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LETTER DATED 10 MAY 1984 FROM THE REGISTRAR OF THE INTERNATIONAL
COURT OF JUSTICE ADDRESSED TO THE SECRETARY-GENERAL

I have the honour, in accordance with Article 41, paragraph 2, of the Statute of the Court, to send you herewith an official copy, for transmission to the Security Council of the United Nations, of an Order of today's date by which the International Court of Justice has indicated provisional measures in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

(Signed) Santiago TORRES BERNARDEZ
Registrar

Annex

[Original: English and French]

10 May 1984

ORDER

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES
IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

/...

INTERNATIONAL COURT OF JUSTICE

1984
10 May
General List
No. 70

YEAR 1984

10 May 1984

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND
AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President ELIAS; Vice-President SETTE-CAMARA; Judges LACHS,
MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI,
SCHWEBEL, Sir Robert JENNINGS, de LACHARRIERE, MBAYE, BEDJAOUI;
Registrar TORRES BERNARDEZ.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court,

Having regard to Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the Republic of Nicaragua filed
in the Registry of the Court on 9 April 1984, instituting proceedings
against the United States of America in respect of a dispute concerning
responsibility for military and paramilitary activities in and against
Nicaragua;

Makes...

Makes the following Order:

1. Whereas in the above-mentioned Application the Republic of Nicaragua, invoking the declarations of acceptance of the jurisdiction of the Court deposited by both States under Article 36 of the Statute of the Court, recounts a series of events over the period from March 1981 up to the present day, as a result of which Nicaragua claims to have suffered grievous consequences, and claims that "the United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally-accepted principles of international law"; and whereas, on the basis of the facts alleged in the Application, it requests 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:

- Articles 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.

(b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

(c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.

(d) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.

(e) That...

(e) That the United States, in breach of its obligation under **general** and customary international law, has infringed and **is infringing** the freedom of the high seas and interrupting peaceful maritime commerce.

(f) That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.

(g) That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately:

from all use of force - whether direct or indirect, overt or covert - against Nicaragua, and from all threats of force against Nicaragua;

from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua;

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, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua;

from all efforts to restrict, block or endanger access to or from Nicaraguan ports;

and from all killings, woundings and kidnappings of Nicaraguan citizens.

(h) That the United States has an obligation to pay Nicaragua, in its own right and as parens patriae for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court. Nicaragua reserves the right to introduce to the Court a precise evaluation of the damages caused by the United States";

2. Having regard to the request dated 9 April 1984 and filed in the Registry the same day, whereby the Republic of Nicaragua, relying on Article 41 of the Statute of the Court and Articles 73, 74, 75 and 78 of the Rules of Court, urgently requests the Court to indicate the following provisional measures to be in effect while the Court is seised of the case introduced by the above-mentioned Application:

That...

- "- That the United States should immediately cease and desist from providing, directly or indirectly, any support - including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support - to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua;
- That the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua";

3. Whereas on 9 April 1984, the day on which the Application and request for the indication of provisional measures were received in the Registry, the Government of the United States of America was notified of the filing of the Application and request, in accordance with Article 40, paragraph 2, of the Statute of the Court;

4. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the Application were transmitted to the Members of the United Nations and to other States entitled to appear before the Court;

5. Whereas, taking into account that the Court does not include upon the Bench a judge of Nicaraguan nationality, the Agent of the Republic of Nicaragua informed the Court, by a letter dated 17 April 1984, that his Government intended to abstain from exercising the right to choose a judge ad hoc, conferred by Article 31, paragraph 2, of the Statute of the Court, in respect of the proceedings relating to the present request for provisional measures, but reserved the right to do so in respect of other proceedings in the present case;

6. Whereas on 13 April 1984 a letter, dated the same day, was received in the Registry from the Ambassador of the United States of America in The Hague whereby the Government of the United States appointed an Agent for the purposes of the case, and (inter alia) indicated its firm conviction that the Court was without jurisdiction to deal with the Application, and was a fortiori without jurisdiction to indicate the provisional measures requested by Nicaragua, and requested the Court to remove the case from the list; and whereas by a further letter dated 23 April 1984 the Agent of the United States of America brought to the notice of the Court information which, in the contention of the United States, established that the instruments relied on by Nicaragua to found jurisdiction could not serve as basis of jurisdiction, and requested the Court to take an "immediate decision which will preclude any further proceedings" on the Application or the request for

provisional...

provisional measures; and whereas the Court, taking into account the contents of a letter dated 24 April 1984 from the Agent of Nicaragua, decided on 24 April 1984 that it had then no sufficient basis for acceding to that request or the earlier request for removal of the case from the list;

7. Having heard the oral observations on the request for provisional measures presented at public hearings held on 25 and 27 April 1984 by the following representatives: on behalf of the Republic of Nicaragua: H.E. Mr. Carlos Arguello Gomez, Agent; The Hon. Abram Chayes; and Professor Ian Brownlie, Q.C., F.B.A.; on behalf of the United States of America: The Hon. Davis R. Robinson, Agent; Mr. Daniel W. McGovern, Deputy-Agent; and Mr. Michael G. Kozak;

8. Having taken note that the Republic of Nicaragua, at the hearings of 25 April 1984, submitted as follows:

On the question of jurisdiction:

"The Republic of Nicaragua submits: first, that the United States Declaration of 26 August 1946, in its original form, remained in force at the time of the making of the Nicaraguan Application of 9 April 1984.

Secondly, that the jurisdictional factor should be related to the issues of irreparable prejudice and urgency in proceedings concerning interim measures; and thirdly, that without prejudice to the foregoing, the jurisdictional factor in this case is conducive to the exercise of the power to order interim measures."

On the provisional measures:

"Nicaragua therefore submits that the Court should issue an order indicating the following interim measures of protection as specified in our request.

First, that the United States should immediately cease and desist from providing directly or indirectly any support including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua ... then, that the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua.

Finally...

Finally, the Court should indicate that the United States should take no action that would have the effect of extending or aggravating the situation pending further consideration of this case by the Court";

9. Having taken note that the United States of America, at the hearings of 27 April 1984, submitted as follows:

"The United States believes that the Court ... lacks jurisdiction in limine. The United States raises this lack of jurisdiction as a plea in bar of fundamental importance..."

"In sum, under these circumstances the United States submits that this court should not proceed on Nicaragua's Application and most certainly should not indicate provisional measures."

"The United States therefore respectfully reiterates its request to the Court that these proceedings on Nicaragua's Application and request for the indication of provisional measures be terminated for once and for all";

*

* *

10. Whereas the Republic of Nicaragua claims to found the jurisdiction of the Court to entertain the present case upon declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court, namely, on the one hand, a declaration made by the United States of America on 14 August 1946 and deposited with the Secretary-General of the United Nations on 26 August 1946; and on the other hand a declaration made by the Republic of Nicaragua on 24 September 1929 recognizing the compulsory jurisdiction of the Permanent Court of International Justice, which, it is claimed, continues in force and is deemed, as between parties to the Statute of the International Court of Justice, to be an acceptance of the compulsory jurisdiction of that Court, by virtue of Article 36, paragraph 5, of its Statute; and whereas the declaration of Nicaragua is unconditional and without reservations, and without limit of time, while that of the United States of America is subject, inter alia, to a proviso that it is not to 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";

and...

and to a proviso that it "shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate" the declaration;

11. Whereas on 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a declaration referring to the declaration deposited on 26 August 1946 and stating that:

"the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America";

12. Whereas in the letter from its Ambassador at The Hague to the Registrar dated 13 April 1984, the United States Government stated that it was

"of the firm view that, under the terms of the United States Declaration of August 14, 1946, assenting to jurisdiction of the Court, and its communication of April 6, 1984, the Court lacks jurisdiction to consider the application of the Government of Nicaragua", and that "a fortiori the Court lacks jurisdiction to indicate the provisional measures requested by the Government of Nicaragua";

