MEMORIAL OF NICARAGUA (COMPENSATION)

MÉMOIRE DU NICARAGUA (RÉPARATION)

INTRODUCTION

A. Prior Proceedings in the Case

1. On 9 April 1984, Nicaragua filed its Application in the Court charging the United States with military and paramilitary activities in and against Nicaragua in violation of United States obligations under international law. The Application asked the Court for a declaration that the United States activities were unlawful, an order to the United States to cease and desist, and compensation. In addition, Nicaragua requested that the Court indicate interim measures of protection under Article 41 of the Statute.

2. In its Order of 10 May 1984, following oral observations on the request for interim measures of protection, the Court indicated provisional measures pursuant to Article 41 of the Statute of the Court.

3. In its Judgment of 26 November 1984, following written and oral proceedings on the preliminary issues of jurisdiction and admissibility, the Court held that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court, and also by virtue of the compromissory clause in the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956. The Court also held that the Application was admissible.

4. The United States announced, on 18 January 1985, that it would not "participate" further in this case. Thereafter, Nicaragua, pursuant to Article 53 of the Statute, called upon the Court to decide the case despite the failure of the Respondent to appear and defend.

5. In its Judgment of 27 June 1986, the Court reached the following conclusions:

— that by training, arming, equipping, financing and supplying the *contra* forces, and otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, the United States has acted in breach of its obligation under customary international law not to intervene in the affairs of another state (Dispositif, subpara. 3);

— that by certain specified attacks on Nicaraguan territory in 1983-1984, and further by the acts of intervention referred to in the Dispositif, subparagraph 3, which involved the use of force, the United States has acted in breach of its obligation under customary international law not to use force against another State (Dispositif, subpara. 4);

— that by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in the Dispositif, subparagraph 4, the United States has acted in breach of its obligation under customary international law not to violate the sovereignty of another State (Dispositif, subpara. 5);

— that by laying mines in the internal or territorial waters of Nicaragua, the United States has acted in breach of its obligations not to use force against another State, not to intervene in its affairs, not to violate its sovereignty, and not to interrupt peaceful maritime commerce (Dispositif, subpara. 6), and also in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation of 21 January 1956 between the United States and Nicaragua (Dispositif, subpara. 7);

— that by failing to make known the existence and locations of the mines laid by it, the United States has acted in breach of its obligations under customary international law in this respect (Dispositif, subpara. 8);
— that by producing in 1983 a manual entitled *Operaciones sicologicas en guerra de guerrillas*, and disseminating it to *contra* forces, the United States has encouraged the commission by them of acts contrary to general principles of humanitarian law (Dispositif, subpara. 9); and
— that by the attacks on Nicaraguan territory referred to in the Dispositif, subparagraph 4, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, the United States has committed acts calculated to deprive of its object and purpose the 1956 Treaty of Friendship, Commerce and Navigation between the parties (Dispositif, subpara. 10), and has acted in breach of its obligations under Article XIX of the Treaty (Dispositif, subpara. 11).

6. In its Judgment of 27 June 1986, the Court also declared that the United States was under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations. (Dispositif, subpara. 12.)

7. The Court further decided, finally, that the United States is under an obligation to make reparation to Nicaragua for all injury caused to Nicaragua by the United States breaches of customary international law and of the Treaty of Friendship, Commerce and Navigation between the Parties. The form and amount of such reparation, failing agreement between the Parties, would be settled by the Court in a subsequent phase of the proceedings. (Judgment on the Merits, para. 284; Dispositif, subpara. 15.)

8. The form and amount of Nicaragua's reparation have not been agreed upon between the Parties. In accordance with the decision of the Court, Nicaragua sent a communication to the United States on 19 July 1986 expressing its willingness to discuss the matter of reparation. The reply was negative. On 12 May 1987, Nicaragua sent a second communication to the United States reiterating its willingness to enter into negotiations in order to reach an agreement on the amount of reparation. The reply, dated 1 August 1987, again was negative. (Ann. XII.)

9. Accordingly, on 7 September 1987, Nicaragua communicated to the Court its desire that the Court initiate the compensation phase of the case. (Ann. XII.) By its Order of 18 November 1987, the Court set 29 March 1988 as the date for submission of Nicaragua's Memorial on Compensation.

10. This Memorial is submitted in accordance with the terms of the Order of 18 November 1987.

B. Overview of the Memorial

11. The Court acknowledged that in a situation of armed conflict such as the one presented in this case, "no reparation can efface the results of conduct" ruled contrary to international law. (Judgment on the Merits, para. 289, p. 144.) Nicaragua concurs. No amount of monetary reparation can truly compensate for the devastation wrought upon Nicaragua by the unlawful conduct of the United States. No such reparation can revive the human lives lost, or repair the physical and psychological injuries suffered by a population that has endured an unrelenting campaign of armed attacks and economic strangulation for over seven years. Nor can monetary reparation fully restore the Nicaraguan economy to the state it would have attained in the absence of a United States policy of military and economic aggression. The full impact of such a policy on a small, impoverished nation is simply incalculable.

12. Nicaragua has, nonetheless, quantified its losses as far as it is possible to

do so. It has assembled both the figures reflecting its human casualties and extensive economic data showing the injury sustained by its economy as a result of the unlawful conduct of the United States. The data is summarized in this Memorial, and presented in full in the Annexes attached hereto. The Annexes also contain explanations of the methodologies employed in the collection of the evidence and the calculations made to arrive at the total amounts Nicaragua claims due from the United States. The methodologies have been developed and applied by experienced economists, and the results, in large part, have been corroborated by the findings of impartial international organizations such as the Economic Commission for Latin America and the Caribbean (ECLAC), a body of the Economic and Social Council of the United Nations.

13. This Memorial is organized as follows. At the outset, the general legal principles governing reparation for unlawful acts are set forth in Chapter 1. Chapter 2 follows with a discussion of the specific legal principles relevant to the loss caused by the military and paramilitary activities, including the mode of compensation for deaths and personal injuries, and for material damage to property and the immediate production losses caused by such property damage. This chapter summarizes the evidence of the loss sustained by Nicaragua as a result of the military and paramilitary activities, and the methodology by which the evidence was collected.

14. Chapter 3 sets forth the principles of specific relevance to the loss sustained by Nicaragua from the attacks by the United States specified in paragraphs 81-85 of the Judgment on the Merits (and Dispositif, subpara. 4), and the mining of Nicaragua's harbours. The evidence of these losses and the methodology by which they were determined are then summarized.

15. In Chapter 4, Nicaragua presents its claim for defence and security costs it has incurred in order to defend itself and its citizens against the unlawful activities of the United States.

16. Chapter 5 presents an overview of the particular characteristics of the Nicaraguan economy relevant to understanding the impact of United States economic aggression on it. It then discusses the principles relevant to determining the losses caused by the United States general embargo on trade with Nicaragua. This discussion is followed by a summary of the losses Nicaragua has suffered as a result of the embargo, such as losses in net export income, increased costs of imports, and consequent production losses.

17. Chapter 6 concerns the additional loss caused to Nicaragua's development potential. The general rules applicable to determining these macroeconomic losses are set forth, followed by a discussion of the evidence of these losses and the methods by which they have been determined.

18. Nicaragua's claim for reparation also includes a claim for pecuniary satisfaction for the violations of its sovereignty that, according to the Judgment on the Merits, constituted separate and independent violations of international law. Chapter 7 discusses the relevant legal principles, and the pecuniary satisfaction to which Nicaragua maintains it is entitled for violations of its sovereignty.

19. Nicaragua also claims compensation for moral damage, in light of the scale, seriousness and persistence of the United States breaches of international law, the deliberate and intentional nature of this unlawful conduct, and the resulting hardships imposed on the Nicaraguan people. Chapter 8 sets forth the bases for this claim.

20. The temporal scope of the claims of Nicaragua is examined in Chapter 9.

21. Finally, the concluding chapter covers procedural issues relating to the non-appearance of the Respondent, the question of interest on the reparation award, and connected matters. Nicaragua's Submissions on Compensation are then presented.

CHAPTER 1

THE LEGAL PRINCIPLES GOVERNING REPARATION FOR UNLAWFUL ACTS

Introduction

22. The operation of assessing compensation for the deaths, injuries, material damage and consequential economic loss caused by the unlawful activities of the United States in and against Nicaragua involves an inquiry in several stages. In this chapter expression is given to the principles governing the general approach to the assessment of compensation. In the two chapters which follow the implications of the third and fourth subparagraphs of the Dispositif are examined. Chapter 2 will also provide an exposition of the particular modes according to which compensation for deaths, injuries and material damage are to be assessed.

A. The General Principle of State Responsibility

23. The starting point must be the principle that responsibility attaches to every internationally wrongful act of the State. The position was stated authoritatively by Judge Ago in the text of his Third Report as Special Rapporteur to the International Law Commission:

> "One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established 'immediately as between the two States', as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case. (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 28.) Moreover, as stated by the Italian-United States Conciliation Commission set up under Article 83 of the Treaty of Peace of 10 February 1947 (United Nations, *Treaty Series*, Vol. 49, p. 167), no State may 'escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law' (*Armstrong Cork Company* case, 22 October 1953, United Nations, *Reports of International Arbitral Awards*, Vol. XIV (United Nations publication, Sales No. 65.V.4, p. 163))." (*Yearbook of the International Law Commission, 1971*, II (Part One), p. 199, at p. 205, para. 30.)

24. Indeed, the principal sources invariably state the general principle that the commission of an act either contrary to customary international law or in breach of treaty obligations gives rise to responsibility for the damage and loss of life resulting from the illegal conduct. A statement and application of the principle is to be found in the Judgment of this Court in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 4 at page 23:

> "The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd,

1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom."

The principle was affirmed also in the Dispositif of the Judgment (at p. 36).

25. This same principle has been given explicit acceptance in the practice of the United States. The result of the *Panay* incident in 1937 was the following telegram from the United States Secretary of State to the Ambassador in Tokyo, for transmission to the Japanese Government:

"342. Please communicate promptly to Hirota a note as follows:

The Government and people and the United States have been deeply shocked by the facts of the bombardment and sinking of the U.S.S. *Panay* and the sinking or burning of the American steamers *Meiping*, *Meian* and *Meisian* [Meihsia] by Japanese aircraft.

The essential facts are that these American vessels were in the Yangtze River by uncontested and incontestable right, that they were flying the American flag: that they were engaged in their legitimate and appropriate business, that they were, at the moment, conveying American official and private personnel away from points where danger had developed; that they had several times changed their position, moving upriver, in order to avoid danger, and that they were attacked by Japanese bombing planes. With regard to the attack, a responsible Japanese naval officer at Shanghai has informed the Commander-in-Chief of the American Asiatic Fleet that the four vessels were proceeding upriver: that a Japanese plane endeavoured to ascertain their nationality, flying at an altitude of three hundred meters, but was unable to distinguish the flags; that three Japanese bombing planes, six Japanese fighting planes, six Japanese bombing planes, in sequence, made attacks which resulted in the damaging of one of the American steamers, and the sinking of the U.S.S. *Panay* and the other two steamers.

Since the beginning of the present unfortunate hostilities between Japan and China, the Japanese Government and various Japanese authorities at various points have repeatedly assured the Government and authorities of the United States that it is the intention and purpose of the Japanese Government and the Japanese armed forces to respect fully the rights and interests of other powers. On several occasions, however, acts of Japanese armed forces have violated the rights of the United States, have seriously endangered the lives of American nationals and have destroyed American property. In several instances, the Japanese Government has admitted the facts, has expressed regrets, and has given assurances that every precaution will be taken against recurrence of such incidents. In the present case, acts of Japanese armed forces have taken place in complete disregard of American rights, have taken American life, and have destroyed American property both public and private.

In these circumstances, the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, an undertaking to make complete and comprehensive indemnifications, and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests and property in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever." (Source: *Foreign Relations of the United States, Japan, 1931-1941*, Vol. I, U.S.G.P.O., 1943, p. 523.)

26. Similarly, in a Note addressed to the Bulgarian Government on 2 August 1955, the United States Government stated the following:

> "The United States Government protests emphatically against the brutal action of Bulgarian military personnel on July 27, 1955, in firing upon a commercial aircraft of the El Al Israel Airlines, which was lawfully engaged as an international carrier. This attack, which resulted in the destruction of the aircraft, and the death of all personnel aboard, including several United States citizens, constitutes a grave violation of accepted principles of international law. The Bulgarian Government has acknowledged responsibility for this action.
>
> The United States Government demands that the Bulgarian Government (1) take all appropriate measures to prevent a recurrence of incidents of this nature and inform the United States Government concerning these measures; (2) punish all persons responsible for this incident; and (3) provide prompt and adequate compensation to the United States Government for the families of the United States citizens killed in this attack." (Whiteman, *Digest of International Law*, Vol. 8, U.S.G.P.O., Dept. of State Publicn. 8290, p. 891.)

27. Further evidence of United States recognition of the general principle can be found in the following sources:

Whiteman, *op. cit.*, pages 888-906.
Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, 1983, pages 221-224.

B. The Principle of Effective Reparation

28. The general principle governing the actual modalities of reparation was laid down by the Permanent Court in the *Chorzów Factory* (Merits) case in a passage which has been recognized as a classical statement:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

29. The principle has been given prominence in the sources of modern international law: see Cheng, *General Principles of Law*, London, 1953, page 233; Oppenheim, *International Law*, Volume I, 8th edition, by Hersch Lauterpacht, page 353; Jiménez de Aréchaga in Sørensen (ed.), *Manual of Public International Law*, London, 1968, pages 567-568; O'Connell, *International Law*, 2nd edition, London, 1970, II, page 1115; Verzijl, *International Law in Historical Perspective*, Volume VI, Leiden, 1973, page 742; Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 286; Podesta Costa and Ruda, *Derecho Internacional Publico*, 5th edition, 1979, pages 189-190; Rousseau, *Droit international public*, V, Paris, 1983,

page 232 (para. 229); Tunkin, *International Law*, Moscow, 1986, page 234; the *I.C.J. Pleadings* in the *Aerial Incident* case (at p. 102 (Memorial of Israel) and at p. 364 (Memorial of the United Kingdom)).

30. The draft articles prepared by Mr. Riphagen, Special Rapporteur of the International Law Commission, on "the content, forms and degrees of international responsibility", include the following (Art. 6):

> "1. The injured State may require the State which has committed an internationally wrongful act to:
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> *(a)* discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and
> *(b)* apply such remedies as are provided for in its internal law; and
> *(c)* subject to Article 7, re-establish the situation as it existed before the act; and
> *(d)* provide appropriate guarantees against repetition of the act.
>
> 2. To the extent that it is materially impossible to act in conformity with paragraph 1 *(c)*, the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which re-establishment of the situation as it existed before the breach would bear." (Fifth Report, *Yearbook of the International Law Commission, 1984*, II (Part One), p. 1 at p. 3; and see also *ibid.*, 1985, II (Part One), p. 4 at pp. 8-10.)

31. It will be readily apparent that the formulation in paragraph 2 of the draft article reflects the principle stated by the Permanent Court in the *Chorzów Factory* case. In its Report on the work of the thirty-eighth session, the Commission stated that during the Drafting Committee's consideration of draft Article 6: "There had been a large measure of consensus with respect to paragraph 2 of the draft article" (*Report of the International Law Commission on the Work of Its Thirty-Eighth Session*, 5 May-11 July 1986, *G.A. Official Records*, 41st sess., Suppl. No. 10 (A/41/10), pp. 96-97 (para. 65), footnote 73).

32. Judge Sir Hersch Lauterpacht underlined the significance of the views expressed in the case concerning the *Chorzów Factory* in his work *The Development of International Law by the International Court*, London, 1958 (at pp. 315-316). In his examination of the issue of measure of damages Lauterpacht points out that in the Judgment of the *Chorzów Factory* case the Permanent Court rejected assertions "that the responsibility of States must be limited to damages arising directly out of the injurious event, to the exclusion of all indirect and consequential damages". In the opinion of Lauterpacht, the Permanent Court leaned in favour of effective reparation.

33. The general principle applicable is often stated in terms of the duty to pay "just compensation": see the *Norwegian Shipowners' Claims*, *Reports of International Arbitral Awards*, I, page 307, at page 339. Another formulation refers to the requirement that compensation be "adequate": see *Chorzów Factory, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Reports, Series A, No. 9*, page 21; Whiteman, *Digest of International Law*, Volume 8, U.S.G.P.O., Department of State Publication 8290, 1967, page 1143.

34. In the specific context of the assessment of compensation for damage to or destruction of property the element corresponding to the principle of effective reparation is the principle of replacement value. The logical connection between the principle as stated in the *Chorzów Factory* case (Merits) and the principle of replacement value is evidenced by the written pleadings of the United Kingdom in the *Corfu Channel* (Merits) case. In that case the claim for the destruction of

the destroyer H.M.S. *Saumarez* was for the cost of replacement (*I.C.J. Pleadings, Corfu Channel*, Vol. I, p. 25, para. 18), and page 101 (Ann. 14). As the text of the Memorial makes absolutely clear, this claim was based upon the passage from the Judgment in the *Chorzów Factory* (Merits) case (Memorial, p. 48, para. 95). (Cf. also the United Kingdom Memorial in the *Anglo-Iranian Oil Co.* case, *I.C.J. Pleadings*, pp. 115, 117.) Moreover, it is significant that the Court accepted the valuation of the destroyer presented by the United Kingdom: see the Judgment in the Compensation phase, *I.C.J. Reports 1949*, page 244 at pages 248-249.

35. An associated factor to be taken into account is the policy of not permitting a Respondent State to take advantage of its own wrongdoing when that wrongdoing creates conditions in which the more normal methods of valuation are difficult to apply. In the *Trail Smelter Arbitration*, the Tribunal in its Interim Award stated that:

> "In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in *Story Parchment Company* v. *Paterson Parchment Paper Company* (1931), 282 U.S. 555 as follows:
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> 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable interference, although the result be only approximate'." (Interim Decision, 16 April 1938; *Reports of International Arbitral Awards*, III, p. 1905 at p. 1920.)

36. This statement of principle by the Tribunal has been adopted by the Government of the United States and thus it is quoted, accompanied by further citations, in Hackworth, *Digest of International Law*, Volume V, U.S.G.P.O., Washington, 1943, page 721. Moreover, the quotation in Hackworth from the Interim Award in the *Trail Smelter Arbitration* is immediately preceded by passages from the *Chorzów Factory* (Merits) Judgment, including the passage quoted earlier (para. 28) containing the judicial affirmation that "reparation must, as far as possible, wipe out all the consequences of the illegal act . . ." (Hackworth, *op. cit.*, pp. 719-720).

C. The United States Government Has Adopted the Principle of Effective Reparation

37. The passage from the Judgment in the *Chorzów Factory* (Merits) case set forth above has been adopted and approved in the two modern authoritative *Digests* of international law published with the authority of the United States Government: see Hackworth, *Digest of International Law*, Volume V, U.S.G.P.O., Washington, 1943, pages 719-720; and Whiteman, *Digest of International Law*, Volume 8, Department of State Publication 8290, Washington, 1967, pages 1137-1138, 1199. The key element in the *Chorzów Factory* Judgment is also quoted in the United States Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran* in the following passage:

"Reparation must, as far as possible, 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). Though the damage suffered by individuals may serve as a convenient scale for the calculation of the reparation due to the State, the damage suffered by the State itself must also be considered. (*Ibid.*, at p. 28.)

In the case before the Court, the United States asserts its right to full compensation for the injuries suffered both by the United States as a State and by its nationals as victims of Iran's unlawful actions." (Memorial of the Government of the United States of America, January 1980, p. 78.)

38. This recent expression of the view of the United States Government in the exactly similar context of State responsibility for unlawful conduct is of particular importance for present purposes. Not only does the principle of effective reparation form part of customary international law but there is unequivocal evidence that the United States has expressly accepted the principle (cf. the Judgment in the Merits phase of the present case, *I.C.J. Reports 1986*, pp. 99-107, paras. 188-204, *passim*). Moreover, the United States Memorial in the *United States Diplomatic and Consular Staff in Tehran* case relates to a case, like the present, which involved claims not based upon the diplomatic protection of individuals but directly upon the interests of the State.

39. It is generally recognized that in the case of a deliberate intention to harm *(dol, dolus)*, the seriousness of the breach of the legal obligation concerned is relevant to the way in which compensation is to be assessed and thus points to a calculation which does not lean in favour of the Respondent State: see Brownlie, *System of the Law of Nations: State Responsibility*, Part I, 1983, page 224.

D. The Governing Principles in Summary

40. In the light of the foregoing, the principles governing the general approach to assessment of compensation in the present proceedings can be expressed in summary form.

First: the mode of reparation must be effective and thus wipe out all the consequences of the illegal act.

Second: the Respondent State has expressly accepted the principle of effective reparation.

Third: where the wrong itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be unjust to deny relief and thus relieve the wrongdoer from making amends. (See the *Trail Smelter Arbitration, Interim Award*, above, para. 35.)

Fourth: in the circumstances of the present case, the standard of reasonableness is appropriate in the assessment of damage especially in view of the necessarily approximate nature of the process of valuation (see the *Corfu Channel* case, Compensation phase, *I.C.J. Reports 1949*, p. 244 at p. 249; and also the *Trail Smelter Arbitration, Interim Award*, above, para. 35).

Fifth: the serious character of the conduct of the Respondent State is relevant to the process by which compensation is assessed.

CHAPTER 2

THE UNLAWFUL CONDUCT OF THE UNITED STATES UNDER FINDINGS 3 AND 4: THE MODALITIES OF COMPENSATION

Introduction

41. In this and the following chapter the Government of Nicaragua will examine the precise implications, for the present phase of the proceedings, of the third and fourth subparagraphs of the Dispositif of the Judgment on the Merits. These paragraphs contain the following key elements of the decision on the Merits:

> "(3) By twelve votes to three,
>
> *Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;
>
> By twelve votes to three,
>
> (4) *Decides* that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State."

Section A. The General Significance of Subparagraph 3 of the Dispositif

42. In the present Chapter, the Government of Nicaragua intends to set out its understanding of the legal implications of the third finding in relation to the other parts of the Dispositif and to the Judgment as a whole.

43. The most obvious inference is that the United States is responsible for the actual consequences of the operations carried out by the *contra* forces against Nicaragua. It makes no difference for present purposes that the activities of the United States take the particular form of "training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding" military and paramilitary activities against Nicaragua. The responsibility generated must be presumed to be the normal form of unqualified State responsibility; the United States "has acted", according to the Dispositif, "in breach of its obligation under customary international law not to intervene in the affairs of another State".

44. As the Judgment emphasizes (p. 65, para. 116), the United States is responsible for its own conduct vis-à-vis Nicaragua "including conduct related to the acts of the *contras*". As the Court makes plain in a long sequence of the Judgment, the question of the responsibility of the United States in respect of "violations of humanitarian law" by the *contra* forces is distinct from the overall question of the responsibility of the United States for breaches of customary international law: see the Judgment, pages 63-65, paragraphs 113-116.

45. In the same connection, the examination of "the question of degree of control" of the *contras* by the United States Government in the Judgment (pp. 53-65, paras. 93-116) is related to the precise issue of the responsibility of the United States for activities of the *contras* involving breaches of the humanitarian law of war and not otherwise. This is confirmed by the later sections of the Judgment, which elaborate upon the whole question of responsibility for violations of "the fundamental general principles of humanitarian law": see the Judgment, pages 112-115, paragraphs 216-220; pages 129-130, paragraphs 254-256; pages 138-139, paragraphs 277-278.

46. In conclusion, apart from the specific issue of the breaches of humanitarian law (an issue not actually raised in the pleadings presented by Nicaragua), the reponsibility of the United States depends upon its *relationship* with the *contra* forces whether or not this relationship involved some degree of control amounting to the high standard referred to hypothetically by the Court (pp. 65-66, para. 115) as "effective control of the military or paramilitary operations". What is significant is the finding by the Court that there was a *sufficient* relationship on the basis of the evidence available to justify the important decision that the "United States of America ... has acted ... in breach of its obligation under customary international law not to intervene in the affairs of another State". In any case, the nature of the relationship has been clarified as a consequence of the evidence produced during the "Iran-Contra" hearings. (See Ann. X.)

47. In its Memorial, Nicaragua claims compensation from the United States for damage done in the course of the military and paramilitary operations against Nicaragua. In many instances, the immediate actions that led to the deaths, injuries and material damage were executed by the *contras*. Nicaragua's claim to be compensated for the damage is based upon the fact that it was the consequence of the unlawful conduct of the United States in relation to the *contras*.

48. The responsibility of the United States for *contra* damage is not dependent upon imputation to the United States of the acts of the *contras*. It is important not to "confuse the imputation of an illicit act with the imputation of resulting responsibility" (see, for example, Judge Ago, 68 *Recueil des cours* (1939-II), p. 451).

49. Although action by an individual acting *qua* individual (and not *qua* organ of the State) cannot be imputed to the State, the State ultimately may be charged with responsibility for the individual action. Such a result is reached, for example, when a State fails to meet an international obligation to prevent the individual's action or to punish the individual once the deed has been accomplished. The illicit act is the omission of the organs of State, not the individual's action: see Judge Ago, Fourth Report, *Yearbook of the International Law Commission, 1972*, II, pages 95-126; and his separate opinion, *I.C.J. Reports 1986*, pages 189-190, paragraphs 18-19.

50. Such is the case as regards United States support for the *contras*. The immediate actions of the *contras* may be compared to harmful conduct by an individual, and the assistance of the United States to breach of an international obligation to prevent or punish. Just as States are under an obligation to prevent or punish certain conduct, the United States was, as determined unequivocally

by the Court, under an obligation not to assist the *contras* in the way it has. It is from the breach of *that* obligation that the injuries inflicted upon Nicaragua by the *contras* arose; and it is *that* breach that entails the responsibility of the United States to make reparation for those injuries. As Judge Ago points out in his separate opinion at the Merits phase of this case the Court applied the pertinent principles in the case concerning *United States Diplomatic and Consular Staff in Tehran.*

51. It must follow, in the respectful submission of the Government of Nicaragua, that the United States is responsible for *all the consequences* of its support for "the military and paramilitary activities in and against Nicaragua" provided that the following two conditions are satisfied:

(a) that the conduct constitutes breaches of the obligation not to intervene in the affairs of Nicaragua; and
(b) that the responsibility to be imputed is not in technical terms based upon violations of the fundamental principles of humanitarian law.

52. The second condition is obviously satisfied. As to the first condition, given the lack of lawful justification (see the Judgment, pp. 110-111, paras. 210-211, pp. 126-127, 246-249), it must follow that the activities of the United States in assisting the *contras ab initio* and *ipso facto* constitute acts of intervention in the internal affairs of Nicaragua for the harmful consequences of which the Respondent State is bound to make reparation.

53. This view of the matter is confirmed by the form and content of the third paragraph of the Dispositif. It is also confirmed by the substantial evidence to the effect that the persistent intention of the Government of the United States was, and continues to be, to overthrow the Government of Nicaragua. The evidence of this intention was presented in the Memorial of Nicaragua (see, in particular, Chaps. I and II). The Judgment of the Court recounts in some detail the covert objectives behind United States support for the *contras* with the overall aim of forcing major changes of internal policy upon the Government of Nicaragua: see the Judgment, pages 53-60, paragraphs 93-101. As the Court acknowledges, the policy was one of "covert operations" involving "military and paramilitary operations" in Nicaragua orchestrated and supported by the United States Central Intelligence Agency (CIA) and with specific political purposes affecting the internal affairs of Nicaragua. The *contra* forces were the chosen instrument of this policy and the consequence of the third paragraph of the Dispositif is that the measure of the United States responsibility must be based upon the damage and loss caused by the operations of the *contra* forces within Nicaragua.

54. This construction of the Dispositif is amply confirmed by the contents of the Judgment of the Court overall. In particular, the passages devoted to the application of the principle of non-intervention (pp. 123-125, paras. 239-243) relate the third finding of the Dispositif to the covert war involving the *contra* forces. The Court refers to "the coercion" of Nicaragua (para. 241) and to the giving of support to armed bands "whose purpose is to overthrow the government" of Nicaragua *(ibid.)*. Moreover, the observations contained in paragraph 242 relating to the provision of "strictly humanitarian aid" and connected questions rest on the premise that the finding on violations of the principle of non-intervention concerns the activities of the *contra* forces and the consequences of those activities.

55. Paragraph 4 of the Dispositif is complementary to paragraph 3 in two significant ways. First, the decision on the principle of non-intervention is reinforced and repeated in respect of those acts of intervention "which involve

the use of force". Secondly, the picture of United States responsibility for "military and paramilitary activities in and against Nicaragua" is completed (aside from the later findings concerning overflights and the laying of mines) by the inclusion of the specific attacks against Puerto Sandino and other targets.

56. The Government of Nicaragua would respectfully draw the attention of the Court to the intimate relationship which the third and fourth paragraphs of the Dispositif bear to each other. Together with the specific operations attributable to the acts of agents of the CIA, the fourth paragraph, like its predecessor, refers broadly to the responsibility of the United States resulting directly from its assistance to the *contras* in Nicaragua. Thus this aspect of the Dispositif and the relevant passages of the Judgment underline the responsibility of the United States in respect of the damage and loss caused by the *contra* operations in Nicaragua. The position is elucidated by the following passage of the Judgment:

> "Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in
>
> 'recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua' (Application, para. 26 *(a)* and *(c)*).
>
> So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the *contras* in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State', and 'participating in acts of civil strife ... in another State', in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to 'involve a threat or use of force'. In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force." (*I.C.J. Reports 1986*, pp. 118-119, para. 228.) (And see also *ibid.*, p. 123, para. 238.)

57. The logical force of the third and fourth paragraphs of the Dispositif in combination is the responsibility of the United States for the loss and damage caused by the activities of the *contras* both when the use of force was involved and also in respect of acts not involving the use of force but which constituted intervention in the internal affairs of Nicaragua. The comprehensive nature of this responsibility is underlined by the considerations advanced in the passage from paragraph 228 of the Judgment quoted above. This points out that the supply of funds to the *contras* did not amount to a "use of force" but was "undoubtedly an act of intervention in the internal affairs of Nicaragua". From this and from the logical structure of the Judgment as a whole, the responsibility

for the consequences of the acts of the *contra* forces must be borne by the United States by reason of the *assistance* given to the *contras* and without any requirement that individual acts of sabotage, murder and pillage should be proved to have been carried out as a result of planning or particular orders on the part of the United States. Indeed, if such proof were called for, the third subparagraph of the Dispositif would be rendered more or less otiose. And this would be a surprising outcome given the priority and prominence accorded to the third finding of the Dispositif in relation to the other findings on issues of substance.

58. In the light of the framework provided by the logical implications of certain key elements both of the Dispositif and of the Judgment as a whole, it becomes possible to develop the *modus operandi* appropriate for the valuation of the elements of loss and damage resulting from the activities of the *contra* forces and other instruments of the United States in and against Nicaragua.

Section B. The Mode of Compensation for Death and Personal Injuries

59. In the submission of the Government of Nicaragua, the inevitable consequence of the findings of the Court in the third and fourth paragraphs of the Dispositif is that the United States is bound to pay appropriate compensation for the deaths, personal injuries and material damage, resulting from its violations of the pertinent obligations of customary international law.

