (Hearings of 20 September 1985.)

This apparently is an invitation to the Court to excuse the misrepresentations of Nicaragua's officials and to overlook the prevarication of Nicaraguan policy, and to condone Nicaragua's violations of international law in the period July 1979 to January 1981, particularly on two grounds: (a) Nicaragua's shipment of arms has ceased and (b) because it has ceased, and because Nicaragua is Nicaragua and the United States is the United States, the United States response is disproportionate, indeed it is the United States which pursues "a diplomacy of provocation".

84. The fact is that Professor Brownlie's hypothesis is hypothetical; that arms shipments and other support by Nicaragua of insurgency in El Salvador have not ceased. That is not to say that the question of the proportionality of the United States response nevertheless is not a genuine question; clearly it is. But what Professor Brownlie's statement adds up to is another indication by Nicaraguan counsel of the duplicity of the position in Court of the Government of Nicaragua. It is clearly an inferential admission that, in the earlier period of the events in issue, the Nicaraguan Government did send arms and other material support to the insurgency in El Salvador.

85. Finally, in respect of the admissions of Nicaraguan counsel, let us look to the closing statement of the Agent of Nicaragua. That statement begins with what may be seen as a political rather than legal

appeal: "The cause of my country is also the cause of all the small nations on earth ... The cause of my country is, and has been, the cause of Latin America." (Hearings of 20 September 1985.) He embroiders that theme with references to "mobilizing the force of international law" not as an impartial arbiter between States but as "a defence against the innumerable interventions of the United States in Latin America" (ibid.). With respect to what he recognizes to be a critical issue of the case, "the question of arms supplied to El Salvador", he reiterates that Nicaragua's position "remains the same as it was at the beginning of the case and as it always has been. We have never varied from that position." He quotes again the affidavit from "our Foreign Minister, Father Miguel D'Escoto" who "swore" that, "In truth, my Government is not engaged and has not been engaged in the provision of arms or supplies to either of the factions engaged in the civil war in El Salvador." He quotes Commander Carrión's sworn testimony that Nicaragua's Government has "never" had a policy of sending arms to opposition forces in Central America. He denies that there were "several" training facilities provided for Salvadoran guerrillas. He affirms that Nicaraguan counsel have never said anything to the contrary. And then he turns to Mr. MacMichael's testimony, as "the one person who has seen all the evidence in the possession of the United States relating to the supply of arms to the Salvadoran guerrillas during the period of time that is relevant to this case".

86. That last sentence calls for two comments. The first is that Mr. MacMichael cannot conceivably be "the one person" who has seen all of such evidence. Not only is that claim implausible on its face; Mr. MacMichael in Court himself conceded that Congressman Boland (and presumably other members of the Congressional committees on intelligence) had seen the very data he had seen: "it is my belief," Mr. MacMichael testified, that the evidence Congressman Boland saw "was essentially the same evidence that I saw" (Hearings of 16 September 1985). Second, the Agent of Nicaragua takes refuge in the same shelter which Professor Chayes earlier dug: that of "the period of time that is relevant to this case". Earlier, the Agent of Nicaragua had maintained that "it is of no relevance to discuss happenings five years ago ..." (Hearings of 19 September 1985). These references to a "relevant period" may, again, be taken as an inferential admission that, in what Nicaragua deems the "irrelevant period", it did supply arms to the Salvadoran insurgents.

4. Admissions by leaders of the Salvadoran insurgency

87. Speaking in Managua on 9 April 1983 at the funeral of his murdered Salvadoran comrade, Melida Anaya Montes, known as "Commander Ana Maria", at the Commander Ana Maria Revolutionary Square in Managua, the Salvadoran insurgent chief, Cayetano Carpio ("Commander Marcial") gave a eulogy before the most senior officials of the Nicaraguan Government, the FSLN, and Salvadoran insurgent groups. He proclaimed that:

> "The Reagan Administration, which is an enemy of mankind and which threatens the peoples of Central America and the world, is daily plotting acts of political and military aggression against our peoples.

That...

That is why it is so profoundly moving that at a time of great bereavement like these which our people are experiencing, the people of Nicaragua are offering us this comforting solidarity and encouragement to continue the struggle against the common enemy with much more ardor.

Imperialism is accusing Nicaragua by saying that the leaders of the Salvadoran people are here; the leaders of the FMLN-FDR. In my opinion this charge was made as if one people's solidarity with another is something to be ashamed of. However, one thing is evident, the members of the Directorate and all its working teams, some inside the country and others outside the country, are steadfastly at work fully aware of the need to unite the internal struggle with international solidarity and with the struggle of all peoples for the liberation of Central America and El Salvador. That is why we move from one country to another. However, when we are in some other country, they do not accuse that country of harboring the FDR directorate, for example. I received the blow of this crushing news at a congress that is currently underway in Libya. From that faraway place, from the deserts of Africa, I immediately rushed here, trying to get here on time for the funeral services of our late companera.

However, imperialism does not accuse these other countries. It accuses Nicaragua. Why? Because imperialism has an overall policy against our Central American peoples, who have already risen up irreversibly in a revolutionary struggle until the final victory.

The Central American peoples' struggle is one single struggle. When he formed his rebel army in the mountains, Sandino had companeros from all over Central America beside him. And all of Central America fought against imperialism in the struggles and accomplishments of the heroic Nicaraguan guerrillas. Our revolutionary leader, Companero Farabundo Marti, was there alongside Sandino.

...

The Salvadoran people are tirelessly struggling, but the struggles of our two peoples are not merely the struggles of El Salvador and Nicaragua. That is why from day to day the Reagan administration is scheming, dealing political and military blows, aggressions and blockades, and making plans to escalate the aggression not only against El Salvador but also against Nicaragua. Therefore, at a time like this, at a time in history which is one of transition toward independence for all our peoples, the glorious example that the Nicaraguan people have given us, their warm solidarity in moments of grief, and I am sure also in moments of great joy, when we achieve victory we will be arm in arm and struggling for the total liberation of Central America.

...

The people of El Salvador will thank you from the bottom of their hearts for this recognition to one of our children, one of our leaders - today, always, at every moment - and for these expressions of solidarity by the people of Nicaragua. All the Central American nations are experiencing the aggression of U.S. imperialism. We are struggling against its intervention in every dignified way we can, but we are also aware that all the Central American nations will become one revolutionary fire if U.S. imperialism carries out its aggressive plans against Nicaragua or El Salvador.

...

You can rest assured that we will fight to the end for the victory of all Central American nations, which deserve to rule their own destinies. On behalf of the FMLN and the FDR, and especially on behalf of the companeros of the Farabundo Marti people's liberation forces, I tell you dear friends, embraced in the same struggle, thank you very much. Until the final victory! Revolution or death! (FBIS, Central America, 11 April 1983, pp. 8-9.)

88. The Sandinista communiqué read out at the funeral service, addressed to the Salvadoran insurgent forces, read:

"Brothers: The death of Commander Ana Maria, deputy commander of the Salvadoran FPL and member of FMLN's DRU, has been a deep blow to the hearts of Nicaraguans. Commander Ana Maria had represented the interests of her people ever since she assumed leadership of the teachers struggle and joined the armed struggle of the glorious Salvadoran people. She managed to be at the same time voice and rifle, missionary and fighter. She represented well the interests of the revolution and contributed remarkably to the unity and development of the Salvadoran people's struggle. Her death brings mourning to the Nicaraguan flag and the hearts of Central Americans and comes at a time when imperialism's ferocity against El Salvador and Nicaragua has been multiplied. Her death comes when imperialism has launched war against our people. Ana Maria's death, however, is not merely another demonstration of the unlimited cruelty of our enemies. It is also an additional powerful reason for the peoples' anger to turn into determination and victories.

The FSLN National Directorate, on behalf of the Nicaraguan people, expresses its most fervent solidarity to the companeros of the FMLN DRU, the FDR, the FPL, the Salvadoran people, and particularly to our companero, Salvador Cayetano Carpio, Marcial.

Our peoples are invincible, because they are revolutionaries. Long live the heroic struggle of the Salvadoran people! [Crowd answers: Viva!] Long live the immortal memory of Commander Ana Maria! [Crowd answers: Viva!] Free fatherland [Crowd answers: 'Or death'!] [Signed] FSLN National Directorate." (Ibid., p. 11.)

89. Within...

89. Within a few days, Cayetano Carpio was reported to have committed suicide in Managua, apparently because of the fact that his supporters (not the CIA as initially charged) had murdered Melida Anaya Montes, and, it is alleged, because of pressures exerted upon him by the Nicaraguan Government (see the account by James Le Moyne below, para. 188). His funeral was attended by the most senior officials of the Nicaraguan Government.

90. It may be observed that, in answer to a question put by me, the Agent of Nicaragua transmitted to the Court the following statement in a letter of 26 November 1985 (NUS 85/27):

> "2.1. Melida Anaya Montes arrived in Nicaragua as a refugee approximately one month before her death; she did not establish residence in Nicaragua and there is no record of her occupation while in Nicaragua. Cayetano Carpio arrived in Nicaragua after Melida Anaya Montes' death in order to attend her funeral; he did not establish residence in Nicaragua and he had no occupation during the few days he was in Nicaragua.
>
> 2.2. Melida Anaya Montes and Cayetano Carpio were associated with the insurgency in El Salvador."

This statement may be compared with Christopher Dickey's account of the murder of Melida Anaya Montes by followers of Cayetano Carpio. He observes that "home to a frail Salvadoran lady" who was second-in-command of the largest single faction of the Salvadoran guerrilla front was a house in Managua; he indicates that he interviewed her there in November 1981 (loc. cit., pp. 212, 304). "On April 6, [1983] Ana Maria was murdered in her pleasant Managua bungalow." (P. 213.) Dickey's account continues:

> "When word of the killing got out, Tomás Borge and Lenin Cerna, the head of State Security, held a press conference. Cerna himself was named to head up the investigation. And Borge quickly deduced what its results would be. The murder, he said, put Nicaragua in the difficult position of admitting that a member of the Salvadoran guerrilla directorate was resident in Managua. It seemed to confirm the charges constantly made by the Reagan administration that the Sandinistas were supplying command and control facilities to the Salvadorans. So, who else could have killed Ana María but the CIA? Who else would be so brutal?
>
> 'I do not need to present specific proof,' said Borge. 'I do not need to say: "Here is the murderer," because everyone knows who the murderer is.'
>
> But Ana María's followers among the Salvadoran guerrillas were not so sure. They knew the bitterness of Marcial. They urged Borge to press harder on the investigation. After two days a servant in Ana María's house confessed her complicity to the Sandinista police. The sound of the screams haunted her and would not let her sleep, she told them. She implicated other conspirators and the path quickly led to the closest friend and confidant of Marcial himself. And the implication,

> even indirect, of Marcial as the author of the murder was more humiliating for the Sandinistas - and for Borge especially - than anything the CIA could have devised.
>
> But as the evidence came out, and Marcial's lieutenant confessed unrepentantly to doing what was necessary to save Marcial's ideals, Marcial not only refused to acknowledge any role in the crime, he accused the Sandinistas - even Tomás Borge - of plotting against him. Old and sick, he was still defiant.
>
> On April 12, Marcial died at his own house in Managua." (Pp. 213, 214. The quotation of Commander Borge is from his statement at a press conference.)

Dickey notes that Cayetano Carpio's farewell letter to his followers was discussed by him "with FMLN officials in Managua in June 1984" (p. 304). He records that he "interviewed Salvadoran guerrilla and opposition leaders obviously resident in Managua in November 1981" (p. 290).

91. The letter of the Nicaraguan Agent of 26 November 1985 states that:

> "The Government of Nicaragua has permitted, and continues to permit, Salvadoran refugees whether or not they are associated with the insurgency in that country, to enter Nicaraguan territory ... Nicaragua is not the only country that allows Salvadorans who may be associated with the insurgency there to enter its territory ..."

and concludes that:

> "it would appear senior representatives of the Salvadoran insurgency have spent more time, and undertaken more political activity, in the United States than Nicaragua."

While the accuracy of that latter statement cannot be judged, the reiterated contention in this letter that Nicaragua "has never permitted Salvadoran insurgents to establish a headquarters ... in Nicaraguan territory" may be compared with Dickey's reporting. If Melida Anaya Montes, resident in Managua, was second-in-command of the largest faction of Salvadoran guerrillas, and her effectively displacing Cayetano Carpio - whose home also was in Managua - as commander-in-chief was a cause of her murder (see Christopher Dickey, "Salvadoran Rebel Intrigue", the Washington Post, 27 June 1983, and Stephen Kinzer, "Salvador Rebels Revile Late Chief", the New York Times, 14 December 1983), where was the headquarters of the Salvadoran Popular Liberation Forces other than his or her Managua residences or working quarters? (See also para. 188 below.)

92. In 1982, the New York Times reported, as a result of an extensive series of interviews with guerrilla leaders and others by one of its most experienced Latin American correspondents, Alan Riding - whom the representative of Nicaragua in the Security Council referred to as "the well-known American correspondent and specialist in Latin American affairs ..." (S/PV.2423, p. 38) and as "an American source well versed in the region" (ibid., pp. 39-40) - that:

"The five guerrilla groups that are fighting to topple El Salvador's civilian-military junta are headed by Marxists ... In scores of interviews in Mexico and Nicaragua, senior rebel commanders ... acknowledge that, in the past, they received arms from Cuba through Nicaragua, as the Reagan Administration maintains ... the guerrillas now concede, Cuba agreed to supply them with the necessary armaments - many of them trans-shipped through Nicaragua - to enable them to open their 'final offensive' on January 10, 1981, just days before President Reagan took office. The guerrillas say that the supply of arms from Cuba has since been halted. ... Nicaragua has become a useful meeting place [for guerrilla commanders], but they also appear frequently in Mexico and Panama for talks with foreign diplomats and politicians." (Alan Riding, "Salvador Rebels: Five-Sided Alliance Searching for New, Moderate Image", the New York Times, 18 March 1982, pp. 1, 16.)

93. The Los Angeles Times contains the following account:

"El Salvador's leftist guerrilla movement boasted Sunday of its close ties to Cuba and Nicaragua and declared that it sees its struggle against the U.S.-backed government in San Salvador as part of a wider regional conflict. ...

The broadcast, transmitted from a secret location in neighbouring Nicaragua - whose Marxist-led Sandinista regime has allowed the Salvadoran guerrillas to establish their headquarters in Managua - also boasted that the rebels have imported arms 'through all routes that we could' and that 'we have used all of Central America and other countries' for that purpose.

The broadcast appeared to support charges made by the Reagan Administration that the insurgency is at least encouraged and armed, if not directed, by the Soviet Union, Cuba and Nicaragua and is aimed at toppling one moderate government after another throughout the region." ("Salvadoran Rebels Brag of Cuban Ties", Los Angeles Times, 13 March 1983.)

94. The Washington Post of 14 March 1983 carried a similar dispatch by Christopher Dickey from San Salvador:

"El Salvador's guerrillas, in a defiant response to President Reagan's speech last week urging an expansion of the U.S. commitment to the government they are fighting, have reaffirmed their determination to maintain ties in Cuba and Nicaragua.

In a broadcast last night, they also threatened 'within the context' an 'open regionalization' of their war if the Reagan administration continued to broaden its support for the faltering Salvadoran government.

In...

In a broadcast over their clandestine Radio Venceremos, the rebels said: 'We are and will continue being friends of the people and governments of Cuba and Nicaragua, and it does not shame us. Completely to the contrary, we are proud to maintain relations with those people - bastions of the anti-imperialist struggle. The Reagan administration is not one to tell the FMLN [Farabundo Marti National Liberation Front] who ought to be its friends and who its enemies.' The statement made no effort to deny receiving Cuban and Nicaraguan support as the rebels have in the past. ...

The rebels' broadcast defended their 'right' to get arms anywhere. While insisting that their main headquarters are inside the country, along with their radio transmitter they admitted to having 'important missions' outside El Salvador.

'We have carried out important logistical operations of a clandestine character with which we have armed and munitioned our forces for a long time. We have carried out these operations by all the courses we could, and we have used all Central America and other countries for them,' the broadcast said.

As Washington has raised its commitment in the region during the past month, the Nicaraguans also have reaffirmed their close ties, if not their concrete material support, with the Salvadoran rebels.

The Sandinista leaders in Managua feel under mounting pressure from a rebellion that reportedly receives covert funding from Washington on the basis that such action helps 'interdict' arms supplies to the Salvadoran guerrillas. Speaking March 3 at a funeral for 17 adolescent Sandinistas killed by counterrevolutionaries, Nicaraguan Commander Bayardo Arce warned that his party's 'internationalism will not bend' and that 'while Salvadorans are fighting to win their liberty Nicaragua will maintain its solidarity."

95. The New York Times of 19 May 1985 carried the following report from El Salvador under the title "Salvador Puts Guerrillas on the Defensive":

"Two weeks ago, the army ambushed and captured a senior rebel commander, Nidia Diaz, who was reportedly carrying important documents. Another senior commander, Napoleon Romero, who says that he surrendered, reported in an interview last week that the insurgents were having difficulty drumming up support. (There was a failed rebel effort last fall to recruit new fighters forcibly.) Speaking with a Government official present, Mr. Romero added that the insurgents had also suffered shortages of supplies. Cuba and Nicaragua, he contended, provide 70 percent of the guerrillas' bullets and explosives. The rebels' general staff works inside El Salvador, he said, but each of the five military factions maintains offices in Managua. Mr. Romero's senior rank in the Popular Liberation Forces has been confirmed by other rebels, but his observations may have been colored while in custody, a period of more than a month."

96. The...

96. The documents referred to in the foregoing article, seized when Salvadoran Government forces captured Nidia Diaz, reportedly the most senior rebel commander ever captured by Government forces, are the subject of a long analysis in the New York Times of 21 May 1985, page A11, by James Le Moyne. The documents, he writes, "appear to represent virtually the entire archive of the Revolutionary Workers Party" of which Miss Diaz is "a top official" and various details "appear to support the authenticity of the documents". Among the points indicated in the documents are:

- Salvadoran rebels consider Nicaragua their closest ally;

- Salvadoran guerrillas are attending courses in the USSR, Viet Nam and Bulgaria;

- The Sandinistas appeared ready to cut off aid to the Salvadoran rebels at the end of 1983 and may have done so, at least temporarily;

- Jose Napoleon Duarté is the rebels' "principal and most dangerous enemy";

- Salvadoran rebel officials, resident in Nicaragua, briefly left Nicaragua in November 1983; at that time, a document notes, and Sandinistas were about to expel the rebels from Managua and "definitely cut off supplies" in response to Sandinista fears of attack by the United States. The Salvadorans sought the intercession of "Fidel";

- If the United States were to invade Nicaragua, the Salvadoran rebels would fight in the Sandinista Army; in that event, the Nicaraguans could no longer "be protecting supplies" to the Salvadoran rebels and most rebel officials living in Managua would have to leave;

- The Salvadoran guerrillas should stress their desire for unity with the Nicaraguans, which called for "the most intimate co-ordination in a concrete manner on all political, military, propaganda and diplomatic fronts".

One of the documents, from the five top Salvadoran rebel commanders to the Sandinista National Directorate of 10 November 1983, calls on the Directorate to provide the Salvadoran rebels "new and audacious forms of aid ... We thank you for all the aid you offered and hope it continues because it is indispensable to defeat whatever form of invasion on Central American soil." These admissions of leaders of the Salvadoran insurgency inculpating Nicaragua, which relate to 1983 and later, must be added to the extensive and profoundly inculpatory admissions of leaders of the Salvadoran insurgency and of leading Communist States reflected in the documents captured in 1980 and 1981, from which excerpts are quoted in paragraph 20 of this appendix.

97. The New York Times of 18 November 1985, page A15, reported a public, 20-page proposal signed by the most senior commanders of the Farabundo Marti National Liberation Front, which called for the end of United States "intervention" in El Salvador, suspension of the Constitution, formation of a transitional government including the rebels, merger of the rebel and Government armies, and elections. The article concludes:

"In...

"In a new twist on previous proposals, the rebel document acknowledges that the guerrillas receive some outside assistance and offers to stop this if the Government also stops receiving outside aid."

5. Statements by defectors

98. The evidential weight to accord to the statements of defectors is open to debate. In its arguments, Nicaragua relied heavily on the affidavit of Edgar Chamorro, a defector from the contras, on whose affirmations the Court also relies. Mr. MacMichael, in explaining the basis of his conclusion that, in the period mid-1979 through January 1981, the Nicaraguan Government had been sending arms to Salvadoran insurgents, gave weight, among other things, to testimony of defectors (Hearings of 16 September 1985). While elsewhere, Mr. MacMichael questioned the reliability of testimony of defectors, he readily recognized that a defector in the hands of United States authorities had nothing to fear if his revelations ran counter to what the United States might wish him to say (ibid.).

99. The testimony of one such defector was submitted to the Court in an Annex 46 to the Counter-Memorial of the United States. Michael Bolanos Hunter, a former guerrilla leader and officer of the Nicaraguan Ministry of the Interior, made a large number of revelations which, if true, show that the Nicaraguan Government has been engaged in efforts to overturn neighbouring governments including that of El Salvador. Thus, Mr. Bolanos claims in the interview published in the Washington Post which appears as Annex 46 that:

"Planning and training for the spectacular and damaging raid by leftist guerrillas in nearby El Salvador on the Salvadoran government military air base at Hopango in January 1982 was centered eight miles from Managua in a Nicaraguan facility under the supervision of a Cuban adviser. This account, which Bolanos said he learned from the Cuban adviser, illustrates the extensive support Bolanos said Nicaragua gives to the rebels fighting against the U.S.-backed government in El Salvador."

100. A more detailed account of Mr. Bolanos's allegations appeared in the Washington Post of 19 October 1983, page A15, "Defector: Salvadoran Rebels Closely Tied to Sandinistas". That article read as follows:

"Top commanders of the leftist rebels fighting the U.S.-backed government of El Salvador are frequently in Managua, Nicaragua, where they are in constant touch with Sandinista officials about questions of arms supply, strategy and tactics, according to a defector from the Nicaraguan counterintelligence agency.

Miguel Bolanos Hunter, echoing charges long made by the Reagan administration, said Nicaragua has been provided guns, advice, co-ordination and training to the guerrillas in El Salvador since they began trying to overthrow the government there in 1979.