13. Whereas by the letter dated 23 April 1984, referred to above, the Agent of the United States brought to the notice of the Court information and material which, in the contention of the United States, established that Nicaragua never ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, and submitted that accordingly

"the declaration which Nicaragua made on 24 September 1929 purporting to accept the Optional Clause never entered into force. As a result, Nicaragua never accepted the compulsory jurisdiction of the Permanent Court. Consequently, Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable, and cannot serve as the basis of jurisdiction over the Application and the claims contained therein or over the Request";

and...

and whereas it was on the basis of that contention that the Government of the United States requested the Court to take "an immediate decision which will preclude any further proceedings on the Application and the claims contained therein", or on the request for provisional measures;

14. Whereas by a letter dated 24 April 1984 the Agent of Nicaragua asserted that "Nicaragua ratified in due course the Protocol of Signature of the Statute of the Permanent Court" and added that apart from Nicaragua's declaration of 1929, "there are in force other treaties which provide this Court jurisdiction over the Application"; whereas however no specification or citation of such treaties was provided;

15. Whereas on 24 April 1984 the Court decided that it had then no sufficient basis for acceding to the request of the United States immediately to preclude any further proceedings, or to the request contained in the letter from the United States Agent of 13 April 1984 that the Court should remove the case from the list;

16. Whereas during the hearings counsel for Nicaragua stated that "the Protocol of Signature of [the Statute of] the Permanent Court was ratified by the relevant organs of the Constitution of Nicaragua"; whereas counsel for Nicaragua also drew attention, as relevant to the asserted legal validity of the Nicaraguan declaration of 1929, to its inclusion in the Yearbook of the Court, the mention of Nicaragua as a State accepting the compulsory jurisdiction of the Court in the United States official publication Treaties in Force and "the standard United Nations Information Book on the International Court", and to the reliance on the 1929 declaration by Honduras in its Application instituting the case concerning the Arbitral Award Made by the King of Spain on 23 December 1906, the relevant passage of which reads as follows:

"Nicaragua has also declared that she recognized the compulsory jurisdiction of the Permanent Court of International Justice. This declaration was dated 24 September 1929. By a Decree dated 14 February 1935, the Senate of Nicaragua ratified the Statute and the Protocol of the Permanent Court of International Justice. On 11 July 1935, a similar decision was taken by the Chamber of Deputies (Official Gazette, Organ of the Government of Nicaragua. Year 39, No. 130, page 1033, and No. 207, page 1674). On 29 November 1939, the Secretary-General of the League of Nations received a telegram signed "Relaciones", notifying him of the ratification by Nicaragua of the Statute and Protocol of the Court. Having regard to these facts, the declaration of 1929 entered into force and continues to be valid by virtue of Article 36, para. 5, of the Statute of the International Court of Justice." (I.C.J. Pleadings, Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), Vol. I., 1960, pp. 8-9 (translation));

17. Whereas...

17. Whereas the Government of the United States of America has brought to the notice of the Court information and material to show that no instrument of ratification of the Protocol of Signature of the Permanent Court of International Justice Statute was ever deposited with the Secretary-General of the League of Nations; whereas that material includes a telegram, referred to in the last Report of the Permanent Court (P.C.I.J., Series E, No. 16, p. 331), received in November 1939 by the Secretariat of the League of Nations from the Foreign Ministry of Nicaragua, announcing the ratification of the Protocol of Signature and indicating that the instrument of ratification was to follow; the file of the League of Nations Secretariat on the matter, containing the 1939 telegram but showing no receipt of any such instrument, and containing also a letter from the Acting Legal Adviser of the League to the Government of Nicaragua, stating that deposit of the instrument of ratification was necessary "to establish effectively the obligation"; a letter of 1943 from the United States Ambassador in Managua, recounting that the Foreign Minister of Nicaragua had informed the Ambassador that a 1935 Decree for ratification had never been published in the Nicaraguan official journal La Gaceta, as required for its entry into force; and whereas the Agent of the United States stated that an examination of La Gaceta for the period 1943 to 1946 showed no trace of the publication of any such Decree; whereas the United States, referring to the mention of the Declaration of Nicaragua in the Yearbook of the Court, has drawn attention to the footnote included in that publication from 1955-1956 onwards; and whereas the United States accordingly contends that Nicaragua either never ratified the Protocol of Signature, or at all events never took the step of depositing an instrument of ratification of the Protocol of Signature prior to the dissolution of the League of Nations on 18 April 1946, that Nicaragua therefore never became a party to the Statute of the Permanent Court, that as a result the 1929 declaration of acceptance of jurisdiction never came into force, and that accordingly Nicaragua cannot be deemed to have accepted the compulsory jurisdiction of this Court under Article 36, paragraph 5, of the Statute of the Court;

18. Whereas the Court notes that the Declaration in the Yearbook was accompanied, respectively, in the volumes for 1947-1948, 1948-1949 and 1949-1950 and in the volumes from 1955-1956 onwards, by the following footnotes:

"Declaration made under Article 36 of the Statute of the Permanent Court of International Justice and deemed to be still in force (Art. 36 (5) of the Statute of the present Court)."
(I.C.J. Yearbooks, 1947-1948, p. 39; 1948-1949, p. 37; 1949-1950, p. 41. See also ibid., 1946-1947, p. 111.)

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument

of...

of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations" (I.C.J. Yearbook, 1955-1956, p. 195. See also ibid., 1946-1947, p. 210);

19. Whereas in his oral reply, the Agent of Nicaragua assured the Court that the ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice was decided, following approval by the President of the Republic of Nicaragua, by the Senate and the Chamber of Deputies in 1935, and the necessary publications effected in La Gaceta; that the statement of the United States Ambassador in Nicaragua in 1943 was wrong, and the opinion of the Ambassador was of no value as to Nicaraguan law; whereas the Agent also stated that "When the Statute of the [Permanent] Court became a law of Nicaragua, this fact was notified to the Secretary [General] of the League of Nations" in 1939, and, referring to the start of the Second World War, he observed that "There are quite obvious reasons why this ratification may not have reached Geneva at the time";

20. Whereas on the basis of its contentions set out above the United States submits that the jurisdictional instrument of the Applicant is lacking entirely, that this is an issue which can and must be addressed immediately by the Court, and that

"Unless Nicaragua can plainly show the Court that it deposited its instrument of ratification to the Protocol of Signature with the League of Nations before April 1946, or that it deposited with the Secretary-General of the United Nations, prior to the filing of its Application on 9 April 1984, a declaration pursuant to Article 36 (2) and (4) of this Court's Statute, these proceedings must be terminated immediately and the Application and request removed from the Court's List";

21. Whereas the Court undoubtedly possesses, and has in the past exercised, a power summarily to remove a case from the General List in circumstances in which the Applicant - while inviting the State named as Respondent to accept jurisdiction ad hoc - itself concedes that there is no subsisting title of jurisdiction; whereas however in the present case the Applicant has indicated a subsisting title of jurisdiction, namely the United States acceptance of compulsory jurisdiction dated 26 August 1946; whereas the question is thus not whether a jurisdictional instrument exists, but whether Nicaragua, having deposited a declaration of acceptance of the jurisdiction of the Permanent Court of International Justice, can claim to be a "State accepting the same obligation" within the meaning of Article 36, paragraph 2, of the Statute, so as to invoke the United States declaration notwithstanding the fact that, as it appears, no instrument of ratification by Nicaragua of the Protocol of Signature of the Statute of the Permanent Court was received by the League of Nations; whereas the Court considers that where the contentions of the parties disclose a "dispute as to whether

the...

the Court has jurisdiction", in accordance with Article 36, paragraph 6, of the Statute, "the matter shall be settled by the decision of the Court", that is to say by a judicial decision stating the reasons on which it is based and rendered after fully hearing the parties; whereas therefore the Court is unable to accede to the request of the United States of America summarily to remove the case from the list;