60. The existing literature on the subject of compensation in case of death presents a version of the relevant principles the reliability and relevance of which are substantially reduced by the following important considerations:

61. *(a)* The propositions are too general and fail to recognize that the precise mode of settling problems of compensation is connected with the substantive law bearing upon the particular case and the conduct of the parties. In a work published in 1983, Brownlie observed:

> "There is an intrinsic connection between the particular rules of substantive law and the mode which is to govern problems of 'remoteness' and 'measure of damages'. This undoubted truth is neglected in the standard works which tend to purvey general propositions concerning compensation in international law." (*System of the Law of Nations: State Responsibility, Part I*, 1983, p. 224; and see also the Preface, p. vi.)

62. *(b)* The propositions in the standard works reflect the naturally conservative approach of Claims Commissions concerned with cases involving deaths and personal injuries resulting from the acts and omissions of members of the administrative apparatus, which acts and omissions were the result of a failure to show "due diligence" rather than the implementation of a deliberate State policy established at the highest executive level and involving a persistent pattern of activity.

63. *(c)* The treatment of the subject of compensation in the standard sources (many of which were published before World War II) tends to ignore some significant episodes of modern State practice and, in particular, the written pleadings in the *Aerial Incident* case in 1959.

64. The picture which emerges from the legal literature in relation to the question of compensation for unlawful killing may be summarized as follows:

(i) The primary basis of calculation is the loss of economic support suffered by dependent relatives (and loss to the decedent's estate is not recoverable).

(ii) In the case of the death of relatives, such as wives or children who did not make pecuniary contributions to their near relatives, recovery is still allowed

either on the principle that the severing of ties and mental anguish calls for reparation on moral grounds or on the basis of an expectancy of future contributions or assistance: see Whiteman, *Damages in International Law*, I, Washington, 1937, pages 693-700.

(iii) In appropriate cases the amount of compensation will be enhanced by reference to the criterion of the serious character of the misconduct causing the death: see Feller, *The Mexican Claims Commissions 1923-1934*, New York, 1935, pages 295-297.

The principles summarized above are derived from the following materials: Hackworth, *Digest of International Law*, V, 1943, pages 747-755; Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, 1983, pages 216-224; O'Connell, *International Law*, 2nd edition, 1970, II, page 1119; Feller, *The Mexican Claims Commission 1923-1934*, pages 110-112, 295-300, 302-303, 306; Whiteman, *Digest of International Law*, Volume 8, 1967, pages 888-906; Borchard, *Diplomatic Protection of Citizens Abroad*, 1925, pages 424-425; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, pages 750-752; Ralston, *The Law and Procedure of International Tribunals*, Revised edition 1926, pages 259-262; Ralston, Supplement 1936, pages 126-130; Whiteman, *Damages in International Law*, 3 volumes, 1937-1943, Volume I, pages 637-796.

65. However, it must not be assumed that these principles are applicable without modification to the present circumstances. On careful examination of the sources it will be seen that the régime of compensation described in the legal literature is designed to deal with the situation in which an alien *resident or otherwise lawfully present within the respondent State's territory* is killed either by a private person or by an official, but in either case without the killing being a deliberate act of State policy authorized by the government. In such cases it is not the killing itself but the subsequent failure of the authorities of the Respondent State to take adequate steps to apprehend and punish the killer (or to provide adequate domestic remedies), which is the basis of legal responsibility. The present case is qualitatively different. The deaths and injuries to be compensated are the consequences of a deliberate policy adopted at the highest levels of Government decision-making in the United States.

66. Whilst the circumstances are not exactly similar, the pleadings in the *Aerial Incident* case of 1959 have considerable relevance to the issues presently before the Court. In that case the claimant States contended and the Bulgarian Government accepted that the air-defence units of the latter had without reasonable excuse shot down an Israeli civil aircraft which had innocently wandered into Bulgarian air space. Some of the victims were citizens of the United States and the United States, alongside Israel and the United Kingdom, submitted Applications instituting proceedings before the Court against Bulgaria: *I.C.J. Pleadings, Aerial Incident of 27 July 1955*. It may be recalled that the Court found that it did not have jurisdiction to adjudicate upon the dispute brought before it by Israel; and the proceedings brought by the United Kingdom and the United States were discontinued in 1959 and 1960 respectively.

67. Of particular relevance for present purposes are certain passages contained in the Memorial presented to the Court by the United States. These passages bring out very clearly the delictual element in claims such as the present. The most helpful parts of the United States Memorial read as follows:

"1. The United States Government desires to remind the Court again that the case is not one of damages, suffered by negligent act or vicarious liability. This case is one which, if committed by individuals, would submit them to charges of murder and in many countries to capital punishment and certainly

to maximum penalties. The fact that this Court may feel it has not power to issue such judgments should not, it is submitted, prevent it from noting that the Bulgarian Government is hardly in a position to quibble about dollars. However, the sum of $257,875 requested in the Application on behalf of the private American claimants, is purely compensatory.

2. On the subject of additional amends, of which the United States gave notice in its Application, paragraph 3, the United States Government respectfully submits that the Court should grant an additional judgment to the United States Government for $100,000 for the additional wrongs wantonly committed by the Bulgarian Government; that is, other than those committed against the next of kin whose monetary claims for compensatory damages have been espoused by the United States. For if we were to follow only the compensatory theory of civil damages in general, we might conceivably reach a point where no damages would be payable though treacherous murders were committed internationally by one government on the nationals of another government. Additional amends to the injured government are therefore desirable and even necessary." (*I.C.J. Pleadings, Aerial Incident*, p. 246.)

68. The delictual element in the *Aerial Incident* case is given appropriate emphasis in the United States Memorial and in fact the pleading concludes with a special claim of $100,000 "on account of the elements of fraud, deceit, and wilful and premeditated killing of American nationals" (*ibid.*, p. 248). However, for present purposes the point of relevance is the emphasis upon the element of delict with which the entire claim is imbued, rather than the additional claim as such. Thus in the case under examination the deaths, injuries and other losses, are part and parcel of the violations recognized in paragraphs 3 and 4 of the Dispositif of the Judgment on the Merits. It follows that the deaths should be regarded in close association with and as elements of those violations. It also follows that the amount of compensation due for deaths should not be calculated according to the criterion of loss of economic support suffered by dependent relatives.

69. It is an incontrovertible fact that in the circumstances of the Nicaraguan economy and the conditions of the rural areas during the period of terrorist attacks by the *contra* forces, the concept of economic loss caused by the individual killings is impossible to apply. Thus the procedure for estimating an equitable measure of compensation should reflect the social and economic realities of Nicaragua during the material period. As the content of the United States claim in the *Aerial Incident* case indicates, the delictual element present in the legal foundations of the claim provides strong justification for a monetary compensation which reflects the essential nature of the wrongdoing.

70. The considerations advanced above apply *mutatis mutandis* to the fixing of compensation with respect to personal injuries. The principles set forth in the standard words place emphasis on proof of loss of economic support on the part of dependents, as in the case of death: see Whiteman, *Damages in International Law*, I, 1937, pages 517-634; Verzijl, *International Law in Historical Perspective*, VI, 1973, pages 751-752; Hackworth, *Digest of International Law*, V, 1943, pages 741-743; Feller, *The Mexican Claims Commissions, 1923-1934*, 1935, pages 295-300, 302-303; Whiteman, *Digest of International Law*, VIII (Sept. 1967), pages 885-888. However, this version of the applicable legal principles is subject to the principle emphasized in the United States Memorial in the *Aerial Incident* case that the compensation should reflect the delictual character of the acts which caused the death or injuries.

71. In the light of the considerations set forth earlier, the method most appropriate for the purpose of arriving at a just and practical assessment of compensation for deaths and personal injuries caused is the adoption of a lump-sum as a reflection of the human losses, which sum would at the same time be both significant and comprehensive.

Section C. The Mode of Compensation for Material Damage to Property

72. The present section of the Memorial is concerned exclusively with material losses resulting from damage to property caused by the military and paramilitary operations for which the United States is responsible. The losses to the economy of Nicaragua are the subject of separate examination (in Chaps. 5 and 6 of the Memorial).

73. As in the cases of death and personal injuries, so here, it is necessary to relate the mode of establishing compensation to the framework of substantive law within which the process of valuation is taking place. Thus the approach adopted by the United States Government in its Memorial in the *Aerial Incident* case is logically applicable. In short, the standard is related to delicts involving intention *(dol, dolus)* and, in case there is a margin of appreciation in the matter of valuation, the standard is that of damages for delict and not compensation for mere unjust enrichment.

(a) *The* modus operandi*: Replacement Value*

74. It is generally recognized that the precise form of reparation in a case of State responsibility will depend on the particular circumstances and the merits of the case: see Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 67; and Oppenheim, *International Law*, Volume I, 8th edition by Hersch Lauterpacht, 1955, page 353. In the case of damage or destruction of property resulting from illegal conduct on the part of a State, the requisite standard is that of effective reparation and this is plain from the Judgment of the Permanent Court in the *Chorzów Factory* (Merits) case quoted above (paragraph 28 of Chapter 1).

75. The *modus operandi* which is the natural result of the concept of effective reparation is that of replacement value and the publicists have recognized this: see former President Jiménez de Aréchaga in Sørensen (ed.), *Manual of Public International Law*, London, 1968, pages 567-568; and Guggenheim, *Traité de droit international public*, II, Genève, 1954, pages 68-69. The United Kingdom relied upon the principle in its Memorial in the *Corfu Channel* (Merits) case (*I.C.J. Pleadings*, I. p. 25 (para. 18) and p. 101 (Ann. 14)), and the Court accepted the valuation of the destroyer H.M.S. *Saumarez* presented by the United Kingdom: see the Judgment in the Compensation phase, *I.C.J. Reports 1949*, page 244 at pages 248-249.

76. In the circumstances of the present case, the criterion of replacement value is especially appropriate. As Professors Lillich and Christenson have observed:

> "When a market value is impossible to prove because a radical change has occurred in the economy of a country or for some other reason, alternative methods of valuation must be used." (*International Claims: Their Preparation and Presentation*, Syracuse, 1962, p. 76.)

However, in certain contexts the principle of market value can be readily applied and produces the most equitable result, as, for example, in the case of damage to export commodities.

77. In conclusion, it would, it is submitted, be natural and in accordance with principle for a tribunal assessing compensation in case of the destruction of assets caused by breaches of international law to apply, except in those cases where market value is readily ascertainable, the standard of replacement value. This was the course adopted by Max Hüber in the *Spanish Zone of Morocco* claims (1925) (*Reports of International Arbitral Awards*, II, p. 617 at p. 735); and in the *Corfu Channel* (Assessment of Compensation) case the Judgment states that "the Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at the time of its loss" (*I.C.J. Reports 1949*, p. 244 at p. 249).

78. The claim relates to material damage to property. The scope of the claim has been defined in accordance with general principles of law and the ordinary standard of international law in these matters. Thus the term "property" includes all assets and enterprises, whether in public or private ownership, which would be recognized in the legal systems of the world as items of value susceptible to damage or total destruction.

79. In the case of items forming part of the productive economy, the claim includes both replacement value and the loss of profits *(lucrum cessans)* caused by the damage or destruction. The inclusion of *lucrum cessans* is a generally recognized principle of international law. The following authorities, among many others, recognize the principle: Jiménez de Aréchaga, in Sørensen (ed.), *Manual of Public International Law*, London, 1968, pages 569-570; Rousseau, *Droit international public*, V, Paris, 1983, pages 223-225, paragraph 224; O'Connell, *International Law*, 2nd edition, 1970, II, pages 1115-1116; Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 71; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, page 756; McNair, *International Law Opinions*, II, Cambridge, 1956, page 290; Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 286. In the case of loss of production causing damage to the economy of a State the concept of *lucrum cessans* is applicable *mutatis mutandis*.

80. The concept of *lucrum cessans* is a helpful tool but it should not be regarded as more than that. Loss of profits and loss of production are simply types of recoverable loss and fall within the broad concept of compensable damage: see Guggenheim, *op. cit.*, page 71. It follows that there may be other forms of consequential economic loss, including items which would not come within the definition of loss of profits: see, for example, the United Kingdom Memorial in the *Anglo-Iranian Oil Co.* case, *I.C.J. Pleadings*, pages 117-118 (paras. 41-42). The overall criterion is always that of effective reparation and the principle that compensation constitutes a substantial alternative to restitution: see the United Kingdom Memorial, *ibid.*, page 117. Consequently what is involved is the "payment of a sum corresponding to the value which a restitution in kind would bear": Judgment in the *Chorzów Factory* (Merits) case, *P.C.I.J., Series A, No. 17*, page 47.

(b) *Other Forms of Economic Loss*

81. The present section of the Memorial is concerned exclusively with the assessment of compensation for the destruction of and damage to capital assets and goods. Whilst this process has taken account of loss of production *(lucrum cessans)* in the simple mode, the question of consequential economic loss in the form of damage to the development potential of Nicaragua has been left aside, and this question, together with the losses caused by the trade embargo instituted by the United States, will be dealt with in Chapters 5 and 6 of the Memorial.

Section D. The Methodology Employed in the Calculation of Compensation for Injury to Persons and Property in the Relevant Period

82. Annex I.2 *b* contains tabulations showing the number of persons killed, wounded and missing as a result of United States military and paramilitary activities, physical damage to property and production losses. Annex I.3 *b* explains the methods by which the information on these subjects was routinely gathered and tabulated since 1983, including the forms and coding procedures used. This Section of the Memorial summarizes the methodological Annex and the affidavit of Dr. Paul Oquist-Kelley, National Director, National Directorate of Information, Organisation and Systems (DINFORS) of the Presidency of the Republic, under whose authority the procedures were developed and carried out.

(i) *The Period from the Beginning of United States Military and Paramilitary Activity through April 1983*

83. In the spring of 1983, President Daniel Ortega, then Coordinator of the Junta of National Reconstruction, ordered the General Directorate of State Information and Management (DIGE) in the General Secretariat of the Junta, to make a study and analysis of the human and material damages of the United States military and paramilitary activities to date. The study was to serve as a basis for his official report to the Council of State in May 1983. Dr. Paul Oquist, who was then Director of DIGE, was in charge of the study. DIGE directed each of the relevant national ministries to assemble and report the material in its files.

84. The military and paramilitary activities were in their second year and had not reached the levels later achieved. Incidents were relatively few and the situation was so novel that the relevant ministries made special studies of many of them. For example, on 14 March 1982 the *contras* attacked and destroyed two important bridges at Rio Negro in Chinandega province and Ocotal in Nueva Segovia, with significant effects on the road transport network in those areas. (Memorial of Nicaragua on Merits, IV, p. 12.) The Ministry of Construction made a special analysis of these incidents and their effects, the results of which were later included in the report to DIGE.

85. DIGE compiled and collated the data reported by the ministries and assembled it into a single comprehensive report that was transmitted to President Ortega. The figures for the relevant periods in Annex I.2 *b* are taken from that report. If anything, they understate the actual amount of damage, since they are not based on a comprehensive and contemporaneous reporting system, but simply reflect incidents and information that a particular ministry deemed important enough to retain in its files.

(ii) *The Computerized System Installed after May 1983* [1]

86. After the first report on the extent of the human and material damage done by the United States military and paramilitary activities, the collection of information on these matters was put on a more systematic and methodical basis. The new information system was installed because, to perform routine functions, carry out economic planning and conduct effective defence against these activities, the Government of Nicaragua needed current and accurate

[1] Occasionally referred to in this Memorial as the "DINFORS" system.

information on a timely basis about damage to persons and property. (Certificate of Dr. Paul Oquist, Ann. I.1, p. 3.) The system uses existing reporting channels in each of the responsible ministries and institutions. The participating ministries and their senior officials are listed at Annex I.3 *b*, page 5.

87. Data collection begins in the field. The local official for each ministry is responsible for completing and forwarding a standardized form covering human and material losses in his or her geographic area of responsibility each month. Because crop cycles are annual, the Ministry of Agricultural Development and Agrarian Reform reports material damage once a year. Thus, local police officers will report through Ministry of Interior channels, army unit commanders report to the Ministry of Defence and zonal or regional directors for each of the economic ministries report to their respective superiors. The forms for these reports and the instructions for completing them are reproduced in Annex I.3 *b*, pages 6-43. Annex I.4 contains a sample of the original completed forms as filled out in the field by the reporting officials.

88. The field reports are sent to the regional office of the appropriate ministry. The regional office checks to ensure that the forms are filled out properly and fully. It then combines and collates the information into a comprehensive regional report and forwards it, together with the underlying field reports, to ministerial headquarters in Managua. There the same process is repeated for the data coming from all reporting regions. The ministries forward their reports to the Ministry of the Presidency. There, after a final review and cross-check, this information is entered into the computerized data base, where it can be used to provide a country-wide picture, regional breakdowns of the information, or data relating to specified time periods or subject-matters. DINFORS, which has overall responsibility for the coordination and operation of the system, performs a final review of the data before it goes to President Ortega.

89. The details of the procedure vary somewhat as between human and material injuries. Each local official reports all injuries to persons in his area on standardized forms, which call for the name, age, sex and occupation of the persons killed or wounded, as well as the type of injury. See Form 1, Annex I.3 *b*, page 6. Casualties are reported separately for "nuestro pueblo" — "our people" — and the *contras*. The ministries include the uncoded names of victims in their reports to the Ministry of the Presidency, which compares and verifies the information to prevent double counting. (The same injury occasionally appears on more than one local report.)

90. In the case of property damage, the valuation is made at the regional or head office of the Ministry, where personnel with the necessary expertise are located. The national office ordinarily does the calculation of production losses. The list of Informant Institutions in Annex I.3 *b*, page 5, shows that, although almost every institution has reported casualties and physical damage to property at some time in the seven war years, only the major economic ministries have reported production losses. These include the Ministries of Agricultural Development and Agrarian Reform, Natural Resources and Environment, Fisheries, Mining, Industry and Internal Commerce, as well as the private and cooperative sectors.

91. The reporting system contains detailed instructions as to the type and coding of physical damages and production loss and forms for recording the results. These are reproduced in Annex I.3 *b*, pages 6-43. The forms and instructions follow a similar pattern, with variations to meet the special needs of the particular economic sector involved. Thus, the forms for production losses in the Mining Sector provide for a separate entry for each major mining installation. The forms for the Timber and Forest Sector require separate entries for lost production due to delay or suspension of projects, workforce and forest

fires. In each case, the report calls for the number of board feet not produced, the international price and the value in United States dollars and cordobas. Similar special requirements appear in the forms for the other reporting entities.

92. Annex I.5 contains a complete record of the operation of the system with respect to fishing for the month of December 1987. In this case, the local reporting forms were filled out by the heads of fishing companies and submitted to the regional delegate of the Nicaraguan Institute for Fisheries (INPESCA) in the departments of Chinandega and Zelaya. These delegates prepare a consolidated report for each region. (Ann. I.5, pp. 4-5; the blank forms are reproduced in Ann. I.3 *b*, p. 41.) No casualties were reported for the period. Information is given separately for production losses attributable to boats that have been attacked, captured, destroyed by mines, burned or diverted for defence purposes. The form shows the potential monthly catch of the boats in each group in pounds (col. 9), the dollar price per pound (col. 10), the total dollar price of production losses in each category (col. 11) and the corresponding cordoba price (col. 12). The type of boat involved — lobsterman or shrimp boat — is shown in column 13. At INPESCA headquarters, the reports are reviewed and validated before they are submitted to the Ministry of the Presidency. Annex I.5, page 6, is the computer printout of the Ministry of the Presidency for production losses for fishing for December 1987 and contains entries for each of the items in the earlier Departmental and INPESCA reports. The dollar and cordoba value of the losses in each category are summed up on the form at Annex I.5, page 7. These sums are in turn carried forward to an overall summary of production losses in all economic sectors in the form at Annex I.5, page 8. (The fisheries entries appear at lines 4-9.)

93. The tables in Annex I.2 *b* are the product of this computerized data system. They show the numbers of killed, wounded and missing on an annual basis from 1980 until 31 December 1987, with separate figures for "nuestro pueblo" ("our people") and the *contras*. The totals for the period come to 6,760 killed, 10,546 wounded and 7,226 missing, not counting *contra* casualties. (Ann. I.2 *b*, p. 5.)

94. It is instructive to consider the distribution of these casualties by age and occupation. Although the largest number — 2,961 dead and 8,507 wounded — were in the armed forces or local militia, the majority of fatalities are civilian. Among the fatalities, 129 were teachers and 219 were doctors or other technical and professional workers, while 644 were students. A total of 7,196 victims (29.3 per cent of the total) were 20-years old or under. (*Ibid.*, p. 8.) More than 10,000 Nicaraguan children have been orphaned by the war. (Ann. I.2 *b*, p. 20.)

95. As to material damage, Annex I.2 *b* shows that property to a value of $221.6 million was physically destroyed from 1980 through 1987. Production losses for the same period came to $984.5 million, for a total of $1,206.1 million. (*Ibid.*, p. 4.) The figure for production loss is, of course, several times larger than the value given for property destroyed. The smaller figure represents only the replacement cost of capital assets. But to this value of the physical asset must be added the loss of future income from that asset, which in every case will be many times the book value. As shown above, both physical damage and production loss were routinely reported through the data collection system. The totals are generally confirmed in the 1987 ECLAC study of the Nicaraguan economy. (See excerpts in Ann. V, p. 10.)

96. An annual breakdown appears in Annex I.2 *b*, page 9, and in the ECLAC document (Ann. V, p. 10, Table 25). Agriculture and forestry accounted for 71.2 per cent of the total production losses with another 19.1 per cent in construction. (*Ibid.*, p. 9.) Physical destruction of property is analysed by economic sector and institutions. (*Ibid.*, pp. 10-15.)

97. As shown above, both physical damage and production loss were routinely reported through the data collection system. In the agricultural sector, production losses include those due to land that could not be cultivated because of military operations.

Section E. Calculation of the Quantum of Reparation the United States is Obligated to Pay as Measured by the Damages to Persons and Property Resulting from the Military and Paramilitary Activities

98. Although as shown in Chapter 9 (paras. 421-424), the date from which damages should be calculated is not later than 1 December 1981, only annual data is presented in Annex I.2 *b*. Since the damage in the last month of 1981 is relatively small, Nicaragua bases its claims in this phase of the proceedings on the figures for the period 1 January 1982 to 31 December 1987.

99. On this basis, the computation of the amount of reparation owing in respect of damage to property is straightforward. The tables in Annex I.2 *b*, page 9, summary Annex VI.1, Table 2, page 3, show that, for the years 1980 and 1981, the physical damage to property totalled $4.5 million and the production loss came to $4.4 million. Subtracting these amounts from the totals shown at the foot of the table gives the following figures for the period 1 January 1982 to 31 December 1987 (see Ann. I.2 *b*, p. 9 and the summary in Ann. VI.1, p. 3, Table 1).

Physical damage	$210,400,000 [1]
Loss of production	980,100,000
Total	$1,190,500,000

100. Similarly, casualty figures for the relevant period may be calculated by subtracting the 1980 and 1981 figures from the table in Annex I.2 *b*, page 17, Table II.1. The resulting totals for "nuestro pueblo" for the period 1 January 1982 to 31 December 1987 are:

Killed	6,712
Wounded	10,521
Missing	7,222

101. There is a difficulty in assigning dollar values in each of these categories. Nicaragua has no evidence to show the length of time for which persons listed as missing were absent from their homes. In some cases, the exact circumstances of missing person reports in war zones are not clear. Similarly, although there is some information about the seriousness of the injuries to the wounded, there is not enough detail to provide a comprehensive statement of the medical costs and loss of work due to those injuries. Annex I.6 contains the available information on the severity of those permanently disabled as a result of the war among Nicaragua's military. Although incomplete, it documents, *inter alia*, 458 amputees, 395 persons who have lost the use of at least one limb and 193 who have been totally or partially blinded. It gives information for almost 2,000 concrete cases [2]. In addition to the military cases, the National Institute of Social Security and Welfare (INSSBI) has given benefits to an average of over 2,000 civilians handicapped by the war annually. On the basis of this information, it is clear

[1] The claim in the total for physical damage in I.2 *b* is less the U.S.$6.6 million included in the system as the initial estimate for the specific attacks cited in the Dispositif. Those attacks are dealt with separately. (See Chap. 3 and Ann. 2.)

[2] A few of these cases are from the periods 1978-1979 and 1980-1981.

that more than 4,000 people have received permanent handicaps due to the war (see Ann. I.6, p. 1 and Ann. IV.5, p. 8).

102. The statistics on the number of persons killed are, in Nicaragua's submission, highly reliable. On the other hand, as is shown in Section B of this chapter [Modalities for Human Loss], paragraph 59, *supra*, the usual criteria for measuring damages for wrongful death in international disputes — such as loss of earnings or pension costs — are inapplicable in Nicaragua, a developing country with a large subsistence economy. Nicaragua has therefore suggested, paragraph 71, *supra*, that any reparation in respect of loss of life must be a conventional figure.

103. To provide some basis for judgment as to the size of such a figure, Nicaragua presents the following information about damages assessed in somewhat comparable circumstances:

104. *Benin:* On 26 January 1977, Benin complained to the United Nations Security Council concerning a commando attack carried out against Cotonou on 16 January 1977. Pursuant to Security Council resolution 405 of 14 April 1977, the Secretary-General appointed "a team of expert-consultants ... to assist the Government of Benin in evaluating the damages resulting from the act of armed aggression committed at Cotonou on 16 January 1977". After a careful study, the expert-consultants concluded that 7 persons had been killed and 51 wounded in the attack. They estimated the damages attributable to these injuries at 112 million CFA, which converts to a total of US$40 million. (See Conseil de sécurité, *Documents officiels*, S/12294/Rev.1.) The relevant United Nations documents have been deposited with the Court. (See Dossier: "Pratique du Conseil de sécurité des Nations Unies en matière d'évaluation de dommages", for this case and that of Botswana, para. 105.)

105. *Botswana:* On the morning of 14 June 1985, a group of South African special forces carried out an attack against Gabarone, Botswana, in which 12 people were killed. In a letter of the same date, Botswana requested the assistance of the Security Council in this matter. In resolution No. 568, adopted the same day, the Security Council directed the Secretary-General, *inter alia*, "to send a mission to Botswana to ... evaluate the damages caused by the premeditated and unprovoked aggressive acts committed by South Africa; ...". In its report, the special mission evaluated the damages in respect of the deaths at US$118,000 per person. Seven persons were wounded in the attack, for which the mission evaluated the total damages at $US419,800, or $US69,971 per person. (See Conseil de sécurité, *Documents officiels*, S/17453.)

106. Further, in a dispute involving the same States that are parties in the present case, Nicaragua paid indemnification for the deaths of two United States citizens. In November 1909, the government of President Zelaya executed two United States citizens for a crime alleged to have been committed in the course of an attempt, in which the United States was involved, to overthrow the Government of Nicaragua. The United States protested and severed diplomatic relations with Nicaragua in a note from Secretary of State Knox dated 1 December 1909. Thereafter, Zelaya resigned and the successor government agreed to the establishment of a mixed claims commission, which, in March 1918, awarded the sum of $20,000 for the two deaths. The present value of these awards as calculated by Nicaragua comes to $50,000 per person. The relevant documentation is in Annex XI.

107. In the last analysis, it is impossible to put a money value on human life. It is especially hard for a State to suggest a figure to compensate for the lives of its citizens. Nor is it very easy for the Court to make such a calculation.

108. Therefore, because of the difficulties both moral and economic of calculating damages for persons killed, wounded and missing on a case-by-case basis, Nicaragua has decided to request the Court to make a lump-sum award of reparation for all the injuries to persons resulting from military and paramilitary activities in the relevant period.

109. Having regard to the number of casualties, the economic consequences of their injuries and deaths to the State, the assessments that have been made in the past and the gravity of the internationally unlawful acts found to have been committed by the United States, Nicaragua believes that a substantial sum is warranted. On this branch of the claim Nicaragua submits that the United States should be required to make reparation in the amount of $900 million.

110. The total of Nicaragua's claims for damage to persons and property resulting from the unlawful conduct of the United States in "training, arming, equipping, financing and supplying the *contra* forces . . ." as found in subparagraphs (3) and (4) of the Dispositif and the related portions of the Judgment on the Merits (but apart from the losses caused by the specific attacks and mining of harbours and excluding losses caused to the development potential of Nicaragua) is as follows:

Destruction of property	$210,400,000
Production loss	980,100,000
Lump-sum reparation in respect of persons killed, wounded and missing	900,000,000
Total	$2,090,500,000

CHAPTER 3

REPARATION FOR THE SPECIFIC ATTACKS AND MINING OF HARBOURS

111. This chapter deals with injuries arising from particular acts of force by the United States against Nicaragua. It sets forth the basis of the legal obligation on the part of the United States to make reparation for these injuries, describes the methodology employed by Nicaragua in calculating the value of the damage, introduces the evidence of loss and injury that has been submitted to the Court, and states Nicaragua's claim for monetary compensation [1].

112. In addition to arming, training, equipping, financing and supplying the *contras*, the United States itself committed acts of physical violence against Nicaragua. The Court found that on seven separate occasions, it conducted armed attacks on port installations. As the Court noted, "agents of the United States participated in the planning, direction, support and execution of the operations". (Merits, para. 86.) The operations are therefore imputable to the United States, and were so recognized by the Court. *(Ibid.)* The extensive property damage caused by these attacks is described in Annex II of this Memorial. (See Ann. II.2 *b*, pp. 9-15.)

113. The mining of Nicaraguan harbours is also attributable to the United States. Those who actually placed the explosive devices in the waters in and near the ports of El Bluff, Corinto and Puerto Sandino were, as the Court found, in the pay of the United States and acting under its instruction and supervision and with its logistical support. (Merits, para. 80.) The United States contemplated and intended that the mining would have serious harmful effects. In a document disclosed during the course of the Iran-Contra Hearings conducted by the United States Congress, National Security Council Staff Member Lt. Col. Oliver L. North reported to then National Security Advisor Robert McFarlane that "Our intention [in mining the harbours] is to severely disrupt the flow of shipping essential to Nicaraguan trade during the peak export period ... [and] to further impair the already critical fuel capacity in Nicaragua". (Memorandum of North to McFarlane, Ann. X, Attachment C-1.) These destructive purposes were realized in the substantial injuries suffered by Nicaragua as a result of the mining; those injuries are described more precisely in Annex, II.3 *b*.

114. In the Dispositif of its Judgment on the merits, the Court decided:

> "that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely [the attacks on ports *inter alia*], has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State ..." (Dispositif, subpara. (4), Merits);

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[1] Nicaragua's claim in this chapter is limited to compensation for material damage caused by these unlawful specific actions of the United States. The human injuries occurring as a result of those actions, see, e.g., Merits, para. 76, are accounted for in the DINFORS study, which analysed and calculated the costs of the total United States military and paramilitary activities in and against Nicaragua, and which serves as a basis for Nicaragua's claim in Chapter 2, *supra*.

> "[and] that the United States of America, by [the attacks on ports] has committed acts calculated to deprive of its object and purpose, the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ..." (Dispositif, subpara. (10), Merits);
>
> "[and] that the United States of America, by [the attacks on ports] has acted in breach of its obligations under Article XIX of the Treaty ..." (Dispositif, subpara. (11), Merits).

The Court also decided:

> "that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted against the Republic of Nicaragua in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce ..." (Dispositif, subpara. (6), Merits);
>
> "[and] that, by [mining the harbours], the United States of America has acted against the Republic of Nicaragua in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation ..." (Dispositif, subpara. (7), Merits).