However, 'a river' of arms shipments from Cuba and the Soviet Union through Nicaragua to El Salvador has all but stopped, Bolanos said, because 'they now have five times more than what we had against ousted dictator Gen. Anastasio Somoza'.

Bolanos claimed that Nicaragua has become 'a new Cuba' in training guerrilla forces from throughout Latin America. As a Sandinista official charged with working against the U.S. Embassy, Bolanos said, he met visiting guerrilla leaders from Colombia, Argentina, Chile, Guatemala, Costa Rica and El Salvador, all of which have centers of operation in Managua.

The Salvadorans have two houses in Managua's residential Las Colinas district, one a communications center and the other a 'safe house' for visiting Salvadoran guerrillas and for meetings with Nicaraguan officials, Bolanos said.

Visiting Salvadorans also use houses belonging to Nicaraguan officials, and some of the guerrilla chiefs are in Managua more than they are in El Salvador, he continued. 'They fly over to the mountains for a day to boost the morale of the troops and fly out again at night sometimes,' he said.

Nicaragua is better than Cuba as a training base for guerrillas because it has regular commercial air transport and permeable borders, while Cuba's island status makes it hard for guerrillas to come and go without being spotted, he said.

Bolanos said he had fought during the 1979 Sandinista takeover of Managua with a Salvadoran known as 'Memo', who then returned to El Salvador and became second in command of the guerrilla units fighting in Morazan province in northeastern El Salvador. Bolanos said he encountered Memo in Managua last October, 'and he said they were using the same methods to get arms as we used in Nicaragua'.

These methods, Bolanos continued, included twice-daily airplane flights to barricaded sections of highway in guerrilla-controlled areas. Each plane carried 30 to 40 guns, he said, and medicine and ammunition often were dropped by parachute, while other arms came concealed in trucks or overland on mules.

His cousin, Miguel Guzman Bolanos, is in charge of arms distribution in Nicaragua, Bolanos said, and told him that Luis Carrion, a member of the Sandinista directorate, had been promised in a 1980 trip to the Soviet Union that the Soviets would provide the Nicaraguans two AK47 machine guns for every weapon they gave the Salvadoran guerrillas. Those included U.S.-made guns the Sandinistas obtained from Cuba, which in turn got the guns from Vietnam, Bolanos said.

...

Bolanos described the aftermath of the murder in Managua last April 6 of Salvadoran guerrilla leader Melida Anaya Montes, which he said occurred across from the house from which Bolanos' agents were watching the nearby residence of a U.S. Embassy political officer. Bolanos' superior, Lenin Cerna, a director of the Interior Ministry's department of state security, accused the Sandinista party's foreign affairs head, Julio Lopez, of having failed to guarantee the guerrilla leader's security and of failing to let Cerna know about the arrangements.

Montes was betrayed to her killers by her cook and one of her security guards, Bolanos said, and was killed for 'political reasons - she was just back from Cuba and wanted to have more dialogue between the guerrillas and the Salvadoran government'."

101. A second notable defector is "Comandante Montenegro", a figure whose importance Mr. MacMichael acknowledged (Hearings of 16 September 1985). A pertinent article from the New York Times is republished in Annex 48 to the United States Counter-Memorial. Arquimedes Canadas, known as Commander Montenegro, was one of the most successful guerrilla leaders of the Salvadoran insurgents, most of the Salvadoran air force having been destroyed on the ground in an operation led by him. In an interview in Washington in 1983, Mr. Canadas said that, before 1980, the insurgency in El Salvador was largely "nationalistic". Since then, he contends, Cuba has "directed the activities" of the insurgency, whose immense destruction of the economic infrastructure of El Salvador he describes. In respect of the destruction of the Salvadoran air force, he is quoted as declaring:

"'The seven soldiers that carried out the operation were trained for six months in Havana,' Mr. Canadas said. 'In October, when I was in Managua, Villalobas had put me in charge of the mission.' Joaquin Villalobas leads the People's Revolutionary Army." ("Cuba Directs Salvador Insurgency, Former Guerrilla Lieutenant Says", the New York Times, 28 July 1983, p. A10.)

Explaining his defection after his arrest, he said that he had made known his dissatisfaction: "that the process was being transformed and manipulated by other interests, the Cubans and Nicaraguans". The report continues:

"Mr. Canadas said he grew aware of Cuba's involvement in mid-1980 when the Farabundo Marti National Liberation Front was set up as the umbrella organization for Salvador's guerrilla groups, including the People's Revolutionary Army. Overseeing the front was a supreme executive body, the Unified Revolutionary Directorate, or D.R.U., that was formed, he said, at a secret meeting in Havana.

'From the political and military point of view, all the decisions that the D.R.U. took - from the strategic sense, from the military sense - were done in co-ordination with the Cubans,' he said.

For...

For example, in November 1980, when guerrilla leaders met in Havana, 'the military plan for the final offensive in January '81 was authorized by the Cubans,' he said."

Mr. Canadas adds:

"By June 1980, Mr. Canadas said, after guerrilla leaders, not including him, went to Havana, 'arms began coming in and the commanders after that meeting did not return to Salvador'. He said that was then the leaders moved their operations to Nicaragua.

'They never returned,' he said 'with the exception of Villalobas, who was the last one to leave Salvador February '81.'

'Before that we did not have much arms coming in,' he said. 'After that the majority of arms was given by Vietnam, American M-16's. The arms came from Vietnam to Havana. Havana to Managua. Managua to Salvador.'"

He concludes by reporting the following about meetings in Managua:

"Three months later, in October, he said, the same group of Salvadorans and Cubans met in Managua. 'We examined everything that had been done since July,' he said. 'We analyzed the taking of Villa el Rosario in Morazán. It was a village occupied by the guerrillas. It showed how much we had advanced. As far as the central front, they indicated that the sabotage of the electric power and telephone lines was not enough, not sufficient. We had to make greater efforts in these activities.'"

102. In 1984, Commander Montenegro gave a further interview, which was published in the New York Times (and republished in the Counter-Memorial of the United States, Exhibit 49). It was to this interview, given "almost two years after his capture", that Mr. MacMichael addressed questioning comments at the oral hearings (Hearings of 16 September 1985). The New York Times story contains significant detail and merits reproduction in extenso:

A Former Salvadoran Rebel Chief Tells of Arms from Nicaragua

"A former Salvadoran guerrilla commander who was captured in Honduras said today that virtually all the arms received by the guerrilla units he led came from Nicaragua.

The former guerrilla, Arquimedes Canadas, known in the rebel movement as Comandante Alejandro Montenegro, also bolstered the Reagan's Administration's disputed assertions that Salvadoran guerrillas have their headquarters in Nicaragua by saying that he went there secretly in 1981 and met with his top commander, the Nicaraguan Army Chief of Staff and four Cuban advisers.

Mr. Canadas said in an interview that in 1981 and 1982 guerrilla units under his command in San Salvador and north of the city received '99.9 per cent of our arms' from Nicaragua.

This contradicts what several guerrilla commanders, including Mr. Canadas, said in interviews at their mountain base near Guazapa volcano in February 1982.

Armed with American-made M-16 rifles, the Salvadoran guerrilla commanders said their weapons were either captured from Government forces, bought on the black market or purchased directly from Salvadoran Government officers. Only one admitted having gone to Nicaragua and none said they had been to Cuba.

Meetings in Cuba and Managua

But today, Mr. Montenegro said through an interpreter that he had been under orders from his guerrilla commander in chief to give false information in 1982 by saying that the arms were captured or purchased when in fact they had come from Managua by truck across Honduras into El Salvador.

In a three-hour interview Tuesday night, Mr. Canadas, who was captured in August 1982 by Honduran Army units in Tegucigalpa while he was en route to Nicaragua, said he had gone to Cuba once and to Managua twice to meet with Joaquin Villalobos, commander in chief of the People's Revolutionary Army.

The P.R.A. is the largest of five guerrilla forces linked together under the Farabundo Marti Liberation Front.

...

Monthly Arms Shipments

In the interview, Mr. Canadas said that in 1981 and 1982 urban commandos and 200 guerrillas under his command in Guazapa received monthly arms shipments from Nicaragua that were trucked across Honduras, hidden in false panels and floors. He said the trucks moved through the normal customs checkpoint of Las Manos at the Nicaraguan border with Honduras and the checkpoint of Amantillo at the Honduran border with El Salvador.

Each truck, he said, carried roughly 25 to 30 rifles and about 7,000 cartridges of ammunition. The rifles, he said were American-made M-16's captured in Vietnam and FAL rifles formerly used by the Nicaraguan Army under Somoza.

Sometimes the trucks arrived without rifles and carried just ammunition and in that case, he said, a typical load would include up to 15,000 cartridges, Soviet-made grenades, and explosives like TNT for sabotage attacks against Government installations.

Since...

Since the time of his capture, American officials have said that Honduran authorities put on major efforts to halt the relatively open flow of arms traffic on Honduran highways. American military officials have now contended that the outside arms flow comes from Nicaragua on nighttime air drops or in canoes or power boats operating in the Pacific coastal waters between Nicaragua and El Salvador.

Mr. Canadas said his one visit to the Salvadoran guerrilla command post in Nicaragua came in October 1981 when he was summoned by Mr. Villalobos, regarded by Salvadoran Army officers as the shrewdest and most important guerrilla commander.

'I don't know exactly where it was because I was taken there blindfolded,' he said. 'We went perhaps 15 minutes on the highway south of Managua where we changed vehicles. Then we went another 10 or 15 minutes. We came to a very large private home with a very large garden with metal benches.'

'To the right of the main entrances was an office where Villalobos worked,' he went on. 'Further in the house was a large room where the commanders of the other guerrilla groups met and where the Cubans and Sandinistas came. There were four Cubans there.'

He added: 'We had one meeting about two hours long one night with the Sandinista Army Chief of Staff Joaquin Cuadra.'

'Cuadra spoke almost entirely about the Nicaraguan situation. And they were interested to know what kind of rebellion was taking place in El Salvador, a peasant rebellion or all elements of the population. In Nicaragua, they said, it had been all elements. But the meeting was not to discuss aid. By that time, aid had reached its peak.'" ("A Former Salvadoran Rebel Chief Tells of Arms from Nicaragua", the New York Times, 12 July 1984.)

103. A comparison of the text of this interview with Mr. MacMichael's comments on it fails to shake Commander Montenegro's claims. First, Mr. MacMichael confirms the truth of the capture of Montenegro in the circumstances recounted in the press. Second, Mr. MacMichael says that, in 1982, he had access to the results of Montenegro's initial interrogations. "At that time," Mr. MacMichael says, "he made no mention of arms". This is Mr. MacMichael, speaking without notes, in 1985, confidently recalling that a report he read three years before "made no mention of arms" (Hearings of 16 September 1985). (Mr. MacMichael could not have refreshed his three-year old recollection by reference, before the hearing, to an account of Montenegro's debriefing or his notes thereon, since his retention of any such papers would be illegal.) Rather, Mr. MacMichael recalled, "much of the object of his interrogation had to do with his leadership of the raid" on the Salvadoran airfield (ibid.). Mr. MacMichael confirms that, before his capture, Montenegro claimed that the guerrillas' arms were purchased or captured (as Montenegro explained in his published interviews), and

Mr. MacMichael observes that his statement made two years later came after a time during which he had been "in the hands of very skilled interrogators" (Hearings of 16 September 1985). Mr. MacMichael says he is not able to judge which story is correct. But he does acknowledge that, in American hands, Montenegro could speak freely with no fear of retribution. Could the same be said of what he dared say when a guerrilla commander in the field?

104. A third defector whose allegations have recently been published is Alvaro José Baldizon Aviles, referred to in paragraph 28 of this Appendix. His contentions largely concern allegations of violations of human rights in Nicaragua by Nicaraguan forces and by agents of the Nicaraguan Government. Some of the objects of those alleged assassinations and other atrocities were victimized in the course of hostilities (such as dissident Indians). Of pertinence to the question of support by the Nicaraguan Government of foreign insurgency (they relate to Costa Rica rather than El Salvador) are the following passages of Baldizon's statement:

> "In March 1983, a group of approximately 45 members of the Costa Rican Popular Vanguard Party (PVP) were training for guerrilla warfare on the property of the African Oil Palm Cultivation Project near El Castillo in southern Nicaragua. ... The chief of the Costa Ricans, 'Ramiro', was approximately 40 years old, was about 5' 9" tall, had white skin, black hair, and wore a full beard. He was always accompanied by a First Lieutenant of the Nicaraguan Army. ... The rest of the Costa Ricans were located about 12 kilometers away on a hill called El Bambu on the San Juan River, in the Costa Rican border area. Their activities were controlled from the headquarters by two-way radio communications.
>
> The Costa Ricans, who justified their presence in El Castillo by claiming to be workers on the African Palm Project and members of a military reserve battalion comprised of project workers, were there for six months. They were then to return to Costa Rica and be replaced by another group for another six months. Some of the troops carried FAL rifles with telescopic sights and were being trained as snipers to kill the San Juan River boatmen who transport and supply the Nicaraguan anti-Sandinista insurgents. The Sandinistas were conducting this training because they reasoned that there are only a limited number of boatmen who know the river well and they would be hard for the anti-Sandinistas to replace." ("Inside the Sandinista Regime: A Special Investigator's Perspective" Department of State, 1985, pp. 25-26.)

105. Revelations by a fourth defector, and from captured insurgent documentation, are described in still another article in the Washington Post, "New Sources Describe Aid to Salvadoran Rebels; Defector, Captured Documents Indicate Nicaragua Has Withdrawn Some Support", of 8 June 1985, page A12 (the documentation apparently being the same papers captured with Nidia Diaz described in paras. 95-96 above):

"Nicaragua...

"Nicaragua, Cuba and other leftist countries have played the leading roles in arming and training El Salvador's left-wing guerrillas since 1980 but gradually have curbed their support since 1983, according to information gleaned from a recent defector from the rebels, a U.S. study of captured weapons and a stash of captured rebel documents.

U.S. pressure has led Nicaragua's Sandinista government to withdraw some of its backing for the Salvadoran rebels on several occasions, both by suspending ammunition shipments and by restricting the activities in Managua of the rebels' Farabundo Marti National Liberation Front, according to these sources.

For example, captured rebel notes and correspondence indicate that Nicaragua cut back assistance following the U.S. invasion of Grenada in October 1983 in an action that drew strong protests from the Salvadoran guerrillas.

It was unclear from the documents and other information how much aid Nicaragua has been contributing in recent months, but ammunition shipments appear to have dropped substantially. The defector, a former political and military commander, said he was aware of only two deliveries this year.

The newly available sources offer a broad portrayal of the history of external support for the Salvadoran rebel front, known by the Spanish initials FMLN. While some have questioned the reliability of the defector's account and of the documents, the new data tended to confirm descriptions provided for the past two years by U.S. and Salvadoran officials.

'The embassy's position is, damn it, we told you so,' a senior U.S. official said.

The government and the U.S. Embassy said the documents were seized April 18 with prominent rebel commander Nidia Diaz, who was a member of the guerrilla delegation at the peace talks in the town of La Palma last October. Salvadoran authorities have refused her requests to meet with reporters since her capture.

The FMLN has charged that the documents are forgeries.

According to the portrayal of support for the guerrillas gleaned from the sources, leftist nations initially contributed 6,000 to 7,000 automatic rifles plus mortars and grenade launchers from 1980 to early 1983. These arms are described as having arrived from Nicaragua by clandestine means, mostly in small planes or overland through Honduras.

Cuba, the Soviet Union, Vietnam, Bulgaria and East Germany have trained a steady stream of guerrilla leaders in military and political work, by this collective account. The FMLN's general command met regularly in Managua in the early 1980's.

Since...

Since roughly two years ago, however, foreign military assistance has consisted primarily of ammunition and explosives, and it increasingly has arrived by sea.

'Most people agree that the big arms imports stopped in 1982,' the senior U.S. official said.

Shipments appear to have dropped off for three reasons: because they were not needed, because of U.S. pressure on Nicaragua and because of the Honduran armed forces' breakup of much of the FMLN's clandestine support network in Honduras during 1982 and 1983.

The Sandinistas also began to pull back the welcome mat in Nicaragua in mid-1983, according to the defector. At that time, the FMLN's general command was forced to transfer its meetings to rebel-dominated territory in El Salvador after Nicaragua was embarrassed by the murder of a senior Salvadoran rebel commander in Managua in a factional dispute, he said.

The issue of Nicaraguan and other outside aid for the Salvadoran rebels has been a central feature of the U.S. debate over Central America. The administration repeatedly has asserted that Nicaragua was 'exporting revolution,' and it used this charge specifically to justify organization and financing of the rebel force now fighting to overthrow the revolutionary Sandinista government in Managua.

Critics of U.S. policy have said the administration lacked adequate proof of a steady, substantial flow of military aid to the guerrillas since their failed 'final offensive' in January 1981. Despite a high-priority effort, no arms shipment in progress from Nicaragua has been intercepted.

Salvadoran rebel leaders and Nicaraguan officials have offered cautious and sometimes conflicting responses to the U.S. charges. The Salvadoran rebels have admitted, for instance, that they smuggle weapons and ammunition via Nicaragua but have said they obtained the arms on the international market and not from the Sandinista government. Nicaragua has acknowledged giving diplomatic and moral support to the guerrillas while denying that it was shipping ammunition.

The defector - whose real name is Napoleon Romero, but who often is known by his nom de guerre, Miguel Castellanos - said that about 70 percent of the FMLN's automatic rifles came from abroad and that the rest were captured from the Salvadoran armed forces. While some of the foreign-supplied weapons were purchased on the international market, he said, most were supplied by friendly governments.

Romero, 35, was commander of the San Salvador front for the Popular Liberation Forces, one of the two largest of the five guerrilla forces in the FMLN, until his defection in early April. He said in a 90-minute interview that he had become disillusioned with the revolutionary movement during the past year because of its violence and lack of accomplishments.

Romero was held by the military for several weeks before being made available to reporters. He is now said to be living under the protection of the military.

The guerrilla organization has charged that Romero was tortured while in custody and is now lying.

As a defector, Romero has an interest in portraying the FMLN in a bad light, but his articulate responses seemed frank during the interview. It was conducted in an office of the armed forces' press committee. A Salvadoran major was present for only brief portions of the interview.

Romero's description of the source of the weapons was bolstered by a U.S. military intelligence survey of serial numbers of U.S.-made M16 automatic rifles captured from the guerrillas. The survey's results, made available by U.S. officials, showed that just under 25 percent of the rifles originally were provided to the Salvadoran Army and thus presumably had been captured by the rebels. Of the remaining rifles, the bulk were said to have been left in Vietnam by evacuating U.S. troops in 1975.

Romero said he believed Cuba was responsible for coordinating much of the international support for the Salvadoran guerrillas.

'Nicaragua is just the bridge for everything coming from Cuba,' he said.

The defector also noted several areas in which leftist countries have not been involved much with the FMLN. For instance, he said that he believed no Cuban or Nicaraguan official advisers or instructors had come to El Salvador to oversee the guerrillas' fight directly.

In addition, while each of the five factions in the FMLN has its own radio transmitter for direct communications with its representative in Managua, Romero said, the insurgency is not 'directed' from Nicaragua on a day-to-day basis as the U.S. government has suggested. FMLN commanders in the field plot their own strategy and tactics, although they often solicit advice from Nicaragua and Cuba, he said.

The captured documents that have been made public so far show the FMLN's dependence on Nicaraguan support mainly by revealing the level of concern on the part of the guerrilla organization in late 1983, when the Sandinistas were pulling back their support. Minutes of meetings, briefing papers and letters show the Salvadoran guerrilla leadership pressing hard for continued backing.

A two-page list of names of FMLN leaders and foreign training courses that they had undergone or were scheduled to undergo also showed the involvement of a wide range of Soviet Bloc countries in seeking to build a cadre of Salvadoran revolutionary leaders."

106. "Revolution

106. "Revolution beyond our Borders" contains further details about Mr. Romero's revelations, which throw light on the continuing supply by Nicaragua of arms and supplies to Salvadoran insurgents in 1983:

> "The flow of supplies from Nicaragua continued at high levels into 1983. According to Napoleon Romero, formerly the third-ranking member of the largest guerrilla faction in the FMLN who defected in April 1985, his group was receiving up to 50 tons of material every 3 months from Nicaragua before the reduction in deliveries after the U.S.-Caribbean action in Grenada. Romero gave a detailed description of just how the logistics network operated. The first 'bridge' implemented for infiltration was an air delivery system. Romero stated that arms would leave Nicaragua, from the area of the Cosiguina Peninsula, for delivery to the coast of San Vicente Department in El Salvador. He described the first such delivery as consisting of 300 weapons infiltrated at the end of 1980 in preparation for the January 1981 'final offensive.' Romero claimed that air routes were suspended when the Salvadoran Armed Forces succeeded in capturing a large quantity of arms that came by air from Nicaragua. It was at this point in 1981, he continued, that seaborne delivery became - as it continues to be - the primary method of infiltration.
>
> Romero described the sea route as departing from Nicaragua's Chinandega Department or islands (like La Concha) off its coast, crossing the Gulf of Fonseca, and arriving at the coast of El Salvador's Usulutan Department. Thousands of rounds of ammunition translate into relatively small numbers of boxes, easily transported by man, animal, or vehicle over multiple routes. The lack of constant government presence, and the relatively short distances from the coastline to all major guerrilla fronts, reduce the difficulties of providing the guerrillas with certain types of logistics support from Nicaragua." (Op. cit., p. 11.)

107. Drawing on statements of Mr. Romero and other defectors, "Revolution beyond our Borders" also provides specific data about the modalities of continuing delivery, as late as 1985, of arms and munitions from Nicaragua to Salvador insurgents, largely by boat and canoe to the Salvadoran coastline, where provisions are picked up and transported by animals, persons and small vehicles. It maintains that:

> "Napoleon Romero, the former FPL commander, estimated that this supply infrastructure was able to provide some 20,000-30,000 rounds of ammunition per month for the FPL alone. Some 300 guerrillas could be provided 100 rounds each (the usual load carried by a combatant), or 150 guerrillas could be provided with 200 rounds for a major battle. Such a delivery would weigh about 1,300 pounds and be packaged in about 34 metal boxes which could be easily transported by 15-20 men, six pack animals, or one small pickup truck. Given El Salvador's small size and the short distances involved, material entering along the Usulutan coastline could arrive at any of the guerrilla fronts in about 1 week under optimal conditions." (Ibid., p. 11, note 26.)