22. Whereas the United States of America further relies on the declaration deposited on 6 April 1984, and contends that that declaration is a valid suspension or modification of the United States declaration of 26 August 1946, and that since the dispute which the Republic of Nicaragua seeks to bring before the Court by its Application falls squarely within the terms of the exclusion of "disputes with any Central American State or arising out of or related to events in Central America", for that reason the 1946 declaration is ineffective to confer jurisdiction on the Court to entertain the present case;

23. Whereas counsel for Nicaragua has drawn attention to the fact that the United States declaration of 1946 was subject to the proviso, noted in paragraph 10 above, that six months' notice was required to terminate it, and contends that

"First, the principles of the law of treaties apply generally to the modification and termination of declarations of acceptance of jurisdiction under the optional clause. Secondly, a declaration which lays down express conditions for termination or modification cannot be terminated or modified except on those conditions or on some other ground recognized in the law of treaties. Thirdly, the conditions laid down in respect of termination or modification must also be compatible with the Statute of the Court. Fourthly, the United States [declaration] of 6 April [1984] is an invalid attempt to modify or vary the existing United States Declaration which has been neither validly varied nor terminated and thus remains in force. Fifthly, and alternatively, the [declaration] of 6 April [1984] has the effect of terminating the original Declaration but ... on its express terms that termination can only take effect six months after notice";

whereas the reply of the United States is that the period of six months' notice applies only to termination of the 1946 declaration, and the declaration of 6 April 1984 "did not terminate or purport to terminate the 1946 Declaration"; that the United States had the right to modify or suspend the operation of its 1946 declaration and "was entitled, before Nicaragua filed its Application, to qualify its 1946 Declaration in any respect, including suspension of the operation of the six-month notice provision"; that the Nicaraguan declaration of 1929, assuming it had any validity, was "immediately terminable", and that "in accordance with the principle of reciprocity", the United States "was, therefore, entitled to introduce a temporal qualification into its declaration with immediate effect";

24. Whereas...

24. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

25. Whereas the Court, having given the matter the fullest consideration compatible with the requirements of urgency imposed by a request for the indication of provisional measures, finds that Nicaragua, as authorized by the second paragraph of Article 36 of the Statute of the Permanent Court of International Justice, made, on 24 September 1929, following its signature of the Protocol to which that Statute was adjoined, an unconditional Declaration recognizing the compulsory jurisdiction of the Permanent Court, in particular without condition as to ratification and without limit of time, but it has not so far been established to the Court's satisfaction that Nicaragua ever deposited an instrument of ratification of that Protocol; whereas however the Court is not convinced, by the arguments so far addressed to it, that the absence of such effective ratification excluded the operation of Article 36, paragraph 5, of the Statute of the present Court, and prevented the transfer to the present Court of the declaration as a result of the consent thereto given by Nicaragua which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears (see Aerial Incident of 27 July 1955 (Israel v. Bulgaria), I.C.J. Reports 1959, p. 142; Temple of Preah Vihear (Preliminary Objections) I.C.J. Reports 1961, p. 17);

26. Whereas the Court will not now make any final determination of the question of the present validity or invalidity of the declaration of 24 September 1929, and the question whether or not Nicaragua accordingly was or was not, for the purposes of Article 36, paragraph 2, of the Statute of the Court a "State accepting the same obligation" as the United States of America at the date of filing of the Application, so as to be able to rely on the United States declaration of 26 August 1946, nor of the question whether, as a result of the declaration of 6 April 1984, the present Application is excluded from the scope of the acceptance by the United States of the compulsory jurisdiction of the Court; whereas however the Court finds that the two declarations do nevertheless appear to afford a basis on which the jurisdiction of the Court might be founded;

* * *

27. Whereas by the terms of Article 41 of the Statute the Court may indicate provisional measures only when it considers that circumstances so require to preserve the rights of either party;

28. Whereas...

28. Whereas the circumstances alleged by the Republic of Nicaragua which in its submission require the indication of provisional measures in the present case are stated in the request filed on 9 April 1984 as follows:

- The United States is presently engaged in the use of force and the threat of force against Nicaragua through the instrumentality of a mercenary army of more than 10,000 men, recruited, paid, equipped, supplied, trained and directed by the United States, and by means of the direct action of personnel of the Central Intelligence Agency and the U.S. armed forces. The United States has publicly accepted responsibility for these activities.
- These activities have already resulted in the deaths of more than 1,400 Nicaraguans, military and civilian, serious injury to more than 1,700 others, and \$200,000,000 in direct damage to property.
- The object of these activities, as admitted by the President of the United States, senior U.S. officials and members of Congress, is to overthrow or at least destabilize the Government of Nicaragua.
- The activities of the United States are not mere isolated incursions or incidents. They are part of a continuing and organized campaign of unlawful use of force that, from its beginnings in 1981, has steadily expanded - and is continuing to expand - in size, scope and intensity and in the grievous losses of life and property inflicted on Nicaragua and its people.
- These activities are mounting in intensity and destructiveness as this case is filed. In March, 1984, 6,000 U.S.-backed mercenaries initiated the largest assault to date on Nicaraguan territory. Heavy fighting is still taking place, and casualties are high.
- Simultaneously with their assault, the mercenary forces announced that they had mined the Nicaraguan ports of Corinto, Puerto Sandino and El Bluff, as part of an effort to cut off Nicaragua economically from the rest of the world. Five foreign commercial vessels have already been disabled by exploding mines, and many others have cancelled scheduled shipments to and from Nicaragua for fear of the mines. Taken together with the previous bombings of international airports, these new actions represent not only an effort to cut Nicaragua's vital trade and communications

with...

with the outside world, but constitute a mortal hazard to third parties engaged in peaceful international commerce and travel.

- As this request is filed, the U.S. Administration is seeking and the Congress is considering \$21,000,000 in additional funding to continue and to further escalate this campaign of military and paramilitary activities against Nicaragua";

29. Whereas in support of its allegations, the Government of Nicaragua has produced affidavits sworn by its Foreign Minister and its Vice-Minister of the Interior; a memorandum allegedly addressed to the United States Embassy in Honduras by the "mercenary leaders - the Task Force Commanders of the FDN and MISURAS"; United States legislative measures; texts of statements made in public or to the press by the President of the United States and senior officials of the United States administration; and a large number of reports in newspapers and reviews published in the United States;

30. Whereas so far as the factual correctness of the allegations made against it is concerned, the Government of the United States of America, in view of its contention that the Court totally lacks jurisdiction in this case, has stated "The United States does not intend to engage in a debate concerning the facts alleged by Nicaragua, given the absence of jurisdiction", but that "The United States does emphasize that it has admitted no factual allegations of Nicaragua whatsoever"; whereas however counsel for the United States has alleged that Nicaragua is itself deeply involved in insurgencies in neighbouring countries, in furtherance of its "active promotion for 'revolution without frontiers' throughout Central America", and has been engaged in a continuing traffic in weapons; that Nicaragua's armed forces have conducted open armed attacks across its borders, as a result of which Honduras and Costa Rica have repeatedly protested; and that Nicaragua's neighbours have turned to the United States for security assistance, and there has been increased co-operation among those countries in collective self-defence measures; whereas in reply, the Agent of Nicaragua has contended that neither the United States, nor other States referred to, have made any claim of self-defence, individual or collective;

31. Whereas the Court has available to it considerable information concerning the facts of the present case, including official statements of United States authorities; whereas, the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision;

32. Whereas...

32. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of either party pending the decision of the Court; and whereas the legal rights for the protection of which Nicaragua claims that provisional measures are required are stated by it to be as follows:

- "- the rights of Nicaraguan citizens to life, liberty and security;
- the right of Nicaragua to be free at all times from the use or threat of force against it by a foreign state;
- the right of sovereignty of Nicaragua;
- the right of Nicaragua to conduct its affairs and to determine matters within its domestic jurisdiction without interference or intervention by any foreign state;
- the right of self-determination of the Nicaraguan people";

and whereas furthermore the Republic of Nicaragua claims that the urgent need for the requested measures is shown by the fact that "the lives and property of Nicaraguan citizens, the sovereignty of the State and the health and progress of the economy are all immediately at stake", that the United States has given no indication that it is willing to "desist from its unlawful actions", but is seeking the resources to continue and intensify its activities;

33. Whereas the letter from the United States Ambassador in The Hague dated 13 April 1984 contained also the following passage:

"The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the "Contadora Process", which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates. This process is strongly supported by the United States as the most appropriate means of resolving this complex of issues, consistent with the United Nations Charter and the Charter of the Organization of American States, in order to achieve a durable peace in the region. The concern of the United States is that bilateral judicial proceedings initiated by Nicaragua would impede this ongoing multilateral diplomatic process."