In a later portion of the Dispositif, the Court stated the normal consequence of these illegal actions under international law:

> "the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law ..." (Dispositif, subpara. (13), Merits);
>
> "[and] the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation ..." (Dispositif, subpara. (14), Merits).

115. Chapter 1 of this Memorial establishes that the reparation owed by a State in breach of an international obligation must be "effective"; that is, it must "wipe out all the consequences of the illegal act". (See Chap. 1, para. 40, *supra.*) The primary remedy is the "re-establish[ment] of the situation as it existed before the [unlawful] act". (Art. 6, draft articles on State Responsibility, Part II, in *Yearbook of the International Law Commission*, 1984, II (Part One), p. 3; see also Chap. 1, paras. 28-34, *supra.*) In cases where that remedy is not possible, however, the offender is obliged to "pay ... a sum of money corresponding to the value which re-establishment of the situation as it existed before the breach would bear". (Art. 6, para. 2, of draft articles on State Responsibility, Art. 6, para. 2, in *Yearbook of the International Law Commission*, 1984, II (Part One), p. 3.) This approach reflects that adopted by the Permanent Court in *Factory at Chorzów, 1928, P.C.I.J., Series A, No. 17*, page 47; see also Chapter 1, paragraph 28, *supra*.

116. One measure of compensation for liability of this kind is the replacement value of property lost and the repair cost or diminution in value of property

damaged[1]. This measure, in the language of *Factory at Chorzów*, "correspond[s] to the value which a restitution in kind would bear" (*P.C.I.J., Series A, No. 17*, p. 47). The same measure was used by the Court in the *Corfu Channel* case. (See Chap. I, para. 34 and Chap. 2, paras. 75-76, *supra*.)

117. The specific acts of force with which this chapter is concerned resulted in substantial damage to property and, with respect to mining the harbours, loss of income. In order to present an accurate claim for this injury, Nicaragua directed the Instituto Nicaraguense de Seguros y Reaseguros (INISER) to produce an accounting and valuation of the damage. This project involved two distinct tasks; identifying the property that had been lost or damaged, as well as special expenses incurred because of the attacks; and ascertaining the correct value of each item for reparation purposes. In the INISER study, both tasks were carried out by trained professionals who are experienced in the business of insurance adjustment. (See Affidavit of Dr. Leonel Arguello Ramirez, Ann. II.1 and Affidavit of Mr. Horacio S. Raudes Sevilla, Ann. II.2.)

118. Identification of the damaged property was accomplished by means of visits to the ports themselves, supplemented by personal interviews with those knowledgeable about the incidents, and data provided by the institutions affected by the attacks. (See letters of Dr. Arguello Ramirez and Mr. Raudes Sevilla, Ann. II.3 *b*, pp. i-iii.) These procedures are fully consistent with the practices of the insurance industry when the effectiveness of on-site inspections is diminished because of a lapse of time between the incident and its assessment. (See *ibid.*)

119. The actual valuation of property lost or damaged by the attacks was also performed according to standards established and adopted by the insurance industry. For lost items, INISER calculated the replacement cost in the year in which the loss occurred. Similarly, for damaged items contemporaneous repair cost has been calculated. (See *ibid.*)

120. The Report issued by INISER is submitted to the Court as Annex II.3 *b*. In Nicaragua's judgment, this Report provides a reliable and fair representation of the monetary values of the damage caused by the actions of the United States in attacking Nicaraguan ports and mining Nicaraguan harbours.

121. As compensation for the attacks on ports and mining of harbours — both violations of international law for which, according to the Judgment, Dispositif subparagraphs (13) and (14), Merits, the United States must make reparation — the Government of Nicaragua claims the following sums:

For the attacks on Puerto Sandino on 13 September and on 14 October 1983:	US$410,000.00
For the attack on Puerto Corinto on 10 October 1983:	6,054,878.24
For the attack on Puerto Potosi on 4 and 5 January 1984:	2,746,000.00
For the attack on San Juan del Sur on 7 March 1984:	Not quantified *
For attacks on boats at Puerto Sandino on 28 and 30 March 1984:	Not quantified *

[1] Other measures include the costs incurred to immediately confront the illegal action (fire-fighting, etc.), consequential losses, violation of sovereignty, and moral damage, among others.

For the attack on San Juan del Norte on 9 April 1984:	Not quantified *
For the mining of Nicaraguan harbours in early 1984:	5,750,000.00
Total reparation for property damage due to specific attacks and mining of harbours:	US$14,960,878.24[1]

* Quantification was not possible in these cases due to the nature or amount of the damage done.

[1] This figure represents Nicaragua's claim for damages in compensation for material injury. The significance of the specific attacks and mining of harbours as violations of Nicaragua's sovereignty is discussed in Chapter 7, *infra*. The claim is placed at present value in the final submission according to the methodology and calculations presented in Annex VI.2.

CHAPTER 4

THE SECURITY AND DEFENCE COSTS RESULTING FROM THE UNLAWFUL CONDUCT OF THE UNITED STATES

A. Introduction: The Principle

122. In the opinion of the Government of Nicaragua justice and ordinary logic require that the assessment of reparation extend to the security and defence costs resulting from the unlawful conduct of the United States. The impact of the military and paramilitary operations on the disposable resources of Nicaragua has been and continues to be substantial. It is obvious that the diversion of resources available for economic development to the purposes of defence must have adverse effects, not least for an economy of the Nicaraguan type, with an extreme shortage of foreign exchange, food, clothing and fuel, on the one hand; and no arms industry, on the other. (See Chap. 5, Sec. A.)

123. It is clear that the costs of responding to the threats to Nicaraguan security posed by the activities to which subparagraphs 3 to 9 inclusive of the Dispositif of the Judgment on the Merits relate quite naturally within the concept of effective reparation generally recognized by the sources of international law and adumbrated in Chapter 1 of the present Memorial.

124. There is evidence of a general recognition in the practice of States that the victim of an unlawful resort to force has a claim for adequate compensation for the cost of reasonable measures of self-defence: see Brownlie, *International Law and the Use of Force by States*, 1963, pages 147-148. Thus, for example, the Geneva Protocol of 1924 stipulated (in Art. 15) that the expense of repressing aggression in accordance with its provisions "shall be borne by the aggressor up to the extreme limits of its capacity". It is true that the Protocol did not enter into force, but there is no reason to doubt the *opinio juris* represented in this expression of the point of principle.

125. Following the Greco-Bulgarian frontier incident of 1925 the Commission of Inquiry appointed by the Council of the League of Nations recommended that in fixing the reparation due to Bulgaria "it would seem that account must first be taken of the cost of the military measures which the Bulgarian Government was compelled to take": see the pertinent section of the Report as reproduced in Hackworth, *Digest of International Law*, U.S.G.P.O., Washington, II, pages 1372-1376 at page 1373.

126. The recovery of the necessary costs of maintaining security against external attack and of responding to the orchestra of military and paramilitary operations for which the United States is responsible in international law is simply a particular example of the application of the principle of liability for all the actual consequences of unlawful conduct. The case is analogous to the claims relating to harm caused by pollution for which a State is responsible. Such claims naturally extend to the costs entailed in removing the source of harm. The principle concerned was applied by the Canadian Government in presenting its claim to the USSR for damage caused by the disintegration over Canada of a Soviet space object, the Cosmos 954 satellite, and the deposit on Canadian territory of hazardous radioactive debris from the satellite.

127. The Canadian claim was based both upon Article II of the Convention on International Liability for Damage caused by Space Objects and upon general principles of international law. The relevant paragraphs of the Statement of Claim annexed to the Canadian Note of 23 January 1979 read as follows:

> "18. The operations described in paragraph 8 above would not have been necessary and would not have been undertaken had it not been for the damage caused by the hazardous radioactive debris from the Cosmos 954 satellite on Canadian territory and the reasonable apprehension of further damage in view of the nature of nuclear contamination. As a result of these operations, the areas affected have been restored, to the extent possible, to the condition which would have existed if the intrusion of the satellite and the deposit of the debris had not occurred. The Departments and Agencies of the Government of Canada involved in these operations incurred, as a result, considerable expense, particularly with regard to the procurement and use of services and equipment, the transportation of personnel and equipment and the establishment and operation of the necessary infrastructure. The costs included by Canada in this claim were incurred solely as a consequence of the intrusion of the satellite into Canadian air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite.
>
> 19. In respect of compensation for damage caused by space objects, the Convention provides for '... such reparation in respect of the damage as will restore ... [the claimant] to the condition which would have existed if the damage had not occurred' (Art. XII). In accordance with its Preamble, the Convention seeks to ensure '... the prompt payment ... [under its terms] of a full and equitable measure of compensation to victims of such damage' (Fourth preambular para.). Canada's claim includes only those costs which were incurred in order to restore Canada to the condition which would have existed if the damage inflicted by the Cosmos 954 satellite had not occurred. The Convention also provides that 'The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity ...' (Art. XII). In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law and has limited the costs included in its claim to those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty ...
>
> 21. The intrusion of the Cosmos 954 satellite into Canada's air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite constitutes a violation of Canada's sovereignty. This violation is established by the mere fact of the trespass of the satellite, the harmful consequences of this intrusion, being the damage caused to Canada by the presence of hazardous radioactive debris and the interference with the sovereign right of Canada to determine the acts that will be performed on its territory. International precedents recognize that a violation of sovereignty gives rise to an obligation to pay compensation." (Brownlie, *System of the Law of Nations: State Responsibility*, Part 1, 1983, p. 97 (Note) and p. 277 (Annex).)

128. The antecedents thus justify the submission of the Government of Nicaragua that the liability of the United States to compensate Nicaragua for the necessary expenditure on external defence and the maintenance of security

in face of a constant threat of violence directed against both its armed forces and its population generally, flows from the application of the normal principles relating to the provision of effective reparation. After all, the responsibility arising from the unlawful use of force, intended, as the Court has recognized (*I.C.J. Reports 1986*, pp. 57-59, paras. 97-99; p. 133, paras. 263-265), to pursue objectives which were illegal *ab initio*, entails reparation for consequences which were intended, and is thus an *a fortiori* case when compared with the unintended consequences of the disintegration of a satellite.

B. The Period for Which Reparation Must Be Calculated

129. The elements of this question will be Chapter 9.

C. Calculation of the Quantum of Reparation

130. The expenditures on defence and security that the Government of Nicaragua has been obliged to undertake increased sharply after 1982 due to the escalation of armed attacks by personnel acting under the direction of the United States Government on ports and harbours, and the escalating actions of the *contra* forces in killing Nicaraguan nationals and destroying property [Refs. Anns. I and II; and chronology]. The following paragraphs set out a sound method for establishing the additional costs incurred.

131. The expenditure by the Government of Nicaragua on defence and security (see Ann. 7.2 for the budget figures, and the affidavit of the Minister of Finance in Ann. 7.1) between 1980 and 1982 had been relatively modest, averaging some US$157 million a year. However, the defence plans made immediately after the initial attacks in 1981 had to be adjusted upward due to escalations in the aggression in 1982 and especially in 1983 in which military and paramilitary attacks increased in both number and importance (for example, the attacks on the ports). Thus defence expenditure in 1983 represents a 53 per cent increase over that for 1982.

132. The claim of Nicaragua for defence costs necessitated by the unlawful activities of the United States is based upon the increase of expenditure in this category taking the years 1980 to 1982 as the standard of comparison. Since the aggression in fact began during this period this standard is inevitably conservative. The basis of comparison is thus the average annual expenditure in United States dollars between 1980 and 1982 (described as "Hypothesis I" in Ann. VII.2 *b*, p. 2).

133. This is the methodology preferred by the Government of Nicaragua and it may be of assistance to the Court if attention is drawn to other methods of assessment which have been laid aside. A ratio of expenditure to Gross Domestic Product ("Hypothesis II", *loc. cit.*) would be valid if an international comparison between economies of different sizes were to be made; rather than, as in these proceedings, a comparison between different periods for the same country. Moreover, in fact the value of this ratio for the 1980-1982 period in Nicaragua is 7.3 per cent (Ann. 7.2, Table 1), which is actually below the 1979-1983 average of 8.5 per cent for less-developed countries estimated by S. Deegar (*Military Expenditure in Third World Countries: the Economic Effects*, Routledge & Keegan Paul, London, 1986: Table 1.3, p. 25). This is despite the fact that Nicaragua was reconstructing its armed forces after the defeat and dismantling of the National Guard in 1979.

134. Indeed the share of defence and security expenditure in the total government budget ("Hypothesis III" in Ann. VII.2, p. 1) stood at 21 per cent on average between 1980 and 1982 (Ann. VII.2, Table 4). This proportion is only slightly higher than that obtaining before the present administration came into power, when the budget share between 1976 and 1978 of the National Guard was on average 20 per cent of the total government budget (Inter-American Development Bank, *Nicaragua: Informe Economico (Ref. GN 1271)* Washington, DC, July 1983; Table 11).

135. Therefore, in order to provide a sound estimate of that part of the defence and security budget attributable to increased efforts by the Nicaraguan Government to defend itself and its citizens against the unlawful activities of the United States the most appropriate method is as follows. An average figure for the combined budgetary allocation to the Ministry of Defence and the Ministry of the Interior has been established, in United States dollars, for the years 1980-1982 (see Ann. VII.2). The budgetary results for the same category of expenditure in the years 1983 to 1987 are then compared to this baseline of "normal" expenditure, the difference being "excess" expenditure to which the claim relates.

136. The Court's attention is respectfully drawn to the fact that those budgetary figures do *not* include foreign military assistance, nor the voluntary efforts of local militias, defence of cooperative farms, etc. However, the figures do include expenditure on civilian policing, but as this did not increase significantly after 1983, it would not affect the estimates of excess expenditure.

137. On this basis the costs of defence relating to the unlawful activities of the United States emerge clearly from the following figures provided by the Nicaraguan Ministry of Finance (Ann. 7.2, Table 3) and corroborated by the UN/ECLAC (Ann. 5, p. 9, note 22).

Nicaragua:	Defence and Security Expenditure in the Government Budget (in US$)		
	Actual	*Normal*	*Excess*
1983	277,900,000	157,200,000	120,700,000
1984	310,100,000	157,200,000	152,900,000
1985	384,300,000	157,200,000	227,100,000
1986	400,900,000	157,200,000	243,700,000
1987	464,400,000	157,200,000	307,200,000
Total			1,051,600,000

The claim for compensation in respect of excess defence expenditure is therefore: US$1,051,600,000.

CHAPTER 5

LOSS CAUSED BY THE GENERAL EMBARGO ON TRADE

137 *[bis]*. No matter how great the injury caused to Nicaragua by the internationally wrongful acts of the United States examined in previous chapters may be, this does not exhaust the loss caused. In fact, each of these categories of harm has had in turn direct repercussions upon the economy of Nicaragua as a whole which has also been harmed by the general embargo on trade with Nicaragua announced by the President of the United States on 1 May 1985.

138. This chapter is devoted to the loss caused by the trade embargo, while Chapter 6 presents the consequential loss caused to Nicaraguan development potential in general as a result of the unlawful acts dealt with in this and previous chapters of this Memorial.

139. However, the importance of these elements of loss cannot be understood without a brief overview of the general characteristics of the Nicaraguan economy, the weakening of which constitutes one of the main instruments by which the United States has intervened in Nicaraguan affairs and in effect attempted to overthrow the present government.

Section A. General Characteristics of the Nicaraguan Economy

140. The object of this section is to outline the main characteristics of the Nicaraguan economy in so far as they have a bearing upon the consequences of the illicit acts of the United States for which Nicaragua is claiming compensation before the Court. The vulnerability of the economy is established in paragraphs 141-144 and the progress towards economic reconstruction achieved before 1982 described in paragraphs 145-149. The reorganization of the economy in order to permit the survival of the population under the conditions of intense attack from 1982 onwards is outlined in paragraphs 150-155. This background is provided in order to assist the Court to appreciate the seriousness of the policy of economic destabilization adopted by the United States Government.

141. In 1979, when the Revolution took place, Nicaragua had a population of 2.5 million, with a growth rate of 3.3 per cent and infant mortality of 120 per thousand live births. Population density was 19.2 per square kilometer on the overall area of Nicaragua (130 thousand square kilometers) and 51.1 per square kilometer of arable land. The country had a per capita GDP calculated at US$720 by the World Bank (see World Bank, *Nicaragua: The Challenge of Reconstruction*, Report No. 3524-NI; Washington, DC, October 9, 1981, p. 1; other data in this paragraph come from the same source) derived from a basically agricultural economy based on largely unprocessed export commodities (coffee, sugar, bananas, meat, etc.) and other natural resource products (marine products, mining and timber); a staple food sector (maize, beans, sorghum and rice), and an incipient manufacturing sector reliant on imported raw materials and United States technology for its operations.

142. Much of the export production of Nicaragua takes place in zones that were to be subsequently affected by *contra* action. Specifically, coffee is mainly produced in the northern regions I and VI (Esteli, Matagalpa and Jinotega), while meat comes from Region V (Boaco, Chontales), and marine products,

precious metals and timber from the Atlantic Coast. Two basic foodcrops for the population — maize and beans — also came from the mountainous northeastern zones where fighting has also been intense. In other words, it is agriculture in particular, and primary production generally, that is most affected by the war (see Ann. I.2 *b*). Of the major agricultural products, only sugar, cotton, sorghum and rice are mainly grown on the Pacific plains; while manufacturing is typically concentrated in the cities, particularly Managua.

143. The Nicaraguan economy is very exposed to foreign markets in the sense that imports and exports make up an extremely high proportion of its gross domestic product. In normal times, half of material output is allocated to exports and similarly, about half of total supply is imported. If the "external trade coefficient" is defined as the ratio of the mean of exports and imports to Gross Domestic Product (GDP); then the value of this coefficient was 37 per cent in 1977, 32 per cent in 1981. However, by 1983 this ratio had fallen to 20 per cent and by 1986 to 15 per cent under the pressure of falling export receipts and limited external credits (see ECLAC, *Annual Reports*, various years). Despite this forced reduction in the "trade coefficient", the critical role of imports in key areas such as energy (half of electricity output relies on imported fuel), manufacturing export, agriculture and transport make the economy highly vulnerable to foreign exchange shortages.

144. The external trade of Nicaragua is handled predominantly through two ports situated on the northwestern coast: Corinto for dry cargo and Puerto Sandino for crude oil. In 1984, for instance (see Instituto Nacional de Estadistica y Censos, *Anuario Estadistico 1984*, Managua, 1985, p. 85) some 96 per cent of Nicaragua's total export volume of 510,000 tonnes of exports went through Corinto, as did 61 per cent of the 1.475 million tonnes of imports. Much of the remainder was accounted for by the 35 per cent of liquid (i.e., oil) imports by weight coming in through Puerto Sandino. In other words, the entire economy was extremely dependent upon two ports with fragile infrastructure and little military defence.

145. The war against Somoza in 1978-1979, which had closely followed the earthquake of 1972, left the economy in ruins. As the World Bank pointed out (*op. cit.*, p. i):

> "i. The struggle which ended with the overthrow of the Somoza régime in July 1979 was extremely costly for Nicaragua. It seriously damaged the nation's productive capacity and led to huge financial losses. The massive flight of capital and later drops in exports led to a severe foreign exchange shortage. The destruction of factories and inventories and the loss of managerial personnel brought about a contraction of industrial activity. Agricultural output was also affected by the war and its aftermath, although not to the same extent as industry. There was a sharp decline in the output of cotton and basic grains and, moreover, the slaughter of immature beef cattle and the smuggling of herds out of the country seriously jeopardized beef production for the coming years. There is no doubt that the Nicaraguan economy suffered a severe setback; the income foregone during 1978-1980 surpassed US$2.0 billion."

146. The medium-term economic and social objectives for the reconstruction period which was expected to last at least five years, were set out by the new government of National Reconstruction in the 1980 Economic Programme (Ministerio de Planificacion, *Programa de Reactivacion Economica en Beneficio del Pueblo*, Managua, December 1979) and identified as four (*op. cit.*, pp. 11-15):

(*a*) reactivation of the economy "to the benefit of the people", favouring the basic needs of the poorer groups and limiting luxury consumption;

(b) creation of a dynamic and democratic State that could bring about the necessary social reforms;
(c) strengthening of national unity between the new government, the working people and private enterprise;
(d) initiation of the transition towards a more just and equal society.

147. In fact, considerable progress was made in attaining those goals between 1979 and 1982. According to the responsible United Nations agency (ECLAC, *Notas para el Estudio Economico de America Latina y el Caribe, 1982: Nicaragua*, Mexico City, 1983) GDP had fallen by 33 per cent between 1977 and 1979, but had grown by 20 per cent in 1980 and 8.5 per cent in 1981. The ECLAC noted (*op. cit.*, p. 1) that in the 1979-1982 period

> "the economy evolved in a relatively dynamic fashion, achieving advances in the redistribution of income and starting social programmes which benefited wide sectors of the population"

although external factors were generally negative: "as in the rest of the region — the notable deterioration in the external terms of trade ... (and) ... climatological factors" affected exports and led to a decline in GDP of 2 per cent in 1982.

148. The social reforms carried out during the 1979-1982 period were considerable, particularly the literacy campaign (which reduced illiteracy from 53 per cent to 13 per cent), public health services, land reform, self-help housing, social welfare programmes, community organization and the extension of basic services such as electricity and drinking water to large sectors of the population (see T. W. Walker, ed., *Nicaragua: the First Five Years*, New York, Praeger, 1985).

149. Evaluations by international financial agencies such as the IBRD *(op. cit.)* and the Inter-American Development Bank (BID, *Informe Economico: Nicaragua*, Washington, DC, 1983) were generally positive. Criticisms of shortcomings in the macroeconomic policy of the Nicaraguan Government were essentially concerned with the high level of expenditure (on social services and public investment) and the multiple exchange-rate system, which generated inflationary pressures. As a result, both the International Bank for Reconstruction and Development (IBRD) and the Inter-American Development Bank (IDB) made optimistic forecasts of Nicaragua's development potential in general and the growth of exports and GDP in particular (see Ann. IV.2); with at least a doubling of export income and growth rates of between 3 and 6 per cent per annum in GDP over the rest of the 1980s.

150. After the 1981 military and paramilitary attacks on infrastructure and production facilities increased leading to considerable economic losses in 1982 (some US$32 million according to ECLAC, *Notas para el Estudio Economico de America Latina y el Caribe, 1987 — Nicaragua*, Mexico City, 1988; Table 25, p. 63). However, the losses from *contra* action intensified markedly in 1983 (US$165 million, *loc. cit.*) and between 1984 and 1987 averaged some US$236 million a year in material damage and immediate production losses from crops destroyed, fishing boats prevented from fishing, etc. Between 1983 and 1987, those losses (discussed in detail in Chap. 6 below) were equivalent to up to one-half of export income.

151. In consequence, the Nicaraguan Government was forced to shift towards a "survival economy" where priority was placed upon supporting the military mobilization effort (which was consuming an increasing share of national resources — already explained in Chap. 4 above) and the basic consumption of the population. Nicaraguan economic programmes from 1983 onwards stressed austerity and the need to reduce social expenditure and investment in order to

release resources for defence. Despite those efforts, the overall financial deficit of the public sector expanded, generating continuing inflation and food shortages (see E. V. K. Fitzgerald, "Financing a Revolution: Accumulation, Defence and Income Distribution in Nicaragua 1979-1986", in E. V. K. Fitzgerald and R. Vos, eds., *Financing Development: a Structuralist Approach to Monetary Policy in the Third World*, London, Gower, 1988).

152. The effect of export income losses from *contra* attacks was compounded by the United States trade embargo in 1985 and led to a severe reduction in GDP per capita in every year from 1984 onwards: the indicators fell by a cumulative 18 per cent between 1983 and 1987 (ECLAC, *op. cit.*, Table 1, p. 39). The war and the macroeconomic disequilibrium (see Ann. IV.2) led to deteriorating social conditions as well (see Ann. IV.5), causing infant mortality and illiteracy to rise once more after the notable successes of 1979-1982. In the words of the regional United Nations agency:

> "Numerous mutually-contributing factors explain this difficult situation. It is not easy to define their order of importance or appearance. Some of the extra-economic ones — such as the armed confrontation with its dramatic consequences in human and material losses — have been present for several years and may even be considered permanent. Their negative effects have an increasing impact on the crisis, obstructing the efforts of the authorities to face them and define the economic policies necessary to attenuate them.
>
> When analysing this crisis, one should not lose sight of the factors that limit development and are common to almost all Latin American economies (be they structural or specific to the crisis of the 1980s). In the case of Nicaragua, added to these are the trade embargo imposed by the United States three years ago and the aforementioned armed conflict.
>
> To varying degrees these factors have given rise to reorientations in the various spheres of economic policy, at times drastic. This has consequently obliged Nicaragua to rechannel material, human and financial resources (several of them being increasingly scarce), which combined with other equally adverse circumstances has had the unwanted consequence of raising prices and causing a severe disarticulation of the economic system." (ECLAC, *op. cit.*, p. 1; the complete text is given in Ann. V.1).

153. Despite this situation of economic emergency and massive defence mobilization, the effort to use external aid effectively to help the poor and to protect human rights has been maintained. As to aid, a study commissioned by 11 aid agencies concluded that

> "compared with aid to most developing countries, Western aid to Nicaragua since the revolution has been well used in meeting development objectives. (...) ... despite wartime conditions, progress has been made in administering aid, in planning its allocation in accordance with national priorities, and in overseeing its disbursement and use". (Transnational Institute, *Aid that Counts: the Western Contribution to Development and Survival in Nicaragua*, Amsterdam, 1987, p. 11.)

154. Finally, a study commissioned by the Swedish International Development Authority concluded that a key threat to human rights in Nicaragua is in fact the undermining of the economy and destruction of social infrastructure in the "low intensity war" itself:

> "International attention has focused on the atrocities committed by the *contras*. Supporters of the Sandinistas can point out that insurgents who

commit such atrocities — and the *contras* have been behaving in this way for over five years — are improbable standard-bearers of a new age of tolerance, democracy and pluralism. The most important effect of the *contra* war on the nation as a whole, however, is the direct economic damage caused by the *contras* and the indirect effects on the economy. This touches all Nicaraguans and all regions of the country and its effects will continue to be felt for many years after the fighting has come to an end." (Catholic Institute for International Relations, *Right to Survive: Human Rights in Nicaragua*, London, 1987, p. 47.)

155. In conclusion, the Nicaraguan economy since 1979 in general, and in the period of the trade embargo in particular, was extremely vulnerable to economic sanctions that affected its foreign trade or finance, and *a fortiori* to military or paramilitary attacks on production capacity. It was made progressively more vulnerable from 1982 onwards as the scale of *contra* attacks was stepped up; until after 1984 only a "survival economy" could be maintained.

Section B. United States Economic Aggressions

156. The vulnerability of the Nicaraguan economy to exogenous fluctuations on world markets, due to its extreme reliance on primary product exports and industrial imports; and on United States markets in particular, are matters of public record, as is clear from the sources cited above. This must be well known to the United States Government; and since 1981 the United States has taken advantage of this vulnerability to exert a wide array of economic weapons in order to achieve its objective of illicit intervention in Nicaraguan domestic affairs by economic destabilization. The National Security Council (see para. 158, below) refers explicitly to "our overall goal of applying stringent economic pressure".

157. The United States has traditionally employed economic weapons in order to further its economic policy goals. A detailed study by the Institute of International Economics (see G. C. Hufbauer and J. J. Schott, *Economic Sanctions Reconsidered: History and Current Policy*, Institute of International Economics, Washington, DC) reveals 59 cases of application of economic sanctions to other countries by the United States since 1940 (*op. cit.*, pp. xiii-xvi) as a foreign policy instrument. In the case of economic sanctions applied to Nicaragua, the goal is stated to be to "destabilize the Sandinista government" (*op. cit.*, Table 11, "Chronological Summary of Economic Sanctions for Foreign Policy Goals: 1914-1984", p. 19).

158. The explicit intent to destabilize the Nicaraguan economy is clear in the illegal mining of Nicaraguan harbours (Dispositif, subpara. 6). The National Security Council memorandum that describes the action (see Ann. X, Attachment C-1) reveals both the objective and perception of trade vulnerability:

> "Our intention is to severely disrupt the flow of shipping essential to Nicaraguan trade during the peak export period. (...) In this case, our objective is to further impair the already critical fuel capacity in Nicaragua."

The crucial argument *(loc. cit.)* in justifying the mining is made clear, where an attack on a specific tanker is clearly related to a wider goal evidently already established: "... it is our judgment that destroying the vessel and its cargo will be far more effective in accomplishing our overall goal of applying stringent economic pressure".

159. The military and paramilitary activities themselves have been clearly intended to destroy economic targets, even more than military ones. The

consequences in terms of export crops, food production, social infrastructure and energy supplies destroyed, are detailed in Chapter 6 below; and have been corroborated by the ECLAC (see Ann. V). In the light of this it is difficult to see how sustained destruction valued at averaging over US$31.2 million a year between 1983 and 1987 (ECLAC ref.) could be the result of uncontrolled *contra* activities and not the result of a strategy concerted with the United States. Nicaragua has given evidence to the Court (see the Memorial of the merits phase, IV, pp. 32-33; and affidavit by Vice Minister Luis Carrión, Ann. A, Exhibit A) to the effect that the United States had given instructions to the *contras* to attack economic objectives.

160. The Nicaraguan economy has in fact been the specific target of most of the actions judged illegal by the Court such as the mining of the harbours, attacks on ports, the "psychological manual" and the trade embargo itself. It has also been the target of other measures such as pressure on international credit institutions, the suspension of the sugar quota in 1983, which was found by the Court to lie outside the terms of the Nicaraguan application, are clearly related actions and necessary for judging the overall activities.

161. The military and paramilitary attacks on the Nicaraguan economy were complemented by United States pressure on international financial institutions in order to deny Nicaragua normal access to concessionary loans. A listing of the credits vetoed by the United States in the World Bank and the Inter-American Development Bank is given in Annex IV.2, Table 7, page 20. The intention of the United States administration to strangle the Nicaraguan economy by applying blanket political pressure on independent international financial institutions is clearly indicated in the letter of Secretary of State George P. Shultz to the Honorable Antonio Ortiz Mena, President, IADB (Ann. C, Ann. II-10 to the Nicaraguan Memorial of 30 April 1985). Incidentally, the main beneficiaries of the loan in question would have been Nicaraguan private sector farmers. The letter states:

> "We are also concerned about the possible misuse by Nicaragua of the proceeds from such a loan. As you are aware, money is fungible; monies received from the Bank would relieve financial pressures on the GON (ed.: Government of Nicaragua) and free up other monies that could be used to help consolidate the Marxist régime and finance Nicaragua's aggression against its neighbors, who are members in good standing of the Bank.
>
> I believe that we must also consider carefully the reaction of the United States Congress and the American public should this proposed loan to Nicaragua be approved. We are all too well aware of the increasing difficulties involved in gaining Congressional appropriations for the international financial institutions, such as the Inter-American Development Bank. There is little doubt that Executive Board approval of the proposed agricultural credit loan for Nicaragua would make our efforts even more difficult. In a broader sense, our joint long-term goal of strengthening the Inter-American Development Bank and expanding its resource base would be undercut by Board approval of this proposed loan."