6. Statements by diplomats of uninvolved countries

108. To the foregoing body of admissions and charges providing evidence of Nicaraguan Government support of foreign insurgency, particularly in El Salvador, there may be added the opinion of diplomats stationed in the capital of Nicaragua. When surveyed by the resident correspondent of the New York Times in 1984, the following report resulted:

> "Western European and Latin American diplomats here say the Nicaraguan Government is continuing to send military equipment to the Salvadoran insurgents and to operate training camps for them inside Nicaragua.
>
> The United States has been making such charges since 1980. Nicaragua, while not explicitly denying all of the charges, say its support is 'moral and political'.
>
> The diplomats, including some from countries that have criticized United States policies in Central America, said military support to the Salvadoran rebels had dropped over the last year, but remained substantial.
>
> No Nicaraguan Comment
>
> At a news conference last week, President Reagan said Nicaragua was 'exporting revolution to El Salvador, its neighbor, and is helping, supporting and arming and training the guerrillas that are trying to overthrow a duly elected government'.
>
> ...
>
> A Salvadoran rebel spokesman in Costa Rica, Jorge Villacorta, said in a telephone interview that the guerrillas had bought weapons on the black market and from organized crime figures in the United States. He said the arms had been delivered by way of Nicaragua as well as through Guatemala, Costa Rica and other countries.
>
> 'We reject the allegation that Nicaragua is providing us with arms,' he said.
>
> But Western diplomats appear to be convinced of the general accuracy of American intelligence reports on the military ties between Nicaragua and the Salvadoran rebels.
>
> 'I believe support for the revolutionaries in El Salvador is continuing and that it is very important to the Sandinistas,' a Western European diplomat said. 'The Sandinistas fear that if the guerrilla movement weakens in El Salvador, their own regime will become more isolated and more vulnerable to attack.'

Salvadoran rebel leaders have insisted that they receive only small amounts of aid from Nicaragua mainly communications equipment, medicine and some ammunition. They say most supplies are bought on the black market or captured from Salvadoran Government troops.

A United States Embassy official in San Salvador said today that the rebels' 'pressing need is not for rifles and small arms'.

Two weeks ago, Fred C. Iklé, Under-Secretary of Defense for Policy, said that roughly half of the arms used by the rebels were United States supplied arms taken from Salvadoran Government troops. Later the Pentagon said the estimate was based on a limited survey in a few rebel areas. Elsewhere, the Pentagon said, the figure is closer to a third to a quarter.

Sources of Most Rebel Supplies

Mr. Iklé also said the United States believed that 80 per cent of the ammunition and explosives used by the rebels are supplied from Cuba and the Soviet Union through Nicaragua.

Administration officials in Washington said today that small planes and boats were transporting supplies from Nicaragua at night. The officials said that command and control of guerrilla operations continued in Managua. In Mexico City, a member of the rebel movement said little of the command structure remained in Nicaragua.

'All the commanders are now living in Morazán,' he said, referring to a province in eastern El Salvador.

...

Several months ago, at Nicaragua's suggestion, a number of Salvadoran civilians affiliated with the rebel cause left Nicaragua in what was described as an effort to remove a possible pretext for American-backed military intervention. However, rebel leaders are believed to visit Managua regularly. Visiting members of Congress have met here with guerrilla commanders, including Ana Guadalupe Martinez of the People's Revolutionary Army.

Western intelligence reports suggest that aid no longer moves overland through Honduras, but is flown daily by light planes to makeshift airstrips in guerrilla-held areas of El Salvador.

Some supporters of the Nicaraguan Government have expressed doubts about these allegations and challenge the United States to produce evidence. Diplomats acknowledge that they have seen no proof, but say they believe that military ties between Nicaragua and the rebels remain strong.

'Maybe...

'Maybe not everything the Americans say is true, but logic and commonsense support their case,' said a Hispanic diplomat. 'The Sandinistas' ideology dictates that they help other countries adopt political systems like their own.'

Slogans supporting the Salvadoran rebel cause are often chanted at Nicaraguan rallies, and the press carries almost daily reports of rebel victories and of atrocities attributed to the Salvadoran armed forces.

Rebels' Communications Posts

American officials are said to believe that at least four of the five principal rebel groups in El Salvador maintain telecommunications posts in Nicaragua to transmit instructions to their forces inside El Salvador. They also believe that some Salvadoran demolition teams have been trained in Nicaragua." (Stephen Kinzer, "Salvador Rebels Still Said to Get Nicaraguan Aid", the New York Times, 11 April 1984, pp. 1, 8.)

This article appears as Annex 49 to the United States Counter-Memorial. Nicaragua introduced no evidence in specific refutation of it.

7. Statements by the Government of El Salvador accusing Nicaragua of assisting insurgency in El Salvador

109. Among the curious contentions of Nicaragua in this case is the claim, found in the Affidavit of Miguel D'Escoto Brockmann, Foreign Minister of Nicaragua, that:

"It is interesting that only the government of the United States makes these allegations, and not the government of El Salvador, which is the supposed victim of the alleged arms trafficking. Full diplomatic relations exist between Nicaragua and El Salvador. Yet, El Salvador has never - not once - lodged a protest with my government accusing it of complicity in or responsibility for any traffic in arms or other military supplies to rebel groups in that country."

110. Accusations by El Salvador may not usually have taken the form of diplomatic demarches, but accusations, official and unofficial, there have been. Thus, in January 1981, during the "final offensive", President José Napoleon Duarte both denounced Nicaraguan and Cuban intervention and called for the assistance of the United States in meeting it. According to the Washington Post:

"Duarte has denounced alleged Cuban and Nicaraguan intervention in El Salvador several times during the last few days ... He has also called on U.S. President-elect Ronald Reagan to 'export democracy' to El Salvador and the world and to increase aid to the government here, particularly economic aid." ("Fighting Subsides in El Salvador; 3 Journalists Hurt," the Washington Post, 13 January 1981, p. 1.)

111. According...

111. According to an Agence France-Presse report of 17 January 1981 (FBIS, Central America, 17 January 1981, p. 5):

> "Salvadoran Government junta President José Napoleon Duarte today added to the charges of Nicaraguan interference in the Salvadoran conflict by displaying a box of rifle cartridges which, he said, is part of the ammunition that Venezuela gave the Sandinistas to help them overthrow Somoza ...
>
> [T]he President ... referred to the case of the cartridges which, he explained, before being found in the hands of the Salvadoran guerrillas was in the hands of the Sandinist National Liberation Front. The president also referred to the widely commented landing of foreign fighters on the Salvadoran coast ...
>
> [President Duarte said that] 'the boats seized are of a type that cannot sail on the open seas. With these boats one can only sail across the Gulf of Fonseca'. The Gulf of Fonseca lies in eastern Salvador, on the Pacific Ocean, and its waters touch the coasts of both Honduras and Nicaragua."

112. According to the San Salvador Domestic Service of 28 January 1981 (FBIS, Central America, 29 January 1981, p. 8), a Nicaraguan-registered Cessna aircraft dropped FAL rifles to a group of guerrillas waiting below. Shortly afterwards, the aircraft was forced to land, injuring its crew, who were rescued by guerrillas and taken to the guerrilla camp. The Salvadoran Army, supported by helicopters, found the camp and surrounded it, and won the ensuing battle. The Nicaraguan Cessna was found destroyed.

113. In the United Nations General Assembly on 12 October 1981, the representative of El Salvador set out President Duarte's response to and repudiation of the proposals of the Salvadoran guerrillas which had been placed before the General Assembly by Commander Ortega (see paras. 44-45 of this appendix). President Duarte protested "the coarse, abusive and clearly interventionist manner in which Mr. Ortega approached the internal situation in El Salvador" (A/36/PV.33, p. 112). President Duarte was quoted in the General Assembly as condemning the "dishonourable ... mission" of the Sandinist Government in lending its territory "as the base for arms supply, refuge and support for the armed groups and as a sounding board for their campaigns of false propaganda" (ibid., p. 113). Observing that the present Government of Nicaragua had nothing to teach El Salvador, President Duarte maintained that Nicaragua's effort to "turn itself into the arbiter of another country's pacification" while promoting its own "bellicose psychosis" was "a true offence to the conscience of civilized, peace-loving countries ...".

114. On 25 March 1982, El Salvador addressed a letter to the President of the Security Council (S/14727), which drew attention to "the vital need for other States, Nicaragua in particular, to follow El Salvador's example" in adhering to the principle of non-interference.

It claimed that Nicaragua was the major cause of increased tension in the area and observed that the so-called "solidarity" of certain ideological movements could not justify overthrowing the fundamental principles of international law.

115. In the United Nations Security Council on 30 March 1982, the representative of El Salvador, speaking to one of the ten complaints of aggression made to the Council by Nicaragua against the United States, all of which allege essentially what Nicaragua alleges in the current case before this Court, protested that:

> "El Salvador has been the victim of acts of intervention, against the will of the Salvadoran Government, which constitute aggressive behaviour; but in spite of those interventionist and aggressive acts against our sovereignty, in order to maintain friendly relations with the countries that promote or implement those acts, we have asked that they put a halt to them but have not presented a formal complaint before the competent international bodies." (S/PV.2341, pp. 41-42.)

116. On 28 March 1983, the Foreign Minister of El Salvador, Fidel Chávez Mena, charged before the United Nations Security Council that El Salvador was

> "the victim of - among other belligerent and hostile acts - the continued transfer of weapons, the last link in the chain being our neighbour republic Nicaragua, which ... does not practice, and respects even less, the principle of non-interference in the internal affairs of Central American States".

He charged:

> "Everyone is aware that the armed groups operating in El Salvador have their central headquarters in Nicaragua. It is there that decisions are made and logistic support is channelled - logistic support without which it would be impossible for them to continue in their struggle and without which they would have joined in the democratic process." (S/PV.2425, 28 March 1983, p. 7.)

117. In November 1983, Ambassador Rosales Rivera, representative of El Salvador to the United Nations, protested before the General Assembly that Nicaragua was following "an interventionist policy". He declared:

> "my country has been the victim, among other warlike and hostile acts, of a continuing traffic in weapons, with Nicaragua as the last link in the chain. From there orders are sent to armed groups of the extreme left operating in El Salvador. These groups have their headquarters in Nicaragua and logistic support is channelled through them." (A/38/PV.49, 10 November 1983, p. 17.)

He quoted pages of detailed data in support of that charge. He added:

"It...

"It would be insane for a Government attacked from outside - such as mine - to remain passive in the face of those whose foreign policy is reflected in official actions and statements with regard to propaganda, training camps, logistics and training of guerrilla groups, as is the case with Nicaragua. We have reached the point where the Co-ordinator of the Sandinist Junta, Commander Ortega, claimed to represent the guerrillas in El Salvador in international forums, including this one.

Our country was mentioned in Nicaragua's statement yesterday morning, and we should like to register our protest at the fact that the Sandinist Junta of Nicaragua has arrogated to itself the right to speak of El Salvador. The fact that a small group of leftist radicals, trying in vain to seize power by violence, has authorized the Sandinist Junta of Nicaragua to act as its spokesman does not in any way mean that Nicaragua is legally entitled to express opinions on behalf of the people of El Salvador. The people of El Salvador is represented only by its Government, which was freely chosen by means of suffrage on 28 March 1982 in an election witnessed by the entire world, thanks to an extensive press coverage and the presence of many international observers who were invited for that purpose.

Nicaragua's aggression has therefore gone hand in hand with a violation of the principle of non-intervention. In the face of these clearly aggressive and hostile acts that violate the rights of the people, we cannot fail to repeat our denunciation and condemnation. As long as the Sandinist régime maintains as a pillar of its policy the enthronement of Marxist-Leninism as a system which should be instituted throughout Central America, seeking to impose it first on El Salvador and then on neighbouring countries, it will be impossible to maintain peaceful coexistence and a minimum of harmony in the region. Once the destabilizing factor has been removed, peace and normalcy will return to the area." (A/38/PV.49, pp. 23, 24-25.)

118. El Salvador President Alvaro Magaña Borga, in an interview with the Spanish newspaper ABC (published in the United States Counter-Memorial, Exhibit 51), had the following exchange in December 1983:

"Question: Mr. President, how do the guerrillas supply themselves and where from?

Answer: Be sure of this: from Nicaragua, and only from Nicaragua. In the past two weeks we have detected 68 incursions by aircraft which parachuted equipment, weapons and ammunition into the Morazán area, which is where the guerrillas are most concentrated ...

Question: I would remind you, Mr. President, that one of Lenin's maxims was : 'Against bodies, violence; against souls, lies.'

Answer:...

Answer: Well, they have learned the lesson very well. While Nicaragua draws the world's attention by claiming for the past two years that it is about to be invaded, they have not ceased for one moment to invade our country. There is only one point of departure for the armed subversion, Nicaragua."

119. In renewed debate on Nicaragua's complaints in the Security Council on 3 April 1984, the representative of El Salvador declared:

"only last month the Government of El Salvador sent various protest notes to Managua rejecting the disobliging statements made with regard to the elections in our country by the President of the Council of State and by the Minister of Defence. We made a formal protest with regard to the statements of support for the Salvadoran guerrilla activities made by Commander Henry Ruiz. The recent statement by the Nicaraguan Minister of Defence with regard to the laying of sound-activated mines in the region's ports, from Panama to Guatemala, by members of Central American movements has also been met with a protest from our Government, which has once again denounced the close linkage in co-ordination and logistics that exists between guerrilla groups and the Sandinist Government." (S/P.V.2528, p. 61.)

120. José Napoléon Duarte was elected President of El Salvador in May, 1984. In his inaugural address of 1 June, published in the United States Counter-Memorial, Exhibit 52, page 6, President Duarte declared:

"Salvadorans, we must bravely, frankly, and realistically acknowledge the fact that our homeland is immersed in an armed conflict that affects each and every one of us; that this armed conflict has gone beyond our borders and has become a focal point in the struggle between the big world power blocs. With the aid of Marxist governments like Nicaragua, Cuba and the Soviet Union, an army has been trained and armed and has invaded our homeland. Its actions are directed from abroad. Armed with the most sophisticated weapons, the Marxist forces harass our Armed Forces and constantly carry out actions intended to destroy our economy, with the loss of countless human lives and the suffering of hundreds of thousands of Salvadorans."

121. At a press conference of 30 July 1984 (the full text of which is found re-printed as Exhibit 53 of the United States Counter-Memorial), President Duarte began by recounting a trip to Europe in which he had been preceded by President Ortega. President Duarte charged that in Europe President Ortega had acknowledged that "he (Ortega) had helped, is helping and will continue to help the Salvadoran guerrillas". Thus President Ortega revealed that "it is he who is openly and directly attacking and intervening in our country" (p. 2). President Duarte continued: "I ordered that we lodge a formal protest with Nicaragua in this regard." (Ibid.) Furthermore, President Duarte recounts, he

ordered...

ordered that studies be made of submitting a complaint to the International Court of Justice about Nicaragua's intervention in El Salvador's affairs. President Duarte continued that: "We would not be able to survive without U.S. aid ..." He stated that, "always provided it stopped its support for the guerrillas, stopped using subversion and exporting revolution to the rest of Central America, I would be willing to sign a treaty not only with Nicaragua but with any other country in the world which shows respect, as we do..." (p. 3). Duarte continued, in response to other questions:

> "What I have said, from the Salvadoran standpoint, is that we have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.
>
> In view of this situation, El Salvador must stop this ... thus, the contras are creating a sort of barrier that prevents the Nicaraguans from continuing to send arms to El Salvador by land. What they have done instead is to send them by sea, and they are now getting them in through Monte Cristo, El Coco, and El Espino. This is because they cannot do so overland, because the contras are in those areas, in one way or another.
>
> Therefore, you can see that these are two different concepts. My position is coherent. I defend my country. I have said that I do not want any weapons, ammunition, or supplies of any kind to reach my country, to support guerrillas in my homeland, and that I am against anything that supports this type of action, either here or there. That is why I have told the Nicaraguans that I think El Salvador has always respected them and that, therefore, they must respect El Salvador." (Pp. 4-5.)

Thereafter, the following exchange occurred:

> "Roberto Block, from REUTER News Agency. Mr. President: You have talked many times about Nicaragua's supply of weapons to the Salvadoran guerrillas, and you appeared at the Congress ... to ask for weapons, for assistance, and to ask that the contras in Nicaragua cut off this supply. I would like to know exactly what tangible evidence exists that Nicaragua is sending weapons to El Salvador. If such proof exists, why did you ask that statements be sent to The Hague, instead of the tangible evidence on these arms supplies from Nicaragua?
>
> [Duarte] ... When a head of state confesses that he is helping guerrillas, he is helping the guerrillas. Therefore, what better evidence exists than a categorical statement by a head of state? Nothing is more powerful than the confession he made.

I said all of this to explain that the evidence does exist. There is evidence on all of the beaches. An overwhelming number of peasants claim that they have seen people enter with weapons, which they load on horses, and leave for the mountains. What you want is to see them for yourself. Well, I invite you to go to the beaches and watch, at night, how they unload the weapons. I am going to give you a specific place, Montecristo Island. They are constantly unloading weapons there. Caches have been found there. We are going to submit all of this evidence to the court at The Hague when the time comes.

[Block] After $50 million ... to the contras by the United States, you are saying that the weapons are still arriving. ...

[Duarte - interrupting] ... I have never said that assistance should be supplied to the contras so that they could invade Nicaragua's territory. I never said that. I said that someone is doing that, and that what it does is prevent the weapons from reaching El Salvador. This is what I have said, and I reiterate it. I am not opposed to the prevention of weapons entering El Salvador. If by some action in the world, these weapons are prevented from entering El Salvador, it is welcome, because this will rid us of the constant problem of so many deaths, murders, and problems in our homeland. This is what must be prevented.

...

They have been unable to stop the flow of weapons. Doesn't this show you that the problem is much more profound than we imagine? How and from where do those weapons get here? The scheme they use is so sophisticated that it obviously renders the problem much more serious." (P. 5.)

122. The foregoing exchange illustrates how genuine is the conviction of El Salvador that Nicaragua continues to send arms to fuel the Salvadoran insurgency; it provides detail in support of those charges, and a sense of how important such activity of Nicaragua is to the insurgency; it demonstrates why it is that El Salvador welcomes the pressures of the contras upon Nicaragua; and it suggests that, had El Salvador's Declaration of Intervention been appropriately treated, rather than being treated in the extraordinary ways in which it was treated, El Salvador might well have taken part in the current case - a participation which could have transformed it.

123. Nor have the protests of El Salvador, made in the United Nations and through the media, eschewed bilateral diplomatic channels. On 20 July 1984, the Acting Minister of Foreign Relations of El Salvador sent the following note of protest to the Nicaraguan Foreign Minister:

"I...

"I have the honor to direct myself to Your Excellency to present in the name of my Government the most vigorous protest over the statements made to the information media of the Federal Republic of Germany on the twelfth of this month by the coordinator of the revolutionary Junta of Government of Nicaragua, Daniel Ortega Saavedra, in which he publicly recognizes and reiterates the unconditional support of your Government to the guerrilla groups of the FDR/FMLN.

As Your Excellency is aware, the Salvadoran people have suffered for several years an aggression armed, financed, and directed in obedience to the designs of an extracontinental power, through intermediaries which, like Cuba and Nicaragua, provide political, logistical, and material support to the groups which plan to install in El Salvador a totalitarian dictatorship through terrorism and resort to all manner of violent acts.

The interventionist attitude of Nicaragua, evidenced once again by one of its highest political spokesmen, has converted that country into a focus of tension and an element of destabilization in the region. That attitude has provoked numerous protests and denunciations on the part of my country and the other countries of the region, and therefore constitutes a reason for concern on the part of the democratic countries of the continent and the entire international community.

Therefore, I take the liberty of pointing out to Your Excellency that the constitutional Government presided over by Eng. Jose Napoleon Duarte, responding to the sovereign will of the Salvadoran people, demands from the Government of Nicaragua respect of its sovereignty, an immediate end to interference in its internal affairs, and respect for the self determination of the Salvadoran people, who seek peace and justice through democracy." (Unclassified Department of State cable from San Salvador 08416.)

124. On 24 August 1984, El Salvador renewed its protests. A protest note delivered to the Nicaraguan Embassy in San Salvador observed that the Nicaraguan Government, "through its highest representatives, has asserted on many occasions and through different means its support for Salvadoran guerrilla groups", and continued:

"The Government's interventionist and openly hostile attitude toward the Salvadoran Government, as well as the official Nicaraguan support for the rebels in El Salvador, were demonstrated during the funeral of Commander Ana Maria (Melida Anaya Montes) in Managua, in April 1983."

The Salvadoran Foreign Ministry maintained that the funeral was presided over by Commander Daniel Ortega, Interior Minister Borge, and Junta member Rafael Cordova, and was attended by Cuban and Salvadoran guerrilla representatives. The note declared that Nicaraguan intervention in the

internal affairs of El Salvador and the material and logistical support given to the rebel groups "represent a flagrant violation of the most elemental norms of international law" (ACAN, Panama City 0221 GMT, FBIS unclassified cable PA 240355Z of 24 August 1984).

125. In addressing the General Assembly of the United Nations in 1984, President Duarte declared:

> "For more than four years now El Salvador has suffered from the effects of a merciless war which has caused us bloodshed and impoverishment. More than 50,000 Salvadorians have been the innocent victims of a fratricidal confrontation. More than half a million persons have had to leave their homes and their property. Subversive forces have engaged in a campaign of terror and systematic destruction, and our people is tired of it. It must end.
>
> ...
>
> I should like to sign, on behalf of the democratic Government of El Salvador, an agreement that will be in keeping with the efforts of the Contadora Group. But such an agreement must be right and just for El Salvador. It must strictly guarantee the application of the 21 points which have already been accepted by all the parties. The agreement must ensure appropriate measures for the verification and control of everything that is agreed. We must make sure that the obligations that we undertake will put an end to the presence of foreign military advisers and eliminate military aid from abroad. It must provide for strict controls and, at the same time, entail for all the commitment not to support or continue to give assistance to terrorist activity against our legitimate democratic Government.
>
> ...
>
> I wish at this point to address some observations to the nations that have committed themselves, in one way or another, to undermining my country, as well as to the guerrilla leaders - not those who are living comfortably in and giving orders from Managua or Havana, or to other nations that claim to be democratic but in fact export violence and murder, but to the leaders of the guerrillas who are in the mountains of my country, those who are suffering from the elements, unsheltered, those who are aware of the real position of the Salvadorian nation when they attack the people and who are waiting - in vain - to be welcomed as liberators when the truth is that their purpose is to oppress those people."
> (A/39/PV.24, pp. 3, 7-8, 16.)