On this basis, the United States contends that the indication of the provisional measures requested by Nicaragua would be "particularly inappropriate at this time", explaining that

"In...

"In the present situation in Central America, the indication of such measures could irreparably prejudice the interests of a number of states and seriously interfere with the negotiations being conducted pursuant to the Contadora Process";

34. Whereas during the oral proceedings counsel for the United States supplied the Court, by way of background information, with a brief history of recent events in the Central American region, and informed the Court that, in the context of the search for a means of addressing the complex and interrelated problems of Central America,

"through the efforts of the Central American States themselves, other States in the region, the Organization of American States, and the United Nations, a region-wide negotiating process has been initiated and reinforced. This regional process, known as the "Contadora process", has been accepted by all of the parties concerned, including Nicaragua. It has made substantial progress towards the achievement of a comprehensive and enforceable resolution of the multi-faceted problems of Central America";

whereas, as the Court was informed, at a conference in October 1982 in San José, Costa Rica, a final Act was adopted formulating proposals for dealing on a comprehensive basis with the problems of instability in the region; in January 1983 representatives of Mexico, Panama, Colombia and Venezuela met on the island of Contadora in Panama, and these states, the "Contadora group" succeeded in bringing together, in May 1983, the five Central American States, including Nicaragua; whereas the process of negotiating commenced in this way is continuing, and has been endorsed by United Nations Security Council resolution 530 of 19 May 1983 and General Assembly resolution 38/10 of 11 November 1983;

35. Whereas at the hearings, it was explained that the United States contends that the Court should deny the request for the indication of provisional measures in this case for a number of "compelling reasons" additional to that of lack of jurisdiction, the first being that

"the other States of Central America have stated their view that Nicaragua's request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations. These other Central American States are indispensable parties in whose absence this Court cannot properly proceed";

and in support of this contention, the United States laid before the Court copies, supplied by the Governments concerned, of telegrams addressed to the Registrar of the Court by the Governments of Costa Rica and El Salvador, and of a telex message addressed to the United Nations

Secretary-General...

~~Secretary-General~~ by the Government of Honduras for transmittal to the ~~Registrar~~; these communications, according to the United States, "make it quite clear that Nicaragua's claims are inextricably linked to the rights and interests of those other States"; whereas it is claimed that the Contadora process "aims at stopping hostilities in all the affected countries through verifiable security arrangements, and at the solution of all the complex and interrelated social, economic and political issues", and that to grant the provisional measures requested, in whole or in part "can only prejudice the ability of the other Central American States to have their grievances, too, satisfied"; whereas the United States further argued that "Any decision to indicate the interim measures requested, or a decision on the merits, would necessarily affect the rights of States not party to the proceedings"; and while reference was made in this respect to proviso (c) to the United States declaration of 1946 as a total bar to the claims in this case arising under multilateral conventions, it was contended that the rule as to participation of every "indispensable party" is a general principle;

36. Whereas the second additional reason advanced by the United States for the Court to deny the measures requested is that

"Contadora itself is a properly instituted regional process seeking to resolve complex and interrelated social, political, and economic issues, as well as security matters underlying the current turmoil in Central America. This Court cannot take cognizance of Nicaragua's Application or indicate the interim measures Nicaragua requests without detrimentally affecting that process in unpredictable and irremediable ways";

and whereas the United States drew attention to Article 52 of the United Nations Charter and Article 23 of the Charter of the Organization of American States, as a result of which, it was argued, Nicaragua is bound by a commitment to regional agencies and arrangements for the pacific settlement of local disputes, which are comprehended by the Contadora process, expressly endorsed by the OAS General Assembly, the United Nations General Assembly, and the United Nations Security Council "as an appropriate regional arrangement for resolving" disputes in the region; whereas the United States accordingly submits that Nicaragua is under a good faith obligation to negotiate within the Contadora process;

37. Whereas, lastly, the United States contends that the Court should decline to indicate provisional measures on the ground that Nicaragua's request, "raising very fundamental questions, ... strains incidental proceedings beyond any reasonable bounds", and that

"Nicaragua's Application appears on its face to request a definitive legal determination regarding an alleged illegal use of armed force in the midst of on-going hostilities. In the circumstances of this case, where the United Nations and the

Organization...

Organization of American States have approved the Contadora process, such questions regarding the use of force during hostilities are more properly committed to resolution by the political organs of the United Nations and of the Organization of American States";

whereas the United States observes that "the primary responsibility for the maintenance of international peace and security is assigned by the Charter of the United Nations to the Security Council", that Chapter VIII of the Charter provides for regional arrangements for the maintenance of international peace and security, and that while all situations involving the threat or use of force "necessarily involve Article 2 (4) and Article 51 of the United Nations Charter or other issues of law or legally significant fact", nevertheless

"That does not mean that this Court can, or should, take cognizance of the legal aspects of those situations in the midst of hostilities, and while the political processes of the United Nations and the OAS are still engaged";

38. Whereas the Government of Nicaragua has disputed the relevance of the Contadora process to the present proceedings, explaining that

"While Nicaragua is actively participating in the Contadora process, and will continue to do so, our legal claims against the United States cannot be resolved, or even addressed, through that process";

and Nicaragua further denies that these proceedings could prejudice the legitimate rights of any other States, or disrupt the Contadora process; whereas the Agent of Nicaragua referred to previous decisions of the Court as establishing the principle that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, and that the Court should not decline an essentially judicial task merely because the question before the Court is intertwined with political questions;

*

39. Whereas in the light of the several considerations set out above, the Court finds that the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of the Court, in order to preserve the rights claimed (See Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, pp. 17-18; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, ibid. pp. 35-36);

40. Whereas...

40. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves, and leaves unaffected the right of the Governments of the United States of America and the Republic of Nicaragua to submit arguments in respect of such jurisdiction or such merits;

41. For these reasons,

The COURT,

A. Unanimously,

Rejects the request made by the United States of America that the proceedings on the Application filed by the Republic of Nicaragua on 9 April 1984, and on the request filed the same day by the Republic of Nicaragua for the indication of provisional measures, be terminated by the removal of the case from the list;

B. Indicates, pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America, the following provisional measures:

1. Unanimously,

The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;

2. By fourteen votes to one,

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene

in...

in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

AGAINST: Judge Schwebel.

3. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.

4. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case.

C. Unanimously,

Decides further that, until the Court delivers its final judgment in the present case, it will keep the matters covered by this Order continuously under review.

D. Unanimously,

Decides that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application;

And reserves the fixing of the time-limits for the said written proceedings, and the subsequent procedure, for further decision.

Done...

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this tenth day of May, one thousand nine hundred and eighty-four, in four copies, one of which will be placed in the archives of the Court, and the others transmitted respectively to the Government of the United States of America, to the Government of the Republic of Nicaragua, and to the Secretary-General of the United Nations for transmission to the Security Council.

(Signed) T.O. ELIAS,
President.

(Signed) Santiago TORRES BERNARDEZ,
Registrar.

Judges MOSLER and Sir Robert JENNINGS append a joint separate opinion to the Order of the Court.

Judge SCHWEBEL appends a dissenting opinion to the Order of the Court.

(Initialed) T.O.E.

(Initialed) S.T.B.