162. An independent scholar, Professor Conroy of the University of Texas, Austin, mentions other hostile economic measures such as:

> "... successful attempts by the Reagan administration to block short-term credits from United States banks for the financing of harvests and shipping of Nicaraguan exports. (...) There were direct attempts by the Reagan administration and by political groups in the United States that supported

its position, to deter consumers from purchasing Nicaraguan products (...) There were extensive campaigns by the United States Department of State to discourage other nations from providing trade credits for Nicaraguan purchases and short-term financing for assisting with harvesting and shipping of Nicaraguan exports." (See M. E. Conroy, "Patterns of Changing External Trade in Revolutionary Nicaragua: Voluntary and Involuntary Trade Diversification", in J. Spalding, ed., *The Political Economy of Revolutionary Nicaragua*, 1987, pp. 175-176.)

163. The combination of those economic sanctions undoubtedly forms a concerted policy of destabilization exercised by the United States Government on the small, poor and highly vulnerable Nicaraguan economy. It is within this same context that both the military and paramilitary activities and the 1985 trade embargo must be seen; the objective of both has clearly been to undermine the Nicaraguan economy as part of an effort to overthrow the government. Before the GATT hearings on the embargo, the United States of America made its intentions clear:

> "The Panel noted that the United States had declared from the outset that it would not remove the embargo without a solution to the underlying political problem." (General Agreement on Tariffs and Trade, *United States — Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 — Ann. IX.9.)

Section C. The General Trade Embargo — the Legal Considerations

164. By an Executive order of 1 May 1985, the President of the United States imposed a general embargo on the United States trade relations with Nicaragua.

165. Under this instrument, the President of the United States declares:

> "I, Ronald Reagan, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.
>
> I hereby prohibit all imports into the United States of goods and services of Nicaraguan origin; all exports from the United States of goods to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto.
>
> I hereby prohibit Nicaraguan air carriers from engaging in air transportation to or from points in the United States and transactions relating thereto.
>
> In addition, I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto ...
>
> The prohibitions set forth in this Order shall be effective as of 12.01 a.m., Eastern Daylight Time, May 7, 1985, and shall be transmitted to the Congress and published in the *Federal Register*." (Ann. IX.1.)

166. The Office of Foreign Assets Control of the Department of the Treasury issued the Nicaraguan Trade Control Regulations implementing the prohibitions in Executive Order No. 12513 on 8 May 1985 (Ann. IX.3). On 31 October 1985, the President of the United States confirmed its decision (Ann. IX.2).

167. In its Judgment of 27 June 1986, the Court found that this embargo had in two respects breached the Treaty of Friendship, Commerce and Navigation

(hereafter referred to as FCN) that had been concluded between Nicaragua and the United States on 21 January 1956.

168. First, the Court considered that:

> "[S]uch an abrupt act of termination of commercial intercourse as the general trade embargo will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty." (Case concerning *Military and Paramilitary Activities in and against Nicaragua (Merits), I.C.J. Reports 1986*, p. 138, s. 176.)

169. Secondly, it found "[T]hat the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty." (*Ibid.*, p. 140, s. 279.) Paragraph 3 of the said Article provides as follows:

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

170. As a result, the Court decided by twelve votes to three

> "[T]hat the United States of America (...) by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed [an act] calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956" (subpara. 10 of the Dispositif of the Judgment, *ibid.*, p. 148);

and

> [T]hat the United States of America (...) by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." (Para. 11, *ibid.*)

171. Consequently, "the United States of America is under a duty to cease and refrain from all such acts" (para. 12, *ibid.*, p. 149), and, by fourteen votes to one, the Court decided

> "[T]hat the United States of America is under an obligation to make reparation to the Repbulic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation signed at Managua on 21 January 1956." (Para. 14, *ibid.*)

172. The present and the following sections examine the loss caused to Nicaragua by the unlawful embargo imposed by the United States as of 1 May 1985 (with effect as of 7 May)[1] and evaluates the reparation due to it.

173. The general principles concerning reparation, as set out by the Nicaraguan Government in Chapter 1 of the present Memorial, are fully applicable to the loss caused by the trade embargo imposed by the United States on 1 May 1985 and found by the Court to be contrary to the FCN Treaty.

174. The fact that the breach is of conventional origin has no effect on the State's international responsibility. In his fifth report as Rapporteur to the International Law Commission on Responsibility of States (para. 28, notes (45)

[1] The statistics presented hereinafter relate to the period beginning 1 May 1985 because they have been compiled on a monthly basis; and in any case, since notice of the embargo was given as of 1 May, it became operative at that date from the point of view of Nicaragua, even though the embargo was not formally in force until 7 May.

and (46), *Yearbook of the International Law Commission, 1976*, II (Part One), pp. 11-12), Judge Ago expressed the matter as follows:

> "[T]here would seem to be no justification for making breaches of obligations arising from conventions subject to a different kind of responsibility from that entailed in breaches of obligations arising from custom." (*Ibid.*, para. 30, p. 13.)

175. An international obligation is breached, and responsibility incurred, only for as long as the obligation is in force. The rule is found in Article 18, paragraph 1, of the draft articles of the International Law Commission on State responsibility:

> "1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State."

As was shown by the special rapporteur of the International Law Commission, the principle merely reflects the jurisprudence of international tribunals (Ago, 5th Report, quoted above, paras. 43 et seq.)

176. On the other hand, it is not important that the obligation infringed may have ceased to exist once the dispute is settled. Thus in the case concerning the *Northern Cameroons*, the Court said:

> "[I]t may be contended that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust." (Judgment of 2 December 1963, *I.C.J. Reports 1963*, p. 35.)

177. On the basis of this Judgment and several arbitral awards, Judge Ago has expressed the view that:

> "All the decisions analysed therefore confirm the validity of the principle that a State shall be held to have incurred international responsibility if it has adopted conduct different from that required by an international obligation incumbent on it at the time such conduct took place." (Ago, 5th Report, prec., para. 48, p. 17.)

178. This view is in conformity with the spirit of the provisions of Article 70, paragraph 1. *b*, of the Vienna Convention on the Law of Treaties under which the extinction of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".

179. Thus in the present case the United States is required to make reparation for the damage suffered by Nicaragua as a result of the embargo, even though on the day on which the embargo was decided, it gave notice of its intention to denounce the FCN Treaty. Indeed, under Article XXV, paragraph 3, the Treaty could be abrogated only on one year's notice. Thus the obligations of the United States under the Treaty ended on 1 May 1986. It was in force both on the date when the embargo was first imposed and when it was confirmed on 31 October 1985 (Ann. IX.2).

180. The question of the date until which compensation is due to Nicaragua as a result of the embargo calls for separate consideration:

> "The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins.

Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation." (ILC draft articles on State Responsibility, Art. 25, para. 1.)

181. The embargo, which was confirmed on 31 October 1985, continues to be detrimental to Nicaragua. It may thus be regarded as an "act of the State having a continuing character". Judge Ago has expressly cited the "maintenance of provisions in force incompatible with the provisions of a treaty" among the examples he has given to illustrate the concept of "continuing wrongful acts" (7th Report, *Yearbook of the International Law Commission, 1978*, II (Part One), s. 28, p. 42, see also: 5th Report, quoted above, s. 62, p. 22).

182. The very nature of the breach of international law constituted by the embargo would seem to justify the conclusion that the United States should be required to make reparation for as long as the embargo is in force. Nevertheless, since the Court has taken the view that the embargo was a violation of the FCN Treaty, but not of international customary law (Judgment of 27 June 1986, *I.C.J. Reports 1986*, s. 245, p. 126), and since the treaty ceased to be in effect on 1 May 1986, the obligations of the United States under the Treaty may be considered to have terminated on that date.

183. As indicated in Article 18, paragraph 3, of the International Law Commission draft articles,

"3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State."

184. Although the Panel of the GATT constituted to examine the embargo and its effects has ruled that under the General Agreement benefits accruing to Nicaragua have been nullified and impaired by the embargo (Ann. IX.6, p. 14), and although the Court has referred neither in the reasoning nor in subparagraphs 11 and 14 of the Dispositif of the Judgment of 27 June 1986 to any time-limit upon the United States breach of its international obligations or its obligation to make reparation, the Government of Nicaragua presents hereafter an assessment of the damages it has suffered only for the period when the FCN Treaty remained in force. As to the embargo, the relevant period thus runs from 1 May 1985 to 30 April 1986.

185. In any event there is strong evidence that the first year of the measure's application has had lasting effects (see *infra*, para. 224); and particularly in the subsequent year due to the effect upon the agricultural production cycle.

186. Liability is therefore entailed for all economic loss resulting from the embargo during the period 1 May 1985 to 30 April 1986, as well as for subsequent economic losses, that is, harm that, though occurring after 30 April 1986, was the result of the first year of the embargo.

Section D. Reparation Due to Nicaragua

187. As established in Chapter 1 above, the cardinal principle applicable to reparation is that it must, as far as possible, obliterate the prejudicial consequences of the wrongful act.

188. The only appropriate reparation for damages suffered as a result of the embargo would, in the view of the Nicaraguan Government, be the payment of an amount equivalent to the loss sustained. Any other form of reparation would

be unsuitable in the present case. No satisfaction could compensate for the material damage caused by the embargo to Nicaragua's economy. *Restitutio in integrum* would seem to be totally impracticable.

189. The Government of Nicaragua will establish hereafter the extent of the damages it has sustained as a result of the unlawful embargo both upon its exports (subsec. *(b)*, *infra*) and its imports (subsec. *(c)*, *infra*) as well as the losses of production (subsec. *(d)*, *infra*). A few general introductory comments need to be made first about the existence and magnitude of the loss, and the method used to evaluate it.

(a) *General Principles Applicable to the Evaluation of Damages Caused by the Embargo on Nicaragua*

(i) *General considerations on the extent of the damage*

190. On several occasions, the General Assembly of the United Nations has condemned the trade embargo imposed by the United States (cf. A/RES/40/188 of 17 December 1985; A/RES/41/164 of 5 December 1986 and A/RES/42/176 of 11 December 1987) and denounced "the negative effects" of the embargo on Nicaragua's economic and social development. Even if no account is taken of the medium- and long-term consequences beyond April 1986 of the embargo for the Nicaraguan economy — which will be examined in Chapter 6, these "negative effects" are of extreme importance in spite of the fact that the actions taken by the Nicaraguan Government had some effect in limiting their impact.

191. As explained in Section A, paragraphs 140-155, *supra*, Nicaragua's economy is extremely dependent upon and strongly dominated by foreign trade. Indeed, as economists and lawyers have repeatedly stated:

> "La situation du boycott risque d'être d'autant plus incommode quand la part de son commerce extérieur est plus considérable, qu'il est plus dépendant économiquement des autres pays en produits de première nécessité ou en matières premières indispensables" [1]. (Lucchini, "Le boycottage", in SFDI, colloque d'Orléans, *Aspects du droit international économique*, 1972, p. 94; see also Laferrière, "Le boycott et le droit 'international'", *RGDJP*, 1910, p. 312; Leben, "Les contre-mesures intérétatiques et les réactions à l'illicité dans la société internationale", *AFDI*, 1982, p. 72).

192. This is why, in reiterating the condemnation in paragraph 7 (iii) of the Ministerial Declaration of GATT of 29 November 1982 and UNCTAD resolution 152 (VI) of 2 July 1983, the General Assembly drew attention to the particular vulnerability of developing countries to "economic measures as a means of political and economic coercion" by developed countries and, in particular, their vulnerability to embargoes (A/RES/38/197, 20 December 1983; A/RES/39/210, 18 December 1984; A/RES/40/185, 17 December 1985; A/RES/41/165 of 5 December 1986; A/RES/42/173 of 11 December 1987).

193. In the case of Nicaragua, such dependence and vulnerability are particularly marked with regard to the United States which was its main trading partner up to 1985 (as to exports, see *infra*, para. 208, and as to imports, see *infra*, para. 225).

194. The 1987 ECLAC report on Nicaragua states:

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[1] A country will be more particularly inconvenienced by a boycott when its foreign trade plays an important role and when it is economically dependent on other countries for indispensable goods or raw materials.

"The relatively high importance of the trade that Nicaragua has historically maintained with the United States suffices to explain the impact of such a measure." (ECLAC, IC/MEX/102, 16 February 1988, Ann. V.1, p. 8.)

195. Immediately after the fall of the Somoza dictatorship, the new government attempted to diversify Nicaragua's trade relations, not out of hostility towards the United States, but because it regarded this situation of extreme dependence to be an unreliable basis of long-term independent economic development. The 1980 Economic Programme ("Programme of Economic Reactivation to the Benefit of the People") set out market diversification as a key strategic goal:

"This programme initiates the utilization of the major institutional changes in the external sector, ... the diversification of trade relations towards new markets ... the planning of imports ... and the renegotiation of external debt, putting them at the service of the satisfaction of the needs of the majority, at the same time as the transition to the New Economy is initiated." (Ministerio de Planificacion, *Plan de Reactivacion Economica en Beneficio del Pueblo*, Managua, 1980.)

196. As demonstrated by Professor Michael E. Conroy, despite the difficulties of this policy, it had begun to bear fruit at the time when the embargo was imposed (M. E. Conroy, "Patterns of Changing External Trade in Revolutionary Nicaragua: Voluntary and Involuntary Trade Diversification" in Rose J. Spalding, ed., *The Political Economy of Nicaragua*, 1987, pp. 169-194; see, in particular, pp. 180-183). If no such efforts had been made to diversify, the damage caused by the embargo to the Nicaraguan economy would have been even more serious.

197. *In accordance with the principle whereby the extent of the harm determines* the amount of the compensation, the Court will probably consider that the compensation due to Nicaragua is solely measured by the loss actually incurred. To the extent that Nicaraguan authorities have managed to find new outlets or new suppliers, the sums thus earned will be deducted from the compensation due. Because of this, also, the United States escapes further liability due to Nicaragua's trade diversification efforts[1].

198. It should also be borne in mind that the extreme suddenness of the measure taken by the United States rendered the reconversion efforts of the Nicaraguan authorities even more difficult.

199. As has been explained:

"Most Third World nations produce and export relatively undifferentiated unprocessed or semi-processed raw materials for which it takes great time and effort to develop market contracts and market penetration. In the event of a decision to use political criteria to deny a nation access to markets, it is relatively simple for importing nations to find alternative sources. Competitive pressures reduce the ability of the exporting nation to find alternative markets, especially in the case of perishable products. And brief delays or simple disruptions in the marketing of critical exports can have immediate and dramatic impacts upon the standard of living of small, open economies that cling tenuously to export-led growth that swings widely with variations in annual export earnings." (M. E. Conroy, *op. cit.*, p. 172.)

200. Similarly, as regards imports, the close ties built up over the years with

[1] The Government of Nicaragua respectfully suggests that this element be taken into consideration when assessing moral damages requested by Nicaragua.

United States suppliers makes rapid re-adjustment extremely difficult, particularly for the purchase of spare parts for old equipment. The embargo order was issued on 1 May 1985, and became effective six days later. Obviously, Nicaragua could not find alternative solutions, new trading partners and other markets in such a short time. By imposing a period of one year's notice prior to any termination, Article XXV, paragraph 3, of the FCN Treaty was precisely intended to avoid placing Nicaragua in such a situation. If it had been able to benefit from this one-year period, it would have been in a much better position to neutralize the effects of the embargo, but, without it, Nicaragua had to meet the consequences "head on".

(ii) *General rules for the evaluation of the damage sustained by Nicaragua*

201. Given the extreme diversity of methods applied by international tribunals to assess the damages sustained by States as a result of internationally unlawful acts, authors generally admit that

> "International law provides no precise methods of measurement for the award of pecuniary damages (...) [T]he general rule is to restore the injured thing to integrity again or to offer an equivalent therefor; but the problems which arise in this effort may be as numerous as the cases themselves". (Cl. Eagleton, *The Responsibility of States in International Law*, 1928, p. 191; see also M. M. Whiteman, *Damages in International Law*, Vol. II, 1937, pp. 1548-1549, or I. Brownlie, *System of the Law of Nations — State Responsibility*, Part I, 1983, p. 227.)

202. This conclusion is particularly relevant when the damage, as in the present case, is complex and caused by the convergence of high miscellaneous elements. As explained by Professor Charles Rousseau,

> "Il est rare que le montant du dommage puisse être déterminé avec une exactitude absolue, notamment dans le cas de dommage causé à un ensemble complexe (recolte, troupeau) dont les éléments ne sont pas connus avec précision. L'évaluation ne peut être qu'approximative"[1]. (*Droit international public*, Vol. V, *Les rapports conflictuels*, 1983, p. 234.)

203. Nevertheless, as established in Chapter 1, the difficulty of determining damage can never provide grounds for rejecting an international claim:

> "[I]l n'est pas permis au juge de débouter le défendeur en alléguant des difficultés dans l'évaluation du fondement de la demande. Ce faisant, il commettrait un déni de justice"[2]. (G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours*, 1929, Vol. 28, p. 275.)

204. Thus, as indicated in Chapter 1 of this Memorial, even in the absence of precise rules about the method of evaluating damage, judges and the parties may and should rely on general principles for guidance, and, in particular, on the idea that "[R]eparation must, as far as possible, wipe out all the consequences

[1] It is rare that the amount of damage may be determined absolutely exactly, particularly in the case of damage caused to a complex unit (harvest, herd) the various parts of which have not been identified with any certainty. Evaluation may only be approximate.

[2] A judge is not allowed to dismiss a claim because of alleged difficulty in evaluating the basis of that claim. In so doing, he would be perpetrating a denial of justice.

of the illegal act" (*Factory at Chorzów, 1928, P.C.I.J., Series A, No. 17*, p. 47 — see *supra*, Chap. 1).

205. Nicaragua has assessed the loss caused to it by the unlawful embargo decreed by the United States on the basis of those general guidelines. In particular,

— the only loss considered is damage, the existence and magnitude of which can be proven — and which has been caused, without any doubt, by the embargo itself;
— the extent and cause of the loss having been established, it has not been necessary, for the purposes of this assessment, to have recourse to calculations of probability;
— lastly, Nicaragua has confined itself to the losses it sustained as a consequence of the first year of the embargo, that is, the period from 1 May 1985 to 30 April 1986.

206. The method used to make the relevant calculation is explained in detail for each category of loss in Annex III.2. The calculations are summarized in subsections *(b)* ii (paras. 212-224), *(c)* ii (paras. 231-236) and *(d)* (paras. 237-242), *infra*.

207. The total amount includes only damage that can be calculated precisely. Except in certain cases (for example, bananas), it does not include provision of the frequently high expenditure involved in organizing fact-finding and negotiating missions for the purpose of finding new markets, both for exports and imports, as well as founding and consolidating commercial offices and firms in Canada, Argentina, Spain, the Federal Republic of Germany, Belgium and Mexico. New markets were found for meat (Canada), sugar (Sri Lanka, Pakistan, the Federal Republic of Germany, the Netherlands and the USSR), molasses (Netherlands), bananas (Belgium) and marine products (Canada). Moreover, the calculations have been made product by product to the greatest extent possible in order to provide the Court with precise data, and therefore cover the five main export products and 23 categories of highly significant imports individually. The calculations for the other export and import products have been done in aggregate. The social repercussions have not, however, been quantified, and in particular the negative effects of the embargo on medical and health services and on employment. (See Ann. IV.5, however, for an overview of long-term developmental consequences in the social sector.)

(b) *Adverse Consequences of the Embargo for Nicaragua's Exports*

(i) *General considerations*

208. Although the share of Nicaragua's exports to the United States had decreased considerably during the 1960s and the 1970s, the proportion was still 36 per cent in 1980 and 12.3 per cent in 1984 (see ECLAC Report on Nicaragua, 1987, Table 11, p. 49). This reduction was partly due to the Nicaraguan Government's moves to diversify foreign trade in an orderly fashion (see *supra*, para. 195) and, administrative and customs harassment by the United States Government after 1981.

209. Moreover, for certain types of produce, the United States was the only outlet, or at least a predominant one. In 1984, the United States absorbed 100 per cent of Nicaraguan exports of bananas and molasses, 85 per cent of marine products, 76 per cent of tobacco and cigar exports, and 47 per cent of meat exported (see Ann. III.2, Table No. 2, p. 3); see also General Agreement of

Tariffs and Trade, *United States — Trade Measures Affecting Nicaragua*, Annex IX.6, Table 3, page 6.

209 *[bis]*. In these conditions, the losses sustained by a small country which was extremely vulnerable to pressure from outside were necessarily high, independently of the measures taken by the United States authorities before their embargo, and which had adverse effects on that country's trade, such as the 90 per cent reduction of the sugar quota from 58,600 short tons to 6,000 short tons per annum in breach of the commitments entered into by the United States. As a result of the latter decision, which came into force on 1 October 1983 (see Ann. IX.4) and which was condemned by a panel of GATT set up under Article XXIII, paragraph 2, of the General Agreement (see Ann. IX.5), Nicaragua suffered losses equivalent to US$33 million.

210. The Government of Nicaragua wishes to point out once more that such losses, although unquestionably caused by the wrongful acts of the United States are not included in the calculation of losses caused to Nicaragua by the embargo.

211. For this purpose, the following elements have been taken into consideration:

— the loss of cargo already loaded, prevented from reaching the United States before 7 May 1985, or goods ready to be exported and which could not be preserved;
— the difference between prices obtained from the new purchasers — which had been the object of a costly search — and those agreed with the original North American purchasers (the reference used is 1984 prices);
— when possible, additional costs involved in diversifying the exports to more distant markets including: costs of transport, forming new firms, trading offices, communications, market research, relocation of exports and personnel, and the training of labour to extract, manufacture and label goods to new specifications since the goods coming under the embargo were extracted, processed and packaged taking into consideration the proximity of the United States market and consumer demand in that country. Bananas, for instance, were cut at a specific level of the bunch to ensure their ripening during the short journey from the Nicaraguan ports to the West Coast of the United States. In the case of seafood, only the lobster tail was sold; tobacco and cigars were of a specific quality intended for the North American market, etc. In several cases, however, there has not been sufficient data to take account of these elements.

(ii) *Evaluation of harm to exports*

212. On the basis of the previous data, Annex III.2 explains the methodology that has been followed in order to calculate harm to Nicaragua's main exports. A brief summary of the main conclusions to be drawn from these studies follows:

213. *Sugar:* Average annual production is estimated at some 50,000 to 60,000 short tons, representing in 1980 about 4.4 per cent of the total value of Nicaragua's exports. The United States, following the 90 per cent reduction in the quota (see *supra*, para. 209), was buying only 6,000 tons, at a fixed price of US$20.31 per hundredweight (cwt). Thus during the one-year period which elapsed between 1 May 1985 and 30 April 1986 the value of sugar exports to the United States should have totalled US$2.437 million (based on firm commitments to purchase at a fixed price). Nicaragua was compelled to sell the extra 6,000 tons on European markets at an average price of US$5.69 per hundredweight.

Currency payments thus totalled US$683,000 amounting to a shortfall — directly due to the embargo itself — of US$1.754 million (see Ann. III.2, pp. 4-5).

214. *Bananas:* This product accounted for about 3 per cent of the total exports of Nicaragua in 1984. Due to the embargo, Nicaragua was forced to conduct a search for new markets, once again, mainly in Western Europe. A permanent office was set up in Belgium at great expense.

215. The damages sustained may be classified in two categories. First, there is the price differential that is due mainly to transport costs. Secondly, there is the very high cost of the investment necessary to penetrate these new markets. Because of this, the negative effects of the embargo were particularly marked during its first year during which reparation is unquestionably due to Nicaragua. For this year alone the loss amounts to US$14.1 million (see Ann. III.2, pp. 5-6 and Table No. 4, on p. 7).

216. *Seafood:* The United States represented 85 per cent of the total market prior to the embargo. Losses totalled US$320,000 because of spoiled goods and "reconversion" and storage costs, and US$3.15 million owing to the price differential. The total comes to US$3.48 million (see Ann. III.2, p. 10, and Tables Nos. 6-A and 6-B).

217. *Meat:* Sales on the American market amounted, in 1984, to 34 per cent of Nicaragua's total meat exports in 1984. Although it has been less difficult to find new markets for meat than for bananas or sugar, there was a specific loss of US$270,000, on account of meat that was ready to be exported in May 1985 but could not be sold. To this sum should be added some US$24,000 for containers ready to be shipped at Puerto Cortes (Honduras) and returned to Nicaragua paying dead freight.

218. Moreover, because of the price differential between sales at the normal level in the United States and actual sales, Nicaragua incurred a loss of US$399,540 for the period 1 May 1985 to 30 April 1986. Total damages thus sustained therefore amount to US$690,000 (see Ann. III.2, p. 8 and Table No. 5).

219. *Tobacco and cigars:* The United States was almost the sole market prior to the embargo. The search for new customers was a particularly long and difficult one, with the result that Nicaragua was virtually unable to export these products during the first year of the embargo. Even if the storage costs and production losses are excluded, the loss amounted to US$620,000 (see Ann. III.2, p. 12).

220. With regard to other products formerly exported to the United States, in particular, molasses, sesame, coffee, etc., it is difficult to calculate these precisely for lack of complete data, but the Nicaraguan Government estimates them at US$2.2 million (see Ann. III.2, Table 14, p. 27). The basis for this figure is the average rate of loss sustained in the export of the six products and services listed above, i.e., 52 per cent applied to the total value of exports to the United States in 1984 for other products and services.

221. The total of the figures for export losses thus amounts to:

— bananas	=	14,212,000
— seafood	=	3,470,000
— sugar	=	1,754,000
— meat	=	690,000
— tobacco and cigars	=	617,000
— air traffic	=	6,000,000
— financial costs	=	404,300

222. The embargo also seriously affected the activities of Aeronica, the Nicaraguan air company. Travel to the United States represented 45 per cent of

its total net income in 1984. Losses incurred as a result of the suppression of air traffic (passengers and goods) between 1 May 1985 and 30 April 1986 totalled US$6 million (see Ann. III.2, p. 22).

223. The embargo also led to greater financial costs for Nicaragua in connection with its exports. On average ten extra days were required for the receipt of export payments. At an average interest rate of 8 per cent per annum (the average LIBOR for 1985-1986, see Ann. VI.2), the consequent loss totals US$404.3 thousand (see Ann. III.2, p. 25 and Table No. 13, p. 33).

224. The highly significant qualitative aspects of the loss incurred due to the export embargo have not been considered either. In many cases, it has not been possible to reckon the cost of missions, communications, etc., necessary to penetrate new markets. These were particularly high during the year which followed the announcement of the embargo. Nor have values been estimated for the loss of decades of favourable business, knowledge and experience with the North American market. In Chapter 8 of this Memorial Nicaragua requests the assessment of pecuniary satisfaction for moral damages, among other causes, for the violation of the FCN Treaty. These considerations are pertinent to the assessment of those losses.

(c) *The Harmful Effects of the Embargo on Nicaragua's Imports*

(i) *General considerations*

225. The share of United States products in Nicaragua's imports is even greater than in the case of exports. From 28.8 per cent in 1977, it fell slightly to 27.5 per cent in 1980 and then to 19 per cent in 1982 and 15.1 per cent in 1984 (see ECLAC Report on Nicaragua, 1987, Table 11, p. 49) as a result of Nicaragua's policy of diversifying its trade relations after 1979 (see *supra*, paras. 195-196) (see M. E. Conroy, *op. cit.*, pp. 179-183).

226. Here again, however, the gross statistics are misleading. Prior to the embargo, imports from the United States continued to play a decisive role.

> "While the overall value of imports from the United States declined, Nicaragua remained dependent on her Northern neighbor in several strategic product categories. In 1982 the United States supplied 42 per cent of imported chemicals (used largely in agriculture production) and 44 per cent of imported spare parts. Spare parts were critical in keeping the Nicaraguan economy running, particularly because much of the country's machinery — in sugar production, for instance, dated back to the early decades of this century (. . .) The Ministry of Industry (for its chemical, instant coffee, cereal, beer and tanning plants) and the State-owned oil company both relied on the United States for 80 per cent of the spare parts needed in their daily operations." (S. Maxfield and R. Stahler-Sholk, "External constraints" in Walker, *op. cit.*, p. 248.)

In other words, before the embargo, the whole of Nicaragua's production was dependent on United States technology and imports, particularly because of the critical need for spare parts which often could not be found elsewhere. Table No. 8 of Annex III.2, page 14, specifies the structure of imports from the United States in 1984.

227. This situation of extreme dependence due to historical and geopolitical factors could not be remedied in the short run. Thus, the prejudicial effects of the embargo on imports were much greater than on exports.

228. The main categories of damage that can be isolated and assessed precisely are:

— the difference between the prices paid to traditional United States suppliers and those paid to new importers (when it had been possible to find them); this difference is unavoidable since it is mainly due to geographical problems: when importing goods from overseas the transport is inevitably much more important than when they come from the United States; however, the traditional structure of shipment (important sea traffic between Central America and the United States, by the "cabotage" system) can no longer be used by Nicaraguan importers (see Ann. III.2).
— the effects of the devaluation of the dollar as compared with the other main currencies in which substitute imports had to be paid;
— certain additional financial costs:
— when possible, effects directly deriving from the embargo: additional purchases made necessary by the impossibility of obtaining certain spare parts.

229. In addition, the first year of the embargo had many prejudicial affects in the medium and long term. These will be examined in subsection D (*infra*, paras. 237-241).

230. It has not been possible to calculate very precisely the "qualitative" damages caused by the embargo on imports. These exist nonetheless (see *supra*, para. 226).

(ii) *Evaluation of damages to imports*

231. Annex III.2 to the present Memorial describes the methodology that has been followed to calculate damages to Nicaraguan imports and it also applies that methodology. To avoid a piecemeal and repetitive approach, in this Memorial the following summary of the conclusions of Annex III.2 are not presented product by product as for exports, but according to the categories of injury sustained by Nicaragua.

232. To establish the amount of losses due to the higher cost of goods that Nicaragua had to import to substitute for those traditionally purchased in the United States, it has been necessary to identify categories of goods that Nicaragua formerly bought from the United States. Annex III.2 identifies 23 highly significant products on the basis of 1984 imports (see Ann. III.2, Table No. 9, p. 16). The price differential on these imports has caused a total loss of US$51.9 million.

233. These 23 products or categories of products represented, in 1984, about 40 per cent of Nicaraguan total imports from the United States. However, the dispersion of the remaining products is such that detailed studies cannot be undertaken. The Nicaraguan Government estimates that because the remaining products are of a less crucial nature and more easily obtainable elsewhere, the respective differentials in purchasing price, freight, insurance and commercial costs are of the order of half the average price increase on the 23 identified products compared to these same costs in 1984. It should be emphasized that these quantitative differentials do not reflect the significant quality differences in some products to Nicaragua's disadvantage. Therefore, losses due to higher import prices in new markets for the remaining commodities which would have been purchased in the United States are conservatively estimated at US$141.5 million.

234. In calculating losses from revaluation in new import markets, it is sufficient to determine the rate at which import trade from the United States

has been diverted to West European markets, and apply for each country the corresponding re-evaluation coefficient. The total amount comes to US$10.9 million (Ann. III.2, p. 17 and Table No. 10, p. 18).

235. Additional costs of intermediation are more difficult to establish precisely, but there has been an additional loss due to this factor.