President Duarte ended his address with an invitation to the heads of the guerrilla movement to meet him in the village of La Palma on 15 October 1984.

126. In addressing the General Assembly in 1985, the Vice-President of El Salvador charged that:

> "the Sandinist Government of Nicaragua has turned the territory of its country into a sanctuary for Salvadoran subversion. There, armed groups of the extreme left rest, resupply and train and from there logistic support for the guerrillas is co-ordinated and sent to El Salvador." (A/40/PV.19, p. 20.)

127. The President of El Salvador in 1985 publicly accused Nicaragua of being involved in the kidnapping of his daughter by Salvadoran insurgents. "Nicaragua is the Central American source for totalitarianism and violence, and the sanctuary for terrorists", he charged (International Herald Tribune, 2-3 November 1985). He added that:

> "my daughter ... would not have been among victims of the merciless violence of the terrorists if terrorists did not have the support, direction, approval and timely protection of the terrorist dictatorship in Nicaragua".

In an interview in Spain with El País, he gave details of alleged Nicaraguan involvement in the kidnapping, maintaining that he had recordings of conversations of the kidnappers in which they said: "That matter I have to consult with Managua." (El País, 6 November 1985.) He also gave details in that interview of the location of alleged Salvadoran guerrilla bases in Nicaragua. The kidnapping of daughters of Presidents appears to be a speciality of Central American terrorism; Honduras has officially charged that the daughter of the then Honduran President was kidnapped by a group of Nicaraguans and Salvadorans (see the address to the Security Council of the representative of Honduras of 28 March 1983, S/PV.2425, p. 57).

128. In respect of statements of the Government of El Salvador, it should finally be emphasized that that Government for years has claimed that Nicaragua has been using force against it and has been unlawfully intervening in El Salvador's civil strife, and it has asserted against Nicaragua both its right of self-defence and its need of United States assistance in defending itself (see relevant quotations from the Declaration of Intervention of El Salvador quoted in the Court's Judgment, as well as paras. 110, 112-124 above). Thus the then President of El Salvador, Alvaro Magaña Borga, in the course of an official visit to Washington in June, 1983 - some nine months before Nicaragua instituted the present proceedings - issued the following statement:

> "Foreign military intervention in domestic affairs constitutes the main obstacle to our efforts to attain peace. The interference of extracontinental communist countries by way of Cuba and Nicaragua in support of armed groups against a legitimate constitutionally elected government, is a form of aggression which violates the essence of international law, specifically the principle of non-intervention in the internal affairs of other states.

Faced...

Faced with this situation, our armed forces have the constitutional obligation to defend the nation's sovereignty and to repel, in legitimate self-defence, the armed subversion that has been imposed upon us from abroad.

This external aggression has destroyed villages, forcing hundreds of thousands of humble Salvadorans to abandon their homes. It has subjected our productive facilities, our crops, our bridges and roads, our communication and transportation systems and the infrastructure of all public services to systematic destruction ...

No one can dispute a nation's right to defend itself against external aggression and against the destruction of the scarce assets which in a developing country are produced at great sacrifice. For this reason, we have the right to understanding and solidarity of all free nations of the world. For these reasons we have the right to the understanding and solidarity from all other free nations; as we have had from our Central American brothers, those with whom we share democratic ideals, and for whom I wish to express our gratitude." (Department of State Bulletin, Vol. 83, No. 2077, August 1983, p. 84.)

129. In 1985, President Duarte, in a letter supporting the United States Administration's April 1985 proposal to provide assistance to Nicaraguan insurgents, wrote:

"We remain concerned ... by the continuing flow of supplies and munitions from Nicaragua to guerrilla forces ... which are fighting against my government and our programs of reform, democracy, reconciliation, and peace ... [W]e deeply appreciate any efforts which your government can take to build a broad barrier to such activities - efforts which a small country like El Salvador cannot take in its own behalf." (Letter to President Reagan, 4 April 1985, reproduced in "Revolution Beyond Our Borders", loc cit., p. 26, note 34.)

8. Statements by the Government of Honduras accusing Nicaragua of subverting El Salvador as well as Honduras

130. Accusations by the Government of Honduras of acts of intervention and aggression by the Government of Nicaragua are legion. The ten times in which Nicaragua has had recourse to the Security Council to charge the United States with acts of aggression - the very acts at bar in the case before the Court - have furnished occasions, among others, in which the representatives of the Government of Honduras (accused by Nicaragua of acting in concert with the United States) have in their turn accused the Government of Nicaragua.

131. Moreover, Honduras has protested not only acts of Nicaragua against it but acts of Nicaragua against El Salvador. Thus on 23 March 1983, the representative of Honduras declared in the Security Council:

"I...

"I have seen a large number of trucks using our territory for the transport of armaments from across the Nicaraguan border. Evidence of this has been submitted to the diplomatic corps and the international press on many occasions. That is why we wish the fundamental aspect to be recognized: that is, absolute respect for established boundaries." (S/PV.2420, pp. 27-30.)

At a later point in the debate, he charged not only that Honduras has "proof that Nicaraguan guerrillas took part" in the kidnapping of 100 Honduran businessmen in San Pedro Sula, but that: "Arms go from Nicaragua to El Salvador. That is clear." (Ibid., p. 72.)

132. In the Security Council debate of 9 May 1983, the representative of Honduras declared:

"The Government of Nicaragua - the Sandinist Government - is not just arming itself out of all proportion or just making aggressive statements. It has also carried out a clearly interventionist policy in neighbouring States by promoting the traffic in weapons. I have seen them; I have witnessed them; they exist. If members would like to see the masses of photographs we can circulate them ... Interventionism is a risky business. As well as the traffic in weapons, terrorism and subversive movements exist in the region, and this is conducive not to peace ... but to the maintenance of a climate of tension and violence in Central America. In this respect Honduras must declare its readiness to exercise its sovereign and legitimate right to defend its democratic system of life ..." (S/PV.2431, p. 42.)

He added:

"This is not a bilateral problem between Honduras and Nicaragua. The weapons that are intended to overthrow the Government of El Salvador are moving through my territory. I do not want continually to cite newspapers, but I am going to quote from yesterday's New York Times, in which there was an indication that weapons have been moving through my country towards El Salvador by eight routes, and that at the same time they are being routed around it through the Strait of Jiquilisco or the Gulf of Fonseca. We believe that what is sauce for the goose is sauce for the gander, and you know that in the United States there are both geese and ganders in this struggle." (Ibid., pp. 49-50.)

133. In the Security Council debate of 25 March 1983, the respresentative of Honduras again charged that: "Weapons continue moving through our territory with the aim of destabilizing the Government of El Salvador." (S/PV.2423, p. 82.)

134. In the Security Council debate of 28 March 1983, the respresentative of Honduras, in speaking of Nicaraguan support of the guerrilla movement in El Salvador, declared that the land borders of Honduras "have been violated: we have truckloads of captured weapons, freight cars full of weapons" (S/PV.2425, p. 81).

135. In July 1983, such Honduran contentions were elaborated in an address by the Honduran Ambassador to the Organization of American States, published as Annex 59 to the United States Counter-Memorial. The Ambassador charged:

> "It is important to bring to the attention of the distinguished representatives the fact that the totalitarian Nicaraguan regime is the main factor in the emergence of the regional crisis, because it has unleashed actions aimed at destabilizing governments in other Central American countries. These actions include, among others, direct support for terrorist and subversive groups. To do this, Nicaragua has the backing of antidemocratic groups and countries that are alien to the Central American region.
>
> ...
>
> Nicaragua has continued in its spiraling arms buildup. It has continued the trafficking of weapons from several places through its territory, particularly to El Salvador, violating our sovereignty.
>
> The actions for the political destabilization of the area have not been interrupted; on the contrary, they have been increased. The acts of provocation and aggression against Honduras have not ceased; rather they have flared up ...
>
> All this clearly shows that Central America is experiencing a widespread conflict provoked by Nicaragua, which has consequences for all countries in the region. Therefore, this is not just a bilateral conflict, as the Sandinist regime has tried to label it."

After furnishing considerable detail about the build-up of the Nicaraguan armed forces, exceeding the military forces of the rest of the Central American countries combined, the Honduran representative continued:

> "The Nicaraguan Government has been sending weapons to the rest of Central America, especially to El Salvador, since 1980. In the specific case of Honduras, Nicaragua has repeatedly violated our territory in order to do this.
>
> On 17 January 1981 Honduran Army troops and public security agents seized a large shipment of weapons and military supplies 16 km from Comayagua. The shipment had been well camouflaged inside a van that entered our territory through the Guasaule customs post. These weapons were for Salvadoran guerrillas. We seized M-16, G-3, and Fal rifles; M-1 carbines; 50-cal ammunition clips; Chinese RPG rockets;

81-mm mortar rounds; ammunition clips; (caterinas); communications equipment; and medicines. Five Hondurans and 12 Salvadorans were arrested for their involvement in this shipment of weapons and supplies.

The arms traffic has continued through different ways and means. On 7 April 1981 troops of the 11th Infantry Battallion stationed in Choluteca seized another van carrying 7.62-mm and 5.56-mm ammunition that had been packed in polyethylene bags and hidden in the sides of the van. The troops also seized a large quantity of material for the Armed People's Revolutionary Organization, ORPA, of Guatemala, which was supposed to get the entire shipment. This van had left from Nicaragua and was detailed at the Guasaule customs post.

Honduran territory has also been illegally used for the passage of troops from Nicaragua to El Salvador. On 26 March 1983 a Honduran patrol caught a group of guerrillas by surpise in Las Cuevitas, Nacaome Municipality, Valle Department, in southern Honduras. They were en route to El Salvador from Nicaragua. Two of the guerrillas were killed in a clash with the Honduran patrol. On this occasion we seized M-16 rifles, one Czechoslovak 7.65-mm machine gun made by FHX, M-16 clips, machine gun clips, (caterinas), a portable radio, an FSLN flag, FMLN and FSLN manuals, as well as two notebooks containing full information on the general route used to move military personnel and weapons through Honduras on the way to El Salvador."

And Honduras provides a great deal more detail about alleged Nicaraguan subversion and terrorism in Honduras, Costa Rica and Guatemala. None of this evidence has been specifically refuted by the Nicaraguan Government in the course of these proceedings, though all of it was on record in them as long ago as 17 August 1984.

136. Honduras has made like specific charges against Nicaragua at meetings of the United Nations, for example, the Security Council session of 30 March 1984 (S/PV.2525). One passage from a long and detailed statement is as follows:

"The fact that the Sandinist Government is intervening in neighbouring countries is confirmed by the support it gives to the promotion of subversion in Honduras. But this effort has failed. It is confirmed also by its support of the guerrillas in El Salvador by supplying them with weapons. As part of this strategy, a week ago Commander Ortega Saavedra, Nicaragua's Defence Minister, announced the possibility that local guerrilla fighters would mine the ports of the other Central American countries, from Guatemala to Panama. This statement is a new and very clear threat of the use of force against other countries, in open violation of the United Nations Charter. Moreover, it is an open admission that the subversive groups attempting to destabilize Governments in the area are operating with the support and under the control of the Nicaraguan Government, as Mr. Edgardo Paz Barnica, the Foreign Minister, said in his firm message of protest." (At p. 58.)

137. In...

137. In the general debate of the United Nations General Assembly of 12 October 1983, the Foreign Minister of Honduras, criticizing actions of Nicaragua, declared:

> "we see examples of open intervention in El Salvador; attempts to destabilize the democratic Governments of Honduras and Costa Rica; an alarming increase in the armed forces of the Nicaraguan régime and statements by the Commanders that govern Nicaragua. 'Our army is prepared to cross the borders of Honduras and Costa Rica', 'El Salvador is our shield', they have proclaimed ...

138. In debate in the General Assembly on 26 October 1984, the representative of Honduras contended:

> "There has been talk of the use of Honduran territory and of that of other countries allegedly to attack the neighbouring Government. But it has not been said that there were hundreds, if not thousands of Sandinists - and they, themselves, have recognized this - who travelled to the Honduran forests, to our tropic zones and tropical jungles, to escape the repression of the Somoza army, to recuperate and then to return to struggle until victory was achieved on 19 July 1979." (A/39/PV.36, p. 77.)

9. Statements by the Government of Costa Rica accusing Nicaragua of subversive acts

139. One of the acts of terrorism attributed by Honduras to Nicaragua by the Honduran Ambassador to the OAS was the subject of a circular note of 28 July 1982 to diplomatic missions accredited to the Government of Costa Rica, which is reproduced at Annex 57 of the United States Counter-Memorial. It refers to a plan, said to be devised and directed by the Nicaraguan Ministry of the Interior, to bomb the Honduran airline offices in San José, a plan which Nicaraguan diplomats accredited to Costa Rica took steps to implement, in collaboration with a Colombian terrorist. (Nicaraguan collaboration with Colombian terrorists was to be charged again in 1985, when the Government of Colombia was reported to have withdrawn its Ambassador from Managua in response to charges of Sandinista involvement in the Palace of Justice siege in Bogota; see The Times (London), 23 December 1985, p. 4.) That circular note also refers to Costa Rican protests to Nicaragua over the frequent violations of Costa Rican territory by the Sandinista Army, as well as "constant violation" by Nicaragua of Costa Rica's right to free navigation on the San Juan river. The Costa Rican note also protests overflights of Costa Rican territory by the Nicaraguan Air Force. No refutation of these charges was made by the Nicaraguan Government in the course of this Court's proceedings, despite the fact that they have been before the Court since 17 August 1984. However, Nicaragua has felt able to press its own charges of "State terrorism", involving, among other acts, bombing of an airline office and overflight of its territory.

10. Statements by the Congress of the United States and by Congressmen opposed to United States support of the contras

140. Annexes to the Nicaraguan Memorial contain extensive reproduction of debates in the Congress of the United States and of relevant United States legislation. Two elements of the debates and the legislation stand out. The first is that the elected representatives of the people of the United States are profoundly divided over the policies the United States should pursue towards Nicaragua. The second is that the elected representatives of the people of the United States are virtually united in their appraisal of the facts of Nicaraguan behaviour vis-à-vis El Salvador and its other neighbours. That is to say, however acute the differences in the Congress, and between the Administration and much of the Congress, on policy towards Nicaragua, and even on what policy towards Nicaragua is legal, there is remarkably little difference about the facts. The great majority of the members of the House and Senate of the United States agree that Nicaragua began to ship arms and otherwise assist in an effort to overthrow the Government of El Salvador before the United States sent as much as a bullet to the contras. Equally, they agree that Nicaragua has maintained to this day its active policy and practice of assisting the Salvadoran guerrillas to overthrow the Government of El Salvador. These conclusions are accepted as true by the strongest and most articulate critics of the United States policy of supporting the contras. Is it to be supposed that they - and the Governments of El Salvador, Honduras and Costa Rica - are all wrong, and that the Government of Nicaragua is all right?

141. A good deal has been made in and by the Court - quite understandably - of the admissions of the United States. The Court would have done well to have given some weight to the affirmations of the Congress of the United States. It is not the practice of the Congress to enact falsehood into fact. In the democratic system which the United States is fortunate enough to enjoy, the press is too free, speech is too unhindered, leaks of official secrets are too easily sprung, the estate of bureaucrats is too low, and the behaviour of Congressmen is too irreverent, to make it likely that, in a case such as this, where the facts have been aired, challenged, debated, scrutinized and tested, the repeated legislative findings of the Congress of the United States, adopted by vast majorities, are false, year after year. And what are those findings?

142. One may begin with the Permanent Select Committee on Intelligence of the House of Representatives. That Committee, then under the chairmanship of Congressman Edward Boland, rendered a report in May 1983 which counsel for Nicaragua, Professor Brownlie, described in Court as "that remarkable public document", a document which is "authoritative and substantial" (Hearings of 20 September 1985). Let us look at some of the "authoritative and substantial" findings of that report (it appears as Ann. E, Att. 1, to the Nicaraguan Memorial).

143. The Committee - whose majority vigorously opposed continued United States support of the contras - began by observing that the insurgency in El Salvador:

"depends...

"depends for its life-blood - arms, ammunition, financing, logistics and command-and-control facilities - upon outside assistance from Nicaragua and Cuba. The Nicaraguan-Cuban contribution to the Salvadoran insurgency is longstanding ... It has provided the great bulk of the military equipment and support received by the insurgents." (At p. 2.)

It declared the following under the caption "Activities of Cuba and Nicaragua":

"The Committee has regularly reviewed voluminous intelligence materials on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua. The Committee's review was indicated not only because of the importance of Central American issues for U.S. foreign policy, but because of decisions which the Congress was called upon to make on questions of aid to countries in the region. The Committee has encouraged and supported a full range of intelligence collection efforts in Central America.

Full discussion of intelligence materials in public reports would pose serious security risks to intelligence sources and methods. Necessarily, therefore, the Committee must limit its treatment of Cuban and Nicaraguan aid for insurgencies to the judgments it has reached. Such judgments nonetheless constitute a clear picture of active promotion for 'revolution without frontiers' throughout Central America by Cuba and Nicaragua.

The Committee has not come newly to its judgments. On March 4, 1982, after a major briefing concerning the situation in El Salvador, the Chairman of the Committee made the following statement:

'The Committee has received a briefing concerning the situation in El Salvador, with particular emphasis on the question of foreign support for the insurgency. The insurgents are well trained, well equipped with modern weapons and supplies, and rely on the use of sites in Nicaragua for command and control and for logistical support. The intelligence supporting these judgments provided to the Committee is convincing.

There is further persuasive evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operation in Nicaragua. Cuban involvement - especially in providing arms - is also evident.

What this says is that, contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency. That support is such as to greatly aid the insurgents in their struggle with government forces in El Salvador.'" (At p. 5.)

144. This...

144. This "authoritative and substantial" report relied on by Nicaragua further holds:

> "At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty:
>
> 'A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas.
>
> The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.
>
> The Sandinista leadership sanctions and directly facilitates all of the above functions.
>
> Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.'
>
> In addition, Nicaragua and Cuba have provided - and appear to continue providing - training to the Salvadoran insurgents. Cuban and Sandinista political support for the Salvadoran insurgents has been unequivocable for years. The Committee concludes that similarly strong military support has been the hidden complement of overt support. As the Assistant Secretary of State for Inter-American Affairs, Thomas O. Enders, stated (April 14, 1983) to the Committee on Foreign Affairs:
>
> 'In 1980 (just as in 1978 Castro had brought the three main Sandinista factions together in Havana), Cuban agents brought five guerrilla factions from El Salvador together in Managua, worked out a unity pact among them, then set up a joint command and control apparatus in the Managua area and organized logistic and training support on Nicaraguan soil. Since that time, the great bulk of the arms and munitions used by the insurgents in El Salvador have flowed through Nicaragua.'" (At p. 6.)

145. It will be observed that the Committee affirms that it has reviewed "voluminous intelligence materials" - materials which, Mr. MacMichael acknowledged, are essentially the same materials that he had scrutinized (Hearings of 16 September 1985). Its conclusions are not indefinite. As of 1983 - not 1981 but 1983 - it held that there was "a clear picture of active promotion of 'revolution without frontiers' ... by Nicaragua". It concluded that, "contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency". It adjudged "with certainty" that arms for the Salvadoran insurgents transit Nicaragua with Sandinista support, and that the Salvadoran insurgents benefit from the continued use of command facilities in Nicaragua.

146. If Mr. MacMichael is correct in hazarding that the intelligence community gave misleading presentations, it appears to have made a good job of it, in the light of the following paragraphs of the Report (which, it must be recalled, is offered by Nicaragua in evidence, as in support of Nicaragua's case):

> "On September 22, 1982, the Committee released a staff report of its Subcommittee on Oversight and Evaluation entitled 'U.S. Intelligence Performance on Central America: Achievements and Selected Instances of Concern'. That report noted:
>
> > 'The intelligence community has contributed significantly to meet the needs of policymakers on Central America. Over the last two years perhaps its greatest achievement lies in determining with considerable accuracy the organization and activities of the Salvadoran guerrillas, and in detecting the assistance given to them by Cuba and other communist countries. Although amounts of aid and degrees of influence are difficult to assess, intelligence has been able to establish beyond doubt the involvement of communist countries in the insurgency.'" (At pp. 5-6.)

147. The views of the Congress on the question of Nicaraguan support of the Salvadoran insurgency have not changed as of 1985. The Conference Report on the Foreign Assistance Act of 1961 as amended in 1985, to which Nicaragua draws attention (Memorial of Nicaragua, Suppl. Ann. C, Att. 7) contains the following passages:

- The Congress calls for:

> " (B) the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador." (At p. H 6720.)

- The Congress further finds that the Government of Nicaragua

> "(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbours in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention." (At p. H 6721.)

148. It is of interest to note that the 1985 Conference Report also "condemns the Government of Nicaragua for violating its solemn commitments to the Nicaraguan people, the United States and the Organization of American States" particularly because of its having failed to fulfill "its 1979 commitment to the Organization of American States to implement genuinely democratic elections..." (p. H 6721).

149. Congressman...

149. Congressman Boland's views, in his capacity as Committee Chairman, which were read out in Court and are quoted above, elicited a comment from Mr. MacMichael which will be examined below. Congressman Boland has since been succeeded as Chairman of the House Permanent Select Committee on Intelligence by Congressman Lee Hamilton, another critic of the Administration's policies of aid to the contras. His views on the facts of Nicaraguan support of the Salvadoran insurgency are of like interest. As of 3 June 1985, these were his views:

> "the Nicaraguan Government appears to have committed itself to a policy of support for insurgencies in other Central American countries. The most important example of this policy is the assistance provided by Nicaragua to the Salvadoran guerrillas. It seems clear that the Nicaraguan commitment to the Salvadoran guerrillas stems from FMLN support to the Sandinistas during their efforts to overthrow Somoza and is a matter of revolutionary pride and solidarity.
>
> The flow of arms from Nicaragua to the Salvadoran guerrillas continues. The network used for this purpose is run by Salvadorans with Nicaraguan support. The supplies provided by the network are thought to be mostly ammunition but also medicine and other supplies. It is also thought that the Salvadoran guerrillas have enough arms but still rely, to some significant degree, on other types of assistance from Nicaragua.
>
> There have been no appreciable interdiction of arms shipments by the Salvadoran armed forces and none at the point of entry into El Salvador. The capture of supplies of arms in the past have been in Honduras while in transit or in safehouses.
>
> The flow of assistance and supplies comes by water along the southeast coast of El Salvador, by land through Guatemala and Honduras, and possibly by air from Nicaragua. The inability of the Salvadoran or Honduran forces to interdict shipments by water routes alone is a factor of their corruption or lack of proficiency and of what must either be an extremely effective guerrilla network or a very small volume of shipments.
>
> Nicaragua also provides communications facilities, safe haven, training, and logistical support to the Salvadoran guerrillas. The system employed to provide all of these types of assistance is flexible and, apparently, very well run.
>
> The judgments made above concerning assistance to the Salvadoran guerrillas are inferential and based on substantial, but circumstantial information." (Congressional Record, Extension of Remarks, June 3, 1985, p. E2470.)