SEPARATE OPINION OF JUDGES MOSLER AND JENNINGS

We have voted in favour of this Order indicating interim measures of protection, but in doing so we wish to emphasize two things.

First, that the duties, in accordance with the provisions of the United Nations Charter, and in accordance with the Charter of the Organization of American States, to refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and to refrain from intervention in matters within the domestic jurisdiction of a State, are duties which apply to the Applicant State as well as to the Respondent State.

Second, we wish also to emphasize the obligation of both the Parties, in the complex and delicate situation in Central America at the present time, to pursue in good faith negotiations within the context of the regional arrangements approved by the Security Council of the United Nations and endorsed by the Organization of American States.

(Signed) Hermann MOSLER.

(Signed) Robert Y. JENNINGS.

/...

DISSENTING OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Court's rejection of the United States request to dismiss Nicaragua's case on jurisdictional grounds. I have supported the Court's indication of three provisional measures, namely:

- the United States should not restrict access to and from Nicaraguan ports, particularly by mine-laying;
- the United States and Nicaragua should each ensure that no action is taken which might aggravate or extend the dispute before the Court;
- the United States and Nicaragua should each ensure that no action is taken which might prejudice the rights of the other in implementing whatever decision the Court may render.

I emphatically dissent, however, from a fourth provisional measure which appears as operative paragraph 2 of the Court's Order. That paragraph provides that:

"The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military or paramilitary activities which are prohibited by the principles of international law..."

In my view, that paragraph's emphasis upon the rights of Nicaragua - in a case in which Nicaragua itself is charged with violating the territorial integrity and political independence of its neighbours - is unwarranted. Worse than that, it is incompatible with the principles of equality of States and of collective security which are paramount in contemporary international law and which the Court, as the principal judicial organ of the United Nations, is bound to uphold.

I. The Order's Failure to Enjoin Alleged Nicaraguan
Violations of International Law

A. Considerations of fact

In its Application instituting proceedings, Nicaragua has made grave charges against the United States, essentially that the United States:

"is...

"is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law".

In particular, Nicaragua charges that the United States has created, trained, financed, supplied and directed an "army" of "mercenaries" who are attacking human and economic targets inside Nicaragua.

The United States has met Nicaragua's Application and its accompanying request for the indication of provisional measures by challenging the jurisdiction of the Court. Its Agent stated that, in view of the absence of jurisdiction, the United States would not debate the facts alleged by Nicaragua, though he emphasized that the United States "has admitted no factual allegations of Nicaragua whatsoever". Nevertheless, in the course of the oral proceedings, and in exhibits submitted by the United States, charges were advanced by the United States against Nicaragua of a gravity no less profound than the charges of Nicaragua against the United States. Moreover, the United States placed on record such charges made not only by the United States, but by the Governments of Costa Rica, El Salvador and Honduras. Furthermore, the extensive exhibits submitted by Nicaragua in support of its Application and request contain, at multiple points, recitations of substantially the same charges against Nicaragua by the United States and other sources.

A few illustrations from the exposition of United States counsel will make the position clear. Quoting "one of the documents upon which Nicaragua has relied in protesting its innocence", the United States Agent read out the following passage from the Report of the United States House of Representatives Permanent Select Committee on Intelligence of 13 May 1983 which is found in Nicaraguan Exhibit X, tab 1:

"[C]ontrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency... It is not popular support that sustains the insurgents... [T]his insurgency depends for its life-blood - arms, ammunition, financing, logistics and command-and-control facilities - upon Nicaragua and Cuba. This Nicaraguan-Cuban contribution to the Salvadoran insurgency is longstanding... It has provided - by land, sea and air - the great bulk of the military equipment and support received by the insurgents."

United States counsel also maintained:

"The new Government of Nicaragua... departed from its early promise of rebuilding its own society on a pluralistic and democratic basis. It turned instead to an increasingly authoritarian internal policy. It initiated a massive build-up of its military forces unprecedented in the region..."

Nicaragua...

Nicaragua also became deeply involved in insurgencies in neighbouring countries, in furtherance of its 'active promotion for "revolution without frontiers" throughout Central America'. This quotation is found in Nicaragua's Exhibit V, tab 10, at pages 5 to 6.

The results have been a tragedy for all of Central America...

Although Nicaragua's greatest efforts have gone towards supporting Salvadoran guerrillas, it has also promoted guerrilla violence in other Central American countries. Costa Rica, Honduras and Guatemala have all been affected.

At the same time, Nicaragua's armed forces have conducted open armed attacks across its borders. Honduras has repeatedly protested armed incursions into its territory and waters, which have resulted in a loss of Honduran lives and destruction of property. Costa Rica has protested Nicaraguan military incursions, shelling of its border posts and seizures of fishing vessels within Costa Rican waters...

As Nicaraguan support of such activities increased, Nicaragua's neighbours turned to the United States for security assistance. At the same time, the threat posed by Nicaragua to the other Central American countries has also resulted in increased co-operation among those countries in collective self-defence measures.

Nicaragua itself has not been immune from the violence spreading throughout the region. The failure to date of the Government of Nicaragua to fulfil the early promises of pluralism, democracy and justice has led to the growth of political opposition in Nicaragua. That Government has been accused by its own former collaborators of betraying the promises of the revolution...

In response to these policies, many Nicaraguans, including leaders of the 1979 revolution and former high-ranking members of the Sandinista Government itself, have since 1980 gone into armed opposition to achieve the original goals of the revolution...

Nicaragua has accused other nations of instigating and supporting the opposition movements within its own territory. But just as it cannot be argued that violence in El Salvador or other neighbouring countries is exclusively the result of Nicaraguan and Cuban aggression, Nicaragua's Government cannot pretend that its armed opposition is solely a creature of outside forces."

Apparently...

Apparently by way of pre-empting such accusations, counsel for Nicaragua filed an affidavit, subscribed and sworn to by Miguel D'Escoto Brockmann, Foreign Minister of the Republic of Nicaragua, which was expounded in Court in some detail. It declares:

"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."

The affidavit further submits that, in respect of "the false accusations that the Government of the United States has made against Nicaragua" in respect of unlawful arms trafficking in Central America:

"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."

The accuracy of the Foreign Minister's affidavit of 21 April 1984 may be measured against a statement made on 10 November 1983 in the General Assembly of the United Nations by the representative of El Salvador:

"We know that Central America is now a region in turmoil, and hence we have acted with the most scrupulous respect for the principle of non-intervention in the affairs of our neighbours. Nicaragua, on the contrary, has followed an interventionist policy, and the accumulation of evidence singles out the Government of Nicaragua as the primary factor in the instability of Central America.

Thus 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, p. 17.)

B. Considerations...

B. Considerations of law

In the current phase of the proceedings, which are concerned solely with the indication of provisional measures to preserve the respective rights of either party, the Court is in no position to weigh or resolve these conflicting factual allegations. Yet what conclusion does the Court draw for its indication of provisional measures? In its operative paragraph 2, it calls for full respect of the right to sovereignty and political independence of Nicaragua, a right which, "like any other State of the region or of the world", Nicaragua possesses. Thus the Court, to its credit, does not overlook entirely the rights of States other than Nicaragua. Nevertheless, it can hardly be said to give the express emphasis to the rights of Costa Rica, El Salvador and Honduras which it gives to those of Nicaragua, and designedly so.

It may be assumed that the Court does not mean to deny the undeniable, namely, that the preservation of the lives and property of inhabitants of El Salvador, Honduras and Costa Rica is just as urgent and just as precious as the preservation of the lives and property of the inhabitants of Nicaragua. It may equally be presumed that the Court places on the same plane the lives of United States citizens who may be present in El Salvador, Honduras and Costa Rica on mission in pursuance of the support of the Government of the United States for the Governments of those countries as the lives of citizens of Cuba or the Soviet Union who may be present in Nicaragua on mission in pursuance of support which those two States extend to the Nicaraguan Government.