236. The sum of losses incurred by Nicaragua and calculated above thus totals

— Higher import prices = US$193,365,000
— revaluation in new import markets = 10,857,000

(d) *Losses of Production and Medium-Term Effect of the Embargo*

237. Obviously, the interruption of trade with the United States had immediate negative effects on production. In this respect, the immediate interruption of imports has been particularly detrimental during the first year of the embargo. Contracts worth US$12.2 million concluded with American suppliers for the purchase of agricultural produce or equipment (seeds, fertilizers, ranching supplies, spare parts) could not be honoured. Nicaraguan farmers were unable, either at that time, or, in some cases, ever again to find these indispensable items, i.e., spare parts for equipment of United States origin. This had repercussions on crops and in relation with the agricultural cycle these effects were especially important in 1986 even if the fall in production was already significant in 1985 (see Ann. III.2, pp. 24-25 and Table No. 11, pp. 29-33). The same is true of industrial production, mining and quarrying, fisheries, energy and transport (see *ibid.*, p. 21).

238. Indeed, the first year of the embargo has had negative effects in 1985-1986, and these effects have continued. It was in 1986 and not in 1985 that losses of crops due to lack of seed supplies or spare parts for the tractors during the previous year, were most marked. Also, it must be kept in mind that even if the embargo had been discontinued on 1 May 1986, it would not have been possible for Nicaragua or Nicaraguan entrepreneurs suddenly to terminate the contracts (imports or exports) that had been reached with new partners on a less advantageous basis than with traditional United States partners, etc., nor to automatically renew their old long-term contracts with United States firms that had been terminated by the embargo. The entrepreneurs had already lost their representation and distributorship contracts which represented a financial loss for them in and of itself.

239. In abstract terms, it would perhaps be possible to develop an econometric model to calculate the medium- and long-term effects of only the first year of the embargo. But such an enterprise would be extremely difficult and divorced from reality since, as the embargo remained in force, it is practically impossible to distinguish the damage caused by the first year of the embargo from that due to its subsequent application. It is possible, however, to calculate the consequential cost of the losses due to the embargo on the nation's Gross Domestic Product.

240. In these conditions the Nicaraguan Government suggests that it would appear reasonable to calculate the compensation due to it on the basis of the total production losses which occurred during the first two years of the embargo, that is, from 1 May 1985 to 30 April 1987, as well as their impact on GDP for those years, and not to take subsequent losses into account. These losses may be evaluated precisely according to the method described and applied in Annex III.2. Thus calculated, the amount totals US$26,930,000. In Chapter 6 the consequent decline in the GDP is presented.

241. In addition, as explained above (paras. 237-238), the qualitative aspects

of the harm caused by the embargo have not been included. It should be borne in mind that familiarity with suppliers, access to inventories of spare parts and consumer goods of North American origin, were essential for an industry and an agriculture developed on the basis of the technology of that country. The embargo provoked a major dislocation of the whole economic system of Nicaragua, the effects of which have not yet been foreseen in their totality, even though they have been manifestly present ever since the embargo began. Similarly, however difficult it may be to ascertain the social cost of the embargo, the latter undeniably exists.

242. Thus, for example, in spite of apparent exceptions in United States Regulations (see Ann. IX.8, ss. 540.539 and 540.540), the health sector has been especially affected. Many medical supplies could not in fact be purchased; this was the case, for example, for oral proteins, anaesthetics, coagulating agents, some antibiotics, etc. In relation to the maintenance of hospital equipment, Nicaragua was also seriously affected since equipment comes mainly from the North American market. All this had very negative consequences for the health of the population (see Ann. III.2, pp. 22-23). In the same spirit it must be stressed that the United States Administration harassed humanitarian organizations and more often than not denied export licences they needed (for an example, see Ann. IX.7, pp. 2-4) [1].

(e) *Conclusion*

243. The Nicaraguan Government is thus able to assess the losses it has incurred as a result of the embargo as follows:

- US$22,864,000 for losses in commodity exports.
- US$193,365,000 for losses related to imports.
- US$11,261,000 for losses in currency revaluation and financial intermediation.
- US$26,930,000 for losses in production due to the embargo.

These four categories are summarized and set out by year of incidence in Annex III.2, Table 14, page 27. Their combined total is US$254,420,000.

244. The actualization of these losses to their present value in 1988 (see Ann. VI.2 for methodology) gives a total actualized loss of US$325,400,000.

[1] The Government of Nicaragua respectfully suggest that this element be taken into consideration when assessing the moral damages requested by Nicaragua.

CHAPTER 6

LOSS CAUSED TO DEVELOPMENT POTENTIAL

Introduction

245. In its Judgment of 27 June 1986, the Court decided, by twelve votes to three

> "That the United States of America is under an obligation to make reparation to the Republic of Nicaragua for *all injury* caused to Nicaragua by the breaches of obligations under customary international law enumerated above" (Case concerning *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 149, Dispositif, subpara. 13; italics added),

and, by fourteen votes to one

> "That the United States of America is under an obligation to make reparation to the Republic of Nicaragua for *all injury* caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." (*Ibid.*, subpara. 14; italics added.)

246. These decisions are in keeping with the Court's jurisprudence according to which

> "Reparation must, as far as possible, wipe out all the consequences of the illegal act ..." (*1928, P.I.C.J*, Case concerning the *Factory at Chorzów* for Indemnity) (Merits), *Series A, No. 17*, p. 47 — see Chap. 1.)

247. Nevertheless, if consideration were given only to the damage described in the previous chapters, Nicaragua would not receive reparation *"for all injury"* sustained and the reparation would not *"wipe out all consequences"* of the "illegal" acts committed by the United States and considered by the Court. These acts had, in effect, real and extremely adverse consequences for Nicaragua's economy and for its economic and social development potential.

248. So far, the Nicaraguan Government has established that it has sustained — and, in several cases, continues to sustain — the following injuries due to the unlawful acts perpetrated by the United States:

- — human suffering,
- — material destruction of property,
- — production losses, and
- — loss of export earnings or increased cost of imports, as a consequence of the trade embargo.

Wherever possible, it has calculated the amount of damage incurred and, accordingly, the compensation due to it on that account. It also has established the amount of the additional government spending that has been necessary to defend the country against the United States military and paramilitary activities.

249. The characteristic shared by these categories of damage is that each of them may be traced back to one or more of the United States activities that the Court has held to be contrary to international law; the mining of the ports has led to destruction and loss in fishing income; the embargo is responsible for particular production losses or shortfall in export earnings, etc. But the damages

sustained by Nicaragua are much greater than this analysis alone would show. Each particular injury has direct negative repercussions on other types of activity and, when taken together, they have a cumulative effect upon Nicaragua's economic and social development.

250. The nature of this form of harm may be examined from two different points of view; and for the sake of clarity, the economic and the social aspects will be presented one after the other.

251. First, the unlawful acts of the United States have directly led to a reduction in the Gross Domestic Product (GDP) of Nicaragua, that is to the sum of the value added by each branch of the economy to the resources at its disposal. As a consequence of the production losses — which are established in the previous chapters —, the economy has less foreign exchange at its disposal and the productivity of nearly all sectors has been affected. This is what may be called the "GDP loss".

252. Secondly, these unlawful acts by the United States have had very dramatic effects on the health of the population, the education of future generations, housing, the transport infrastructure, etc. These negative social effects may be grouped under the general title of "social losses".

253. It has been relatively easy to assess the first of these two categories of damage (GDP loss); on the other hand, the social losses are more difficult to calculate precisely, although they unquestionably exist.

254. Before proceeding to describe in detail and, when possible, to make an assessment of harm caused to Nicaragua's economic and social development, it is necessary to establish the principle of the obligation to make reparation, which is incumbent upon the United States.

Section A. The Obligation to Make Reparation

255. In accordance with the general principle of customary law that has at present found expression in Article 1 of the International Law Commission draft articles on State Responsibility, "Every international wrongful act of a State entails the international responsibility of that State". Consequently, any damage that originates in an internationally wrongful act obliges the States to which that act may be attributed to make reparation, as expresseed in Article 6 of the second part of the draft articles prepared by Professor Riphagen and which the International Law Commission adopted provisionally in 1986.

256. This fundamental rule is fully applicable to the damage caused to Nicaragua's economic and social development as briefly defined above, under the most traditional principles of international law. See subsection *(a)*, *infra*. Contemporary economic and social development and its resulting legal consequences confirm and strengthen this interpretation. See subsection *(b)*, *infra*.

(a) *In Accordance with Traditional Principles of International Law the United States is Required to Make Reparation of the Damage Caused to Nicaragua's Development Potential*

(i) *The nature of the damage caused to Nicaragua's development potential is such as to require a reparation*

257. The obligation to make reparation automatically springs from the principle of integral and effective reparation (see Chap. 1) which the Court established in subparagraphs 13 and 14 of the Dispositif of 27 June 1986 (see *supra*, para. 1).

258. It is particularly well established that compensation is due not only for the destruction itself *(damnum emergens)*, but also for the resulting loss *(lucrum cessans)* (see Chap. 2).

259. The rule of contemporary jurisprudence is well expressed by arbitrator Asser in the *Cape Horn Pigeon* case:

> "Considering that the general principle of civil law according to which the damages should include an indemnity, not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and that in order to apply it, it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but that it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim;
>
> Considering that in this case it is not a question of indirect damage, but of direct damage, the amount of which should be estimated." (29 November 1902, *RIAA*, IX, p. 65.)

260. Under this principle, the arbitrator ordered Russia to pay compensation for the loss of the fishing season caused by the unlawful seizure of the *Cape Horn Pigeon*. (See also, the *William Lee* case, Mixed Claims Commission, *U.S.* v. *Peru*, 27 November 1863, *RIAA*, II, pp. 282-287; the sentence rendered by F. de Martens in the case of the *Costa Rica Packet*, 25 February 1897, Moore, *I. Arb.*, pp. 4949 et seq.; and examples quoted by Whiteman, *Damages in International Law*, 1937, pp. 1251 et seq.).

261. International arbitral tribunals have also ordered compensation to be paid for lost crops, the *Poggioli* case, 1903, *RIAA*, X, p. 669; *Feuillebois* case, Mixed Claims Commission, *France* v. *Mexico*, 15 June 1929, *RIAA*, V, pp. 543-544), or for the loss of possible profit caused by the unlawful disturbance to the normal course of business. Thus in the *Irene Roberts* case, Commissioner Bainbridge declared:

> "Under these circumstances, well-established rules of international law fix a liability beyond that of compensation for the direct loss sustained (...). The derangement of Mr. Quirk's plans, the interference with his favourable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for injury to be sustained." (1903, Ralston, *Venezuelan Arbs.*, p. 145.)

262. This position was also adopted by the Permanent Court of International Justice in the *Chorzów Factory* case. After laying down the rule on effective reparation (see Chap. 1) the Court continues:

> "This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for maintainance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking — the expropriation of which is prohibited by the Geneva Convention — thus involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure." (*1928, P.C.I.J., Series A, No. 17*, pp. 47-48; see also the dissenting opinion of Lord Finlay, p. 71.)

263. Further, the Court did not exclude

> ". . . the possibility of taking into account *another damage* which the Companies may have sustained owing to dispossession, *but which is outside the undertaking* itself" (*ibid.*, p. 49; italics added).

It is clear that the Court had in mind not only the loss of profit directly incurred by the companies in question but also the negative repercussions they may have suffered as a result of the unlawful dispossession. This appears from the nature of the questions that the Court submitted to the experts it had appointed. After asking them to evaluate

> "the financial results, expressed in Reichmarks current at the present time (profits and losses) which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, *if it had been in the hands of the said Companies*",

it instructed them to determine the value of the undertaking if it "had been developed proportionally on lines similar to those applied in the case of other undertakings of the same kind . . ." (*ibid.*, pp. 51-52).

264. The parties finally settled the case by negotiation (cf. *Order of 25 May 1929, P.C.I.J., Series A, No. 19*), so the Court did not have to reach conclusions as to the existence and amount of the injury. But the quoted passages in its Judgment of 13 September 1928 demonstrate that such injury could include not only the profit losses of the plant itself but also the negative repercussions of the latter on all the other activities of the enterprise.

265. The Court's Judgment in the *Chorzów Factory* case was interpreted in this manner by the United Kingdom in its Memorial in the *Anglo-Iranian Oil Co.* case. After quoting the Judgment of 1928, it adds:

> "According to these principles, the compensation would have to cover the value of all the property of the Company in Iran of which the Company has been deprived as a result of the confiscation of this property by the Iranian Government (this constituting the value of the investment which the Company had made in Iran — *damnum emergens*), and in addition compensation for all the loss of prospective profits which the Company had suffered *(lucrum cessans)*. *Under this heading of loss of profits would be included not merely an estimate of loss of profits which the Company had lost by the cessation of the Iranian portion of its enterprise, but the loss which it had suffered* (including, if necessary, the extra expense in which it would be involved) *by the reason of the fact that the non-Iranian portion of its enterprise with which the Company is left would be an ill-balanced truncated portion of what was designed to be a part of one balanced whole, and would, therefore, be far less valuable as a truncated portion as compared with its value as part of a whole.*" (*I.C.J. Pleadings*, 1952, pp. 117-118; italics added.)

See also Salvioli, *op. cit.*, who, in analysing Judgment No. 13 of the Permanent Court, makes a clear distinction between lost profits *stricto sensu* (pp. 261, et seq.) and compensation due in the absence of the "*développement normal de l'entreprise*" (the undertaking's normal development), page 239.

266. These principles are logically applicable to the present case. Indeed, they are applicable *a fortiori* in the present case. As regards the type of loss with which the present chapter is concerned, it is similar in nature, for Nicaragua, to the damage caused the Bayerische and Oberschlesische Stickstoffwerke companies, which were the owners of the Chorzów plant in the case judged by the

Permanent Court in 1928: Nicaragua has suffered loss of production caused by the wrongful acts perpetrated by the United States. In turn, those losses have directly affected its economy and development potential as a whole. The resulting damage must thus be compensated.

267. Two factors justify consideration of the damage caused by the international wrongful act of a State to the economy and development potential of another State. First, this involves an assault upon one of the main components of the modern State. Secondly, the degree of gravity of a breach in international law in the case of a failure to respect the duty of *due diligence* in the protection of foreigners cannot be compared to a predetermined policy, decided at the highest governmental level, of deliberately harming another sovereign State (see Chap. 2). There is no doubt that the unlawful action of the United States had the very object of damaging the Nicaraguan economy and development potential (see Chap. 5, paras. 156-163).

268. The Arbitration Court on *Damages to Portuguese Colonies* held:

> "[I]l ne serait pas équitable de laisser à la charge de la victime les dommages que l'auteur de l'acte illicite initial a prévus et peut-être voulus, sous le seul pretexte que, dans la chaîne qui les relie à son acte, il y a des anneaux intermédiaires" (1928, *RIAA*, II, p. 1031)[1].

(ii) *The question of causality*

269. As explained by Edwin B. Parker, Umpire of the American-German Claims Commission of 1922 in the case of the *War-Risk Insurance Premium Claims*, the word "indirect" is "inapt, inaccurate and ambiguous" and the

> "... distinction between 'direct' and 'indirect' damage is frequently illusory and fanciful and should have no place in international law" (*RIAA*, VII, pp. 62-63 — see also Garcia-Amador, 6th Report, *op. cit.*, para. 159, p. 40).

270. The applicable principle has been fixed with great clarity in administrative decision No. 2 of the American-German Commission of 1 November 1923:

> "The proximate cause of the loss must have been in legal contemplation the act of Germany. The proximate result or consequence of that act must have been the loss, damage, or injury suffered. The capacity in which the American national suffered — whether the act operated directly on him, or indirectly as a stockholder or otherwise, whether the subjective nature of the loss was direct or indirect — is immaterial, but the cause of his suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause — a rule of general application both in private and public law — which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitively traced, link by link, to Germany's

[1] It would not be fair to leave the victim to bear the consequences of damages that the perpetrator of the initial unlawful act has provided for and perhaps even intended, simply on the pretext that in the chain connecting them to his act there are intermediate links.

act." (*RIAA*, VII, pp. 29-30; see also the award of the German-Portuguese Arbitration Court of 31 July 1928, mentioned above, para. 38.)

271. Contemporary doctrine concurs with this view:

> "Whenever an international liability arises, there is a duty to make complete compensation and therefore for all the prejudicial consequences of the occurrence giving rise to the liability whether the damage thus ensuing is direct or indirect." (Yntema, *op. cit.*, p. 153.)
>
> "All damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain of causation, should be compensated." (Eagleton, *The Responsibility of States in International Law*, 1928, p. 202.)
>
> "Doivent être considérés comme conséquences de l'acte dommageable et doivent par conséquent être pris en considération pour l'appréciation de l'étendue de l'obligation de réparer, tous les faits qui sont reliés à l'acte originaire par un lien de cause à effet, en d'autres terme tous les faits desquels on peut remonter jusqu'à l'acte primitif par une chaîne ne présentant aucune solution de continuité." [1] (Personnaz, *La réparation du préjudice en droit international*, 1938, p. 136.)

(See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", *RGDIP*, 1924, pp. 203-231, *passim*, in particular p. 227; Salvioli, *op. cit.*, pp. 224 and 246; Jiménez de Aréchaga, *op. cit.*, pp. 568-569; Bollecker-Stern, *op. cit.*, pp. 221, et seq.; Verzijl, *International Law in Historical Perspective*, 1973, pp. 743 and 756; I. Brownlie, *op. cit.*, pp. 225-227; Nguyen Quoc Dinh, Daillier et Pellet, *Droit international public*, 1987, p. 697; etc.)

272. The position was aptly summed up by the Government of the Netherlands in its reply to the questionnaire of the Preparatory Committee of the Hague Conference in 1930:

> "Sans faire de distinctions plus ou moins artificielles de 'dommage direct' et 'dommage indirect', il faut indemniser le dommage qui doit être considéré comme étant la conséquence du fait imputé à l'Etat" [2] (SDN, *Publications*, C.75 (a), M.69 (a), 1929, V, p. 149).

273. The causal relationship is thus the only condition for the compensation of damage caused by an internationally wrongful act in international law. This condition is without doubt fulfilled in the present case.

274. The acts perpetrated by the United States and held by the Court to be contrary to international law are the determining cause of the GDP loss and the social losses that have affected Nicaragua since 1981.

275. There are two ways of establishing this causality. The first is to take each of the acts for which the United States is responsible and determine the harmful consequences for Nicaragua. The second is to start from the losses incurred by Nicaragua and trace them back to their original cause. Both approaches lead to the same conclusion: the United States has caused enormous harm to Nicaragua, and it has done so deliberately.

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[1] The following should be regarded as the consequences of the injurious act and thus be taken into consideration in assessing the obligation to make reparation: all facts related to the original act by a causal relationship, or in other words, all facts which lead up to the initial act by a chain which presents continuity.

[2] Without making the more or less artificial distinction between "direct" and "indirect" damage, reparation must be made for the damage which must be regarded as the consequence of the act attributed to the State.

276. The Government of Nicaragua will cite two examples of the first of these approaches:

277. (i) On 13 September 1983, "an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up" and on 15 October 1983 "the underwater pipeline was again blown up" (*Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 48). The Court recognized that these attacks were attributable to the United States (*ibid.*, p. 50) and in breach of both the principle of international customary law which bans the use of force in international relations, the obligation not to violate the sovereignty of Nicaragua, and the Treaty of Commerce, Friendship and Navigation of 21 January 1956 (*ibid.*, Dispositif, subparas. 4, 5, 10 and 11, pp. 147-148).

278. As Nicaragua has demonstrated in Chapter 3 above, damages caused by these attacks to petroleum installations and the resulting loss of petroleum amount to US$410,000.

279. However, this amount represents only a small part of the loss incurred by Nicaragua as a result of the attacks on Puerto Sandino. It must be recalled that virtually all oil imported by Nicaragua arrives at Puerto Sandino and proceeds from there to Managua through a pipeline. Hence, the loss of petroleum that was being stored in Puerto Sandino and the unavailability of the oil terminal for several months had immediate repercussions on a large number of industrial activities, in particular the chemical industry and electricity generation. In turn, the reduction of electrical power supplies led to reduced activities in many industries, whence a more general reduction in the gross national product and in the population's standard of living. Moreover, the need to replace the lost oil and to rebuild the destroyed installations has prevented the Government of Nicaragua from making other productive purchases abroad and generating the value added from combining the imports with domestic resources.

280. (ii) The same is true of the trade embargo imposed by the Executive Order of the President of the United States on 1 May 1985 (Ann. IX.1), which the Court declared contrary to the object and purpose of the FCN Treaty of 1956 and to the obligations of Article XIX of that Treaty (*I.C.J. Reports 1986*, pp. 138, 140 and subparas. 10 and 11 of the Dispositif, p. 148).

281. The Nicaraguan Government has demonstrated in the previous chapter that this unlawful action caused the irreparable loss of perishable goods, reductions in export earnings, much higher import costs, and production losses directly linked with the inability to export. The resulting loss due to losses from the general embargo on trade (US$254.4 million) and the GDP losses denied therefrom (US$381.6 million) amounts to at least US$636 million.

282. Yet again, this amount is far from sufficient to cover the actual loss incurred by Nicaragua. The fall in activity was not confined to export-oriented agricultural and industrial production. These economic activities are also consumers of goods and services produced in Nicaragua, whose producers were also affected by the embargo. Furthermore, the income of the farmers, workmen and entrepreneurs in those industries was reduced; their purchases, savings and investment accordingly fell.

283. Here again, the immediate and direct source of these negative repercussions is to be found in the general trade embargo imposed by the United States in breach of its international obligations. The causal relationship between the internationally wrongful act and the damage is thus amply demonstrated.

284. Many more examples could be supplied, either in connection with the use of force by the United States against Nicaragua as in the mining of the ports, or the damage caused by the United States breach of the principle of non-

intervention, as found by the Court, by the "Support given ... to the military and paramilitary activities of the *contras* in Nicaragua". (*I.C.J. Reports 1986*, para. 242.)

285. However, as indicated above (para. 275) this causal relationship may also be established adequately in another manner, by starting not from each of the wrongful acts attributable to the United States but from the damage which was incurred by Nicaragua, and following the chain of circumstances that caused it.

286. It is relatively easy to determine, on the basis of reliable and objective international sources, the amount of GDP loss.

287. A rigorous evaluation of Nicaragua's growth prospects was carried out in 1981 by an official mission of the World Bank when relations with the Government of Nicaragua were normal. *Nicaragua — The Challenge of Reconstruction* (deposited with the Court). This report indicated growth scenarios for the upcoming years. The question arises as to why the development forecast in that careful study was not achieved.

288. The World Bank was fully aware of the reconstruction policy being carried out since 1979 by the Government and they made explicit reference to the objectives and methods it had set itself. In the synopsis which appears at the beginning of the document it is stated:

> "The behaviour of the economy during the recovery period is analysed, particularly with respect to the development of the major productive sectors, agriculture and industry, and to Government policies regarding money and credit, public finances, investment, and foreign borrowing." (*Ibid.* — see also for example pp. 4 et seq.)

289. Subject to certain adjustments necessitated by the situation of conflict imposed upon it by the United States, the Government of Nicaragua largely adhered to the economic policy envisaged in the report. (See Government of Nicaragua, *Economic Policy Guidelines, 1983-1988*, Fondo Internacional de Reconstruccion, Managua, 1982.) The report also mentions "the less favorable international environment expected for the 1980s" (see *ibid.*, p. 49). The deterioration in the economic climate cannot be held to be responsible for the present situation. The Bank was, moreover, quite aware of the vulnerability of the Nicaraguan economy to external shocks. "... Nicaragua is highly vulnerable to various shocks" (*ibid.*, p. 57). This analysis leads to the inescapable conclusion that it is the unlawful acts of the United States which explain why these forecasts could not be achieved. They are the main variables which the Bank's mission was not able to take into account.

290. Moreover, all economic analyses highlight the role of the hostile acts of the United States in the disappointing performance of Nicaragua's economy. The 1987 ECLAC study of Nicaragua's economy notes:

> "Throughout this report, the effects of the armed conflict during the last few years on the performance of the economy have been shown. Particularly during 1987 its repercussions have been one of the most adverse factors." (Ann. V.1, p. 7.)

The analyses of qualified economists point in the same direction (see, for example, S. Maxfield and R. Stahler-Sholk, "External Constraints" in Th. W. Walker, ed., *Nicaragua — The First Five Years*, 1985, pp. 245-264; or E. V. K. Fitzgerald, "An Evaluation of the Economic Costs to Nicaragua of U.S. Aggression: 1980-1984" in R. J. Spalding, ed., *The Political Economy of Revolutionary Nicaragua*, 1987, pp. 195-213).

291. The Nicaraguan Government does not deny, however, that in recent

years, some other factors have affected Nicaragua's development, but in a much less serious manner. These are principally the natural catastrophes from which the country has suffered, such as floods and drought in 1982. The former were assessed as causing some US$207 million worth of damage to infrastructure and housing (see CEPAL, *Repercusiones de los fenomenos meterologicos de 1982 sobre el desarrollo economico y social de Nicaragua* (E/CEPAL,MEX/1983/L.1), Mexico City, 1983). Nonetheless, the impact of these latter elements upon the Nicaraguan economy — which may be calculated in a reasonably precise manner — although considerable, are in no way comparable with the effects of the wrongful acts that are attributable to the United States. In any case, the method followed below to calculate the losses suffered by the Nicaraguan economy as a consequence of the wrongful acts of the United States is based on the economic results achieved, and thus already takes into account such exogenous factors.

292. In conclusion, the Government of Nicaragua wishes to stress that its demonstration of the existence of a causal relationship between the damage and the internationally wrongful acts committed by the United States is in conformity with the traditional practice of international tribunals.

293. Hence in the *Cape Horn Pigeon* case, Arbitrator Asser observed:

> "... that it suffices to show that *in the natural order of things* one would be able to realize a profit of which one is deprived by the act which gives rise to the claim" (29 November 1902, *RIAA*, X, p. 65 — italics added); see also 30 December 1896, the *Fabiani* case, in La Fontaine, *Pasicrisie internationale*, p. 165; the Tribunal stated that the damage must be valuated according to "*le cours ordinaire des choses*" ["the ordinary course of events"].

294. This was also the attitude of the Permanent Court in the *Chorzów Factory* case. In its Judgment of 13 September 1928, the Court instructed the experts it had designated to envisage "hypothetically but probably" the results that the enterprise would have achieved if "it had been able to continue its *supposedly normal development*" (*1928, P.C.I.J., Series A, No. 17*, p. 52 — italics added).

(b) *The Legal Relevance of Contemporary Economic and Social Trends and Emergent Principles of International Law*

295. However, the interpretation and application of traditional principles of international law

> "... cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover an international instrument [as well as an international rule] has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (I.C.J., Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia ... I.C.J. Reports 1971*, p. 31; see also Advisory Opinion of 16 October 1975, *Western Sahara, I.C.J. Reports 1975*, p. 32).

296. Trends in international law reflecting contemporary political, economic and social changes have strengthened the conclusions in subsection *(a)*, above. First, the inevitable interaction of contemporary economies justifies consideration of the impact of the breaches of law committed by the United States (i); and secondly, the emphasis on development and the new international economic order confirm that the attacks upon Nicaragua's economic and social development potential have to be compensated (ii).

(i) *The interaction of contemporary economies*

297. Traditional jurisprudence takes account of the general economic and social context surrounding the damages for which reparation was requested (see *supra*, paras. 246 et seq.).

298. In the *Chorzów Factory* case, the Permanent Court was mindful that the object of the Geneva Convention of 15 May 1922 concerning Upper Silesia was to ensure "the maintenance of economic life in Upper Silesia" (*1928, P.C.I.J., Series A, No. 17*, p. 47). Such concerns are even more valid when the national economy itself is threatened (see *supra*, para. 265 and Chap. 5, secs. A and B).

299. Today, whatever the nature of the economic and social system — capitalist, socialist or mixed — the State bears responsibility for national economic prosperity. This basic conception which is reflected most prominently in the system of national accounts (see United Nations Statistical Office, *A System of National Accounts: Studies in Methods*, Series F, No. 2, Rev. 3, New York, 1968) necessarily affects the development of the law.

300. Professor Paul Reuter, among others, has applied this idea systematically in the field of international law on State responsibility. Thus, according to this author:

> "Le préjudice de l'Etat et celui du particulier, lorsqu'il s'agissait d'une perte patrimoniale privée, étaient parfaitement distincts à l'époque libérale. Mais la collectivisation des risques par l'assurance facultative, puis obligatoire, patrimoniale puis sociale — les nationalisations l'accroissement massif du prélèvement fiscal sur le revenu national, — toutes les manifestations de la compénétration de la richesse nationale et de la richesse privée, symbolisées techniquement par la comptabilité nationale, ont fait de la fiction une réalite — une perte individuelle est aussi une perte collective et l'Etat est plus encore le représentant de la collectivité nationale que le titulaire de biens propres."[1] (P. Reuter, *La responsabilité internationale*, 1956, p. 110; see also *Droit international public*, 4th ed., 1973, p. 189, and "Le dommage comme condition de la responsabilité internationale", in *Estudios de Derecho Internacional — Homenaje al Profesor Miaja de la Muela*, 1979, Vol. II, 842.)

301. Similarly, in his separate opinion in the *Barcelona Traction, Light and Power Company, Limited*, case, Judge Gros says:

> "[T]he economic world today exhibits phenomena of State intervention in and responsibility for the economic activity of the subject within the national territory or abroad which are so frequent and thoroughgoing that the separation of the interest of the individual from that of the State no longer corresponds to reality." (*I.C.J. Reports 1970*, p. 269.)

302. In modern circumstances, it is proper to take into account all the negative economic consequences caused by the wrongful acts of one of the parties, to the other party. For States, their global economic losses *mutatis mutandis* represent the equivalent of the traditional *lucrum cessans*.

[1] The prejudice of the State and that of the individual, in the case of private loss of assets, were perfectly distinct from one another during the liberal period. However, the collectivisation of risks by optional — then compulsory patrimonial, then social insurance nationalizations — the massive increase of tax levies on national income — all these being signs of the merging of national and private wealth, technically symbolized by national accounts, have turned fiction into reality: an individual loss is also a collective loss and the State is much more the representative of the national community than the owner of its own wealth.

303. These principles have been formally adopted on many occasions in contemporary law.

304. Thus, for example, Article 91 of Additional Protocol No. 1 of 1977 to the Geneva Conventions of 1949 stipulates:

> "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

This provision, which had been the object of an amendment submitted at a late stage by Vietnam at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, should be read in the light of its *travaux préparatoires*.

305. The latter are summarized by Professor Ph. Bretton:

> "Le représentant de la RSVN justifia l'insertion de cette disposition dans le protocole I en faisant valoir qu'elle s'imposait pour réparer les destructions et les dommages résultant des guerres d'agression coloniales et néo-coloniales imposées par l'agresseur sur le territoire même de peuples faibles et mal armés, dans des pays d'Asie, comme ce fut le cas au Vietnam, et dans des pays d'Afrique." [CDDI+/I/SR67, 26 avril 1977, p. 2.] "Du point de vue juridique, il est intéressant de relever que les dommages visés par l'auteur de ce texte comprenaient à la fois les dommages directs *et* les dommages indirects résultant du retard préjudiciable au développement de l'économie nationale." [1] ("L'incidence des guerres contemporaines sur la réaffirmation et sur le développement du droit international humanitaire applicable dans les conflits armés internationaux", *Clunet*, 1978, p. 243.)

306. This text was adopted by consensus both in the Commission and in plenary session, that is without opposition from the United States — which, moreover, also failed to oppose the adoption of resolution 32/3 of the United Nations General Assembly of 14 October 1977 concerning aid for the reconstruction of Vietnam.