150. These judgments of the House of Representatives are duplicated in the Senate. Thus in March 1984, Senator Daniel Patrick Moynihan, a member of the Senate Intelligence Committee, said on the Senate floor:

"It...

"It is the judgment of the Intelligence Committee that Nicaragua's involvement in the affairs of El Salvador and, to a lesser degree, its other neighbors, continues ... the Sandinista support for the insurgency in El Salvador has not appreciably lessened; nor, therefore, has their violation of the OAS Charter abated." (Reprinted in "For the Record", the Washington Post, 10 April 1984.)

151. Leading, informed opponents of the Reagan Administration's Central American policies who nevertheless are convinced that Nicaragua has been subverting the Government of El Salvador are not restricted to the Congress. For example, the last Ambassador to El Salvador under the Carter Administration was Robert E. White, a career Foreign Service officer who was replaced by the new Administration as "a first signal that U.S. policy was in new hands" (Alexander M. Haig, Jr., Caveat, p. 127). He retired "to become a vociferous public opponent of our policy in El Salvador" (ibid.). Ambassador White, in testimony before a Congressional committee, declared that the evidence contained in the Department of State White Paper of 1981 was genuine and stated that the Salvadoran guerrillas had "imported massive quantities of arms" by way of Nicaragua (see Richard Whittle, "Reagan Weighs Military Aid to Counter Soviet, Cuban 'Interference' In El Salvador", Congressional Quarterly, 28 February 1981, p. 389; Nicaraguan Memorial, Ann. E, Att. 1, p. 37 (for the text of Ambassador White's letter to President Duarte transmitting an analysis of the captured documents, as well as Congressman Young's commentary on those documents); and Margot Hornblower, "Ousted Envoy Hits Arms Aid to Salvador", the Washington Post, 26 February 1981, p. 1).

152. Against this weight of informed United States opinion, Nicaraguan counsel have offered essentially two things. First, they have offered the sworn and reiterated affirmations of Foreign Minister D'Escoto and Commander Carrión, as well as of the Nicaraguan Agent; second, the testimony of Mr. MacMichael. It has been demonstrated above that those former, self-interested affirmations not only conflict with the testimony of Mr. MacMichael for the period mid-1979-April 1981, but conflict with an affidavit of Commander Carrión himself, not to speak of the considerable amounts of other evidence set forth in this appendix. Accordingly, I am convinced that it is impossible to conclude that, for the pre-March 1981 period, these Nicaraguan affirmations can be regarded as true; on the contrary, it is obvious that they are false. Now if these representatives of the Government of Nicaragua have deliberately spoken falsely about the pre-March 1981 period, in an attempt to mislead the Court, what reason is there to suppose that they spoke the truth about the absence of arms shipments to Salvadoran insurgents after March 1981? In short, there is every reason to discard the affirmations of representatives of Nicaragua as lacking in probative value. That is not to say that the Court is right simply to discount those affirmations along with those of representatives of the United States and absolve itself of dealing with the fact that on a vital question the sworn factual submissions of Nicaragua are false; that is another matter. But as for whether the representations of Nicaraguan representatives can offset the findings of the United States Congress, it is clear that they cannot.

153. Of

153. Of course, one can say that, no less than Nicaraguan representatives, the United States Congress is a party in interest, and that its affirmations carry no more weight than do those of officials of Nicaragua. One can say that, but one cannot reasonably sustain such a conclusion. For, as pointed out, the statements of the United States Congress and of leading members of the House and Senate are of persons who do not fully support, but in large or full measure oppose, the policy of the United States which is at issue in this case. Quite apart from what one may believe or conclude about the relative fidelity of the persons in question, there is reason not to discount these expressions of studied Congressional conviction.

154. For his part, Nicaragua's key witness on the question, Mr. MacMichael, did not discount Congressional conclusions. On the contrary, when asked how he could explain the discrepancy between his evaluation of the intelligence data and Congressman Boland's, he earnestly replied:

> "this is a very important question ... I do not like to believe that my powers of judgment are greater than those of Congressman Boland. He certainly has seen the evidence, and it is my belief that the evidence he saw was essentially the same evidence that I saw." (Hearings of 16 September 1985.)

Then how does Mr. MacMichael explain such wide discrepancies between his interpretation of the evidence and that of Congressman Boland? First, he says that, in 1982, it was concluded in respect of an intelligence presentation to the House Intelligence Committee that the presentation seemed designed more to present the Administration's position than to illuminate the situation. Second, he suggests that, when in 1983 Mr. Boland made statements such as those quoted in paragraphs 140 and 141 of this appendix, he did so in the context of a report which recommended cutting off funding for the contras, on the ground, among others, that, since the flow of arms to Salvadoran rebels from Nicaragua continued, the contras obviously were ineffective in interdicting that flow. Mr. MacMichael suggests that, apparently, Mr. Boland had to claim that there was a continued flow of arms to the Salvadoran insurgents in order to justify his conclusion that the contras were ineffective and should no longer be supported.

155. Do these explanations withstand analysis? Hardly. If, in 1982, in a House Intelligence Committee whose majority was opposed to the policy conclusions to which intelligence briefings led, there was dissatisfaction with the objectivity of those briefings, one may be sure that steps were taken to improve the objectivity of the presentations, which, moreover, have taken place frequently thereafter, including in 1985 when the House of Representatives adopted the conclusions quoted above in paragraphs 147-148. That Mr. MacMichael's characterization does not appear to be the House's appreciation of the quality of such intelligence briefings is indicated in the quotation supplied in paragraph 146 of this appendix. Moreover, it is implausible to suggest that, in order to justify his policy of cutting off support to the contras, Congressman Boland had to find the existence of a pattern of shipment of arms to El Salvador where none existed. If in fact there

were no such pattern, if in fact Nicaragua was blameless, Congressman Boland would have been in the stronger position simply to oppose the policy of supporting the contras. Thus the "stipulation" which Mr. MacMichael attributes to Congressman Boland is conjecture which in no way answers the question of how it is that apparently everyone else who has seen the same intelligence data as did Mr. MacMichael arrived at a very different interpretation of it.

11. The transcript of conversation between Assistant Secretary of State Enders and Co-ordinator Ortega

156. Reference has been made in paragraphs 25-26 of this appendix to the transcript of conversation which records exchanges in Managua on 12 August 1981 between the then Co-ordinator of the Junta, Commander Daniel Ortega, and the then Assistant Secretary of State for Inter-American Affairs, Thomas O. Enders. That transcript has been offered in evidence by Nicaragua, which contends that "the report of the meeting between Commander Ortega and Mr. Enders corroborates and confirms the evidence and testimony already presented to the Court by Nicaragua on the subject of the supposed supplying of arms to El Salvadoran insurgents", evidence and testimony which it then summarizes (NUS/25, p. 3). That contention merits examination, especially because the Court appears to agree with it.

157. After having stated that, "you see your revolution as irreversible, and so do we", Mr. Enders went on to refer to his other conversations in Managua, a record of which is not provided, and observed that three major problems had emerged, two raised by the United States and the third by Nicaragua, namely:

> "1. The continued flow of arms, munitions and other forms of military aid to El Salvador.
>
> 2. The rapid expansion of military power in Nicaragua which, if it continues, will become a threat to its neighbours, and might give rise to a general conflagration in which the United States could not remain uninvolved.
>
> 3. The fear that the United States is taking steps to destabilize and attack the revolution." (NUS/25 ter, p. 1.)

158. Commander Ortega's response is interesting, not least because, rather than initially denying Nicaraguan military aid to Salvadoran insurgents, he spoke of Nicaraguan National Guardsmen in camps in the United States, of support by the United States for El Salvador, and the circumstances which have "forced" Nicaragua to embark on an arms race. Mr. Enders replied that the United States and Nicaragua are at a crossroads.

> "On your part," he said, "you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results." (Ibid., p. 3.)

159. Mr. Enders...

159. Mr. Enders proceeded in a diplomatic vein. "We should be glad if attention could be paid to the question of the arms race in Central America." While the United States "could ourselves suggest a few ways of resolving this problem, ... it is for each individual country to settle the question of the number of soldiers and the quantity of arms it should have". As for fear on Nicaragua's part of United States intervention, the United States would be prepared to investigate the possibility of "reaffirming" the commitment of the Rio Treaty not to resort to the threat or use of force, "either bilaterally or by other means". The United States is prepared "to give somewhat closer consideration to the problem of Nicaraguan political exiles in the United States ... it is obvious that if you see them as a political threat, the problem would be to see how we could respond to this concern". Mr. Enders continued:

> "When we suspended our economic assistance, we said that it could be resumed if Nicaragua halted the arms flow to El Salvador, and even though the situation in the United States has since changed, this offer remains open." (Ibid., p. 4.)

He added that the United States could investigate almost immediately the question of food and development aid, and Peace Corps assistance. He proposed that, in the next weeks, both sides take steps to reduce the polemics and continued:

> "During this time we hope that steps will be taken to halt the arms flow to El Salvador, and I propose to return to Nicaragua at the end of September to review the programme which has been drawn up and see if conditions are ripe to go on to the next stage." (Ibid., p. 5.)

Mr. Enders then concluded:

> "I must emphasize that we feel we are now at a crossroads, and if we do not take these steps we will not achieve any détente. I do not think it is necessary to go into the alternatives before us in detail, but I should like to point to two ideas: there are only two things which could oblige us to involve ourselves militarily in this region: (1) if this idea of doing the utmost to halt the arms flow to El Salvador is rejected, (2) if the arms race in Central America is built up to such a point that some of your neighbours in Central America seek protection from us under the Inter-American Treaty. We have nothing to gain in such a situation - the cost would be excessive - but if it is forced upon us, the present American administration would be prepared to take a decision in that situation.
>
> How would you like us to proceed? Should we go on explaining the ideas which I have put forward?" (Ibid.)

160. Commander Ortega's reply was conciliatory but, on the one hand, while admitting Nicaraguan interest in seeing the Salvadoran and Guatemalan guerrillas triumph, on the other he gave no assurances about Nicaraguan policy on the flow of arms to the guerrillas:

> "We too have considered the two alternatives which you have put forward, and we too have seen the crossroads. We have decided to defend our revolution by force of arms, even if we

are crushed, and to take the war to the whole of Central America if that is the consequence. We are aware of the military power of the United States, but in that respect we are romantics; however, we are not suicides, and we have no wish for that kind of solution. I think the proposal you have made is within rational limits.

the basic responsibility lies not only with the conduct of Nicaragua, but also in the conduct of the United States, which determines our own ...

We have an historical prejudice towards the United States, because that country has shown a series of attitudes which makes us fear attack from it, and look for all possible means of defence. We are interested in seeing the guerrillas in El Salvador and Guatemala triumph, when we see that there is no good will in the United States towards us. This is why the greatest weight in this situation attaches to the policy of the United States. This situation is not going to be resolved by the conduct of Nicaragua, but will depend on the conduct of the United States. It seems to me that an effort must be made to explore these paths which you are describing ...

For our part, we are prepared to make every possible effort to achieve an understanding with the United States, but this will depend on its attitude. We have a feeling of insecurity; ...

Your return in September would be very positive and this commits us to take practical steps. If the United States, for example, can take action against camps of the former National Guard on its territory, this will relieve the pressure on the arms race in Nicaragua." (Ibid., pp. 5-6.)

161. Mr. Enders then made the following remarks, which were no less conciliatory while again emphasizing the importance of Nicaragua's cutting off the flow of arms to Salvadoran insurgents:

"As regards taking responsibility, we are not trying to make you carry responsibility for the present situation. I can understand that a revolution which has recently triumphed will find it necessary to take arms to defend itself and protect other revolutionary movements with which it has affinity, and of course it is more advantageous to you if the struggle takes place in other countries rather than your own. The problem is that this manner of proceeding or this form of conduct may become a challenge to the United States to which the latter has to respond, and this is a vicious circle which we must escape from. The proposals I wanted to make were aimed at overcoming this problem, and I think that if we want to go on, we must reduce the polemics and provide ourselves with a reliable channel of communication. ...

I must emphasize the importance of stopping the flow of arms to El Salvador, for if this is not done, I could not suggest to my government that we pursue the line we have discussed. Personally, I am certain that we will make great efforts to exploit the ideas that I have put to you and the proposals that you make." (Ibid., p. 7.)

162. Commander Ortega replied:

"As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it; however, I want to make clear that there is a great desire here to collaborate with the Salvadoran people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it." (Ibid.)

163. To that, Mr. Enders responded:

"You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations [sic: relations?] have not yet reached the necessary level to exchange intelligence reports.

I should like to reaffirm that we are serious people and that we are not setting impossible conditions or playing some diabolical game which you cannot win." (Ibid.)

164. Whereupon, Mr. Ortega concluded: "In March you transmitted reports to us which were very valuable in halting the flow ..." (Ibid.)

165. While the elision marks of the record indicated that this was not the end of the exchange, it is the end of the portions of the exchange which Nicaragua saw fit to provide to the Court. Does that record support the conclusion advanced by Nicaragua that it corroborates and confirms its position on the flow of arms to El Salvador? Up to a point, but not up to the critical point. The exchange does bear out the fact that, prior to March 1981, there was a flow of arms from Nicaragua to Salvadoran insurgents: this is a conclusion which Nicaragua concedes in its interpretation of the Enders conversation (NUS 85/25, p. 4). However, Nicaragua maintains that that flow was "small", contrary to the policy of the Nicaraguan Government, and that to the best of its ability the Nicaraguan Government acted to prevent and stop it. (As has been demonstrated, the flow between the summer of 1979 and March 1981, was not small, and it was not only promoted but arranged by the Nicaraguan Government. It is here that, in this letter reproduced as NUS 85/25, Nicaragua puts forth a remarkably misleading description of Mr. MacMichael's actual testimony, which ignores his acceptance as a fact that Nicaragua as a Government had been involved in provision of quantities of arms to the Salvadoran insurgents before March 1981.)

166. What...

166. What is key is that Mr. Enders maintained that there was a continuing or, rather, resumed flow of arms from Nicaragua to El Salvador; and that Mr. Ortega replied that "as far as we have been informed by you, efforts have been made to stop it". Commander Ortega continued: "We would ask you to give us reports about that flow to help us control it." Mr. Enders' reply was straightforward:

> "You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

167. What was Mr. Enders saying? He was saying, it would appear, look, when, in the autumn of 1980, Mr. Cheek told you that the arms flow to the Salvadoran guerrillas must stop if the flow of American aid to Nicaragua is to be sustained, he gave you some details about the arms flow, on the theory that, conceivably, the facts were not known to Nicaraguan Governmental authorities. The result was (as revealed by the captured papers of Salvadoran guerrillas, see paragraphs 16, 18-20, 151 above) that the precise routes of arms supply pinpointed by United States intelligence were closed down, and others were opened up. Again in March of 1981, apparently there was a like experience; the United States seems to have transmitted specific reports; those routes of arms flow which its intelligence had located were closed down; yet the flow had resumed. Mr. Enders accordingly observes that, "We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

168. But Commander Ortega did not give up easily. "In March you transmitted reports to us which were very valuable in halting the flow ..." At this point, as noted, the record, in so far as it is supplied, is cut short, but there is - contrary to the contention now advanced by Nicaragua in NUS 85/25 - no evidence that "after March 1981 ... no such shipments were made". It is true that, after March 1981, Mr. MacMichael found no evidence that there had been such shipments. But the evidence that there have been such shipments, particularly of ammunition and explosives, is considerable, as the data set out in this appendix shows. (Moreover, additional detailed evidence showing shipment of arms through Nicaragua and provision of other support by Nicaragua to Salvadoran insurgents after 1981 is contained in Background Paper: Nicaragua's Military Build-Up and Support for Central American Subversion, submitted to the Court by the United States with its Counter-Memorial - evidence which, apart from Mr. MacMichael's testimony, Nicaragua has left essentially unchallenged.) As concluded in paragraphs 58-61, 76-77 of this appendix, it is not possible to believe that the Nicaraguan Government actually was unaware of and uninvolved in the large-scale flights of arms from an airfield near Managua in January 1981; a comparison of Mr. MacMichael's testimony on the flights from Papalonal (Hearings of 16 September 1985) and the allegations in "Revolution Beyond Our Borders" (pp. 18-19, 27-29) shows a striking correspondence between Mr. MacMichael's recollections and the United States contentions, both of which are inconsistent with those

operations not having had the sanction of the Nicaraguan Government. If the position of Nicaragua that it was uninvolved in the pre-March 1981 shipments is untrue - and demonstrably it is - what remains of the current Nicaraguan contention that the Enders/Ortega conversation confirms and corroborates its whole position? Indeed, if the shipments made before March 1981 were unknown to the Nicaraguan Government, how can it be sure that, after March 1981, "no such shipments were made"?

169. In the aftermath of the Enders visit, the United States put the Enders' proposals in writing, papers were exchanged, and negotiations were carried on. By October 1981, the Nicaraguan Government rejected the Enders approach as "sterile" (see Mr. Enders' statement of 12 April 1983 before the Senate Committee on Foreign Relations, reprinted in "Nicaragua: Threat to Peace in Central America", Department of State Current Policy Paper No. 476, p. 2). On the one hand, officially Nicaragua continued to maintain that it was not giving material support to the Salvadoran insurgents. On the other hand, Commander Bayardo Arce told the United States Chargé d'Affaires that the United States "had better realize that nothing you can say or do will ever stop us from giving our full support to our fellow guerrillas in El Salvador" ("Revolution Beyond Our Borders", op. cit., pp. 57, 72 (note 23)). Where the fault lies in the breakdown of the Enders' initiative is difficult to say; opinions vary. Mr. Enders, in the cited Senate statement, places the blame on Nicaragua (loc. cit., p. 2). President Ortega has publicly recalled Mr. Enders' declining to supply information on arms shipments through Nicaragua and protested that Mr. Enders set as a condition for a dialogue "to even start - that Nicaragua couldn't arm itself, that Nicaragua could not permit the trafficking of weapons to El Salvador, that the 'opposition' be part of the regime" (Playboy, loc. cit., p. 200). Actually, the transcript of the Ortega/Enders exchange furnished by Nicaragua indicates no demand by the United States that "Nicaragua couldn't arm itself", and no demand for admitting the opposition. But it does show a reiterated United States requirement that "Nicaragua could not permit the trafficking of weapons to El Salvador". If in fact Nicaragua was not engaged in such trafficking, why, it may be asked, could not it readily accept this condition, which the United States made clear was the sine qua non of peaceful co-existence?

170. In any event, whoever was at fault in the failure of the Enders mission, it is clear that the United States mounted a high-level, candid, and conciliatory attempt to persuade Nicaragua to cease its support for the insurgency in El Salvador in return for inducements which would have met Nicaragua's professed concerns and interests, and that this attempt embodied explicit acceptance of the Nicaraguan revolution. With the failure of the Enders mission, with the perception by the United States of its rejection by Nicaragua by October 1981, the United States apparently concluded that it would have to try to force Nicaragua to do what Nicaragua would not genuinely agree to do: stop promoting the overthrow of the Government of El Salvador. Accordingly, the next month, November 1981, President Reagan authorized United States support of the contras.

12. Further early United States attempts at peaceful settlement

171. Nevertheless, even after the United States embarked on the course of contra support, it made further serious attempts at peaceful settlement. At the suggestion of the President of Mexico, the United States, in Spring of 1982, presented specific proposals in writing to Nicaragua: eight points reiterating and developing the Enders' proposals. "The first is the cessation of Nicaragua's support for insurgencies in neighbouring countries ... we must have results on this before any results can be achieved on other aspects of the proposal ..." (Transcript of a Department of State Press Briefing, 8 April 1982, Documents on American Foreign Policy, 1982, Doc. 686, p. 1438.) The second was a proposed statement by the United States dealing with Nicaraguan exile activities in the United States. The third was a proposed joint United States-Nicaraguan statement on friendly relations, "a joint statement pledging noninterference in each other's affairs or in the affairs of others in the region" (ibid.). The fourth was a proposal for arms and military force limitations, which provided for a regional ban on the importation of heavy offensive weapons and reduction of the presence of foreign military advisers. The fifth was a proposal for international verification of these undertakings by the OAS or other regional organizations. The sixth was a proposal for economic co-operation, including "the reestablishment of direct economic assistance" by the United States to Nicaragua. The seventh proposal was for human and cultural exchanges and "confidence building". The eighth proposal was for a reiteration of the Sandinista commitment to "the principles of political pluralism, a mixed economy, and nonalignment" which, together with the FSLN commitment to the OAS "concerning the holding of free elections would be important determinants of the political context of our future relations" (ibid.). These proposals were presented to the Nicaraguan Government by the United States Ambassador in Managua. Nicaragua reportedly made no positive reply.

172. Thereafter, on 4 October 1982, the United States joined with the Governments of the Republics of Belize, Colombia, El Salvador, Honduras, Jamaica and Costa Rica in a "Declaration on Democracy in Central America" (Documents on American Foreign Policy, 1982, Doc. 699, p. 1470). It called for the creation and maintenance of truly democratic governmental institutions in the region and respect for human rights as well as the following prescriptions:

> "d) Respect the principle of non-intervention in the internal affairs of states, and the right of peoples to self-determination;
>
> e) Prevent the use of their territories for the support, supply, training, or command of terrorist or subversive elements in other states, end all traffic in arms and supplies, and refrain from providing any direct or indirect assistance to terrorist, subversive, or other activities aimed at the violent overthrow of the governments of other states;
>
> f) Limit arms and the size of military and security forces to the levels that are strictly necessary for the maintenance of public order and national defense;

g) Provide for international surveillance and supervision of all ports of entry, borders, and other strategic areas under reciprocal and fully verifiable arrangements;

h) On the basis of full and effective reciprocity, withdraw all foreign military and security advisers and forces from the Central American area, and ban the importation of heavy weapons of manifest offensive capability through guaranteed means of verification." (Ibid., p. 1472.)