Rather, the unwillingness of the Court to apply the principles of international law which operative paragraph 2 of its Order recalls against as well as in favour of Nicaragua, its unwillingness to apply those principles equally and expressly in favour of El Salvador, Honduras and Costa Rica, must stem from the fact that those three States are not parties to the case before the Court. Presumably, the Court does not apply these principles in favour of the United States, which is a Party to the case, because it is not the object of military and paramilitary activities of Nicaragua - a presumption, however, which may not wholly accord with the facts, in so far as it may be true that alleged Nicaraguan support of subversion of its neighbours affects United States advisers on mission in those neighbouring countries.

It is precisely this preoccupation of the Court on such grounds with the rights of Nicaragua alone which is so objectionable, as a matter of law, as a matter of equity, and as a matter of the place of the Court as the principal judicial organ of the United Nations.

It should initially be recalled that it is indisputable that the Court is empowered to issue measures of interim protection which apply to an applicant no less than a respondent State. This is true even where - as in this case - the respondent State does not request that provisional measures be directed towards the applicant. Thus Article 41 of the Statute of the Court provides that the Court shall have the power to indicate, if it considers that circumstances so require, any provisional

measures...

measures which ought to be taken "to preserve the respective rights of either party". Article 75, paragraph 2, of the Rules of Court provides that:

"When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request."

The Court exercised precisely such a power in the Anglo-Iranian Oil Co. case, issuing a balanced Order directed to both Iran and the United Kingdom. It justified its so doing in these terms:

"Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by... the Rules of Court, to indicate interim measures of protection proprio motu, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent;"
(I.C.J. Reports 1951, p. 93.)

The Court exercised a like even-handed authority in its indication of provisional measures in the Fisheries Jurisdiction case (United Kingdom v. Iceland), I.C.J. Reports 1972, pp. 12, 16, 17-18, and in the companion Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), I.C.J. Reports 1972, pp. 30, 34, 35-36. In all three cases, the Court took care to preserve the rights of the defendant State, even though, in all three cases, the defendant was not even represented at the Court's hearings on the requests for indication of provisional measures.

Nevertheless, Article 41 provides for provisional measures to preserve the rights of "either party". Does that debar provisional measures in this case which are directed not against Nicaragua's alleged acts prejudicial to the rights of the United States but to the rights of third parties, namely, Costa Rica, El Salvador and Honduras? A reasonable construction of Article 41 appears to exclude the rights of third States which have not intervened as parties to the case. However, such a conclusion, on the facts of the case now before the Court, would be quite beside the point.

For the point is that the rights of the United States are at issue in this case - not simply the rights of the United States as defendant, but the rights it may affirmatively assert against Nicaragua. And those rights are by no means limited to such assaults on the persons or property of citizens of the United States as alleged Nicaraguan activities may directly or indirectly entail. Rather, the rights of the United States which are central to this case are the rights of all States which are central to modern international law and life: those that spring from "the most fundamental and universally accepted principles of international law" invoked by Nicaragua in its Application. These

fundamental...

fundamental rights of a State to live in peace, free of the threat or use of force against its territorial integrity or political independence, are rights of every State, erga omnes. They do not depend upon narrow considerations of privity to a dispute before the Court. They depend upon the broad considerations of collective security.

At the outset of the oral argument, the Agent of Nicaragua made what he described as another "evident observation", namely that the United States claim that the indication of interim measures could irreparably prejudice the interests of a number of States put in issue "the right of the United States to speak on behalf of other countries". "What right", he asked, "does the United States have to act as guardian of these countries before the Court?"

That question evidences a profound misunderstanding of the very principles of international law which Nicaragua has invoked. For if the concept of collective security has any meaning, if the essentials of the Charter of the United Nations are to be sustained, then every State is indeed the guardian of the security of every other State. The Charter speaks of the Peoples of the United Nations uniting their strength "to maintain international peace and security" and of ensuring, "by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest". The Charter's primary purpose is:

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression..."

Under Article 2, paragraph 4, all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence "of any State". Under Article 51, "the inherent right of individual or collective self-defence" is preserved. These bedrock principles of modern international law are not particular, bilateral rules running between two States, in whose observance and realization third States have no legal interest. On the contrary, they are general, universal norms which, when prejudiced, impair the security of third States as well. Not only does every State have a legal interest in the observance of the principles of collective security; it is one of the most important legal interests which any State can have.

In its Judgment of 18 July 1966 in the South West Africa cases, the Court - by the President's casting vote, the votes being equally divided - declined to allow "the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest... a right of this kind... is not known to international law as it stands at present..." (South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 47).

But...

But that holding was rapidly and decisively displaced by the Court's Judgment in Barcelona Traction, where the Court - with only one dissenting vote - held:

"33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression..." (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32.)

In a commentary of characteristic cogency on this landmark holding, the then Professor Roberto Ago wrote:

"It seems unquestionable that, by making such affirmations, the Court sought to draw a fundamental distinction with regard to international obligations... it implicitly recognized that that distinction should influence the determination of subjects entitled to invoke State responsibility. In the Court's view, there are in fact a number, albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are - unlike the others - obligations in respect of which all States have a legal interest. It follows, the Court held, that the responsibility flowing from the breach of those obligations is entailed not only with regard to the State that has been the direct victim of the breach (e.g., a State which has suffered an act of aggression in its territory); it is also entailed with regard to all the other members of the international community. Every State, even if it is not immediately and directly affected by the breach, should therefore be considered justified in invoking the responsibility of the State committing the internationally wrongful act." (Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Yearbook of the International Law Commission 1976, Vol. II, Part One, p. 29.)

Professor Ago then proceeded to set out an impressive body of doctrine, of State practice, and of the literature of international law, in support of the Court's holding in Barcelona Traction and of his analysis of the thrust of that holding (ibid., pp. 28-54). He tightly ties the Court's

holding...

holding to the principles of the United Nations Charter, particularly those found in Article 2, paragraph 3, Article 2, paragraph 4, and in Chapter VII.

It follows from the Court's holding in Barcelona Traction that the basic tenets of modern international law which it articulates govern - or should govern - the Court's Order in this case. The United States has, in the specific term of Barcelona Traction, "a legal interest" in the performance by Nicaragua of its fundamental international obligations; to use Ago's words, "even if it is not immediately and directly affected" by the breaches of international law which it attributes to Nicaragua, the United States "should therefore be considered justified in invoking the responsibility" of Nicaragua as the State which, the United States maintains, is at root responsible for the internationally wrongful acts which are at issue in this case. The United States should be considered justified in doing so before this Court not because it can speak for Costa Rica, Honduras and El Salvador but because the alleged violation by Nicaragua of their security is a violation of the security of the United States.

Considerations of equity reinforce these conclusions of law. As Judge Hudson wrote of the equitable principles of international law in his individual opinion in the case of Diversion of Water from the River Meuse, P.C.I.J., Series A/B, No. 70, p. 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... 'He who seeks equity must do equity.'"

He who seeks equity must come to Court - as it is laid down in the governing maxim of equity in the common law - with clean hands. Can it be said, even on the most provisional evaluation of the facts, that it is clear that Nicaragua's hands are so clean that the injunctions of operative paragraph 2 of the Court's Order should not be directed to it as well?

Now it may be asked, if I take this position as to operative paragraph 2 of the Court's Order, why do I not take it in respect of operative paragraph 1, which concerns port access and mine-laying and is directed to the United States alone?