307. Thus in the framework of law applicable to international armed conflicts, it is for the whole of the damage caused to the economies of victim States that reparation is due, including that resulting from "prejudicial delay in the development of the national economy".

308. Furthermore, in connection with several recent affairs connected with acts of aggression or unlawful intervention in the domestic affairs of various States, the Security Council set up missions to assess the damage caused by these wrongful acts. In all cases, the damage caused to the development potential of the country concerned has been taken into account by the fact-finding mission, even when the latter had stated its inability to make a precise evaluation of the amount in question when it handed in its report:

— in 1977, the consultant experts designated under resolution 405 of the Security Council to assess damage caused by the attack of 16 January 1977 against

[1] The representative of the SRVN justified the insertion of this provision in Protocol I on the grounds that it was necessary in order to compensate for the destruction and damage caused by colonial and neo-colonial wars imposed by the aggressors on the actual territory of weak and poorly armed peoples, in the countries of Asia, as was the case in Vietnam, and in countries of Africa. Legally speaking, it is interesting to note that the damage referred to by the author of the text includes both direct and indirect damage caused by "the prejudicial delay in the development of the national economy".

Benin took into account the "consequences of the aggression on the national economy" (because of the lost working hours and psychological climate of fear), the threat to the country's development and extra expenditure incurred for security purposes (doc. S/12415, pp. 30 et seq.);

— in 1980, the Special Committee set up under resolution 455 of the Security Council of 23 November 1979, in assessing damage caused to Zambia by the acts of aggression of the Smith régime in Rhodesia, took account not only of material damage and losses connected with exports and imports but also their repercussions on the Zambian economy as a whole (doc. S/13774, in particular p. 35);

— in 1982, the report by the fact-finding Committee which had been set up under resolution 496 (1981) of the Security Council to calculate and assess the economic damage caused by the attacks of mercenaries in the Seychelles Islands was based not only on the cost of rebuilding the airport but also on the reduction in receipts of the tourist industry *and* on the multiplier effect of these losses on the whole of the economy (S/14905/Rev. 1, p. 54 and Ann. IV, pp. 85 et seq.);

— in 1985, the mission sent to Botswana under resolution 568 (1985) of the Security Council referred not only to the loss of human life and personal injuries, and damage caused by South African attacks, but also the cost engendered by the climate of insecurity and additional security expenditure (S/17453, pp. 94 and 99);

— in the same year, the fact-finding Committee set up under resolution 571 (1985) of the Security Council emphasized the damage to the Angolan economy caused by attacks from South Africa (S/17468, p. 134) and the Council demanded that South Africa should make full reparation to Angola (resolution 577 of 6 December 1985). (All relevant documents are deposited with the Court.)

309. These precedents are of obvious relevance in the present context. If the aforementioned interventions and attacks justified the taking into account of damage caused to the economic and social development potential of the victim States, this is *a fortiori* the case in view of the repeated armed attacks and the continuous interference in the domestic affairs of Nicaragua by the United States since 1981.

310. Moreover, in resolution 38/10 of 11 November 1983 concerning "the situation in Central America", the General Assembly

> "3. *Condemns* the acts of aggression against the sovereignty, independence and territorial integrity of the States of the region, which have caused losses in human life and irreparable damage to their economies, thereby preventing them from meeting the economic and social development needs of their people; especially serious in this context are:
>
> *(a)* The attacks launched from outside Nicaragua against that country's strategic installations, such as airports and seaports, energy storage facilities and other targets whose destruction seriously affects the country's economic life and endangers densely populated areas."

311. Thus, in conformity with the practice usually followed by the Security Council in affairs of this kind, the General Assembly, in relation to the case which is now before the Court, expressly considered that the damages suffered by Nicaragua included those which compromise the economic and social development of that country.

(ii) *The impact of international law of development and the requirements of the new international economic order*

312. Among the changes that international law has undergone over the last decades the most marked has probably been the spill-over of development considerations into the legal sphere. As Judge Bedjaoui has written:

> "Over and above the conflict of interests between industrialized States and States of the Third World, there is, all the same, a general agreement of principle between them, although doubtless for different reasons and leading to different action in each of the two groups, that the poor countries must develop, thus giving effect to the United Nations Charter which, already more than 30 years ago, made development an international problem par excellence, of concern for the whole world community." (*For a New International Economic Order*, 1978, p. 138.)

313. In 1970, Judge Jessup had already predicted that ". . . the law of international economic development will mature" (Judgment of 5 February 1970, separate opinion, *I.C.J. Reports 1970*, p. 166). As of now, it may be stated that law has greatly "matured" and it is international law as a whole which has now become impregnated by the concept of a "new international economic order" consecrated by the General Assembly in 1974.

314. Among the principles, adopted by consensus in 1974, on which the new order would be based are the following:

- "The right of every country to adopt the economic and social system that it deems the most appropriate for its own development",
- "Full permanent sovereignty of every State over its natural resources and all economic activities", and
- "The need for developing countries to concentrate all their resources for the cause of development" (United Nations General Assembly, A/RES/3201 (S.VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974, para. 4 *(d)*, *(e)* and *(r)*).

315. These principles, which firmly establish the right and duty of each State to develop freely according to the system it has chosen, are embodied in the Charter of Economic Rights and Duties of States of 12 December 1974.

316. In addition, and this is of particular relevance in the present case, the Declaration on the Establishment of a New International Economic Order proclaims:

> "The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples" (para. 4 *(f)*).

317. It is interesting to note that, in the situations covered by the aforementioned text, it is compensation for damage caused to the economic and social development potential of the countries considered that is demanded.

318. Another pertinent development of contemporary international law is connected with the recognition, for all peoples and human beings of a right to development of which, as spelled out by the General Assembly of the United Nations in the Declaration on the Right to Development of 4 December 1986, the realization

> "... requires full respect for the principles of international law concerning

friendly relations and co-operation among States in accordance with the Charter of the United Nations".

319. As shown by Judge Keba M'Baye, the right to development is not a vague concept *de lege ferenda*. It is, without any possible doubt, part of positive international law (cf. "Le droit au développement comme un droit de l'homme", *H.R. Rev.*, 1972, pp. 503-534; "Le droit au développement" in the Hague Colloquium, 1979, *The Right to Development at the International Level*, 1980, pp. 88s; "Le droit au développement en droit international", *Mel. Lachs*, 1984, pp. 163-177; see also A. Pellet, "Note sur quelques aspects juridiques de la notion de droit au développement", in M. Flory, ed., *La formation des normes en droit international du développement*, 1984, pp. 71-85).

320. In the very recent past a Court of Arbitration consisting of three Judges of this Court gave particular recognition to the right of a people "to a level of economic and social development which fully preserves [its] dignity" (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, 14 February 1985, *ILM*, 1986, Vol. XXV, No. 2, p. 302). Moreover, the Tribunal referred to "the economic preoccupations so legitimately put forward by the Parties" *(ibid.)*.

321. Consequently, any breach of this right calls for reparation. Moreover, whenever a breach of international law has harmed the potential for economic and social development of a State, the damage must be compensated. The wrongdoer is responsible both on account of the initial breach and the breach of the resulting right to development. In cases of this kind, the obligation to make reparation has a two-fold basis.

322. In the present case, the United States has seriously injured Nicaragua's economic and social development potential (see *supra*, para. 231 to 233 and 277 to 290). At the same time, the United States violated Nicaragua's right to development in that it deliberately endangered the

> "... comprehensive economic, social, cultural and poltical process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom" (Declaration on the Right to Development, Preamble, para. 2).

323. The United States obligation to make reparation is based both on breaches of international law attributed to the United States that caused damage to Nicaragua's potential of development, and on the actual existence of that damage, which infringes Nicaragua's right to development.

324. The United States is obliged to make reparation for the harmful consequences of its internationally wrongful acts, including GDP losses and social losses. The most recent principles confirm the conclusions derived from the application of the most traditional rules of *jus gentium* to the subject-matter.

Section B. Reparation Due to Nicaragua

325. As in the case of the other categories of injury to Nicaragua from the internationally wrongful acts of the United States, the cardinal principle is integral and effective reparation of the damage to Nicaragua's development potential (see Chap. 1).

(a) *The General Principles Applicable to the Evaluation of Damage Caused to Nicaragua's Development Potential*

(i) *General considerations on the extent of the damage*

326. As shown in Section A of Chapter 5, the Nicaraguan economy is extremely vulnerable due to its underdevelopment and trade exposure. These structural problems were exacerbated by the costs of fighting the Somoza dictatorship, which bled the country dry *(ibid.)*. The combination of these two factors explains why this country was so susceptible to external shocks (see *ibid.*).

327. Despite these handicaps, the World Bank drew attention to the country's economic potential in its report of 9 October 1981, *The Challenge of Reconstruction*:

> "Nicaragua is favored by a number of conditions conducive to a high rate of economic growth. It has a low population/land ratio and abundant rich volcanic soils, its metal mining potential is good, and the core of the transport infrastructure network is well established." (P. 34.)

328. In 1979, the new government set itself the priority task of reconstructing the national economy with a view to bringing about social justice and by 1980 its efforts began to bear fruit (see Chap. 5, Sec. A).

329. Nevertheless, Nicaragua's development prospects are heavily dependent upon three factors:

— agriculture, which all experts agree is the principal motive force behind growth (see World Bank, *op. cit.*, pp. 34-35);
— guaranteed access to energy, in particular fossil fuel, which is the principal source of electrical energy (see *ibid.*, p. 34);
— transport, including roads in ports and airports, because of the crucial importance for the economy of foreign trade (see Chap. 5, *supra*, Sec. A).

One of the main objectives of the United States military and paramilitary activities was the weakening of these three sectors.

330. This destruction has undermined the country's economic structure. It thus has a long-term effect, and the breaches of international law are still continuing.

331. If, for example, a cornfield is burnt before the crops have been harvested, the crop is lost. This obviously places the farmer and his family in a difficult situation, but the loss of his output and his purchasing power has repercussions on the economic activities of other sectors. Yet, if assistance is given, a crop may be planted and harvested again in the following year.

332. A coffee plantation is more complicated: a coffee shrub produces coffee only after five or six years on average. Thus, after repeated acts of destruction or years of inattention due to fear of being killed, the coffee-grower must abandon his land and take refuge in the towns, where he will join the army of unemployed with all the attendant social and urban problems. The burning of forests has similar results.

333. In the same way, the destruction of a bridge may isolate an agricultural region completely, preventing it from trading in its produce with resulting loss in purchasing power for the peasants, supply difficulties for city dwellers, price increases which are practically impossible to prevent and resulting macroeconomic and social effects.

334. The bombing of an oil plant causes the loss of the oil stored there and the expenditure of additional currency in order to replace it. While it is down,

the electric plant can no longer produce electricity and factories are paralysed, being compelled either to lay off their employees or to pay them for doing no work.

335. In each of these cases the loss for the Nicaraguan economy appears as a decrease in national output (measured as Gross Domestic Product — GDP) and can be analysed as the result of either a decline in export income or an increase of indebtedness. The losses by their very nature are spread over a period of several years. In the opinion of the Nicaraguan Government, there are two main consequences to be drawn from this from the legal point of view.

336. Thus, the losses incurred to date do not represent the appropriate amount of reparation. Unlike material damage *stricto sensu* (see Chap. 2) it is impossible to assess their replacement value. The only possibility is annual calculations of the loss in national income consequent upon the immediate losses from United States unlawful acts, as from 1982 to the present.

337. Secondly, the harmful effects of the wrongful acts of the United States have not ceased. In other words, although there is no doubt whatsoever that the prejudice exists and that it requires compensation, the complete evaluation of that prejudice is, at this stage, extremely difficult (for the conclusion which the Applicant State respectfully draws in this context, see Conclusion, *infra*, paras. 477 to 483).

(ii) *General rules for the evaluation of the prejudice caused to Nicaragua*

338. Any difficulty encountered in determining the amount of compensation should not serve as a pretext to refuse reparation. Otherwise the wrongdoer would be placed in a position of undue advantage.

339. The problem is quite different as regards the two aspects of developmental loss: the reduction in Gross Domestic Product consequent upon production and trade losses on the one hand and the social consequences of attacks and economic sanctions on the other.

340. The first category of such damage may be assessed in a fairly precise manner based on customary methods of econometric calculation. In the case of Nicaragua in particular, such an assessment is greatly facilitated by the macro-economic analysis model developed by the Instituto Latinoamericano de Planificacion Economica y Social (ILPES), a subsidiary body of ECLAC (Ann. IV.4).

341. The macroeconomic methodology summarized in Annex IV.3, for the evaluation of damage caused by the intervention and attacks of the United States (see Ann. IV.2 for an analysis of those consequences) applies the ILPES model in order to examine the negative effect on the economy as a whole of foreign exchange losses in exactly the same way as that in which the positive effect of a foreign loan is conventionally estimated.

342. The social costs of the United States internationally wrongful acts however, require a more specialized estimate. On this point the Nicaraguan Government summarizes relevant data (see Ann. IV.5) and presents the Court with a global estimate that takes into consideration the order of magnitude of the GDP loss.

343. The sum of US$1,190.5 million resulting from the application of the most relevant methodology for damages and production losses represents a strict minimum of the damage.

(b) *The Calculation of the Amount of Compensation*

(i) *GDP loss*

344. The methodology used to calculate damages caused by the United States

wrongful acts to the economy of Nicaragua is explained in Annexes I.2 and IV.3 to the present Memorial and Annex IV.2 applies that methodology. The use of the term "GDP loss" for this loss category refers to the loss of economic development potential in the wider sense. In the technical sense, the validity of the reference to Gross Domestic Product lies in the fact that the loss arises from value-added foregone, and that GDP is the sum of value-added in all the economic activities of an economy (United Nations Statistical Office, *op. cit.*).

345. The guidelines for this methodology are provided by the macroeconomic model of the Nicaraguan economy produced by ILPES (Ann. IV.4), a model which was constructed under a technical assistance programme funded by the United Nations Development Programme (UNDP) to improve the quality of routine economic policy analysis. This model, established in 1987, gives a general framework for analysing the trends of the Nicaraguan economy on the short- and medium-term. The method is based on econometric estimation of the behaviour of the major macroeconomic variables, and endeavours to take into account any relevant variable excluding *ceteris paribus*, the influence of all others (such as natural disasters, world market conditions, quality of economic administration, etc.). The model permits the calculation of the effects of variations in any macroeconomic variable (in this case, foreign exchange income) on GDP. It is similar to those constructed by ILPES for use in other Latin American countries. It has been used here to calculate the macroeconomic consequences of the material damages and production losses deriving from the wrongful acts for which the United States is liable. The results of this valuation are summed up hereinafter.

346. Each year's material damage and losses can be analysed as a foreign exchange loss, either as a decline in export income (in the sense that this production was not available for export), or as an increase of indebtedness (in the sense that Nicaragua was compelled to replace them with fresh imports). In both respects, they have been a burden on the balance of payments current account. Hence, the effects of this constraint on the Nicaraguan economy can be calculated in terms of demand restriction and restrictions on import capacity (see Ann. IV.3, pp. 2-4). The reduced availability of foreign exchange between 1982 and 1987, due to United States military and paramilitary attacks and other wrongful acts of the United States, means that production in all sectors of the economy was affected, and not just those where destruction and imminent production losses occur. In other words, the value which would have been added to the imported raw materials foregone, was not realized. The sum of these annual values added is the GDP loss.

347. The calculations have been made on a yearly basis. The total amount of GDP loss is US$1,582.7 million (see Ann. VI.1, Table 1).

348. This estimate does not contemplate the direct losses from the disarticulation caused by military mobilization and defence costs (see Chap. 4), nor the other measures taken by the Government of the United States such as the cut in sugar quota in 1983 or the financial harassment of Nicaragua by the United States (see Ann. IV.2).

349. Concerning the GDP loss, Nicaragua has used a method of evaluation based on the ILPES macro-economic model which allows the effects of United States aggression alone to be measured, independently both of exogenous phenomena such as natural disasters or climatic conditions, and of endogenous factors such as the economic policies of the Nicaraguan Government. The difference between the ILPES model estimates of GDP loss due to the war are congruent with the difference between the World Bank (1981) and the Interamerican Development Bank (1983) estimates of likely future performance and the actual performance in the context of the war.

350. It is possible to calculate the losses in export income and GDP (proposed as the basis of compensation by Nicaragua) due to United States military and paramilitary attacks and the trade embargo. If these losses are added to the actual record of exports and GDP during the 1982-1987 period, the result is what the Government of Nicaragua holds would have occurred had those illegal actions not taken place. The forecasts of the IBRD *(op. cit.)* and the IDB *(op. cit.)* reproduced in Annex IV.2 might be taken as a reasonable expectation of what would have happened to these variables in the relevant period under "normal" circumstances; but of course did not, due to the attacks. In fact, as Annex IV.2 (Tables 8 and 9) indicates, the results are of a similar order of magnitude.

351. For example, the mean of the IBRD "high" and "low" forecasts for normal circumstances made in 1981 for GDP in 1986 is US$2.59 thousand million; a difference of US$440 million above the GDP figure of US$2.15 thousand million actually achieved for that year. The GDP losses due to damage and production losses as well as the embargo for 1986 are US$529.7 million, a figure of a similar order of magnitude. Another example is the IDB export forecast (made in 1983) of US$719 million for 1986; while the outturn was in fact US$307 million, a difference of US$412 million. This figure is even greater than the production and embargo losses of US$353.1 million claimed by the Government of Nicaragua for 1986.

352. The two methods compared are different in nature. The main one, based on the ILPES model, includes only the losses in economic development potential from the material damages and the losses of production caused by the wrongful acts of the United States. The second method, which consists of a subtraction of the actual GDP from the projections made in 1981 by the World Bank is not selective. It includes all the causes of GDP losses, not only the wrongful acts of the United States, but also the natural catastrophes of 1982 and 1985 and the acts for which the United States has not been declared liable.

353. In the view of the Nicaraguan Government it is preferable to take into account the results given by the first method because it is independent of exogenous effects such as natural disaster. Nevertheless, those deriving from the second method may well be of interest to the Court as they indicate the comparable order of magnitude.

354. Nicaragua thus presents two claims in respect of GDP losses:

(i) The GDP (i.e., value-added) lost as a consequence of the production losses and material damage caused by United States military and paramilitary attacks between 1982 and 1987; which totals (see Ann. VI.1, Table 1) US$1,582.7 million.

(ii) The GDP (i.e., value-added) lost as a consequence of the commercial losses caused by the trade embargo between 1985 and 1987; which totals (see Ann. VI.1, Table 1) US$381.6 million. In combination, these two claims represent a sum of US$1,964.3 million in lost economic development potential. When these losses are brought to their 1988 present value (see Ann. VI.2) they are equivalent to: (i) US$2,058.3 million; and (ii) US$488.1 million, respectively; for a total of US$2,546.4 million.

(ii) *Social losses*

355. All United Nations bodies state that development is not a purely economic matter but "a comprehensive economic, social, cultural and political process"

(cf. A/RES/41/128, 4 December 1986, Declaration on the Right to Development, Preamble, para. 2).

> "[T]he ultimate aim of development is the constant improvement of the social situation of entire populations" (A/RES/41/142, 4 December 1986, *Implementation of the Declaration on Social Progress and Development*; see A/RES/2542 (XXIV), 11 December 1969).

356. There can be no doubt that the wrongful acts of the United States have had, and still have, enormous detrimental effects on the welfare and social progress of the Nicaraguan people. The first priority of the new government after the fall of the Somoza dictatorship was to increase the welfare of the people. The 1980 plan for reactivating the economy puts the emphasis on increasing the standard of living of the Nicaraguan people by meeting their basic needs, such as proper nourishment, healthcare, education, mass transportation and housing:

> "A real possibility will be opened to all Nicaraguans of improving the quality of their lives, through the establishment of a policy which tends to eradicate unemployment and makes effective the right to housing, health, social security, efficient collective transport, education, culture, sport and wholesome entertainment". (Ministerio de Planificacion, *Programa de Reactivacion Economic en Beneficio del Pueblo*, Managua, 1979, p. 106.)

357. During the first three years of the Revolution, these objectives were given high priority. Health and education accounted for 27 per cent of the budget for 1980, and 24 per cent in 1981, compared to 15 per cent in 1987, and encouraging results were obtained: a reduction to 13 per cent of the adult illiteracy rates owing to a massive national literacy campaign in 1980, construction of about 200 new primary schools in 1980-1981, and mass-vaccination and housing campaigns, etc. (see World Bank, *Nicaragua: The Challenge of Reconstruction*, Ann. X, pp. 32-33).

358. Although the Nicaraguan Government has maintained this social priority, the policy has been compromised by the wrongful acts of the United States. Not only have the rise in levels of social welfare attained in several fields not been maintained, but a certain regression has been registered. First, the destruction and production losses caused by the United States has reduced incomes generally. Between 1983 and 1987 *per capita* GDP has declined by 19 per cent and civilian government expenditure has fallen, which has inevitably affected nutrition and health, particularly that of children. (See Ann. IV.5.) Secondly, the trade embargo denied spare parts and foreign exchange to social service facilities and reduced their capacity to serve the population. This effect has been aggravated because the United States military and paramilitary activity has concentrated (see Chap. 5, Sec. A) its attacks on targets having especially strong social effects: destruction of harvests or schools, murders of teachers or of doctors and nurses.

359. Annex IV.5 to the Memorial describes some of the social consequences of the wrongful acts of the United States. The social data presented in the next paragraphs are taken from official Nicaraguan Government statistics (see Instituto Nacional de Estadistica y Censos, *Anuario Estadistico 1978* and *Anuario Estadistico 1986*).

360. *Health:* Since 1980, two hospitals have been built; 417 new primary care posts have been created; the number of doctors has increased by 58 per cent, the number of nurses by 211 per cent; infant mortality had been reduced from 120 per thousand to 75 per thousand; and poliomyelitis has been eradicated; etc.

361. However, since 1983 it has become increasingly difficult to meet the needs

of the population. The total losses of healthcare units amount to US$2.8 million, 60 doctors and 22 nurses have been murdered, kidnapped or wounded. Malnutrition has increased among the peasant population, especially children. The incidence of measles has risen throughout the country and, in the war zones, malaria has risen by 17 per cent.

362. *Education:* Between 1979 and 1983, in addition to the literacy campaign referred to above, the number of primary schools rose from 9,986 to 16,382 and enrolment from 369,000 to 565,000. Secondary enrolment rose from 98,874 to 158,215.

363. During the period 1984-1987, 67 schools were partially or totally destroyed at a cost of US$1.2 million, and 60,240 primary school students and 30,120 participants in adult education have been affected by the closure of 620 schools and 840 adult education collectives in the war zones. One hundred and ninety-eight teachers and 704 students have been murdered, kidnapped or wounded and the teaching personnel has declined. The school attendance rate has decreased while the illiteracy rate has risen again to over 24 per cent.

364. *Social Security and Welfare:* Before 1979, social security coverage had been limited to a small urban minority; but by 1986 over 358,000 families, about half the total population, enjoyed this coverage which was expanded in the cities and to the rural areas. Some 203 special attention centres had been established to attend to homeless children, the mentally handicapped and old people. Special schemes had been established to reintegrate discharged prisoners, prostitutes, etc., into society.

365. Between 1982 and 1987, the wrongful acts of the United States have damaged installations providing social services to the population to a cost of more than US$600,000. Due to the war, one-quarter of a million persons (7 per cent of the population) have been displaced; 11,241 children have been orphaned; thousands of families have been deprived of income because of the death of the head of the family; more than 4,000 persons handicapped by the war are dependent for their survival on government assistance over the long-term. The government has been obliged to allocate large amounts of money to the care of refugees and aiding the victims of the war. These financial expenses amount at least to US$31,159,239 in the period 1982-1987.

366. *Labour:* The workforce (Economically Active Population) of Nicaragua is of the order of 1 million persons, of whom about one-half are occupied in agricultural pursuits. Those in permanent employment received considerable increases in social benefit and a betterment of working conditions after 1979; while the self-employed gained access to land under the Agrarian Reform or were organized in small industrial cooperatives.

367. The United States military and paramilitary activities have seriously affected the labour situation in the country. Thousands of young men and women who would have formed part of the working population have been mobilized. Starting in 1985, a relative lack of labour power has begun to be felt in the formal sector of the economy. The situation is aggravated by the migration of 9,575 qualified professionals between 1979 and 1986, frightened by the situation created by the United States.

368. *Housing:* Before 1979, Nicaragua faced a dramatic situation in housing: the majority of the population lived in unhealthy houses with no electricity or running water. Between 1980 and 1986 some 7,000 houses a year have been built by the government, and many more families have benefited from "site and service" schemes providing sanitation and electricity. By 1986, 51 per cent of the population had access to potable water and 45 per cent to electric power; roughly double the proportions ten years earlier.

369. Between 1980 and 1987, more than 2,300 houses have been destroyed at

an estimated cost of US$13.2 million and tens of thousands of peasant families have been compelled to abandon their homes. Due to the war effort, housing construction cannot even keep up with population growth.

370. *Roads and mass transportation:* Improving the means of transport is an essential factor for raising the quality of life and standard of living. One thousand, two hundred and nineteen kilometers of new roads and 20 bridges were built between 1980 and 1986. In the same time the *contras* have destroyed 32 bridges (at a cost of US$1.5 million) and impeded the planned construction of hundreds of kilometers of new roads.

371. The cost of the purely material damage described above — destruction of healthcare facilities, of schools, of houses or of bridges — has already been included in the total cost of material damage (see Chap. 2). But, the social losses arising from the loss of these facilities are infinitely more difficult to evaluate with certainty.

372. In some cases a figure can be put on part of the cost of compensating the population. Thus it is estimated that the Nicaraguan Government has invested more than US$31 million in buying land, extending credit, building houses, health and education facilities, providing food and other social services, etc., for people displaced as a result of the war. But for most of these social losses, estimation is very difficult, but it is of the same order of magnitude of the closely related losses of economic potential. Therefore, the Court is requested to award Nicaragua a lump-sum of US$2,000 million as appropriate compensation for the enormous social losses it has suffered due to the wrongful acts of the United States.

Conclusion

373. As stated by the Court in its Judgment of 27 June 1986, "in a situation of armed conflict (...) no reparation can efface the results of conduct" contrary to international law (*I.C.J. Reports 1986*, p. 144). It is important that even if the reparation cannot "wipe out all the consequences of the illegal act" (*1928, P.C.I.J., Series A, No. 17*, p. 47) it should meet this objective as far as possible. And this is particularly true in a case of flagrant and persistent misconduct by the wrongdoing State.

374. The sums presented in this chapter represent only a minimum.

375. The GDP losses have been calculated in accordance with an internationally recognized method, on the basis of rigorous and objective data. Thus the amount of reparation owed by the United States on account of loss of development potential which their internationally wrongful acts have brought about for Nicaragua represents a minimum net present value GDP loss of US$2,546.4 million actualized to 1988. (See Ann. VI.2 for calculation.)

376. Similarly, as precise a description as possible has been given *supra* of the social losses brought about by the internationally wrongful acts of the United States. Given that these are of the same order of magnitude of the current GDP losses, the sum of US$2,000 million is claimed for the people of Nicaragua whose development potential has been seriously affected by United States military and paramilitary activities.

CHAPTER 7

REPARATION FOR THE VIOLATIONS OF THE SOVEREIGNTY OF NICARAGUA

A. Introduction: the Relevant Findings

377. Two of the findings which form part of the Dispositif of the Judgment on the Merits in the present proceedings relate expressly to the breach of the obligation under customary international law "not to violate the sovereignty of another State". These are the decisions in subparagraphs 5 and 6 of the Dispositif concerning overflights of Nicaraguan territory and the laying of mines in the internal or territorial waters of Nicaragua during the first months of 1984. In addition, subparagraph 5 includes violations of sovereignty caused "by the acts imputable to the United States referred to in subparagraph (4) hereof".

378. It is a truism that a Dispositif should be interpreted in the light of the Judgment as a whole, and in the present connection the significance of the Dispositif is clarified by the following passages from the Judgment:

> "251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the *contras*, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).
>
> 252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take countermeasures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law." (*I.C.J. Reports 1986*, p. 128.)

379. In the light of the passages quoted above, the content of the Dispositif,

and the submissions of the Applicant State both in the Memorial and in the oral hearings, the United States has been found responsible for four distinct types of violation of the territorial sovereignty of Nicaragua. Whilst there is some overlap, in substance the violations generate four distinct forms of State responsibility relating to distinct causes of action (or heads of liability) and distinct aspects of the conduct of the United States.

B. The Mode of Reparation

380. In the case of what is sometimes called "moral injury" to the personality of the State the appropriate mode of reparation is usually described in the literature as "satisfaction". This may take one or more forms, including the presentation of official regrets and the punishment of the guilty officials: see, for example, Rousseau, *Droit international public*, V, Paris, 1983, pages 218-219, paragraphs 218-219; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, Paris, 1987, page 710, paragraph 508. Moreover, it is often pointed out that a mere judicial declaration of responsibility may play the role of "satisfaction", as in the *Corfu Channel* (Merits) case (*I.C.J. Reports 1949*, p. 4 at pp. 35, 36).

381. These elements will be familiar to the Court and the purpose of this pleading is not to rehearse the standard materials but respectfully to offer an important elucidation. On occasion the literature appears to exclude pecuniary reparation from the list of available forms of satisfaction; cf. Jiménez de Aréchaga in Sørensen (ed.), *Manual of Public International Law*, London, 1968, page 572; Przetacznik, *Revue générale de droit international public*, Volume 78 (1974), pages 945-973. Such a position would surely be incompatible with sound legal principle and ordinary common sense. No doubt the forms of satisfaction *normally applicable* in negotiated bilateral settlements in respect of "moral damage" do not involve pecuniary reparation. But there are good reasons for this when the wrong is of a highly symbolic character (for example, an insult to the flag) and the reparation itself is appropriately symbolic.

382. The present case, however, is significantly different. The process of reparation is taking place within the framework of an adjudication, and the wrongs complained of fall within well-known causes of action which were specifically pleaded by the Applicant State and were the subjects of specific findings by the Court. As wrongs, they generate liability without proof of special damage, but as a matter of remedies they are eminently suitable for reparation by means of an appropriate pecuniary award.

383. The possibility of awarding pecuniary satisfaction for violations of sovereignty is not restricted in any way as a consequence of the decision of the Court in the *Corfu Channel* (Merits) case. In that case the Court, having held that the action of the British Navy known as "Operation Retail" constituted a violation of Albanian sovereignty, stated that: "This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction." (*I.C.J. Reports 1949*, p. 35; and see also *ibid.*, pp. 25-26.) The Court does not address itself to the question whether pecuniary reparation would be available in principle. However, the precise basis of decision is the fact that Albania had not claimed any sum of money, as the text of the Judgment makes clear:

> "The Albanian Government has not disputed the competence of the Court to decide what kind of *satisfaction* is due under this part of the Agreement. The case was argued on behalf of both Parties on the basis that this question

should be decided by the Court. In the written pleadings, the Albanian Government contended that it was entitled to apologies. During the oral proceedings, Counsel for Albania discussed the question whether a pecuniary satisfaction was due. As no damage was caused, he did not claim any sum of money. He concluded *[translation]*: 'What we desire is the declaration of the Court from a legal point of view . . .'." (*I.C.J. Reports 1949*, pp. 25-26.)