The Government of Costa Rica invited the Government of Nicaragua to enter into a dialogue on the basis of these principles. Nicaragua refused even to receive the proposal.

173. Mr. Enders' contemporary comments on these initiatives are of interest. In a speech of 20 August 1982 ("Building the Peace in Central America", Department of State Current Policy No. 414), Mr. Enders said the following:

"Of all these problems, it is Nicaragua that is the most worrisome. It was the new Sandinista government that regionalized the conflict in Central America by backing the violence in El Salvador. Sandinista leader Daniel Ortega once told me that the FMLN [Farabundo Marti National Liberation Front], the Salvadoran guerrilla coalition, is 'nuestro escudo' - 'Nicaragua's shield.' And Sandinista support has not lessened. The FMLN's headquarters are in Nicaragua. It receives sustained logistic support from Nicaragua, above all by airdrop and sea delivery but also by land. Its training camps are in Nicaragua ..."

"The United States has also made proposals. Beginning nearly a year ago and more intensively since April, we have attempted to engage Nicaragua in a dialogue. We have tried to respond to Nicaragua's concerns, while meeting those of Nicaragua's neighbors, and our own.

The Sandinistas tell us that they fear an invasion by the United States. So we have offered to enter into a formal nonaggression agreement. The Sandinistas tell us that ex-Somocistas are training in the United States to invade Nicaragua. We have assured them that we are enforcing our Neutrality Act, which makes it a federal crime to launch an attack, or to conspire to attack, another country from the United States.

The Sandinistas tell us we are regionalizing the conflict, preparing Honduras, El Salvador, and Costa Rica as bases for action against them. So we have suggested that each country in Central America agree to put a reasonable, low limit on the numbers of foreign military and security advisers it has, and we have suggested that each country pledge not to import any additional heavy offensive weapons. Both commitments, of course, would have to be subject to international verification.

Nicaragua would also have to meet the concerns that its neighbors and we share. We asked that Nicaragua cease its involvement in the conflict in El Salvador. The Sandinistas say that they are not aware of any such involvement, but are willing to end it if we just give them the information we have. In our most recent exchanges we suggested that removing the combined guerrilla headquarters from Nicaragua would be a good place to start and offered to help the Sandinistas locate it. For example, the point from which guerrilla operations in El Salvador are being directed was recently in a Managua suburb. We are confident that although it moves around a great deal within Nicaragua it can be found. Nicaragua has yet to respond.

Similarly, Nicaragua must cease its terrorist and other aggressive actions against Honduras and Costa Rica.

We have raised a second issue, which also deeply concerns Nicaragua's neighbors. This is the trend in the organization and use of state power in Nicaragua. It is, of course, for Nicaragua to decide what kind of government it has. No one challenges that. We don't. Its neighbors don't.

But we believe we are all entitled to ask what assurance can any of us have that promises of noninterference will be kept if the Nicaraguan state remains the preserve of a small Cuban-advised elite of Marxist-Leninists, disposing of growing military power and hostile to all forms of social life but those they dominate? And we are also entitled to ask what is to become of internationally recognized human rights under these conditions? Such questions are not a defense, secret or otherwise, for a return to a discredited Somocismo. They could be answered in the fulfillment of the Sandinistas' own original commitments to democracy and regional peace."

13. The four treaties proposed by Nicaragua in 1983

174. By the autumn of 1983, United States policy - as manifested not only with respect to Nicaragua, but apparently with respect to Grenada - succeeded in winning the attention of the Nicaraguan Government. While it appears that Nicaragua was prepared to look on approvingly, indeed give sustained support to, a Salvadoran insurgency involving thousands of deaths, thousands of wounded, and the widespread destruction of electrical power grids and dams and the blowing of innumerable bridges and roads, it protested vigorously when the contras blew up its bridges and assaulted its militia, Sandinista activists, and innocent citizens who had been similarly slaughtered for years in El Salvador.

175. Armed pressure accordingly apparently moved the Nicaraguan Government to do what persuasion could not: to propose a settlement, the essence of which appears to have been: Nicaragua will cease support of insurgency in El Salvador, if the United States will cease not only support of the contras but also support of the Government of El Salvador.

176. The four draft Nicaragua Accords of October 1983 contain no express acknowledgement of the Nicaraguan policy of support of the armed subversion of El Salvador. The "Draft Accord Concerning El Salvador" and the commentary with which the Nicaraguan Government accompanied it, as well as the other three draft accords, do not give the impression of proposals designed to lead to serious negotiation (see, Fundamental Commitments to establish Peace in Central America, Official Proposal submitted by Nicaragua within the framework of the Contadora process, 1 December 1983, Managua, Free Nicaragua; Exhibit IX to the Nicaraguan Application). Its Introduction maintains that:

> "The sustained and ever-increasing intervention of the Government of the United States in the internal Salvadoran struggle is the principal factor that hampers and renders difficult the achievement of a negotiated political solution, since it has constituted itself in fact as the principal supplier of arms directly to the governmental forces as well as indirectly to the revolutionary forces." (P. 57.)

It continues:

> "Conscious of this situation, and in a new effort to contribute to a political solution, the Government of Nicaragua made public on 19 July 1983 an appeal to all nations in which it asked:
>
> > 'the absolute cessation of all supply of arms by any nation to the forces in conflict in El Salvador, in order that this people may resolve its problems without outside interference'.
>
> Having received no answer to this appeal, the Government of Nicaragua has considered it necessary to formalize this proposal in concrete and detailed terms, in the form of an accord, to be subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador. In any event, Nicaragua is disposed to subscribe to said accord immediately, even though it be with the United States only, in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua." (P. 58.)

On 19 July, Commander Ortega's announcement of his diplomatic proposal calling for cessation of all outside assistance to "the two sides" in El Salvador may be said to have implicitly acknowledged the assistance which his Government had been giving to the Salvadoran insurgents (see "Revolution Beyond Our Borders", p. 27). The Draft of the Accord itself takes "into account that the continuation of the supplying and trafficking of arms, munitions and military equipment ..." greatly impedes the possibilities of a peaceful negotiated settlement (p. 59; emphasis supplied). The heart of the proposed Accord is found in draft Articles 1 and 2:

"ARTICLE ONE

The High Contracting Parties promise to not offer and, should such be the case, to suspend military assistance and training and the supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.

ARTICLE TWO

The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment and military assistance to and training of the contending forces in the Republic of El Salvador." (At p. 60.)

177. Foreign Minister D'Escoto travelled to Washington to present the four draft Accords; he spoke not only with senior officials of the Department of State, but with members of Congress and the press. The reaction of the press was interesting, and apparently uniform. Le Monde headlined: "Le Nicaragua cesserait d'aider le Salvador si les Etats-Unis renoncaient à soutenir les antisandinistas." (Le Monde, 22 October 1983, p. 1.) It wrote that Managua had just proposed "in good and due form to abandon the Salvadoran guerrillas to their own devices, in exchange for a guaranty that it would have nothing to fear from Washington". The Washington Post stated that:

"Nicaragua yesterday submitted to the Reagan Administration a package of four binding treaties under which the leftist Sandinista Government would pledge not to support guerrillas in El Salvador if the United States would stop supporting anti-Sandinista rebels in Nicaragua." (The Washington Post, 21 October 1983, p. 1.)

The New York Times reported that the United States Administration found the Nicaraguan proposals "deficient" and said that they should be addressed to the Contadora group. But it added:

"United States officials said that they were encouraged that the Nicaraguan Government was accepting, more explicitly than ever before, some 'symmetry' in El Salvador's demands for an end to outside aid for Salvadoran guerrillas and Nicaragua's demand that the United States halt its aid to Nicaraguan rebels". (The New York Times, 22 October 1983, p. 1.)

178. It could not be expected that a proposal of the substance and tenor of the "Draft Accord concerning El Salvador" would furnish a basis for a settlement. The United States could not be expected to agree at that stage to cease its lawful aid to the recognized Government of El Salvador - a cessation which could be easily monitored - in exchange for a pledge by Nicaragua to cease its unlawful aid to the Salvadoran insurgents - a cessation which could not be easily monitored. It could not be expected to so agree in view of the fact that its assistance to

the...

the Government of El Salvador was in response to prior, massive shipments of arms by Communist States via Nicaragua to the Salvadoran insurgents; while President Carter's Administration had suspended provision of arms to the Governments of El Salvador and Nicaragua, it was not until January 1981, in the midst of the insurgents' "final offensive", that the United States resumed arms shipments to the Government of El Salvador. Nevertheless, the Nicaraguan proposals, and the reaction of the press to them, do not strengthen the professions of the Nicaraguan Government that it has "never" engaged in arms trafficking to the Salvadoran insurgents.

14. Details of Nicaraguan subversion of El Salvador provided in "Revolution Beyond Our Borders" and in earlier publications duly submitted to the Court - and Nicaragua's reply

179. "Revolution Beyond Our Borders" contains a wealth of data, much of it documented, supporting the claims of the United States that Nicaragua has been and is engaged in activities subverting the Government of El Salvador, and, to a lesser extent, Honduras and Costa Rica. That data appears to comport with the allegations of the Governments of El Salvador and Honduras which have been set out above, and with significant facts as they came to light in the oral hearings.

180. The United States requested circulation of "Revolution Beyond Our Borders" as a United Nations document (A/40/858-S/17612). By letter of 19 November 1985, the Permanent Representative of Nicaragua to the United Nations responded, and characterized the report "as fabricated", contending that it contains "disinformation for propaganda purposes" (A/40/907-S/17639). What proof does Nicaragua offer "of the falsity of the United States Government's accusations"? "As proof of the falsity of the United States Government's accusations, we attach the transcript of the statement made before the Court by Mr. David MacMichael ..."

181. The failure of Mr. MacMichael's testimony to sustain Nicaragua's case has been analysed above. If all Nicaragua can say - and essentially that is all it does say - in refutation of "Revolution Beyond Our Borders" is what Mr. MacMichael says, then it may be recalled that:

- Mr. MacMichael's testimony supports, rather than refutes, the validity of the charges of the United States with respect to Nicaragua's provision of arms to Salvadoran insurgents until March 1981;

- Mr. MacMichael's testimony establishes that he detected no "convincing" or "substantial" or "significant" evidence of shipment of arms from Nicaragua to El Salvador in the period March 1981-April 1983; however, that conclusion is qualified by his admission of the interception in Costa Rica of an arms shipment destined to move across Nicaragua to El Salvador in 1982; and it is qualified as well by his inability to explain persuasively how it is that others who examined the same intelligence data as did he, such as Congressman Boland, are convinced of continuing Nicaraguan support for the Salvadoran insurgents;

- Mr. MacMichael confirms that leadership of the Salvadoran insurgents regularly have operated out of Nicaragua, an opinion he does not confine to the pre-1981 period;

- Mr. MacMichael confirms that the Salvadoran rebel radio station has broadcast from Nicaragua.

182. It is important that the Court has had the benefit of a reply by the Nicaraguan Government to "Revolution Beyond Our Borders," inadequate as that reply is. There is every reason to suppose that, if Nicaragua were able to make a more effective reply, it would. As it is, it seems fair to take Nicaragua's reply, if not as an acknowledgement of the truth of United States allegations, and it is hardly that, then as an unconvincing refutation of them. Moreover, much of the content of "Revolution Beyond Our Borders" was duly pleaded by the United States in its Counter-Memorial and the annexes and documents filed with it. Nicaragua's refutation of the evidence there set out consisted essentially of Mr. MacMichael's testimony. For the reasons indicated in paragraph 181 of this appendix, that refutation is no more adequate in respect of such duly pleaded evidence than it is in respect of "Revolution Beyond Our Borders".

183. For example, Nicaraguan evidence and argument - and the Court's Judgment - do not begin to explain how it is that so many of the arms with which the Salvadoran rebels were supplied, and which were captured from them by the Salvadoran Army, reportedly have been traced by serial number to shipments originally made by the United States to Viet Nam and abandoned there (see Background Paper: Nicaragua's Military Build-Up and Support for Central American Subversion, pp. 21-22, and "Revolution Beyond Our Borders", p. 46). In that regard, it is significant that, in 1981, a spokesman for Viet Nam acknowledged that weapons left by the Americans in Viet Nam had been sent to insurgents in El Salvador (see William Shawcross, "In Vietnam Now", The New York Review of Books, 24 September 1981, Vol. XXVIII, No. 14, p. 4). It is also suggestive that, in March 1981, the Nicaraguan Minister of Defence, Commander Humberto Ortega, stated in a speech in Hanoi that:

> "We sincerely thank the Vietnamese people and highly value their support for the heroic Salvadoran people ... the fierce and bloody struggle in El Salvador requires the support of all progressive nations and forces through the world." (FBIS, Vol. IV (Asia and Pacific), 12 March 1981, p. K8.)

184. Nor does the Court's Judgment meet other points made in "Revolution Beyond Our Borders", despite the fact that the Judgment acknowledges that that publication may be taken into account by the Court. For example, "Revolution Beyond Our Borders" maintains that, as a direct result of support by Nicaragua and other States using Nicaragua as a conduit, the Salvadoran guerrillas were transformed from terrorist factions that had been limited to robberies, kidnappings and occasional street violence into an organized armed force able to mount a co-ordinated, nationwide offensive. "Before the Sandinista Directorate took power in Managua, there were guerrillas in El Salvador but no

guerrilla war." (At pp. 2, 5.) But the Court's Judgment gives no sense of appreciating the impact on the character of the Salvadoran insurgency of Nicaragua's intervention, which has by no means been limited to the provision of arms (even though that is the element of Nicaragua's intervention which the Court chooses to notice).

185. The Court's Judgment does refer to the "final offensive" mounted by the Salvadoran insurgents in January 1981. It notes that that offensive failed, and maintains that any United States response to it which arguably might have been justified if prompt surely could not be justified months later. The weakness of that argument has been considered in the body of this opinion. But it should be added that the Court's Judgment takes no account not only of the great damage wrought by that offensive (see the "FMLN Evaluation of the 1981 Offensive" reprinted in "Revolution Beyond Our Borders", p. 47) but of the "prolonged war" strategy of the Salvadoran guerrillas which followed it, which has inflicted immense economic and human losses upon El Salvador (ibid., p. 10). That prolonged war could not have been sustained, at any rate with comparable effect, without the prolongation of the Nicaraguan supply line. That FMLN Evaluation, by the way, contains some revealing lines of Salvadoran insurgent thinking about their Sandinista allies, among them:

> "The people of Sandino, who opened the future of Central America, will not kneel before the imperialists. The people of Central America ... will close ranks ... Each new step that imperialism takes in its military escalation against the Salvadorean people, increases the threat against the Nicaraguan revolution ..." (Ibid., p. 48.)

186. Furthermore, the Court's Judgment has nothing to say about the considerable evidence in "Revolution Beyond Our Borders" of Nicaraguan and Cuban training of Salvadoran insurgents, not merely for the 1981 offensive but for subsequent, continuing operations (ibid., pp. 11-12). Equally, the Court's Judgment is silent about the evidence of the presence in Nicaragua of a general staff of Salvadoran guerrillas exercising command and control of their revolution from Nicaraguan territory (ibid., p. 12). That silence is the more remarkable in view of the acknowledgment of such presence by Nicaragua's witness, Mr. MacMichael, and the more powerful acknowledgment still represented by the deaths in Managua of the most senior of all Salvadoran revolutionary commanders, Salvador Cayetano Carpio ("Commander Marcial") and his deputy.

187. Nor do Nicaraguan denials, and the Court's inferential acceptance of them, adequately explain an occurrence such as that recounted in an article in the New York Times of 20 December 1985, page A15, reporting an automobile crash in Honduras in December 1985 which, it is claimed, provided fresh evidence of continuing shipment of munitions and money from Nicaragua to Salvadoran insurgents.

> "The Reagan Administration said today that a recent traffic accident in Honduras had turned up strong evidence that cars with secret compartments were being used to move military supplies from Nicaragua to Salvadoran guerrillas.

Elliott Abrams, Assistant Secretary of State for Inter-American Affairs, displayed photographs and a videotape that the Honduran authorities said they took when they dismantled a car after it was in an accident on the Pan American Highway near La Leona on Dec. 7.

He said the bright green Lada car, which is built in the Soviet Union under Fiat license, was carrying 7,000 rounds of ammunition, 86 electric blasting caps, 20 fragmentation grenades, 17 grenade fuses, radios and walkie-talkies, computer-made coding and de-coding material and $27,400 in $100 bills.

The Nicaraguan Embassy in Washington said the authorities in Managua had told them that they knew nothing about the car crash. The embassy repeated previous assertions that the Sandinista Government was not involved in providing arms and ammunition to the Farabundo Marti National Liberation Front in El Salvador. An embassy spokesman, Miriam Hooker, called on the United States to take its accusations to the International Court of Justice in the Hague.

A Tire Blew Out

Mr. Abrams said the car, which had Costa Rican license plates, had been driven from Costa Rica to Nicaragua, where it was loaded. It was then driven across a corner of Honduras toward El Salvador, he said, when a tire blew out and caused a crash.

When the Honduran police inspected it, he said, they found wires protruding from what was an air conditioning duct. The wires, he said, turned out to be parts of blasting caps. As a result, he said, the car was taken to Tegucigalpa and dismantled. The ammunition and other items were found in six concealed compartments, he said.

The driver of the car, identified as Elias Solis González, a member of Costa Rica's Communist party, was arrested by Honduras, Mr. Abrams said.

The dismantling operation was videotaped, he said, as a result of a suggestion the United States made to the Honduran military several years ago.

Mr. Abrams said three things led to the conclusion that the vehicle had been loaded in Nicaragua. First, he said, the packing material around the items in the secret compartments consisted of pages of the official Sandinista newspaper Barricada. Second, the driver, a Costa Rican, told the authorities that he was coming from Nicaragua. Finally, he said, the communications gear and coding booklets were clearly marked as coming from a guerrilla headquarters that 'we know for a fact is in Managua'.

Discounting suggestions made in the past that munitions shipments from Nicaragua to the Salvadoran guerrillas might be the work of people not affiliated with the Government or the Sandinista Front, the ruling party, Mr. Abrams said it would be equally plausible to suggest that the 'tooth fairy' was responsible.

'It is impossible in a country with the degree of control that exists in Nicaragua for there to be shops that build this kind of car, for there to be ways of filling it with explosives, with letters from the Soviet Union and Cuba, with code material which is generated by pretty sophisticated computers,' he said. 'It is impossible that all that should take place in Managua without the involvement of the Sandinistas.'

All of the shipment, he said, came from the Managua headquarters of the Armed Liberation Forces and was intended for its fighters in El Salvador. The Liberation Forces is the military wing of the Communist Party of El Salvador and one of five guerrilla groups in the Farabundo Marti Front.

Mr. Abrams said that the Administration had previously accumulated bits and pieces of evidence of such an arms route to El Salvador but that this was the most conclusive evidence that Nicaragua continued to supply arms to the Salvadorans. Other such vehicles with hidden compartments were found in Costa Rica and Honduras in 1980 and 1981, he said."

For a similar account, see the Washington Post, 20 December 1985, page A49.

188. Finally, Nicaraguan denials of its pervasive support of the Salvadoran insurgency are belied by another, most recent survey on the scene, by James Le Moyne, chief of the New York Times bureau in San Salvador. In an article entitled, "The Guerrilla Network", published in the New York Times Magazine of 6 April 1986, Mr. Le Moyne comments on "the revealing information" which "came to light a year ago with the capture of Nidia Diaz" (supra, paras. 95-96, 105) and observes that:

"Recent months have also seen an increasing willingness of former guerrilla officials to divulge details of their shadowy past. Several high-level Sandinistas have left the Nicaraguan Government because of what they describe as their unhappiness with the Sandinistas' dependence on the Cubans and the Russians and their failure to establish a pluralistic society. In the case of the Salvadorans, a few commanders have been captured and been persuaded to give up the fight; others have been ousted over differences on how the revolution is to proceed.

From interviews with these current and former guerrillas (conducted separately over a six-month period), a clearer picture emerges of the connections between the various leftist Central American rebel factions - a picture

> that reveals a guerrilla movement that is anything but monolithic. Details were offered, for instance, on the arms shipments from Nicaragua to El Salvador, on the role of Cuba in the planning of the abortive 'final offensive' in El Salvador in 1981, and on the events leading up to the almost Shakespearean murder-suicide of two prominent leaders of the Salvadoran guerrilla movement three years ago.
>
> The story behind the brutal killing of Melida Anaya Montes and the suicide of the man implicated in her murder, Salvador Cayetano Carpio, offers a rare glimpse of the frequently fractious society of revolutionary leaders in Central America. In this instance, Mr. Carpio's fiercely Stalinist stance pitted him against many within his own group who sought greater unity among rebel factions as well as a negotiated end to the fighting, a position that was strongly supported by Cuba and Nicaragua." (At p. 18.)

On the basis of his interviews with Salvadoran and other rebels, Mr. Le Moyne recounts that Salvadoran guerrillas with leadership potential - and their counterparts in other Central American countries - first were offered basic military training at hidden camps in their own countries, and "Most of them later appeared to receive more specialized training abroad - in Cuba, various Eastern European countries and Vietnam." (P. 20). He continues:

> "Rebels say that Cuban embassies serve as refuges and bankers for Central American leftists traveling abroad. In addition, say several former rebels, almost all the top Sandinista commanders and most of the very senior rebel officials in El Salvador and Guatemala have received advanced guerrilla training in Cuba. The courses given range from intelligence gathering to instructions in rural and urban guerrilla warfare." (P. 20.)