The essential reason is that the United States has placed before the Court no allegations that Nicaragua has laid mines in the waters or ports of other States. It has drawn to the Court's attention a diplomatic protest by the Government of the Republic of Honduras of attacks by Nicaraguan patrol boats on unarmed, civilian-operated fishing boats. (See the note from the Foreign Minister of Honduras to the Foreign Minister of Nicaragua of 15 April 1983 which is reproduced at United States Exhibit IV, tab B.) It has drawn to the Court's attention

a...

a diplomatic protest by Honduras of the mining of roads in Honduras "by the Sandinista forces... with the perverse intent to cause this type of indiscriminate bloody act in open violation of the territorial integrity of Honduras" - an act which caused the death of United States journalists Dial Torgerson and Richard Ernest Cross, and injuries to a Honduran citizen, Francisco Edas Rodriguez. (See the note from the Foreign Minister of Honduras to the Foreign Minister of Nicaragua of 30 June 1983 which is reproduced at United States Exhibit IV, tab C. See, also, the protest dated 8 July 1983 alleging further acts of mining of Honduran roads and other "hostile acts of the Government of Nicaragua", *ibid.*) It has charged that Nicaragua has seized fishing vessels within Costa Rican waters (see the quotation above from the oral argument of United States counsel to the Court). But the United States has not submitted to the Court charges that Nicaragua has mined the waters and ports of neighbouring States.

It should, however, be observed that Nicaragua has introduced into evidence a newspaper account of an address by the United States Permanent Representative to the United Nations, Ambassador Jeane J. Kirkpatrick, to the American Society of International Law of 12 April 1984 (Nicaraguan Exhibit IV, No. 2). While that newspaper summary does not advert to the point, the text of Ambassador Kirkpatrick's address states that, on 23 March 1984, a member of the ruling Nicaraguan directorate warned the President of Costa Rica "that other Central American ports might be mined by insurgent groups acting in solidarity with Nicaragua". But in the circumstance in which no such allegation has been made before the Court, I do not feel entitled to weigh it in appraising provisions of the Court's Order.

II. The Jurisdiction of the Court to Indicate Provisional Measures

The United States concentrated on advancing a battery of arguments designed to demonstrate that the Court lacks jurisdiction in this case, on the merits and in respect of the indication of provisional measures. While the Court has reserved to the next phase of the proceedings the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of Nicaragua's Application, and while no definitive views can be expressed on jurisdictional questions at this stage, I think it right to give some indication of why I have joined the Court in voting to reject the United States request to remove the case from the Court's list.

Among the arguments made by the United States, two were most strenuously and ably advanced. The first turned on the failure of Nicaragua to ratify the Protocol of Signature of the Statute of the Permanent Court of International Justice. The second turned on the terms of the United States adherence of 26 August 1946 to the Court's compulsory jurisdiction, under the Optional Clause, which the United States purports to have altered on 6 April 1984, and to the terms of the Nicaraguan acceptance of the Court's compulsory jurisdiction should that acceptance be deemed to be in force.

A. Nicaragua's...

A. Nicaragua's failure to ratify the Statute of the P.C.I.J.

Nicaragua's Application instituting proceedings in this case bases the jurisdiction of the Court on the contentions of a single sentence: "Both the United States and Nicaragua have accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the Court." Nicaragua has never made a declaration under Article 36, paragraph 2, of the present Court's Statute. In the oral proceedings, Nicaragua invoked submissions to the Court's jurisdiction on the part of the United States under Article 36, paragraph 2, and on the part of Nicaragua under Article 36, paragraph 5. That latter provision specifies:

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

Nicaragua maintains that it deposited such a declaration under Article 36 of the Statute of the Permanent Court of International Justice in 1929 which is "still in force".

However, the United States maintains that the Nicaraguan declaration of 1929 never came into force, for the reason that it could do so only if Nicaragua's adherence to the Statute of the Permanent Court had come into force, either before or after the deposit of the Nicaraguan declaration of 1929. The United States contends that, while Nicaragua signed the Protocol of Signature of the Statute, it failed to ratify it by failing to deposit with the Secretary-General of the League of Nations its instrument of ratification.

The details of these conflicting contentions should be reserved to the next phase of the proceedings. Suffice it to say that it appears to be beyond doubt that Nicaragua did not complete ratification of the P.C.I.J. Statute and that, in consequence, it was officially treated by the Permanent Court and by the League of Nations as never having made a declaration which came into force submitting to that Court's compulsory jurisdiction. So treating Nicaragua as not having made a declaration in force was and is in accordance with the law of treaties.

That being the case, the United States request to strike the Nicaraguan Application from the list would appear to be justified - were it not for the following facts which did not come sufficiently to light in the course of the oral proceedings.

The first Yearbook of the International Court of Justice, that for 1946-1947, contains, at pages 110-112, a table entitled: "Members of the United Nations, other States parties to the Statute and States to which the Court is open." (An asterisk denotes a State bound by the compulsory jurisdiction clause.)" (At p. 110; footnotes omitted.) A caption of the table reads:

"Deposit..."

"Deposit of declaration accepting
compulsory jurisdiction

State	Date	Conditions"
Nicaragua is listed thereunder, as follows:		
"Nicaragua	24 IX 1929 ¹	Unconditional"

Footnote 1 reads: "Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, 5, of Statute of the present Court)." (Ibid., p. 111.)

Moreover, that Yearbook contains a section entitled: "Communications and declarations of States which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court of International Justice" (ibid., p. 207; footnote omitted). Among the declarations of such States which are then set out in full is that of Nicaragua:

"Nicaragua¹.

'Au nom de la République de Nicaragua, je déclare reconnaître comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale.

Geneve, le 24 septembre 1929

(Signed) T. F. MEDINA' "

Footnote 1 reads:

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry."

Furthermore, on page 221 of the same Yearbook, there appears still another compendium of the texts of adherences to the compulsory jurisdiction, entitled: "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)." Nicaragua is among the States which are listed as unconditionally bound. The date of signature of "24 IX 29" is the date given for signature of the Optional Clause; the column entitled "Date of deposit of ratification" is left blank. That column appears to relate to the date of deposit of ratification of the declarations and not of the Protocol of Signature of the Statute.

Finally...

Finally, the Secretary-General of the United Nations has published annually since 1949 a volume initially entitled: Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary. That compendium for 1949 contains, at page 18, a list entitled, "States Whose Declarations Were Made Under Article 36 of the Statute of the Permanent Court of International Justice and Deemed to Be Still in Force". Among the States so listed is Nicaragua. The data is stated to be derived from the Yearbook of the Court for 1947-1948.

The facts which flow from the foregoing may be summarized in this way: (a) the Registry of the Permanent Court and the Secretariat of the League of Nations did not, as long as those institutions were in existence, treat Nicaragua as party to the Statute, with the official consequence that its declaration accepting the Court's compulsory jurisdiction never came into force; (b) the Registry of the International Court of Justice and the Secretariat of the United Nations from the outset of the life of the Court and the Organization did treat Nicaragua, which became automatically party to the Statute as an original Member of the United Nations, as a State bound to this Court's compulsory jurisdiction by reason of its 1929 declaration being deemed to be still in force.

How is it that such opposite conclusions could have been reached, back-to-back as it were?

A definitive conclusion of law on the foregoing facts must await the judgment of the Court in the next phase of the proceedings. But it would appear that the Registry of this Court and the Secretary-General may well have taken the position that the declaration of Nicaragua of 1929 accepting the Permanent Court's compulsory jurisdiction, while never perfected, remained in an imperfect but not invalid state; it could have been brought into force at any time during the life of the Permanent Court by transmission to the Secretary-General of the League of the instrument of ratification; but it was not brought into force until Nicaragua ratified the Charter of the United Nations and the Statute of this Court which is an integral part of that Charter. Once Nicaragua took that step, its declaration made under Article 36 of the Statute of the Permanent Court and which - by the terms of that declaration alone - is "still in force shall be deemed... to be" an acceptance "of the compulsory jurisdiction of the International Court of Justice for the period" which it still has to run (Art. 36, para. 5, of the Statute).

It may be objected that what never came into force cannot be still in force and that, accordingly, Nicaragua's ratification of the Charter could not have given life to a declaration which had never been brought into force under the League. But the contrary position may find some support in the French text of Article 36, paragraph 5:

"Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant

acceptation...

acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes."
[Emphasis supplied.]