384. A further consideration is the extreme improbability of the view that the law recognizes the award of moral damages exclusively as *accessory* to other damages (as in the *I'm Alone* case, *Reports of International Arbitral Awards*, III, p. 1609, at p. 1618), but does not accept the award of pecuniary reparation as the *principal form* of compensation for serious breaches of fundamental principles of customary international law. Indeed, most of the doctrinal opinion assumes that the forms of satisfaction include the payment of money: see Johnson, *British Year Book of International Law*, Volume 29 (1952), page 493; O'Connell, *International Law*, 2nd edition, London, 1970, pages 1114-1117; Rousseau, *Droit international public*, V, Paris, 1983, pages 219-220, paragraph 219; Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 75; Brownlie, *Principles of Public International Law*, 3rd edition, 1979, page 461.

385. The ruling of the Secretary-General of the United Nations in the *Rainbow Warrior Affair (New Zealand* v. *France)* provides substantial support for the view that pecuniary compensation is an appropriate remedy for gross violation of the territorial sovereignty of a State: for the text see E. Lauterpacht, Q.C. (ed.), *International Law Reports*, Volume 74, page 256 (Ruling dated 6 July 1986). The circumstances are well known and all the essential facts were admitted by the French Government. Both Parties agreed to ask the Secretary-General for a ruling on their differences. In its Memorandum New Zealand claimed "compensation for the violation of sovereignty and the affront and insult that that involved" (*ibid.*, p. 259). This claim was separate from a claim in respect of cost resulting from France's unlawful acts. In response to the claims for compensation the Ruling of the Secretary-General awarded New Zealand US$7 million "as compensation for all the damage it has suffered" (*ibid.*, p. 271), and it is obvious that this finding was not confined to one particular aspect of the claim for compensation.

386. Thus the submission of the Government of Nicaragua is that the appropriate mode of reparation should be the grant of pecuniary satisfaction and that this submission is fully in accordance with the standards of contemporary international law and practice.

C. The Claim for the Four Forms of Violation of the Sovereignty of Nicaragua

387. The Judgment of the Court on the Merits has identified four distinct forms of violation of the sovereignty of Nicaragua: the conduct constituting breach of the obligation not to intervene in the affairs of another State (see the Judgment, para. 251), the conduct in breach of the obligation not to use force against another State (Dispositif, subpara. 5 referring to subpara. 4), the directing or authorizing of overflights of Nicaraguan territory (Dispositif, subpara. 5), and the laying of mines in the internal or territorial waters of Nicaragua during the first months of 1984 (Dispositif, subpara. 6).

388. These findings identify and are based upon four distinct causes of action. The literature of the law recognizes the significance of the separate causes of action in the context of State responsibility: see Jennings, 121 *Recueil des cours*,

(1967-II), pages 507-509; Jennings also in Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 1986, page 326; Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, 1983, pages 53-85. This approach reflects the practice of States in formulating Applications before the Court and the related submissions. Thus in the *Nuclear Tests* cases Australia claimed that three separate categories of rights had been violated by France's conduct of nuclear atmospheric tests in the South Pacific region (and that these rights were subject to legal vindication independently of material damage): see *I.C.J. Reports 1974*, pages 360-362, paragraphs 101-102 (joint dissenting opinion).

389. Moreover, in this same connection the Court is respectfully reminded that, in a joint dissenting opinion, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock recognized (at least on a *prima facie* basis and for purposes of admissibility) that each separate claim engaged a distinct issue involving the question of "legal interest" and the content of a particular rule of customary international law: see *I.C.J. Reports 1974*, pages 363-371, paragraphs 105-118. A similar position was taken by the same Judges in the case of *New Zealand* v. *France*, *I.C.J. Reports 1974*, pages 519-522, paragraphs 48-54.

390. In the submission of the Government of Nicaragua, the liability of the Respondent State is generated independently by each of the four causes of action concerning the violation of its sovereignty. Each cause of action relates to a substantially distinct type of misconduct and the liability is therefore cumulative. On this legal basis, Nicaragua claims symbolic pecuniary compensation for each of the four distinct forms of violation of its sovereignty. This claim is presented without prejudice to the claims contained in the present Memorial relating to loss of life, personal injuries, destruction of and damage to property and other losses caused to the economy of Nicaragua, resulting from the violations of customary international law and from breaches of the obligations under the Treaty of Friendship, Commerce and Navigation signed on 21 January 1956. The claim respecting violation of Nicaragua's sovereignty is equally without prejudice to the general claim for compensation concerning moral damage, which claim is accessory to the claims for material damage (see Chap. 8 below).

391. In the submission of the Government of Nicaragua the quantum of the pecuniary satisfaction should be the product of the most logical standard of justice available, that is to say, the actual or approximate expenditure by the United States entailed by the actual operations which in each of the four cases of violation respectively contribute to the violation, or pattern of violations, of Nicaraguan sovereignty. This standard has the several attractions that it involves a neat measure of violation of sovereignty, that it is just that the quantum of wrongdoing be related to the effort expended by the wrongdoer conveniently expressed in money terms, and that the type of operation is not necessarily the same in each case and any actual difference will be reflected in the relevant expenditure.

392. This standard of justice can be applied to the four forms of violation of sovereignty as follows. In the case of the violations resulting from breaches of the principle of non-intervention the expenditure entailed by the actual operations which constituted the breaches depended upon the appropriations made in accordance with the plans and policies of the United States Government. In the material period these appropriations total $222.7[1] million (see Ann. VIII, p. 3,

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[1] This figure does not include an additional US$36.7 million raised from private sources and other countries with United States National Security Council intermediation or the funds included in this amount, product of arms sales to Iran. (See Ann. VIII, p. 3, and Ann. X, pp. 45-46.)

and Ann. X, pp. 45-46) and therefore this sum is the product of the most logical standard of justice in respect of this type of violation of sovereignty.

393. The second category of violations of sovereignty consists of the seven episodes involving direct action of United States personnel: see the Judgment on the Merits, *I.C.J. Reports 1986*, pages 48-51, paragraphs 81-86. The seven episodes in respect of which the United States has been held liable are as follows:

> "(i) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
> (ii) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
> (iii) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
> (iv) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
> (v) 7 March 1984: an attack was made on the oil and storage facility at San Juan del Sur by speedboats and helicopters;
> (vi) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
> (vii) 9 April 1984: a helicopter launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte."

394. The Judgment on the Merits contains the following description of the *modus operandi* according to which these specific attacks were conducted:

> "The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A 'mother ship' was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by 'UCLAs'. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the 'UCLAs', while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established." (*I.C.J. Reports 1986*, pp. 50-51, para. 86.)

395. As the Court will understand, it is not possible to produce evidence of the actual cost of these operations, but a reasonable estimate based upon this description of the *modus operandi* would be US$10 million. This figure represents the following assumptions:

(a) The cost of seven individual operations at US$250,000 each.
(b) The cost of the logistical background and lead time operations which would be the necessary incidents of these attacks, which cost is estimated at US$8.25 million.

396. The third category of violations of sovereignty was the laying of mines over a period of months: see the Judgment on the Merits, *I.C.J. Reports 1986*, pages 46-48, paragraphs 76-80. The process of estimation in this instance must be a matter of impression and a reasonable figure would be US$5 million.

397. The fourth and last category of violations of sovereignty is by no means the least significant. The type of activity which the infringement of airspace involves in the present case goes far beyond a technical infringement of sovereignty. The purposes of the flights (Judgment on the Merits, *I.C.J. Reports 1986*, pp. 51-53, paras. 87-91) were partly for logistical support[1], partly for reconnaissance[2] and partly for intimidation, for example, by means of sonic booms. Such operations thus form an integral part of the orchestra consisting of different instruments of coercion and aggression and their attendant paraphernalia. A pattern of such operations constitutes a gross violation of the sovereignty of Nicaragua.

398. In the nature of things the costs of aerial reconnaissance of the sophisticated type employed against Nicaragua are very considerable. Nicaragua estimates that at least 10 per cent of the total cost of United States military and paramilitary activities consists of intelligence information gathered through aerial reconnaissance of Nicaraguan territory. That thus amounts to an average of US$138.5 million per year for a total of US$831 million in the period 1982-1987.

399. In conclusion, the Government of Nicaragua wishes to emphasize the circumstances which point to the particular propriety of pecuniary reparation for the violations of sovereignty perpetrated by the United States and its agents. These violations have formed a set of persistent courses or patterns of conduct: they do not represent merely technical violations of the sovereignty of Nicaragua. Moreover, the United States has on numerous occasions expressed its intention to intervene in the affairs of Nicaragua for various purposes of national policy, none of which has been recognized by the Court as a justification for the conduct concerned. Pecuniary satisfaction would reflect the significant legal interest which Nicaragua has in freedom from intervention, freedom from armed attacks, freedom from aerial trespass and freedom from the mining of her harbours and sea lanes, all of which represent legal interests of the type insisted upon by the Governments of Australia and New Zealand in their pleadings in the *Nuclear Tests* cases.

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[1] The United States Congressional Committees investigating the Iran-Contra Affair (H. Rep. No. 100-433 and S. Rep. No. 100-216) report 110 logistical overflights in the period 23 March-6 October 1986 alone. (See Ann. X, Attachment A, pp. 79-81.)

[2] Nicaragua has documented 1,796 reconnaissance flights in the period 1981-1988 (see Ann. VIII, p. 18).

CHAPTER 8

MORAL DAMAGE: THE GENERAL CLAIM FOR ACCESSORY COMPENSATION

A. Introduction

400. In the previous chapter of the Memorial the Government of Nicaragua presented its claims in respect of violations of sovereignty in terms of a request for pecuniary satisfaction as the principal form of reparation for those violations of obligations arising from customary international law. However, in the circumstances of the present case, and given the nature of the wrongful acts for which the United States has been held liable, the Government of Nicaragua requests the Court to assess an appropriate sum as additional amends, that is to say, as compensation accessory to the compensation for loss of life, personal injuries, material damage and loss to the economy of Nicaragua, resulting from the activities of the United States and its agents.

B. Accessory Compensation for Moral Damage: the Principle

401. The principle that compensation may be awarded as a form of reparation for moral damage is recognized by authoritative opinion: see Rousseau, *Droit international public*, V, Paris, 1983, pages 226-227, paragraph 225; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, pages 761-762; and Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Paris, 1938, pages 210-212.

402. The principle has also been recognized in several major episodes of dispute settlement. Thus in the *I'm Alone* case the Canadian Government complained of the sinking on the high seas of a liquor-smuggling vessel of Canadian registration by a United States coastguard vessel, as a climax to a hot pursuit which commenced outside United States territorial waters but within the inspection zone provided for in the "Liquor Treaty" between Great Britain and the United States. The Canadian claim was referred to Commissioners appointed under the Convention concerned, and in their final report the following appears:

> "We find as a fact that, from September, 1928, down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned ... The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.
>
> The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge the illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the

United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly." (*Reports of International Arbitral Awards*, III, p. 1609 at pp. 1617-1618.)

C. Acceptance of the Principle of Compensation for Moral Damage by the United States Government

403. It comes as no surprise that the element of compensation for "moral damage" is recognized in the practice of States, and, in particular, in the two United States Department of State compilations of practice: see Hackworth, *Digest of International Law*, II, U.S.G.P.O., Washington, 1941 (Department of State Publication 1521), pages 703-708; and Whiteman, *Digest of International Law*, Volume 8, U.S.G.P.O. (released December 1967) (Department of State Publication 8290), pages 1212-1214, which incorporate the decision of the Commissioners in the *I'm Alone* case. In addition it is to be recalled that Whiteman, *Damages in International Law*, Volume II, U.S.G.P.O., Washington, 1937, pages 1372-1376, incorporates the text of the report of the Commission appointed by the Council of the League of Nations to carry out an investigation of the Greek-Bulgarian frontier incident of 1925. The Report, dated 28 November 1925, makes recommendations regarding reparation to be made, *inter alia*, for "moral damage".

404. Again in the *Aerial Incident* case the United States claim against Bulgaria, as carefully formulated in its Memorial (pp. 246-248), included a claim for the illegality and wanton breach of international standards. The Memorial relies, *inter alia*, upon the Final Report of the Commissioners in the *I'm Alone* case.

The key passages in the United States Memorial are as follows (at p. 246):

> "2. On the subject of additional amends, of which the United States gave notice in its Application, paragraph 3, the United States Government respectfully submits that the Court should grant an additional judgment to the United States Government for $100,000 for the additional wrongs wantonly committed by the Bulgarian Government; that is, other than those committed against the next of kin whose monetary claims for compensatory damages have been espoused by the United States. For if we were to follow only the compensatory theory of civil damages in general, we might conceivably reach a point where no damages would be payable though treacherous murders were committed internationally by one government on the nationals of another government. Additional amends to the injured government are therefore desirable and even necessary.
>
> International law authorities have recognized the existence of this problem (see, for example, the reservation to judgment of Judge Parker in the *Lusitania* case which is cited by the Memorial of the Government of Israel in the parallel case, paragraph 104, page 108, last sentence).
>
> On the issue of damages the applicable case is, therefore, the *I'm Alone* case, which is discussed in Volume I, Whiteman's *Damages in Internatinal Law* (1937), pages 151-157, 717. In that case the commission, consisting of Mr. Justice Van Devanter of the United States Supreme Court and Duff, Canadian Commissioner, ruled that the United States should pay, in addition to individual sums for the sinking of a rum-runner of Canadian registry as compensation to the members of the crew who were not parties to the illegal conspiracy to smuggle liquor into the United States, a sum of $25,000 to

the Canadian Government in addition to apologizing to that Government for the intentional sinking of the suspected vessel. The commission said that:

'... the sinking could not be justified by any principle of international law ... The act of sinking the ship ... by officers of the United States Coast Guard, was ... an unlawful act';

and the commissioners considered that the United States ought:

'... formally to acknowledge its illegality and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.' (Whiteman, page 157.)

It is noted that in the *Imbrie* case against Persia, the United States took a similar view (see Whiteman, Volume I, page 732).

Courts have long recognized that there are situations in which no showing of monetary loss need be made to justify a monetary award. The relevance of the domestic Anglo-American law on defamation is an example. As is well known, injury to reputation does not need to be proved to the penny and juries and courts are permitted to award substantial damages without a showing of actual injury. The damage inflicted on the United States and the American people is obviously greater than the damage to an individual.

The case presented in this Memorial is not simply a civil problem of claims of American nationals. The whole problem of the freedom of the air and the safety of the nationals of all governments from murderous attack by the government of overflown terrain is involved. The problem presented transcends the individual 4X-AKC.

The principle that a government is liable for its torts, both for those committed against the nationals of other governments and those against other governments themselves, is clear ..." (*I.C.J. Pleadings, Aerial Incident*, pp. 246-247.)

405. In the *Aerial Incident* case the United States Memorial concluded with a special claim of $200,000 to cover the delictual elements, in addition to the awards of "monetary damages for the account of the next of kin of the American passengers". (*Ibid.*, p. 248.)

406. These materials demonstrate beyond any reasonable doubt that the United States Government has accepted the principle that compensation is an appropriate form of reparation in cases of so-called "moral damage" to the claimant State. Moreover, the principle is recognized as being applicable precisely in the situation in which the moral damage forms an aspect of conduct involving material harm and consequently the compensation for moral damage is in a sense accessory to the claim for deaths, personal injuries and material losses.

D. The Connection between the Findings on the Merits, Obligations *Erga Omnes*, and Norms of *Jus Cogens*

407. The propriety of reparation for moral damage in the present proceedings is confirmed by the particular character of the legal norms involved in the principal findings of the Court on the Merits. The findings in subparagraphs 3 and 4 of the Dispositif of the Judgment on the Merits relate directly to obligations *erga omnes*. This type of obligation was profiled in a passage in the Judgment of the Court in the *Barcelona Traction* case thus:

> "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, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character." (*I.C.J. Reports 1970*, p. 32.)

The Court is respectfully reminded that the majority Judgment in the *Barcelona Traction* case had the support of 12 Judges.

408. The concept of obligations valid *erga omnes* has broad support from authoritative opinion: see, for example, Mosler, *The International Society as a Legal Community*, Alphen aan den Rijn, 1980, pages 19-20, 134-136. The concept is for most practical purposes identical to that of *jus cogens*, a concept which has received widespread recognition from authoritative opinion. The evidence of such general acceptance is by no means confined to the well-known provisions in Articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties concluded in 1969. As long ago as 1957 Sir Gerald Fitzmaurice, in his lectures at the Hague Academy, referred to:

> "... certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of *jus cogens* — that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*." (92 *Recueil des cours* (1957-II), p. 120; and see also at pp. 122, 125.)

409. The extensive acceptance given to the concept of *jus cogens* by the most highly qualified publicists of the various nations is amply evidenced by the following sources: Fitzmaurice, *British Year Book of International Law*, Volume 59 (1959), pages 224-225 (also published in Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, pp. 626-627); McNair, *The Law of Treaties*, Oxford, 1961, pages 213-215; Waldock (Special Rapporteur of the International Law Commission), Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1963, II, pages 52-53, paragraphs 1-6; Quadri, 113 *Recueil des cours* (1964-III), pages 335-338; Jennings, *Cambridge Essays in International Law*, London, 1965, pages 73-74; Verdross, *American Journal of International Law*, Volume 60 (1966), pages 55-63; Morelli, *Rivista di diritto internazionale*, Volume 51 (1968), pages 108-117; Judge

Ammoun, separate opinion in the *Barcelona Traction* case, *I.C.J. Reports 1970*, page 304; Ago, 134 *Recueil des cours* (1971-III), page 324 (note 37); Tunkin, *Theory of International Law*, London, 1974, pages 147-160; Ago (Special Rapporteur of the International Law Commission), *Yearbook of the International Law Commission*, 1976, II (Part One), pages 31-32, paragraphs 98-99; Jiménez de Aréchaga, 159 *Recueil des cours*, Volume 159 (1978-I), pages 62-68; Podesta Costa and Ruda, *Derecho Internacional Publico*, 5th edition, 1979, I, page 30; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, Paris, 1987, pages 107, 185-191; and the Counter-Memorial submitted by the United States in the Jurisdiction phase of the present case, dated 17 August 1984, **II**, pages 94-95, paragraph 314.

410. In brief, the concept of *erga omnes* obligations and its close relation *jus cogens* stand for the *ordre public* of the international community, and the award of reparation for moral damage would give substance to this *ordre public* and thus fall well within the bounds of the judicial function and considerations of judicial propriety.

411. For there can be no doubt, in the submission of the Government of Nicaragua, that the preponderance of the activities for which the United States has been held to bear responsibility fall within the category of norms of *jus cogens*. The subject-matter of *jus cogens* was summarized by Judge Ago in his lectures at the Hague Academy in 1971 thus:

> "If one examines carefully the opinions expressed in the International Law Commission and, more generally, in the writings of jurists, one becomes aware that a certain unity of views exists with regard to the determination of the rules which the consciousness of the world regards today as rules of *jus cogens*. These include the fundamental rules concerning the safeguarding of peace, in particular those which prohibit any recourse to the use or threat of force, fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and of war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (the high seas, outer space, etc.)." (134 *Recueil des cours* (1971-III), p. 324, note 37; reproduced in English translation, *Yearbook of the International Law Commission*, 1976, II (Part One), p. 32, note 148.)

412. The law of the Charter of the United Nations concerning the use of force is always recognized as forming part of *jus cogens*: see President Waldock, *Yearbook of the International Law Commission*, 1963, II, page 52, paragraph 1; President Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 64. Moreover, Judge Ago's formulation (quoted in the previous paragraph) includes not only the "fundamental rules" relating to the use or threat of force but also "the rules prohibiting any infringement of the independence and sovereign equality of States", and this expression may be reasonably understood to extend to violations of the obligation under customary international law not to intervene in the affairs of another State, whether or not such violations involve the use or threat of force.

413. In any case, in a context which prefigured the appearance of *jus cogens* as such, the Court has characterized resort to forcible intervention in the following terms:

> "The Court can only regard the alleged right of intervention as the

manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." (*Corfu Channel* (Merits), *I.C.J. Reports 1949*, p. 35.)

E. The Particular Elements of Affront to International Public Order

414. The elements of moral damage will naturally vary considerably from case to case according to the circumstances and the identification of the elements relevant to a particular case must be a matter of appreciation. However, the process of weighing up the elements of moral damage is by no means unstructured, and must reflect the relevant precedents and known criteria of contemporary international public policy.

(i) *The Connection between the Activities of the United States and Norms of* Jus Cogens

415. The Government of Nicaragua has already emphasized that the preponderance of the activities for which the United States has been held to bear responsibility fall within the category of norms of *jus cogens*.

(ii) *The Overall Intention and Policy of the United States Government*

416. The particular nature of the overall intention and policy of the United States Government is of the greatest relevance for present purposes. The real nature of that policy was represented in the evidence set forth in the Memorial of Nicaragua in the Merits phase of these proceedings. As a consequence of the Iran-Contra hearings, the full nature and extent of the United States policy aims and cynical indifference to the standards of international law and morality are now matters of public knowledge (see Ann. X, Attachments A-D). The circumstances of United States armed aggression and its persistent campaign of intervention are such that there is a total absence of any data which might be relevant to either justification or mitigation. In short, the policies and the modes of implementation adopted were not only illegal *sub modo* but were also illegal *ab initio* and *ipso facto*.

(iii) *The Seriousness of the Breaches*

417. On a previous occasion the Court found it necessary to emphasize "the extent and seriousness of the conflict between the conduct of [the Respondent State] and its obligations ...": see the Judgment in the case concerning *United States Diplomatic Consular Staff in Tehran, I.C.J. Reports 1980*, page 42, paragraph 91. In the same context the Court found itself "obliged to stress the 'cumulative effect' of the Respondent State's breaches when taken together" *(ibid.)*. These characterizations apply with no less justice to the conduct of the United States as described in the body of the Judgment on the Merits and as reflected in the impressive succession of findings in the Dispositif.

(iv) *Cynical Disregard of the Obligations of the Treaty of Friendship, Commerce and Navigation of 1956*

418. In subparagraphs 10 and 11 of the Dispositif of the Judgment on the

Merits the Court deals in its findings with specific conduct of the United States involving breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956, and calculated to deprive that instrument of its object and purpose. The issues of reparation arising from the general embargo on trade and other specific acts of the Respondent State have been examined elsewhere in the Memorial (see Chaps. 3 and 5). However, in the opinion of the Government of Nicaragua, the deliberate and totally unjustified breaches of a treaty of friendship provide an independent basis for a claim for pecuniary satisfaction by way of reparation for a form of moral damage.

419. The calculated disregard of the provisions of a Treaty of Friendship, Commerce and Navigation, involving the laying of mines in the approaches to Nicaraguan ports is *par excellence* a type of moral damage. As the Court indicates in its Judgment on the Merits (*I.C.J. Reports 1986*, p. 138, paras. 275-276) the breaches of the Treaty involved direct attacks on ports and other targets, the mining of Nicaraguan ports and acts of economic presure. The view of the Court is clearly expressed: the conduct of the Respondent State was in this respect "flagrantly in contradiction with the purpose of the Treaty" (*ibid.*, para. 276).

(v) *Intimidation as an Instrument of National Policy*

420. The most striking feature of this case is the persistent policy of the Government of the United States to coerce the Government of Nicaragua into an acceptance of its political demands. The present proceedings are focused primarily upon intervention and the use of force as instruments of national policy. In its Judgment on the merits the Court has taken care to emphasize that no "general right of intervention, in support of an opposition within another State, exists in contemporary international law": see *I.C.J. Reports 1986*, pages 108-109, paragraphs 206-209; and, in particular, page 109, paragraph 209. Moreover, the Court has pointed out that the United States has not claimed that its intervention is justified on the legal plane: see *ibid.*, paragraphs 207-208.

421. Thus the policy aim of the United States (the coercion of the Government of Nicaragua as an instrument of national policy), the attitude of the Government of the United States (a cynical indifference to the absence of a legal justification), and its actual conduct (the extensive and persistent use of coercion both by means of armed force and by means of economic pressure), involve breaches of the rules prohibiting the "infringement of the independence and sovereign equality of States", which rules have been described by Judge Ago as rules of *jus cogens*: see 134 *Recueil des cours* (1971-III), page 324, note 37; and (in English translation) *Yearbook of the International Law Commission*, 1976, II (Part One), page 32, note 148.

(vi) *The Callous Indifference to Elementary Considerations of Humanity*

422. In a number of respects the activities of the United States reflected, and continue to reflect, a callous indifference to the "elementary considerations of humanity" referred to by the Court in its Judgment in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 22. It has been the standard tactic of the *contra* forces to kill civilians and to use deliberate tactics of terror. Consequently the quality of the intervention for which the United States has been held responsible is the moral equivalent to the conduct described by the United States Memorial in the *Aerial Incident* case, as follows:

"The case is one which, if committed by individuals, would submit them to charges of murder and in many countries to capital punishment and certainly to maximum penalties." (*I.C.J. Pleadings, Aerial Incident* case, p. 246.)

423. This callousness in choice of methods by responsible officials of the United States is highlighted by the production and dissemination of the manual entitled *Operaciones sicologicas en guerra de guerrillas* in 1983. The Judgment on the Merits (pp. 65-69, paras. 116-122) provides a succinct description of the contents and purposes of this remarkable work. As the Court has occasion to observe

> "the question whether the United States was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States" (*ibid.*, para. 116).

In a later section of the Judgment the Court examined the legal implications of the publication and dissemination of the manual and reached the following conclusions:

> "255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to 'neutralize' certain 'carefully selected and planned targets', including judges, police officers, State Security officials, etc., after the local population have been gathered in order to 'take part in the act and formulate accusations against the oppressor'. In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants of
>
> > 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people'
>
> and probably also of the prohibition of 'violence to life and person, in particular murder to all kinds ...'.
>
> 256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual

was to 'moderate' such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties." (*I.C.J. Reports 1986*, pp. 129-130, paras. 255-256.)

424. Moreover, the issues thrown up by the encouragement of brutal conduct toward the population of Nicaragua were reflected in subparagraph 9 of the Dispositif, adopted by 14 votes to 1, thus:

> "*Finds* that the United States of America, by producing in 1983 a manual entitled *Operaciones sicologicas en guerra de guerrillas*, and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;" (*ibid.*, p. 248).

In the submission of Nicaragua the significance which the Court has so obviously attached to this facet of the conduct of the United States should be reflected appropriately in the award of reparation for what is evidently a classical instance of moral damage.

(vii) *Hardship Caused to the People of Nicaragua*

425. Apart from the actual atrocities committed against the population by the *contra* forces and the physical consequences of the armed attacks launched against centres of population, the covert war and the economic pressure exerted against Nicaragua have caused hardship to the people of Nicaragua. Large numbers of people have had to flee the war zones and cultivated areas have been abandoned. It may be recalled that the Court stressed the element of hardship to human beings (in respect of a relatively small group) in its Judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*. (*I.C.J. Reports 1980*, p. 42, para. 91.)

426. The general impact of the United States "intervention" and the damage resulting cannot be measured exclusively in terms of deaths, injuries, material damage and other losses to the economy. There are additional social effects arising from the diversion of resources to purposes of national security and a progressive deterioration of the infrastructure. The particular results of this weakening of the means of providing health services and education, in a country in which the general standard of living is very low, are reflected in the statistics relating to infant mortality and illiteracy (see data in Ann. I.2).

(viii) *The Court's Order of 10 May 1984 as a Circumstance Relevant to Moral Damage*

427. The particular scale and significance of the threat to the sovereignty and political independence of Nicaragua were fully recognized in the operative part of the indication of provisional measures contained in the Order made by the Court on 10 May 1984. The second paragraph, adopted by 14 votes to 1, provided as follows:

> "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 matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organisation of American States." (*I.C.J. Reports 1984*, p. 187.)

428. The Government of Nicaragua would respectfully remind the Court that in its Judgment on the Merits it was felt necessary "that it should re-emphasize, in the light of its present findings" the indication set forth above. In the submission of the Government of Nicaragua this indication, addressed as it was solely to the Respondent State, constitutes a circumstance relevant to the determination of reparation for moral damage.

(ix) *The Disregard of the Court's Injunctive Declaration as a Circumstance Relevant to Moral Damage*

429. The Court responded to the request contained in the Memorial of Nicaragua by a decision by way of an injunctive declaration to the effect that "the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations" (Dispositif, subpara. 12). This is obviously the linchpin of the structure of findings.

430. It is a matter of public record that the United States has chosen to disregard this decision of the Court and the Government of Nicaragua desires to indicate its opinion that such blatant disregard of a decision of the Court, the principal judicial organ of the United Nations, constitutes an important circumstance relevant to the determination of reparation for moral damage in these proceedings. As the Court has observed in relation to the provisional measures indicated on 10 May 1984:

> "Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties 'should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court' and
>
> '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'.
>
> When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each Party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law." (*I.C.J. Reports 1986*, p. 144, para. 289.)

(x) *The Infringement of the Freedom of Communications and of Maritime Commerce*

431. In its Judgment on the Merits (*I.C.J. Reports 1986*, paras. 214, 253) the Court gives due significance to the principle of freedom of maritime communi-

cations recognized by the Court in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 4 at page 22. In particular, the Judgment on the Merits in the present proceedings points out that:

> "... it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce." (*I.C.J. Reports 1986*, p. 129, para. 253.)

432. In the submission of the Government of Nicaragua this detriment pointed to should be given substance in that it be recognized as a significant element in the justification of an award of compensation for moral damage.

F. Compensation for Moral Damage: the Claim

433. In the submission of the Government of Nicaragua a claim in respect of moral damage to the Republic of Nicaragua is justified on the following bases, either taken as independently sufficient or as collectively sufficient.

First: by reason of the general principles of public international law.

Second: as a consequence of the specific recognition and approval of the principle of compensation for moral damage by the United States Government in the proceedings in the *Aerial Incident* case and otherwise.

Third: by reason of the particular elements of affront to international public order present in these proceedings and which are relevant to the determination of the propriety and quantum of reparation for moral damage.

434. In accordance with subparagraph 13 of the Dispositif of the Judgment on the Merits the Government of Nicaragua claims the sum of US$2,443,200,000 as the just and equitable reparation for the moral damage resulting from the illegal activities of the United States (apart from the claims relating to the violations of Nicaragua's sovereignty).

CHAPTER 9

THE PERIOD FOR WHICH REPARATION MUST BE CALCULATED

435. The function of this Chapter is to analyse the temporal dimension of the United States obligation to make reparation for the damage and injuries done to Nicaragua through its internationally wrongful acts. This requires a determination of the duration of the internationally unlawful acts committed by the United States, more particularly the date on which they began and the date, if any, on which they ended. As the International Law Commission stated in its 1978 Report to the General Assembly, these determinations

> "may be decisive in resolving a whole series of problems in which temporal element is involved. That is the case, for example, with regard to the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question." (*Yearbook of the International Law Commission*, 1978, II (Part Two), p. 87.)

436. Nicaragua submits that by virtue of subparagraphs 3, 4 and 13 of the Dispositif, the United States is under an obligation to make reparation to Nicaragua under subparagraphs (3) and (4) of the Dispositif in an amount measured by the damage inflicted by the military and paramilitary activities between December 1, 1981, at the latest and the present, and for as long into the future as it continues to act in the manner found by the Court to be unlawful.