Mr. Le Moyne describes in some detail the training of senior Sandinista and other Central American revolutionaries at Patrice Lumumba University in Moscow, in Cuba, and North Korea, as well as the hard and dedicated life a guerrilla leads in the field. He continues:

> "Several senior Sandinista officials have admitted they offered to help the Salvadoran rebels with their revolution soon after Anastasio Somoza was ousted. According to a number of former Sandinista guerrilla commanders, the Nicaraguans were paying off a debt they had incurred in 1978. At that time, the Salvadorans had managed to amass a remarkable war chest estimated at more than $80 million from kidnappings, and they decided to invest $10 million in the Sandinista revolution. The money was handed over in Costa Rica, in cash.
>
> After the Sandinistas came to power, they allowed the five rebel groups in the Salvadoran guerrilla front to set up their propaganda, communications, financial and logistics offices in Managua. Men who had worked for three leading Sandinistas - Julio López, chief of the Sandinista Directorate of International Relations;

Bayardo Arce Castano, then the head of the political commission of the National Directorate, and Tomás Borge - say that these officials helped oversee several arms shipments to the Salvadorans. Mr. Borge denies playing such a role. (Several former Sandinistas say that Mr. López's directorate, which is modeled after Cuba's Department of the Americas, serves as the foreign ministry of the Sandinista Front, charged with maintaining ties to other guerrilla groups.)

The Sandinistas offered other assistance as well. According to two former Sandinista officials, a Central American - who had previously worked in the United States as a Cuban agent specializing in the workings of Congress and the American press - moved to Managua where he carried out the same task for the Sandinistas. He briefed at least one high-level Salvadoran rebel delegation that was sent to lobby in the United States. 'He told them how to approach a particular Congressman, what illusions to appeal to, what his likes and dislikes were', says one of the former Sandinistas. 'He also advised them on how to talk to the American press.'

There was also cooperation closer to home. A Sandinista official who worked in the Nicaraguan Embassy in Honduras in the early 1980's says he secretly met Salvadoran rebels there to exchange intelligence about the Honduran and Salvadoran armies and to arrange arms shipments to El Salvador. The Salvadorans, he says, bribed Honduran Army officers to let the weapons pass overland to El Salvador.

As El Salvador slid to the edge of full-scale revolt, Cuba became an important source of weapons and advice. According to a number of former senior Salvadoran and Sandinista officials, Cuba helped arrange for the supply of at least 60 percent of the weapons that enabled the Salvadoran guerrillas to equip an army in record time. American military officials, who say they have checked the serial numbers of captured rifles, report that many are guns the United States left behind in Vietnam.

Few of the arms shipments to El Salvador by way of Nicaragua have been intercepted by Salvadoran or Honduran troops. A former Sandinista official who says he helped arrange such shipments describes one method of eluding detection. Rebel accomplices in Panama, Costa Rica and Nicaragua placed guns in sealed trucks with a manifest describing the cargo as industrial goods bound for Mexico or Guatemala. When the truck crossed into El Salvador, rebel units there 'hijacked' the cargo by previous arrangement and removed the hidden weapons.

When the time appeared ripe for the 'final offensive,' recall two former Sandinista officials, top Cuban officials - including Fidel Castro and Manuel Pineiro - took part in strategy sessions with Sandinista and Salvadoran

commanders. The Cubans and most of the Nicaraguans and the Salvadoran rebel command believed that the Sandinista-style insurrection could be repeated in El Salvador, and that it was important to act before Ronald Reagan became President. Edén Pastora Gómez, then the Sandinista Deputy Minister of Defense, disagreed.

He argued that conditions in El Salvador were very different from those in Nicaragua. In a manner that has since been duplicated in the Philippines, the Sandinistas had led a largely middle-class insurrection against a family dictatorship. In El Salvador, however, not only were the guerrillas waging a war against a military dictatorship and having to reckon with a potent Salvadoran Army, but they could not count on the support of the middle class. Mr. Pastora predicted disaster. The offensive was launched in January 1981. Mr. Pastora proved correct." (Pp. 70-71.)

Mr. Le Moyne's research into the Carpio affair is also of interest. He depicts Mr. Carpio as a hard-line Stalinist, and states that several rebels indicated that American pressure not only blunted the rebellion in El Salvador but caused Cuba and Nicaragua to become concerned that "the Reagan Administration was on the verge of retaliating against them. They counseled that it was time to consider a negotiated end to the fighting." (P. 73.) But Mr. Carpio resisted that advice and apparently believed that his chief opponent inclined to accept it was the second-highest-ranking official in his group, Melida Montes. "On April 6, 1983, she was found brutally murdered in her safe house in Managua ... Miss Montes had just returned from a visit to Cuba, en route to a party congress in El Salvador and a final showdown with Mr. Carpio." (Ibid.) He describes Mr. Carpio's involvement in her murder, the resultant pressures exerted upon Mr. Carpio by the Nicaraguans, the orders issued to him by Nicaragua to divulge information on the network which he had built which was relatively independent of the Cubans and Sandinistas, and concludes: "Rather than comply, Mr. Carpio went home and shot himself in the heart." (P. 75.) Home was in Nicaragua. Mr. Le Moyne further states:

"After the United States invaded Grenada in late 1983, the Sandinistas asked most Salvadoran rebels to leave Managua. These rebels have now been allowed to return, but the Sandinistas also outraged the Salvadorans by temporarily cutting arms supplies to them, according to captured rebel documents." (P. 79.)

I. In 1979, Members of the Nicaraguan National Guard Escaped to Honduras, From Which They Harassed Nicaragua. Officers of the Argentine Army Began Training These Counter-Revolutionaires Apparently Late in 1980 or Early 1981 - and Continued to Do So Until Early 1984

189. Training of the contras who collected in Honduras was initially undertaken by Argentine officers, provided by the Argentine Government, beginning, it appears, sometime late in 1980 or early in 1981, well before the United States support of the contras began. This is indicated by evidence submitted by Nicaragua. For example, the Nicaraguan

Memorial, Annex F, Attachment 12, page 19 ("U.S. Backing Raids Against Nicaragua", the New York Times, 2 November 1982), states that Argentina "had organized anti-Sandinist paramilitary forces in Honduras 18 months ago, before the American involvement". That article further reports that, "Initially, Argentina did take the lead in supplying and directing the units" of the contras. In Security Council debate on 25 March 1982, Commander Ortega claimed that the contras were being trained and advised "by active and retired military personnel from Argentina and other South American countries" (S/PV.2335, p. 31). What is not clear is whether such Argentine assistance to the contras was undertaken initially with the support or financing of the United States, or whether collaboration in such training came about only at a later stage; in view of indications that Argentine training of the contras began as early as 1980, it is likely that the United States then was not involved (see Christian, op. cit., p. 197, and para. 210 below). For some considerable time, it in any event appears that CIA involvement was largely limited to financing the training of the contras (and their Argentine trainers). An article introduced into evidence by Nicaragua states:

> "The program got off to a bad start when the CIA turned to a surrogate, the right-wing military dictatorship in Argentina, to organize and train the Contras. The Argentines already had a small training program for the Contras in Honduras, and by working with them the U.S. shielded its own involvement. But the heavyhanded Argentine approach tainted the movement in the eyes of many Nicaraguans. The U.S. had few alternatives, since the CIA at the time didn't have any reliable paramilitary capability of its own.
>
> ...
>
> The structure of the program was known as La Tripartita. The idea was to combine American money, Argentine trainers and Honduran territory to create a guerrilla army known as the Fuerza Democratica Nicaragüense, or FDN. Later, the U.S. financed other guerrilla groups operating from Costa Rica.
>
> The FDN embodied the political tensions that have plagued the Contras from the beginning. Founded in August 1981, the group combined a rightist military leadership, directed mostly by people who had been loyal to deposed Nicaraguan dictator Anastasio Somoza, with a moderate political leadership. It wasn't a comfortable marriage.
>
> The head of the Argentine training mission in Honduras was Col. Osvaldo Ribeiro, known as Ballita, or the Little Bullet. He became a prominent figure in Tegucigalpa, living in a large house, distributing American money and dispensing what CIA officials viewed as unsound military advice. For example, since his own experience was in urban rather than rural combat, he advised the Contras to mount a program of urban terrorism. The CIA wanted to cultivate a popular insurgency in the countryside.

> The Argentines also apparently tolerated a practice of killing prisoners. A former Contra official describes the informal rule for dealing with captives: If a prisoner has ammunition when captured, let him live, since he hasn't fought to the last bullet: if a prisoner hasn't any ammunition, kill him. (To stop the killing, CIA officers ordered in mid-1982 that all prisoners be brought back to base for interrogation.)" (The Wall Street Journal, 5 March 1985, pp. 1, 24, reproduced in the Nicaraguan Memorial, Ann. F, No. 191.)

This piece of Nicaraguan evidence also refers to the fast-deteriorating situation in 1981 "as Nicaragua rushed weapons into El Salvador by the truckload". It concluded that the contra programme "has also reduced the flow of arms in El Salvador".

190. Dickey's book With the Contras provides considerable detail about Argentina's relations with Nicaragua. He reports that, before Somoza's fall, Argentina's military government had placed an intelligence unit of Argentine officers in Nicaragua in an effort to sustain Somoza, at the same time as opponents of the Argentine Government, the montoneros, had fighters assisting the Sandinistas in Somoza's overthrow. He indicates that close relations between the Sandinista Government and the montoneros were maintained thereafter, the montoneros serving in Sandinista intelligence work. He reports that Somoza was murdered in Paraguay in 1980 by an Argentine ERP guerrilla leader. "The Argentine killers of the left and right, of the revolution and of the government, who had stalked each other for so long, now began to strike the enemies of their friends and the friends of their enemies." (Loc. cit., p. 89.) According to Dickey, Argentina took the initiative as early as January 1981 in extending material support to the contras (that is, about a year before the CIA appeared on the scene in Honduras); as noted, Christian puts the beginnings of Argentine involvement with the contras a few months earlier. Contras were taken to Argentina for training, and Argentine officers undertook the training of the contras in Honduras. Training of the contras appears to have been largely in Argentine hands into 1983 or 1984. While Argentine relations with the United States became strained in the wake of United States support for the United Kingdom after Argentina's taking of the Falklands (Malvinas) Islands in 1982, it appears that Argentine officers remained in Honduras until as late as the beginning of 1984 (Dickey, loc. cit, pp. 30-31, 54-55, 89-92, 113-119, 123-124, 145-146, 153, 156, 230, 251). In his testimony before the Court, Commander Carrión stated that, "In 1982 up to the beginning of 1984 the main part of the training was given by Argentine mercenaries ..." (Hearings of 12 September 1985); CIA officers were also employed, according to Commander Carrión, "particularly in the area of sabotage and demolition".

J. In November 1981, After Nicaragua Had Failed to Accept Repeated United States Requests to Cease Its Material Support for Salvadoran Insurgents, the United States Decided to Exert Military Pressure Upon Nicaragua in Order to Force It to Do What It Would Not Agree to Do

191. See paragraph 33 of this opinion, and paragraphs 169-170, 173, 110, 121-122, 128-129 of this appendix.

K. The...

K. The Object of United States Support of the Contras Was Claimed by the United States to be Interdiction of Traffic in Arms to El Salvador, Though Clearly That Was Not the Purpose of the Contras

192. See paragraphs 156-173 of this appendix.

L. By October 1983, in Apparent Response to United States Pressures, Nicaragua Proposed Four Treaties Which Were Interpreted as an Offer to Cease Supporting Rebellion in El Salvador if the United States Would Cease Support of the Contras and of the Government of El Salvador

193. See paragraphs 174-178 of this appendix.

M. In 1983, the United States Called Upon Nicaragua to Cut Back Its Arms Build-up, to Sever Its Ties With the USSR and Cuba, and to Carry Out Its Pledges to the OAS and its Members for a Democratic Society

194. It is clear that, beginning in 1983, the United States expanded its demands upon Nicaragua. Until some time in 1983, they were - actually or ostensibly - essentially limited to Nicaragua's cessation of its support for the overthrow of El Salvador's Government and the subversion of other Central American States. Thereafter, they were widened to embrace not only cutback of Nicaragua's military build-up (very large relative to anything else in Central America, and so large by Latin American standards as to be exceeded only by Cuba and Brazil), but severance of its ties to Cuba and the USSR and performance of its pledges for the establishment of a democratic society.

195. In respect of Nicaragua's military expansion, it is the fact that it was undertaken on a large-scale when the Carter Administration was in power and well before Nicaragua could have had colourable reason to claim security concerns. It has continued at an intensive pace since, during a period when Nicaragua can reasonably claim security concerns. An essential element of the Contadora process is to introduce a better balance in the military postures of the Central American States.

196. Contadora also calls for the withdrawal of foreign military advisers, which appears to be the essential thrust of United States demands that Nicaragua sever its ties with Cuba and the USSR and like-minded States. It is the fact that, from the first days of Sandinista rule, very large numbers of Cuban advisers, military and civilian, have been emplaced in Nicaragua and in its governmental ministries, and that considerable numbers of military, secret police or other advisers have been sent to Nicaragua by the USSR, the German Democratic Republic, Bulgaria and other Communist States, as well as the PLO and Libya.

197. Moreover...

197. Moreover, there are recurrent reports of the haven which various terrorist elements allegedly have gained in Nicaragua. The United States has publicly and officially made such charges; there are reports that other governments have made representations to Nicaragua through diplomatic channels; for its part, Nicaragua has denied such charges. It is claimed that the Argentine monteneros, the Colombian M-19, the Italian Red Brigades, and Peru's Shining Path are among such elements (see Juan A. Tamayo, "Sandinistas Attract a Who's Who of Terrorists", and "World's Leftists find a Haven in Nicaragua", the Miami Herald, 3 March 1985, pp. 1A, 22A. Mr. Tamayo indicates that his reports are based on considerable interviewing in Managua.) Dickey's reporting of collaboration between the Argentine monteneros and the Sandinistas has been noted above, as have charges of Nicaraguan support of the Colombian M-19. Collaboration between the Sandinistas and the PLO and PFLP is said to go back to at least 1970. For example, Sandinista Patrick Arguello Ryan, according to an official United States report, was killed in the hijacking of an El Al airliner en route from Tel Aviv to London on 6 September 1970. He reportedly had been trained at a PLO camp. It is claimed that Arguello is now treated by the Nicaraguan Government as a hero and that a large dam under construction has been named in his honour (Department of State, "The Sandinistas and Middle East Radicals", 1985, p. 2.)

198. United States demands that the Nicaraguan Government negotiate with the contras, and hold elections which will genuinely test Sandinista governance, are controversial. For the reasons set out in Section IV of this opinion, and in the light of the commitments undertaken on behalf of Nicaragua vis-à-vis the OAS and its Members in 1979 (App., paras. 8-13), calls upon Nicaragua to conduct itself in accordance with those commitments are lawful. They are also consonant with the terms and substance of the Contadora Document of Objectives.

N. By the Beginning of 1984, the United States Undertook Direct if Covert Military Action against Nicaragua, Assaulting Oil Facilities and Mining Nicaraguan Ports

199. The facts of this heading, which are developed in the Court's Judgment, are essentially uncontroverted.

O. Particularly Since January 1985, the United States Has Spoken in Terms Which Can Be Interpreted as Requiring Comprehensive Change in the Policies of, or, Alternatively, Overthrow of, the Nicaraguan Government as a Condition of Cessation of Its Support of the Contras

200. It is demonstrated by evidence volunteered by Nicaragua - the transcript of the conversation between Messrs. Ortega and Enders - that the United States made it clear that it accepted the Nicaraguan revolution as "irreversible". Such a policy is incompatible with the contention of Nicaragua that the policy and actions of the United States

Government were, "from the beginning", designed to overthrow the Nicaraguan Government. Moreover, the facts demonstrate that the United States extended significant financial and other support to the Nicaraguan Government from the time it seized power until January 1981. The facts on both counts show that United States policy at least into 1981 could not have been designed or implemented with a view towards the overthrow of the Nicaraguan Government.

201. As for the situation from 1982, when the contras began operations (on any noticeable scale, in March 1982), and thereafter, the facts are not so clear. My own reading of them is that the purpose of United States support of the contras probably was not overthrow of the Nicaraguan Government but rather the exertion of pressure upon it, initially designed essentially to compel it to cease its support of insurgency in neighbouring States. Later, in 1983, other purposes came into play, but these purposes did not, and do not, necessarily imply overthrow of the Nicaraguan Government, for two reasons. First, the purposes as stated do not require overthrow of the Nicaraguan Government, but rather changes in its internal and external conduct and representative character. Second, the size, armament and training of contra forces, relative to those of the Nicaraguan Government, have been so modest - the resources applied by the United States in support of its Nicaraguan policy, comparatively so small - that it is most improbable that the contras could overthrow the Nicaraguan Government. Absolutely, the aid given to the contras has not been so small, but relative to that which Communist and other States have given to Nicaragua, and in relation to Nicaragua's military strength, it is small. Nor can the short-lived and limited direct United States attacks on Nicaraguan oil facilities and ports and the mining of Nicaraguan ports be seen as measures which were likely to lead to the overthrow of the Nicaraguan Government.

202. Of course, the capacities of the contra forces, and the extent of United States involvement in activities directed against Nicaragua, have been and remain open to change. The ambitions of United States policy apparently have evolved with time. As noted above, by 1983, the United States was seeking a good deal more than the cessation of Nicaraguan support of foreign insurgencies; and the manual of psychological warfare prepared by the CIA for distribution to contra forces in 1983 - which has been repudiated as an authoritative statement of policy of the United States Government - openly spoke of the overthrow of Sandinista authority. By 1985, statements of President Reagan and Secretary of State Shultz were open to the interpretation - they do not require the interpretation, but they are open to the interpretation - of demanding and seeking overthrow of the Nicaraguan Government. Some statements may so suggest; others affirm that the objects of United States policy are less far-reaching. Both President Reagan and Secretary of State Shultz have expressly affirmed that "the overthrow of the government of Nicaragua is not the object nor the purpose of United States policy ..." (United States Counter-Memorial, Ann. 1, pp. 3-4). While the goal of Nicaragua's policy - the overthrow of the Government of El Salvador, if not of the Governments of Honduras, Costa Rica, and Guatemala - seems clear, the goal of United States policy is more difficult to establish.

203. Thus...

203. Thus one may contrast a written statement of United States policy with President Reagan's use of the expression, "say, 'Uncle'". Annex 95 to the United States Counter-Memorial reproduces the text of a report to the Congress by Secretary Shultz on 15 March 1984 pursuant to Section 109 (f) of the Intelligence Authorization Act of 1984. At page 6, it is stated that, in direct meetings in Managua with officials of the Nicaraguan Government, a special Ambassador of the United States "made clear to the Sandinistas our four policy objectives vis-à-vis Nicaragua:"

> "(1) Implementation of the Sandinistas' democratic commitments to the OAS;
>
> (2) Termination of Nicaragua's support for subversion in neighboring states;
>
> (3) Removal of Soviet/Cuban military personnel and termination of their military and security involvement in Nicaragua; and
>
> (4) The reduction of Nicaragua's recently expanded military apparatus to restore military equilibrium among the Central American states."

It may be observed that these objectives are altogether consonant with the Document of Objectives of the Contadora process. Such objectives are expressed in relevant United States legislation, and repeated in very recent, official statements of the United States.

204. Now let us look at the "say, 'Uncle'" exchange. This is how it ran:

> "Q. Mr. President, on Capitol Hill ... the other day, Secretary Shultz suggested that a goal of your policy now is to remove the Sandinista government in Nicaragua. Is that your goal?
>
> THE PRESIDENT: Well, removed in the sense of its present structure, in which it is a communist totalitarian state, and it is not a government chosen by the people. So, you wonder sometimes about those who make such claims as to its legitimacy. We believe, ... that we have an obligation to be of help where we can to freedom fighters and lovers of freedom and democracy, from Afghanistan to Nicaragua and wherever there are people of that kind who are striving for that freedom.
>
> ...
>
> Q. Well, sir, when you say remove it in the sense of its present structure, aren't you then saying that you advocate the overthrow of the present Government of Nicaragua?

THE PRESIDENT: Well, what I'm saying is that this present government was one element of the revolution against Somoza. The freedom fighters are other elements of that revolution. And once victory was attained, the Sandinistas ... ousted and managed to rid themselves of the other elements of the revolution and violated their own promise to the Organization of American States, and as a result of which they had received support from the Organization, ... their revolutionary goal was for democracy, free press, free speech, free labor unions, and elections, and so forth, and they have violated that.

And ... the freedom fighters opposing them, are Nicaraguan people who want the goals of the revolution restored. And we're going to try to help.

Q. Is the answer yes, sir? Is the answer yes, then?

THE PRESIDENT: To what?

Q. To the question, aren't you advocating the overthrow of the present government? If ...

THE PRESIDENT: Not if the present ...

Q. ... you substitute another form of what you say was the revolution?

THE PRESIDENT: Not if the present government would turn around and say, all right, if they'd say, 'Uncle'. All right, come on back into the revolutionary government and let's straighten this out and institute the goals." (Memorial of Nicaragua, Ann. C, Att. I-14, pp. 5-6.)

205. Does President Reagan's statement affirm - as Nicaragua trumpets - that United States policy is overthrow of the Government of Nicaragua? It is open to that interpretation. But the direct meaning of it is, first, that the President declined to agree that the purpose of United States policy is "the overthrow of the present government" and second, that the President meant no more than that the present Nicaraguan Government should re-admit the disaffected opposition and "institute the goals" of the revolution, namely, genuinely free elections, a pluralistic system, respect for human rights, and a foreign policy of non-alignment. Now it is perfectly true that, for the current Nicaraguan Government to make such changes - for it to conduct free elections, to encourage a pluralistic society, to respect human rights, and conduct a non-aligned foreign policy - would require profound changes in the actual policies it pursues. It may be that the current Nicaraguan Government is incapable of such changes - and it may not be. But the President's statement does not necessarily equate with overthrow of the Nicaraguan Government.

