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 B 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 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 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 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 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 B 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 B 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 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)* (*ibid.,* pp. 30, 34-36). 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 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 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 Profesor 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, Spe-

> cial 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 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 B 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 B 2 of the Court's Order, why do I not take it in respect of operative paragraph

B1, 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 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 Rodríguez. (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 Failure to Ratify the Statute of the Permanent Court of International Justice

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 :

State.	"Deposit of declaration accepting compulsory jurisdiction. 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 :

"*Nicaragua* [1].

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

Genève, 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, 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 (Article 36, paragraph 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 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), 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. Hud-

son, "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", *ibid.,* 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 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 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 Perma-

nent 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 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 suffers, 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 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.