It will be observed that the French text does not speak of declarations "which are still in force" but declarations "for a duration which has not yet expired". This position arguably also finds support in the essential reasoning of the joint dissenting opinion of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender in the case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 156. Furthermore, that distinguished scrutinizer of the activities of the Permanent Court and this Court, Judge Hudson, appeared to treat Nicaragua's declaration of 1929 as in force for the purposes of Article 35, paragraph 5, of the Court's Statute. He accordingly wrote:

"The new paragraph 5 was inserted with the purpose of preserving some of the jurisdiction of the Permanent Court for the new Court. For the States which had deposited ratifications on October 24, 1945, the date on which the Statute entered into force, the provision must operate as of that date. At that time, declarations made by the following States under Article 36 were in force, and 'as between the parties to the Statute' the provision applies to them: Argentina, Brazil, Denmark, Dominican Republic, Great Britain, Haiti, Iran, Luxembourg, New Zealand, Nicaragua, and El Salvador." (Manley O. Hudson, "The Twenty-Fourth Year of the World Court", American Journal of International Law, Vol. 40 (1946), p. 34. See also M.O. Hudson, "The Twenty-Fifth Year of the World Court", American Journal of International Law, Vol. 41 (1947), p. 10.)

As the argument of the United States in this case makes clear, Judge Hudson was fully aware of the fact of Nicaragua's failure to ratify the Statute of the Permanent Court, and of the legal conclusions which authorized organs of the League of Nations and the Permanent Court drew from that failure.

The record is confused, because the footnote setting out the fact that notification of the deposit of Nicaragua's instrument of ratification had not been received, which is found at page 210 of the Court's Yearbook 1946-1947, and which has been quoted above, is not found in subsequent Yearbooks until the Yearbook 1955-1956, where the following footnote appears, at page 195:

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations."

That...

That footnote appears in all subsequent Yearbooks to this day. Why the footnote reappeared, and what the effect of its reappearance is or may be, is not clear.

Nevertheless, at this juncture, the question is not whether the line of reasoning which Judge Hudson apparently followed, and to which the publications of the United Nations and the Court lend a substantial, but not unambiguous, support, is correct, or whether the contrary view so forcefully expounded by the United States Agent in the oral hearings is correct. What is important is that the facts described above are sufficient at this stage to provide the Court with a basis, in respect of Nicaragua's apparent adherence or alleged adherence to the Court's jurisdiction, on which the jurisdiction of the Court in this case might be founded. In view of these facts, and of the precedents of the Court in finding a sufficient jurisdictional basis on which to indicate provisional measures, I did not find it possible to vote to strike the Nicaraguan Application and request for provisional measures from the list, despite the cogency of the United States argument.

B. Modification or termination of the declarations of the United States and Nicaragua

Among several other jurisdictional arguments advanced by United States counsel, two stand out and merit provisional observations.

On 6 April 1984, the United States sent to the Secretary-General of the United Nations a note with respect to the United States declaration of 1946 accepting the compulsory jurisdiction of the Court under the Optional Clause. The note in part read:

"the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

The United States observes that Nicaragua's Application of 9 April 1984 falls squarely within the terms of the 6 April 1984 note, since it poses a dispute with a Central American State and arises out of or is related to events in Central America.

Nicaragua maintains that the note is ineffective to modify or suspend provisions of the United States 1946 declaration, since the declaration, while not reserving a right to vary or suspend its terms,

does...

does provide that it "shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration". Nicaragua contends that, since the United States declaration may be terminated only on six months' notice, it may not be modified or suspended on less notice. It argues that the law of treaties is applicable to the United States declaration, that that law permits termination of a treaty in accordance with the terms of that treaty, and that the only term in point is the provision for termination on six months' notice.

The United States countered that the United States note of 6 April 1984 is not, and does not purport to be, a termination of its 1946 declaration. Rather, it is a modification "narrowly limited in time and geography". Nicaragua's argumentation came to the claim that, since the United States did not reserve a right to modify or suspend operation of its 1946 declaration, it could not do so. The United States contended that "this argument is simply inconsistent with the practice of States and this Court". Citing cases of this Court and various leading authorities, the United States maintained that a bilateral agreement between States both of which have filed declarations under the Optional Clause arises only on the filing of a case between them; before that, there is no consensual bond and "hence no obligation of the respondent to the applicant to continue the terms of its declaration". The United States relied on State practice, particularly modifications of adherences to the compulsory jurisdiction of the Permanent Court by Great Britain, the Commonwealth countries and France on the outbreak of the Second World War expressly to exclude disputes arising out of the war, even though the durations of those declarations had not expired.

"If those States were entitled to determine unilaterally that a change of circumstances had occurred and to revoke their declarations contrary to the time limits specified in those declarations, surely the United States may act similarly here."

A second argument advanced by the United States is that, under the governing principle of reciprocity, the United States could be bound by its six-month notice proviso in relation to Nicaragua if Nicaragua had a similar or greater notice period in its declaration. Nicaragua - on the assumption that its declaration is valid at all - in 1929 accepted the jurisdiction of the Permanent Court unconditionally. But surely, the United States argued, "such an unconditional acceptance was not intended to bind a State in perpetuo". State practice - and the United States cited examples of termination or modification of unconditional acceptances by Paraguay and El Salvador - confirms that conclusion, as do the opinions of leading authorities. Thus purportedly "unconditional" acceptances such as Nicaragua's in 1929 "are, in fact, denounceable". Since, in this case, Nicaragua's purported declaration was and is immediately terminable, the United States equally was entitled to introduce a temporal qualification into its declaration with immediate effect, in accordance with the principle of reciprocity.

The...

The response of Nicaraguan counsel to the foregoing contentions was that, if a declaration is made unconditionally and there is no reference to termination, the presumption is that it cannot be denounced except in accordance with the principles of the law of treaties.

In my provisional view, and subject to the pleadings of the Parties in the next phase of the proceedings, both of the jurisdictional arguments advanced by the United States which have been summarized in this section of this opinion are so substantial as to require the most searching analysis of the Court.

Nevertheless, I have not found it possible to conclude that, on either ground or on the basis of the several other jurisdictional arguments of the United States, the jurisdictional provisions invoked by Nicaragua do not, *prima facie*, afford a basis on which the jurisdiction of the Court might be founded.

It is beyond dispute that the Court may not indicate provisional measures under its Statute where it has no jurisdiction over the merits of the case. Equally, however, considerations of urgency do not or may not permit the Court to establish its jurisdiction definitively before it issues an order of interim protection. Thus the Court has built a body of precedent which affords it the authority to indicate provisional measures if the jurisdiction which has been pleaded appears, *prima facie*, to afford a basis on which the Court's jurisdiction might be founded. Whether "might" means "possibly might" or "might well" or "might probably" is a question of some controversy. The nub of the matter appears to be that, while in deciding whether it has jurisdiction on the merits, the Court gives the defendant the benefit of the doubt, in deciding whether it has jurisdiction to indicate provisional measures, the Court gives the applicant the benefit of the doubt. In the present case, the Court, in my view, has given the Applicant the benefit of a great many doubts.

The result is that States which have, by one route or another, submitted to the Court's compulsory jurisdiction in advance of a particular dispute, run the risk of being the object of an order indicating provisional measures even though (as in the Anglo-Iranian Oil Co. case) the Court may eventually conclude that jurisdiction on the merits is lacking. Thus the tactical disadvantage which the minority of States which has adhered to the Optional Clause generally suffer, as compared with that majority which has not submitted declarations under the Optional Clause at all, may be markedly greater than was conceived at the time declarations were submitted or has been perceived since.

A ready solution to this problem which comports with the maintenance of the Court's jurisdiction is not obvious. But one step which the Court itself can take is to ensure that the parties, at the stage of argument on provisional measures, are afforded the time required to prepare to

argue...

argue issues of jurisdiction in depth. A second step is to ensure that the Court itself is afforded the requisite time to deliberate issues of jurisdiction in depth and to formulate its order in accordance with its internal judicial practice.

(Signed) Stephen M. SCHWEBEL.