P. There Is Evidence of the Commission of Atrocities by the Contras, by Nicaraguan Government Forces, and by Salvadoran Insurgents, and of Advocacy by the CIA of Actions Contrary to the Law of War

206. There is substantial - and horrifying - evidence in the record, and in the public domain, of violations of the law of war in the Nicaraguan struggle, particularly by the contras based in Honduras and, apparently to a lesser extent, by the Nicaraguan Government (see, e.g., An Americas Watch Report by Robert K. Goldman et al., Violations of the Law of War by Both Sides in Nicaragua, 1981-1985, and ibid., First Supplement June 1985; Amnesty International, "Nicaragua: The Human Rights Record", 1986; Leiken, loc. cit., p. 52). Contra atrocities are well documented (see, in addition to the sources in the record and cited above, Dickey's book, loc. cit., especially pp. 180-182, 186, 193-195, 224-227, 246-250). But there is also substantial evidence in the public domain indicating that the Nicaraguan Government has gone to considerable lengths to publicize actual or alleged violations of the law of war by the contras, to influence the reports of investigators of such violations, and to even more extreme lengths to conceal and suppress evidence of its own violations (see, e.g., the detailed statements supportive of these conclusions in Alvaro José Baldizon Aviles, "Inside the Sandinista Regime: A Special Investigator's Perspective", Department of State, 1985, especially pp. 10-16, and Mateo José Guerrero, "Inside the Sandinista Regime: Revelations by the Executive Director of the Government's Human Rights Commission", Department of State, 1985, pp. 2-3, and the comments by Leiken, loc. cit., as well as the comments he quotes of the director of Americas Watch on their allegations. See also, "Inside Communist Nicaragua: The Miguel Bolanos Transcripts", Heritage Foundation, 1983, pp. 6-8.) Moreover, there is substantial evidence in the public domain of violation of the law of war by Salvadoran guerrillas, such as shooting of non-combatants, abduction of civilians (mayors, the daughter of the Salvadoran President), indiscriminate mining of roads, and other such acts, evidence which is essentially uncontroverted. There is also in the public domain a great deal of uncontroverted evidence of atrocities committed by right-wing death squads in El Salvador. Charges of indiscriminate bombing have been made against forces of the Government of El Salvador, but these charges are controverted and controversial.

207. In proceedings before the Court, the Nicaraguan Government and its witnesses have submitted not only graphic evidence of atrocities alleged to have been committed by the contras but claims that such atrocities have been committed at the instigation of the United States. In support of those latter claims, Nicaragua has submitted essentially three items of evidence: an affidavit by Edgar Chamorro, a former contra official who now resides in Florida; the manual prepared by a CIA contractor entitled "Psychological Operations in Guerrilla Warfare"; and testimony by Professor Glennon.

208. Nicaragua placed great reliance on the affidavit of Mr. Chamorro, in this regard and in an effort to show that the United States organized, and directed the military strategies and tactics of, the contra force and chose its leadership. Mr. Chamorro did not

appear in Court and was not subjected to examination. His affidavit may be entitled to weight, but not necessarily more weight than the affirmations of various defectors from the Sandinistas and Salvadoran guerrillas, such as Miguel Bolanos, a former Sandinista State Security officer, paragraphs 99-100 of this appendix and Annex 46 to the United States Counter-Memorial; "Commander Montenegro", a former Salvadoran guerrilla leader, paragraphs 101-103 of this appendix and Annexes 48 and 49 to the United States Counter-Memorial; Alvaro José Baldizon Aviles, formerly Chief Investigator of the Special Investigations Commission of the Nicaraguan Ministry of the Interior, some of whose contentions have been quoted or referred to in paragraphs 28 and 104 of this appendix; and still another Sandinista defector, Mateo José Guerrero, who was the Executive Director of the Nicaraguan Government's official National Commission for the Promotion and Protection of Human Rights until his defection in March 1985 ("Inside the Sandinista Regime: Revelations by the Executive Director of the Government's Human Rights Commission", loc. cit.). Their statements are in the public domain; they have been widely reported in the press; some of those press articles appear as Annexes duly submitted to the Court by the United States; and such reports are exactly of the same value as evidence as the hundreds of articles annexed by Nicaragua to its pleadings. It is difficult to see why, if the Court is justified in giving weight to Mr. Chamorro's attestations, it should give no weight to those of defectors from the Sandinistas such as those just referred to, at any rate, those whose contentions were duly submitted to the Court with the United States Counter-Memorial on jurisdiction and admissibility.

209. Mr. Chamorro's affidavit, which contains much of interest, has passages which give one pause. Moreover, Mr. Chamorro, speaking in this affidavit, says one thing; but speaking in other contexts, also in evidence proffered by Nicaragua, he says another.

210. Thus if we turn to the Nicaraguan Memorial, Annex F, Attachment 163, pages 254-255, we find "Edgar Chamorro, an insurgent leader expelled from the organization last month in a dispute with his colleagues," stating, according to this article, the following: contra commanders had the benefit of "training in Argentina in 1981, before CIA advisers took a direct hand in running the rebellion"; and José Francisco Cardenal, a former Vice-President of the Council of State under the Sandinistas and a leader of the contras until December 1982, "was dropped at the insistence of Argentine advisers who were directing the insurgents in Honduras ... The dispute revolved around Cardenal's efforts to act as leader, with Argentine officers insisting on retaining control of the insurgency, Edgar Chamorro recalled." Chamorro is reported to have added: "At that time, CIA advisers were playing a secondary role in Honduras and were rarely seen there before guerrilla ranks began to grow in 1983." (The Washington Post, 17 December 1984, p. 2.) It may be asked whether these statements attributed to Mr. Chamorro comport with the indications in his affidavit (e.g., para. 10) that, in 1982, the whole enterprise was being run by the CIA.

211. Mr. Chamorro...

211. Mr. Chamorro affirms in his affidavit that it "was standard F.D.N practice to kill prisoners and suspected Sandinista collaborators ... The CIA did not discourage such tactics. To the contrary ..." (Para. 27.) But in other evidence proffered by Nicaragua, (Nicaraguan Memorial, Ann. F, Att. 188, p. 286), Mr. Chamorro is quoted as saying - in 1985 - that: "The Americans were very strong on human rights. [Contra commander] Bermudez was critical of some of them on that. He felt that they were trying to find out too much." (The Los Angeles Times, 4 March 1985, p. 12.) How can Mr. Chamorro maintain that, on the one hand, the CIA did not discourage the killing of prisoners and on the other that, "The Americans were very strong on human rights"? How could he say this in the same year, speaking both times when he was well free of his connections with the contras?

212. In respect of the quotation just given from his affidavit concerning "standard F.D.N practice to kill prisoners and suspected Sandinista collaborators" (para. 27), which, Mr. Chamorro alleges, were "tactics reflected in an operations manual prepared for our forces by a CIA agent..." (para. 28), Mr. Chamorro proceeds to claim that, "In fact the practices advocated in the manual were employed by F.D.N troops". (Para. 28.) But, in other evidence proffered by Nicaragua (Nicaraguan Memorial, Ann. F, Att. 165, p. 257), Mr. Chamorro is quoted as giving another impression. The practice of some rebel commanders executing their prisoners, which, he says, contra leaders found "sickening and disgusting", was "common but it definitely was not our policy" ("Nicaragua Rebels Accused of Abuses", the New York Times, 27 December 1984, p. 1). If it was definitely not "our policy", how could it have been the policy which the CIA "did not discourage"? Yet again, Mr. Chamorro is quoted as saying: "Frankly, I admit we have killed people in cold blood when we found them guilty of crimes. We do believe in the assassination of tyrants. Some of the Sandinistas are tyrants in the small villages." (Joel Brinkley, "Legislators Ask if Reagan Knew of C.I.A.'s Role", the New York Times, 21 October 1984, p. 1.) This statement was promptly denied by a spokesman for the Nicaraguan Democratic Force, who maintained that: "We have condemned any form of terrorism, including assassinations." ("Reagan to Dismiss Officials Responsible for Guerrilla Primer", the New York Times, 22 October 1984, pp. 1, 10.)

213. In his affidavit, Mr. Chamorro recounts that he had cut out pages from the manual which recommended hiring professional criminals and creating martyrs for the cause. "About 2,000 copies of the manual, with only those two passages changed, were then distributed to F.D.N troops." (Para. 28.) These passages imply that the manual was read by FDN troops and was a factor in the perpetration of their atrocities (an impression which Mr. Chamorro's affidavit and Nicaraguan counsel seem anxious to convey). But what did Mr. Chamorro otherwise say on that very point? According to evidence offered by Nicaragua (Nicaraguan Memorial, Ann. F, Att. 139, p. 229), Mr. Chamorro said of the manual: "I know that people did not read it." ("Alleged Author of CIA Manual Said to be Ex-GI", the Washington Post, 20 October 1984.)

214. Since...

214. Since I have read the whole of "Psychological Operations in Guerrilla Warfare" by "Tacayan" (Memorial of Nicaragua, Ann. G), I too believe that people did not read it. It is difficult to suppose that the generality of the contra fighters, many of whom are poorly educated campesinos, or even their commanders, read some 90 pages of turgid prose, replete with references to Aristotle, the HUK guerrilla movement of the Philippines, and the "Socrates dialectic". Those who might have read it, or parts of it - Dickey reports that the manual was used in classes of a Nicaraguan instructor of the contras (loc. cit., p. 256) - would have read a confusing mixture. On the one hand, the manual counsels that the guerrillas are to achieve:

> "a close identification with the people ... working together with them on their crops ... in fishing, etc. ... as long as explicit coercion is avoided, positive attitudes can be achieved with respect to the presence of armed guerrillas within the population" (p. 2).

The importance of "Showing each guerrilla the need for good behaviour to win the support of the population" is stressed (p. 6).

> "[T]hese principles should be followed:
>
> - Respect for human rights and others' property.
>
> - Helping the people in community work.
>
> - Protecting the people from Communist aggressions.
>
> - Teaching the people environmental hygiene, to read, etc., in order to win their trust, which will lead to a better democratic ideological preparation.
>
> This attitude will foster the sympathy of the peasants for our movement, and they will immediately become one of us, through logistical support, coverage and intelligence information on the enemy or participation in combat. The guerrillas should be persuasive through the word and not dictatorial with weapons. If they behave in this way, the people will feel respected, will be more inclined to accept our message and will consolidate into popular support." (At p. 9.)

Thus each guerrilla "should be respectful and courteous with the people ..." (p. 10). The manual is full of homilies of this kind, apparently designed to discourage abuses of human rights. Indeed, the origins of the manual indicate that it was an attempt to curb abuses of human rights which had been committed by groups of contras who had had some, largely Argentine training but no effective control (see Dickey, op. cit., pp. 249-257).

215. At the same time, the manual contains a section on "Implicit and Explicit Terror" which advocates some acts within the bounds of the law of war and some acts in violation of the law of war. Euphemistic terms in some instances are used to describe such acts: e.g., Sandinista informants will be "removed" (p. 13). On the one hand, this passage is found:

> "- The fact that the 'enemies of the people' - the officials or Sandinista agents, must not be mistreated in spite of their criminal acts, although the guerrilla force may have suffered casualties ..." (At p. 13.)

On the other hand, this passage is found, under the caption, "Selective Use of Violence for Propagandistic Effects":

> "It is possible to neutralize carefully selected and planned targets, such as court judges, mesta judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor." (P. 14.)

Mr. Chamorro, in explaining why he had pages ripped out of the copies of the manual which spoke of hiring criminals and making martyrs, but left sections dealing with "neutralizing" selected officials intact, reportedly stated: "To the rebels, Mr. Chamorro said, the word 'neutralize' did not necessarily mean assassinate." ("Legislators Ask If Reagan Knew of CIA's Role", the New York Times, 21 October 1984, pp. 1, 13.)

216. "Psychological Operations in Guerrilla Warfare" was a low-level, inadequately supervised and edited, haphazardly published product (if Mr. Chamorro's affidavit is to be credited; see para. 28). It appears to have been composed in Honduras by a single CIA contractor, working with Mr. Chamorro and a few other Nicaraguans, who seems to have drawn on training documents for guerrilla warfare prepared in 1968 by the United States Army, which he revised and elaborated (Psychological Operations in Guerrilla Warfare, With Essays by Joanne Omang and Aryeh Neier, 1985, pp. 27-28). Those training documents, in turn, allegedly were modelled on Communist terror techniques (see "C.I.A. Manual Is Linked to Vietnam War Guide", the New York Times, 29 October 1984.) Evidence introduced by Nicaragua states that: "Mr. Chamorro was in charge of editing ..." ("CIA Aides Dispute Reagan on Primer", the New York Times, 23 October 1984, Nicaraguan Memorial, Ann. F, Att. 141, p. 231.) "What the Agency higher-ups thought of the manual nobody knew, and nobody seems to have asked. The administration at Langley never bothered to read it." The CIA operations chief in charge of Nicaraguan affairs "could not. He didn't know Spanish." (Dickey, loc. cit., pp. 256.) There are indications that the manual may have been cleared (even edited) by some middle-level CIA officials ("C.I.A. Chief Defends Manual for Nicaraguan Rebels", the New York Times, 2 November 1984, p. A3); at any rate, after its existence was made public, a half-dozen CIA officials were officially reprimanded in regard to it, but whether for malfeasance or non-feasance is unclear. Mr. Chamorro states in his affidavit that he complained to the CIA station chief about the manual "and no action was ever taken in response to my complaints" (at para. 28). However, in other evidence submitted by Nicaragua, Mr. Chamorro is reported to have said the following: "After he had made his objections known, Chamorro said, several boxes of the manual were picked up from his offices by U.S. personnel and he did not

know where they were taken." (Christopher Dickey and Joanne Omang, "Alleged Author of CIA Manual Said to be Ex-GI", the Washington Post, 20 October 1984, Nicaraguan Memorial, Ann.F, Att. 139, p. 229.) It has been claimed by the United States Government that release of the manual was never authorized (ibid.). Copies were, however, used in contra instruction (Dickey, loc. cit., pp. 256, 310). In all, it may be concluded, as did a Congressional investigation of the manual's production which is quoted in the Court's Judgment, that: "Negligence, not intent to violate the law, marked the manual's history." The fact remains that the manual says what it says.

217. It is difficult to appraise the influence, if any, on the contras of the manual, and of an accompanying "picture book" showing the reader how to puncture tires, leave the lights burning, call in sick to work, make Molotov cocktails and otherwise sabotage Sandinista rule. It is not possible to establish or disestablish that these documents were generally read by the contras and had a genuine influence on their conduct. To the extent that they did have an influence, in some respects it might have been beneficent, in others, vicious.

218. What is clear, however, is that passages of the manual advocate, or in the least are open to being understood as advocating, gross violations of the law of war, among them, and most reprehensibly, assassination of those "carefully selected and planned targets" who are to be "neutralized". The text of the manual in the terms in which it was prepared by the CIA's contractor cannot be reconciled with the terms of the United States Army's The Law of Land Warfare and similar field manuals, nor with the terms of the relevant Geneva Conventions and customary international law.

219. It is equally clear that it is not the proper function of the Government of the United States, or any government, to promote the publication of manuals which advocate acts in violation of the basic rules of the law of war and of humanity. Acts such as assassination of non-combatants are in gross violation of the Geneva Conventions, whether hostilities are international or not. Does it follow that, by reason of its part, such as it was, in the production of the manual, "Psychological Operations in Guerrilla Warfare", the United States has violated its responsibility under international law "to respect and ensure respect" for the provisions of the Geneva Conventions for the Protection of War Victims to which it is a Party (the quotation is from the text of common Article 1 of the Geneva Conventions of 1949)? As pointed out in the body of this opinion, the Geneva Conventions have not in the past been construed to treat advocacy by a State of violations of the Geneva Conventions as a breach by that State of its obligations under the Conventions. Nor is the delict of "incitement" known to customary international law. But whether or not the United States role in the drafting and publication of the manual is a violation of its obligations under the Geneva Conventions or customary international law - and it does not appear to be - it can only be characterized as an act which, in the least, is incompatible with their spirit and with the conduct expected of responsible governmental authorities.

220. A second profoundly troubling question is whether the United States, for the period and to the extent in which its agents trained contra forces, can be said to have adequately instructed the contras on their obligations under the law of war and, if not, what follows. The training of the contras into 1984 appears to have been largely but certainly not entirely conducted by Argentine officers and, since Congressional limitations were imposed in 1984, there appears to have been no United States military training; the evidence of what United States trainers did is mixed; but production of the manual, of itself, suggests dereliction on the part of the United States. The results, in terms of contra behaviour, certainly do not show sufficient diligence of Argentine and United States trainers in instruction on the law of war. However, since the contras were and are not under United States command, it does not follow that contra atrocities are to be legally imputed to the United States. Many States train foreign military forces, but it is not maintained that such States are, by reason of such training, responsible for violations of the law of war committed by such forces not under the command of those States.

221. In the circumstances of this case, I agree with the Court that international responsibility for acts of the contras in violation of the law of war cannot be imputed to the United States. No proof has been placed before the Court which shows that the United States bears a direct responsibility for such acts of the contras. United States forces have not acted in the field together with the contras; the contras are not led by United States officers or reinforced with United States troops. As evidence introduced by Nicaragua indicates (Nicaraguan Memorial, Ann. E, Att. 1, p. 11), in the words of Congressman Boland speaking of the contras: "These groups are not controlled by the United States. They constitute an independent force ..." (To the same effect, see Congressman Hamilton as quoted by Nicaragua, ibid., pp. H 5724-H 5725.) For further indication in evidence introduced by Nicaragua that American advisers do not control ground operations conducted inside Nicaragua by rebel forces, see Memorial of Nicaragua, Annex F, Attachment 72, page 125: "Americans on Ship Said to Supervise Nicaraguan Mining", the New York Times, 8 April 1984, where it is stated:

> "that unlike ground operations inside Nicaragua conducted by rebel forces, which American advisers monitor from Honduras but do not control, the planting of mines in Nicaragua waters directly involves Americans and is under their immediate control".

222. It may further be recalled that the principal witness called by Nicaragua on the question of the alleged responsibility of the United States for atrocities committed by the contras was Professor Glennon. When questioned about matters of imputability, the following exchange occurred:

> "A.: Judge Schwebel, we did not include in our study an analysis of the issues of state responsibility and imputability as part of our mission. Ours was a fact-finding mission and I really would prefer not to comment beyond that.

Q.: May I ask how you can conclude, if you have not considered questions of imputability, that the United States is responsible for violations of human rights by the contras?

A.: Because the sponsors of our mission asked us to study moral imputability as well as legal imputability. We set out Article 3 of the 1949 Geneva Convention in our report, but as you can see from our report we did not get into the legal issues. I stand fully behind my conclusion that the United States is responsible for the actions of the contras and I think we meant that primarily in a moral sense, but as I say our mission was directed to finding facts and I am convinced that those facts are solid." (Hearings of 16 September 1985.)

223. The conclusion that the acts of the contras in violation of the law of war may not be legally imputed to the United States nevertheless does not answer the question of whether the United States, if it is unable to exercise adequate control over the conduct of the contras, should maintain support of them - a question which understandably has provoked acute controversy in the United States.

224. It should be added that, if the United States were to be held, as Nicaragua maintains that it should be held, responsible for the atrocities of the contras, then it would appear, by parity of reasoning, that Nicaragua should be held responsible for the atrocities of the Salvadoran insurgents. Those atrocities are incontrovertible. It has been established that the Salvadoran insurgents have been armed, supplied, and in some measure trained by the Nicaraguan Government and that command and control facilities on Nicaraguan territory have been used by the Salvadoran insurgents, much of whose leadership has been and perhaps still is situated in Nicaragua. Just as it does not appear that the contras have been under United States command and it does not appear that United States officers and troops have been in the field with the contras, so it does not appear that the Salvadoran insurgents have been under Nicaraguan command and that Nicaraguan officers and troops have been in the field with Salvadoran forces. If these appearances are correct, then it would follow that Nicaragua is no more - but no less - responsible for the violations of the law of war by the Salvadoran insurgents than is the United States responsible for the violations of the law of war by the contras. However, Nicaragua is responsible for any violations of the law of war directly attributable to its forces, of which there is some evidence (see, inter alia, the sources cited in paras. 13, 28, of this appendix). In any case, the responsibility or lack of responsibility of one Government or collection of insurgent authorities for violations of the law of war cannot excuse the responsibility of another for its violations.

Q. The Contadora Process Designed to Re-establish Peace in Central America Embraces the Democratic Performance Internally of the Five Central American Governments

225. Question has been raised about the legality of United States demands upon Nicaragua to reform its internal political processes so as to promote democracy, pluralism, and observance of human rights, as well as national reconciliation with opposition forces. The conclusion that Nicaraguan commitments to the OAS and its Members place such subjects within the sphere of international concern has been expounded in the body of this opinion and in this appendix, in paragraphs 8-13.

226. Moreover, it is pertinent to recall that the Contadora Document of Objectives, adopted on 9 September 1983 by the States participating in the Contadora process including Nicaragua, includes the following provisions:

> "Considering:
>
> The situation prevailing in Central America, which is characterized by an atmosphere of tension that threatens security and peaceful coexistence in the region, and which requires, for its solution, observance of the principles of international law governing the actions of States, especially:
>
> The self-determination of peoples ...
>
> Pluralism in its various manifestations;
>
> Full support for democratic institutions,
>
> The promotion of social justice ...
>
> Respect for and promotion of human rights; ...
>
> The undertaking to establish, promote or revitalize representative, democratic systems in all the countries of the region; ...
>
> Declare their intention of achieving the following objectives:
>
> To ensure strict compliance with the aforementioned principles of international law, whose violators will be held accountable;
>
> To respect and ensure the exercise of human, political, civil, economic, social, religious and cultural rights;
>
> To adopt measures conducive to the establishment and, where appropriate, improvement of democratic, representative and pluralistic systems that will guarantee effective popular participation in the decision-making process and ensure that the various currents of opinion have free access

to fair and regular elections based on the full observance of citizens' rights;

To promote national reconciliation efforts wherever deep divisions have taken place within society, with a view to fostering participation in democratic political processes in accordance with the law; ..."

227. It will be observed that calls upon Nicaragua to promote pluralism, full support for democratic institutions, human rights and a representative and democratic system fall within the very terms of the Contadora Document of Objectives to which it has agreed. The Contadora Document of Objectives indeed describes these as "principles of international law governing the actions of States", from which it follows that, in Central America, they can hardly be matters within the exclusive domestic jurisdiction and determination of those States, including Nicaragua. The States concerned declare their intention of achieving the named objectives, which embrace compliance with these principles of international law, and include ensuring the exercise of human, political, civil, economic, social, religious and cultural rights. They further include adoption of measures for the establishment and improvement of democratic and pluralistic systems and the promotion of national reconciliation. In view of the agreement by the Government of Nicaragua to these principles - as "principles of international law" - and to these objectives, there appears to be little legal ground for its objecting to calls upon it to observe what it has pledged itself to observe, in the Contadora context and otherwise. It may further be recalled that the Charter of the Organization of American States provides that:

"The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy." (Art. 3, para. (d).)

(Signed) S.M. SCHWEBEL