(i) The Date from Which Reparation Should Be Calculated

437. The Court determined that the internationally unlawful conduct of the United States consisted in "training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua ...". (Dispositif, subpara. (3), and, to the extent that these acts "involve the use of force", *ibid.*, subpara. (4), *I.C.J. Reports 1986*, pp. 146-147.) The breach may be considered to be a "breach of an international obligation by a complex act" within the meaning of the International Law Commission draft articles on State Responsibility, Article 25 (3). See *Yearbook of the International Law Commission*, 1978, II (Part Two), page 80. The unlawful activity was also a wrong having a "continuing character" within the meaning of Article 25 *(ibid.)*. It consists of "a succession of actions or omissions ... in respect of the same case" *(ibid.)*, although it is not excluded that some acts in the series might independently be violative of international law. In the present case, the "succession of actions" begins with the official presidential finding authorizing the provision of covert assistance to the *contras*, and includes the various appropriations of funds by the Congress, the expenditure of funds for the purchase of arms and equipment, the delivery of these supplies, the provision of training, intelligence information and logistic support, etc. All of these were acts of organs of the United States and are fully imputable to it.

438. According to Article 25 (3), in the case of a complex act the breach does not "occur" until "the moment when the last constituent element of that complex act is accomplished" *(ibid.)*. Nevertheless, the Article continues, the duration of the breach "extends over the entire period between the action or omission which initiated the breach and that which completed it" *(ibid.)*.

439. In the present case, the action that initiated the complex act took place sometime in late 1981. President Reagan made the Finding required by United States law to authorize covert activities against Nicaragua in November 1981. The significance of this date is confirmed by evidence that organized *contra* activity began to increase around that time. The affidavit of Edgar Chamorro stated that the "mergers arranged by the CIA" of "the previously disparate armed bands" into a single armed opposition force took place before August 1981. (Merits, para. 94.) Further, according to the testimony of Comandante Carrión, "'organized military and paramilitary activities' began in December 1981". (Merits, para. 93.)

440. Thus, "the action or omission which initiated the breach" occurred by 1 December 1981 at the latest. It naturally follows that the United States obligation to make reparation runs from that date[1].

(ii) The Date to Which Reparation Should Be Calculated

441. In this case the international wrong did not end with the completion of the complex act. The breach is a "continuing wrong", draft article 25 (1), which endures as long as the United States persists in the activities found to be illegal[2]. Thus, the United States is under a duty to make reparation in an amount measured by the damage done by the military and paramilitary activities as long as they continue[3].

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[1] The discussion in the text characterizes the wrongful conduct adjudged by the Court as a complex act culminating in or followed by an act having a continuing character. The same conduct might equally well be characterized as a composite act. The series of actions involved in the provision of supplies, equipment, training, weapons and logistical and intelligence support, repeated over the period in issue, established an integrated pattern of wrongful United States activity. The alternative characterization would have no effect on the duration of the breach, however. According to ILC draft Article 25 (2), that "extends over the entire period from the first of the actions or omissions constituting the composite act ... and so long as such actions or omissions are repeated". The first act constituting the composite act occurred by 1 December 1981, as shown above, and the pattern is being repeated to the present.

[2] The International Law Commission's Report to the General Assembly includes examples of a continuing wrong: unlawful blockade of foreign ports, unlawful occupation of the territory of a foreign State, unlawful detention of a foreign official. *Yearbook of the International Law Commission*, 1978, II (Part Two), page 90. The breach in the present case can be easily analogized to these. Supplying the *contras* with arms, training, equipment, financing, logistical support, etc., constituted a breach of international law, in the same way that the creation of an illegal naval blockade would constitute a breach. The continuous or repeated supplying of arms, etc. — as happens in the present case — establishes that the breach is a continuing violation, just as the maintaining of a blockade is a continuing violation.

[3] The Court was unable to find "that the respondent State 'created' the *contra* force in Nicaragua", *I.C.J. Reports 1986*, paragraph 108, page 61, because "there is some evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States". (*Id.*, para. 93, at 53.) Thus, strictly speaking, the United States should not be held responsible for that portion of the damage that could have been accomplished by these forces without any outside assistance. The Court also found, however, that these bands operated "in a disorganized way and with limited and ineffectual resources ...". (*Id.*, para. 108, at 62.) We are therefore entitled to conclude that the damages that would have been done absent United States aid are *de minimis*. This conclusion is borne out by the evidence, which shows that the material damage from *contra* activities in 1980 amounted to three killed and wounded and only $1.5 million in property damage. For 1981, when assistance was given for the last month or two of the year, the figures come to 70 killed and wounded and $7.4 million in property damage. (Ann. 1.2, pp. 9, 17.) There is no record of *contra* casualties in 1980. For 1981, there were 42 killed and wounded and 20 captured. (*Id.*, p. 23.)

442. In its Judgment on the Merits, the Court identified 30 September 1984 as the cut-off date for United States "finance for supporting the military and paramilitary activities of the *contras*". (Merits, para. 97.) This conclusion was based on two factors. First, the record before it contained evidence showing, erroneously as it turns out, that United States assistance was "limited to 'humanitarian assistance'" after that date. *(Ibid.)* (The Court itself implied that this assistance would not qualify as "humanitarian" under the principles of international law. *Ibid.*, paras. 242, 243.) Secondly, the Court perforce rendered its Judgment on the basis of the evidence of record as it stood on 20 September 1985, at the close of the oral hearings on the merits, which could include no information about United States activities thereafter. (Para. 58.)

443. In the present phase, Nicaragua has introduced evidence to show that despite the understanding expressed by the Court in the Judgment, United States activities in all the forms mentioned in the Dispositif — and with it the responsibility of the United States to make reparation — continues down to the present. This evidence is presented in Annex X and the attachments thereto. In brief, the evidence establishes the following.

444. First, despite the legislative prohibition on military aid, in the period before the close of the oral hearings from 1 October 1984 to 30 September 1985, and thereafter until 18 October 1986, officials of the United States National Security Council, the Central Intelligence Agency, and other organs of the United States operated a far-flung secret network to ensure the continued provision of money, arms, transport, intelligence, training and other assistance to the *contras*. A full account of this activity is contained in the Report of November 1987 of the Iran-Contra Committees of the United States Senate and House of Representatives, which Nicaragua has submitted to the Court (hereafter, the "Iran-Contra *Report*"). Thereafter, beginning in October 1986 the United States resumed overt military assistance to the *contras*. Although in February 1988, when the current appropriation expired, the Congress refused to make any further appropriation, funds, weapons, supplies, equipment and other military assistance sufficient for several months were still in the pipeline. The United States President has announced his intention to secure additional Congressional funding. (Ann. X, p. 44.)

445. In sum, the evidence shows that United States military and paramilitary activities, condemned in the Judgment on the Merits, have continued without interruption until the present.

(a) *Evidence of Events Occurring before the Close of the Oral Hearings in September 1985*

446. The proof concerning United States secret activities against Nicaragua in fiscal year 1985 is summarized in Annex X, *A Chronological Statement of Evidence relating to Continued Military and Paramilitary Activities in and against Nicaragua*, pages 5-37. The Chronological Statement is based primarily on the Iran-Contra *Report*. It shows that, from 30 September 1984, when under the Boland Amendment all military and paramilitary activity in and against Nicaragua was supposed to cease, until the resumption of overt military aid in October 1986, the United States conducted a secret full-scale operation to maintain and preserve the covert war. The Iran-Contra *Report* summarizes the two years of activity as follows:

> "... North had successfully managed, with the approval of his superiors, the covert program to assist the *Contras* for almost two years ...
> ... The result was that, with the help of other United States Government

officials, North managed to provide the *Contras* what Congress had not: a full-scale program of military assistance." (Iran-Contra *Report*, p. 78.)

447. Lt. Col. Oliver L. North, a member of the National Security Council staff with offices in the White House, was the principal operating officer in charge of the program. He acted under the authority and with the approval of his superiors, Robert McFarlane and John Poindexter, who successively held the office of National Security Adviser to the President. He had the authorization and co-operation of the Director of Central Intelligence, William J. Casey. Numerous other officials were heavily involved in the operation, including the Assistant Secretary of State for Inter-American Affairs, the Ambassador and CIA Station Chief in Costa Rica, and United States military officers in Central America. A special "Restricted Interagency Group" with representatives from the State Department, CIA and NSC had overall direction of the operation.

448. The President himself admitted that he knew and approved of the activity:

> "Now ... the *Contra* situation ... There's no question about my being informed. I've known what's going on there ... And to suggest that I am just finding out or that things are being exposed that I didn't know about — no. Yes, I was kept briefed on that. As a matter of fact, I was very definitely involved in the decisions about support to the freedom fighters. It was my idea to begin with." (Ann. X, p. 33.)

There can be no doubt that, even though they may have been acting illegally, North and his superiors were acting as officials of the United States and their acts are imputable to the United States. As stated by Judge Ago in his Third Report on State Responsibility, in determining whether an act is internationally wrongful, it is irrelevant that the State organ has acted in violation of municipal law. (*Yearbook of the International Law Commission*, 1971, II (Part One), p. 226.)

449. In the course of their activities, these officials made use of a network of former United States military and intelligence officers, arms brokers, offshore bank accounts and dummy corporations, referred to by the Congressional Committees as "the Enterprise". To quote the *Report* again,

> "The Enterprise, functioning largely at North's direction, had its own airplanes, pilots, airfield, operatives, ship, secure communications devices and secret Swiss bank accounts." (Iran-Contra *Report*, p. 4.)

450. The activities of North and the other United States officials and private individuals assisting the *contras* during this period were manifold. The first objective was to restore the flow of funds to the *contras* that Congress had cut off. To this end, they acted in the name of the United States to secure contributions from other countries and from private sources in the name and using the prestige of the President. (*Ibid.*, pp. 85, 90-91, 100.) In all, the Enterprise raised at least US$36 million in the 1984-1985 period.

451. North and his associates used the funds to continue the military and paramilitary activities in and against Nicaragua. These activities included the procurement of infantry weapons — AK-47 rifles, RPG-7 rocket launchers, light machine guns, and SA-7 surface-to-air missiles — based on lists drawn up by *contra* commander Bermudez and reviewed and revised by North. (*Ibid.*, p. 50; see also *ibid.*, p. 48.)

452. In addition, the United States provided extensive intelligence information to the *contras*.

> "The CIA and DOD [Department of Defense] could not provide military intelligence directly to the *contras*, so North provided it himself. North

> would obtain maps and other intelligence on the Sandinista positions from the CIA and DOD, ostensibly for his own use. North would then pass the intelligence on to the *contras* using Owen as a courier." (*Ibid.*, at 43.)

North also sent to the *contras* detailed directives concerning specific military operations and deployments. (See Ann. X, pp. 12-14.)

453. North summarized the results of the secret operations as of 1 May 1985 in a memorandum to McFarlane, claiming that

> "The FDN has grown nearly two-fold since the cut-off of USG [United States Government] funding ... In short, the FDN has well used the funds provided and has become an effective guerrilla army in less than a year." (*Ibid.*, p. 16.)

454. Beginning 1 October 1985, official United States assistance was resumed with an appropriation of $27 million limited to "humanitarian assistance". Despite this label, as the Court noted in paragraph 243 of the Judgment on the Merits, the CIA was specifically authorized to share intelligence information with the *contras*. A secret fund of as much as $13 million was established for communication facilities for this purpose. (Iran-Contra *Report*, pp. 64, 4-4-05.) As a result, in 1985, United States aircraft — RC-135, SR-71, AC-130, EC-130, U-2, and E-34, as well as C-130s adapted for aerial photography — made a total of 880 reconnaisance flights over Nicaraguan territory in the period 1 October 1984 to 30 September 1985. (Ann. VIII, 13-14.)

455. Operations continued unabated in this period. One focus of the effort was the opening of a "southern front" for the *contra* war, based in Costa Rica. Lewis A. Tambs, newly appointed United States ambassador to Costa Rica, considered this his major assignment. A second major focus was improvement of the system for delivery of supplies to the *contras* on both the northern and southern fronts. To this end, an elaborate air-supply network was established, operating out of the United States built military air base at Ilopango, El Salvador. A second air field for supply and refuelling was established in Costa Rica. (See Ann. X, pp. 19-27.) Thus, for example:

> "Between early April and April 11 [1986], North coordinated virtually every aspect of the first drop of lethal supplies into Nicaragua by way of the Southern front. He was in regular communication with Secord and others to ensure that the drop was successful. KL-43 messages among the planners involved in this drop show both the level of detail in which North was concerned and the coordination among various United States Government agencies to ensure that the drops succeeded." (Iran-Contra *Report*, p. 66.)

In short, the United States, through North, other United States officials in Washington and Central America and their "Enterprise", had accomplished "what Congress refused to fund — the air resupply of lethal material for the *contra* forces inside Nicaragua". (*Ibid.*, p. 60.)

456. Regularly scheduled flights dropped supplies to *contra* forces both in the south and in the north. By the middle of 1986, the Enterprise had spent over $16.5 million on arms, aircraft, direct payments to *contra* leaders and other aspects of the resupply operation. (*Ibid.*, at 377.) Deliveries reached a peak in September 1986, when more than 180,000 pounds of supplies were dropped to the southern front alone.

457. In October, one of the supply planes was brought down over Nicaragua, eventually bringing down with it North, the Enterprise and the whole network

of secret United States military assistance to the *contras*. By that time, however, the Congress had acted to renew overt military aid for fiscal year 1987.

458. The evidence summarized above must be considered in order to correct the mistaken conclusion into which the Court was led by the United States legislation purporting to ban assistance to the *contras* in fiscal year 1985 and confining it to "humanitarian aid" in fiscal year 1986. Nicaragua, like any other litigant, has a duty to assist the Court in its consideration of the case before it and is under a burden of due diligence to discover and present all evidence relevant to the determination. In the ordinary case, the Applicant can be held to the consequences of any failure to produce proof of facts.

459. This is no ordinary case, however, and there was no failure of diligence by Nicaragua. High officials working directly for the United States President deliberately concealed the relevant evidence not only from the Court but from the Congress and from the people of the United States and the world. (See generally, Ann. X, pp. 31-37.) Suppose that the United States had appeared and participated in the merits phase of the case and had falsely represented to the Court that only humanitarian assistance was being sent to the *contras* after September 1984. Can there be any doubt that if the misrepresentation were discovered while the case was still pending, in whatever phase, the Court would hear evidence as to the true state of affairs? To refuse to do so would permit the offending Party to benefit from the breach of its duty to the Court and in effect would condone the wrong.

460. Although the United States has decided not to appear in this case, it remains a Party and as such is under a duty not to deliberately mislead the Court. It has violated this duty even though it was not in the courtroom. In its Judgment the Court commented on the release by the United States State Department at the time of the oral hearings of a document entitled *Revolution Beyond Our Borders* setting forth the position of the United States on the facts and law of this case. The document was brought to the notice of the Court by the United States Information Office in The Hague after the oral hearings on the merits had started, and was in fact referred to in the Judgment. (*I.C.J. Reports 1986*, para. 73, at 44.) It was misleading in omitting any account of this secret United States assistance to the *contras* during the period covered. The information it purported to give should be viewed with this in mind.

461. Finally, quite apart from any duty the United States may owe the Court as a Party in the case, the fact is that the Court proceeded on an appreciation of the situation existing after September 1984 that we now know to be mistaken. The mistake was not due to any fault of Nicaragua but to deliberate and wrongful concealment by the United States. The Court should consider the evidence Nicaragua has introduced to correct the misrepresentation of the situation by the United States.

(b) *Evidence of Events Occurring after the Close of the Oral Hearings*

462. In the Judgment on the Merits, the Court said that

> "general principles as to the judicial process require that the facts on which its judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case." (Merits, subpara. 58.)

463. In this passage, the Court was referring to its Judgment on the Merits, and it is certainly true that under "general principles of the judicial process", it would ordinarily be improper for the Court to take notice of facts occurring between the final submission of the case by the Parties and the rendition of

that Judgment. It is equally clear that the same principles do not preclude the presentation, in a later damages phase of the same case, of evidence to show the continuation of the conduct found to be unlawful in the merits phase and quantifying the losses resulting from it. In its Memorial on the Merits, Nicaragua anticipated this possibility and "reserve[d] the right to seek additional compensation for damage caused after 31 December 1984, and to present evidence in support of such claim". (Memorial of Nicaragua, Merits, IV, p. 38.)

464. The Court's prior cases support the view that it may hear evidence and argument concerning events occurring after the close of oral hearings. In the *Nuclear Tests* cases, the Court found it "necessary" to consider statements of the French Government, both those that were made before the oral proceedings and called to its attention at that time "and those subsequently made". (*I.C.J. Reports 1974*, at 264.) The Court said:

> "It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings." *(Ibid.)*

465. The Court quoted this passage in its Judgment on the Merits in the present case and remarked further that "[n]either Party has requested such action by the Court; ..." (Merits, para. 58.) The relevant passages of the Court's Judgment do not suggest that consideration of evidence of facts occurring after the close of oral hearings on the merits is improper. On the contrary, the implication is that the Court is fully empowered to hear such evidence "if the interests of justice so require", either on its own motion or at the request of a Party.

466. The interests of justice in this case surely require the reception of evidence of events subsequent to September 1985. As noted above, the internationally unlawful conduct of the United States involves a wrong of a continuing nature. Without this evidence, the Court will be unable to quantify the reparation that the United States is obligated to make under subparagraph (13) of the Dispositif. Since the case is still pending, there is no need to "reopen the oral proceedings" for this purpose.

467. The evidence of events occurring after the close of the oral hearings in September 1985 demonstrates that the covert program of United States military and paramilitary activities continued until October 1986. On 18 October 1986, a new appropriation of $100 million for fiscal year 1987 took effect. Of this amount, $70 million was available for military "assistance", with the remaining $30 million restricted to so-called "humanitarian" assistance. The limitations that previously had prohibited the CIA from using its secret "Reserve for Contingencies" were also lifted. United States Senate Majority Leader Robert Byrd informed in a Senate debate that as much as $400 million were to be allocated for the *contras* from this source[1]. Both the frequency and intensity of *contra* attacks reflected the new infusion. After 30 September 1987, a series of continuing appropriation bills provided additional funds. (Ann. X, pp. 37-46.)

468. Nicaragua does not seek any new determination of liability on the basis of this evidence. That the United States has breached its international obligations "by training, arming, equipping, financing and supplying the *contra* forces" has

[1] 132 *Cong. Rec.* S11507 (13 August 1986).

been established by the Judgment on the Merits. Evidence of the continuation of these activities after the close of the oral hearings shows that the liability creating actions of the United States have continued to the present.

(c) *Damage Resulting from Unlawful United States Actions Since the Close of the Oral Hearings*

469. Nicaragua has also introduced evidence of the occurrence and monetary value of damage to persons and property resulting from the United States military and paramilitary activities since the close of the oral hearings. (Ann. I. 2*b*.) This information is essential to calculate the precise amount of the total reparation that will wipe out the consequences of the United States unlawful acts. Evidence of the quantum of harm occurring after the close of the hearing on the merits is admissible under any one of three independent legal principles on which the compensatory obligation of the United States may be based.

(a) The damages shown are the result of continuing internationally unlawful conduct of the United States. As noted above, in Nicaragua's view, the United States military and paramilitary activities constitute a breach of an international obligation of a continuing character and entails liability for all harm caused by it during the period of the breach. (See Chap. 1, *supra*.)

(b) The damage done by the military and paramilitary activities in the period after the close of the oral hearings results from the acts of the United States before September 1985 that the Court adjudged to be unlawful. As the Court held, these United States acts were "crucial to the pursuit of their activities". (Para. 110.) The Court pointed to the continuation of *contra* activity after the prohibition of military aid in September 1984 as evidence that they were not completely dependent on United States assistance. We now know, however, that despite the prohibition, military aid continued in secret up to and after the oral hearing. Without this continuing United States action, the *contras* could not have achieved the level of organization and military efficacy they attained. The *contra* forces would have remained a handful of scattered bands of irregulars, engaged in cattle rustling and border raids as they did before the beginning of the internationally unlawful action of the United States. But for this action they would not have had the military capability to undertake the operations conducted in the period after the close of the oral hearings and to inflict the damage shown by the evidence.

(c) In subparagraph (12) of the Dispositif the Court held that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations; ...". The United States has failed to comply with the Court's injunction. The United States is therefore now in violation of the international legal duty imposed by the Judgment. That violation entails the same obligation to compensate for the resulting damage as any other breach of an international obligation. The evidence of *contra* activities after the Judgment on the Merits quantifies the amount of reparation due for this breach. Before the close of the oral hearings, Nicaragua was, of course, unable to make submissions of fact or law concerning the breach of the obligation imposed by the Judgment and the reparation due on that account. The breach had not occurred and the obligation had not accrued at that time. The Applicant State should therefore have the opportunity now to introduce evidence of the breach of this obligation and the value of the losses incurred.

(d) *Conclusion*

470. Liability in the amount of the losses due to the military and paramilitary activities over the entire period from 1 December 1981 to the present is clear as a matter of legal principle[1]. Anything less would fail to fulfil the command of *Chorzów* that "reparation must, as far as possible, wipe out all the consequences of the illegal act . . .". Nicaragua has introduced evidence to establish the quantum of this harm in Annex I. 2*b*. There is nothing in the Statute or Rules of the Court, nor in the principles of international law, to prevent the Court from considering any of this evidence to determine the amount of reparation the United States is obligated to pay in respect of its internationally unlawful actions in "training, arming, equipping, financing and supplying the *contra* forces . . .".

[1] Since the internationally unlawful conduct here in issue involves an act of a continuing nature, it and its consequences may persist even after judgment in the current phase.

CONCLUSION

471. In this concluding chapter the Applicant State intends to present its views on certain questions subsidiary to the general issue of the assessment of compensation and to formulate its Submissions. However, first of all the Government of Nicaragua finds it necessary to explore some important procedural questions which inevitably arise in the unusual circumstances of this case.

A. Article 53 of the Statute

472. The Court does not need to be reminded that the proceedings in the merits phase of this case took place under Article 53 of the Statute and, according to the position adopted by the United States in its Note dated 13 November (signed by the Deputy-Agent), this aspect of the proceedings will remain during the present phase. In the course of preparing and presenting the case on the merits the Government of Nicaragua adopted a constructive approach to the problems of proof and did not in any sense seek to lay emphasis on the application of the provisions of Article 53. However, as the proceedings move through the present phase the Applicant State considers it to be useful to offer certain points for the consideration of the Court, which points relate to the problems of administering justice in a case such as the present.

473. The disadvantages faced by an Applicant State in proceedings involving a non-appearing Respondent State are often referred to: see, for example, the views of Sir Gerald Fitzmaurice, *British Year Book of International Law*, Volume 51 (1980), pages 89-122; and Thirlway, *Non-appearance before the International Court of Justice*, Cambridge, 1985, pages 137-157. As Fitzmaurice points out the result of non-appearance is that the Applicant State "becomes severely handicapped in the presentation of its case before the Court" and the principle of "equality of arms" as between litigants is placed in jeopardy (*op. cit.*, p. 91).

474. This being said, it is the intention of Nicaragua to make certain proposals in a constructive spirit and with the purpose of assisting the procedural economy of the present phase of the case.

475. In the first place the Government of Nicaragua would respectfully draw the attention of the Court to the advantages presented by the provisions of Article 49 of the Statute, and Articles 61 and 62 of the Rules (see Rosenne, *The Law and Practice of the International Court*, 1985, pp. 576-578; and Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, pp. 400-413). In the absence of the Respondent State the development of the pleadings is less suited to the pointing out and refinement of issues and both the Court and the Applicant State are placed at a certain disadvantage. In the circumstances of the present case it would be of considerable assistance to the Government of Nicaragua if, at a time convenient to the Court, Nicaragua were given some indications as to the particular issues of law on which the deliberations of the Court were likely to focus or issues of fact which the Court wishes to explore or to explore further. It goes without saying that an indication sufficiently in advance of the opening of the oral hearings would be of particular assistance to the Applicant State.

B. Informal Presentation of Material on the Part of the Respondent State

476. In the same context of seeking to promote the efficiency and economy of the proceedings Nicaragua requests that, if the Respondent State transmits by some informal mode material to the Court which, in a normal procedural context, would have been presented as evidence, the Applicant State be accorded the opportunity to comment upon material presented by informal methods.

C. The Scope of the Present Proceedings

477. The unusual character of the present proceedings involves a further procedural issue of great practical significance. The wrongs to which several parts of the Dispositif relate involve acts of State of a continuing character according to the draft articles on State Responsibility provisionally adopted by the International Law Commission. The relevant provisions are contained in Article 25 as follows:

> "Moment and duration of the breach of an international obligation by an act of the State extending in time
>
> 1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
> 2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.
> 3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it."

478. The continuing character there referred to is relevant to the aspects of the Dispositif relating in particular to breaches of the principle of non-intervention. However, other findings are relevant, including the violation of sovereignty resulting from overflights.

479. As the Court will appreciate the Applicant State is justified in relying upon the perfectly logical principle of continuing acts. The question which therefore arises is the adjustment of the procedural modes available to the realities of the situation, that is to say, the continuation on the part of the United States of policies incompatible with the Judgment of the Court on the Merits. Given the fact that it is impossible to predict when these breaches of international law will cease it is impossible to make a final assessment of the reparation called for in relation to the continuing acts.

480. In the submission of the Government of Nicaragua, the only reasonable

possibility at this stage is to make a valuation of the damage that these continuing acts have already caused to Nicaragua. As to the future, reparation can only be assessed when the breaches having a continuing character and the consequences of those breaches have ceased. At that time, the reparation will have either to be agreed between the Parties or, if this proves to be impossible, to be the subject of a further phase of the present proceedings.

481. In this context, it must be recalled that in its Judgment on the Merits the Court stated that no provision in its Statute debars it from awarding reparation on a provisional basis. But, at that time, it felt that such a decision would not be "appropriate" at that stage of the proceedings. In the words of the Judgment:

> "There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the 'minimum (and in that sense provisional) valuation of direct damages'. There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that
>
> > 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement ...'. (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.)
>
> Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua." (*I.C.J. Reports 1986*, p. 143, para. 285.)

482. Thus the Court did not consider an interim award "appropriate" by reference to a series of considerations which do not obtain at the time of the presentation of the present Memorial. At this stage the entitlement of the Applicant State is "established with certainty and precision", and there are, in a number of respects, "exceptional circumstances". Moreover, a negotiated settlement is not in prospect.

483. In the light of the principle accepted by the Court that an interim award may be justifiable if certain conditions are fulfilled, the Government of Nicaragua requests the Court:

(a) to award Nicaragua a sum as effective and complete compensation for all the damage that will be proved at the date of the Judgment (or of the closure of the proceedings), whether or not such damage is caused by breaches of international law extending in time or by acts not extending in time; and

(b) to maintain the rights of Nicaragua to compensation for all damage which might occur as a result of these breaches having a continuing character, and

as a consequence to maintain the power to reopen the proceedings if and when the circumstances generally and the interests of justice, in particular, make such a course necessary.

D. The Calculation of Present Value

484. The issue of compensatory interest may be conveniently dealt with at this juncture in the Memorial. There is a large literature and the principle of compensatory interest is generally accepted both in doctrine and in the jurisprudence of international tribunals. The general principle was well stated by the United States-German Mixed Claims Commission in its Administrative Decision No. III (1923):

> "Applying the principles announced in Administrative Decision No. II at pages 7-8, the Commission holds, that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking, the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation." (*Reports of International Arbitral Awards*, II, p. 64 at p. 66.)

485. At the same time the award of interest as such is but one of several techniques available for the implementation of the principle of effective reparation. As the passage from the decision of the Mixed Claims Commission clearly indicates, what is at stake is the use of a technique to produce a figure which represents the present value of the compensation. Thus, provided an appropriate technique is employed in order to achieve an "actualization", the principle of compensatory interest is applied, so to speak, *mutatis mutandis*.

486. In respect of the reparation claimed for physical damage to property, loss of production, other consequential economic loss, and defence costs, the Government of Nicaragua has used the methodology for the calculation of present value described in detail in Annex VI.2.

487. The appropriate rate of interest should, in the submission of the Government of Nicaragua, be a function of the principle of effective reparation. Consequently the rate must depend upon general economic conditions and markets: see Brownlie, *System of the Law of Nations: State Responsibility*, Part I, 1983, page 229. In its Judgment in the "*Wimbledon*" case (1923), the Permanent Court adopted the view that the rate of interest is *relative* to the "present financial situation of the world" and "the conditions prevailing for public loans". (*1923, P.C.I.J., Series A, No. 1*, p. 32.) The methodology adopted by Nicaragua reflects these criteria and is explained in Annex VI.2.

488. On the basis that the principle of effective reparation has been applied by other means in each case the question of compensatory interest (or calculation of the present value) does not arise in the following categories of claim presented in this Memorial:

(a) The claim to reparation in respect of deaths and personal injuries;
(b) the claim to pecuniary satisfaction in respect of the four types of violation of sovereignty; and
(c) the claim to reparation in respect of moral damage.

E. Costs

489. Article 64 provides that "unless otherwise decided by the Court, each party shall bear its own costs". This text, taken together with Article 97 of the Rules, indicates the existence of a discretionary power to be exercised by the Court in the light of all the relevant circumstances, and according to general principles of law.

490. At this stage the Government of Nicaragua presents the formal submission that this is an appropriate case for costs on the basis of the considerations related fully in Chapter 8 (concerning reparation for moral damage). However, the Government of Nicaragua wishes to reserve its presentation of the claim for costs until such time as the Court finds it convenient to indicate its views on the precise procedural implications of Nicaragua's claim for costs. As the Court will no doubt appreciate, it is inappropriate to present a claim in the absence of adequate knowledge of the procedural framework: see the Memorial of Israel, *Aerial Incident* case (*Israel* v. *Bulgaria*, etc.), *I.C.J. Pleadings*, page 114 (para. 120); and Rosenne, *The Law and Practice of the International Court of Justice*, 2nd edition, 1985, pages 592-593.

F. Post-Judgment Interest

491. The Court is requested to include the payment of interest in its award of compensation to the Applicant State in the present proceedings (cf. the *"Wimbledon", 1923, P.C.I.J., Series A, No. 1*, pp. 32, 33).

SUBMISSIONS

492. The Government of the Republic of Nicaragua asks the Court to adjudge and declare as follows:

493. A. In accordance with the operative part of the Judgment of the Court dated 27 June 1986 the United States is under an obligation to make reparation to the Republic of Nicaragua for the following types of injury caused by breaches of the pertinent obligations of an international law character; thus:

First: In respect of the deaths and personal injuries relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment: the sum of US$900 million.

Second: In respect of material injury to property relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment (but apart from the losses caused by the specific attacks and mining of harbours referred to in subparagraphs 4, 6, 7 and 8): the sum at present value of US$275,400,000.

Third: In respect of the production losses relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment (but apart from the losses caused by the specific attacks and mining of harbours referred to in subparagraphs 4, 6, 7 and 8): the sum at present value of US$1,280,700,000.

Fourth: In respect of the material injury to property consequent upon the specific attacks to which the finding in subparagraph 4 of the operative part of the Judgment relates, together with the material injury to property consequent upon the mining of Nicaraguan harbours to which the findings in subparagraphs 6, 7 and 8 of the operative part of the Judgment relate: the sum at present value of US$22,900,000.

Fifth: In respect of the security and defence costs resulting from the unlawful conduct of the United States as defined in subparagraphs 3 to 9 inclusive of the operative part of the Judgment: the sum at present value of US$1,353,300,000.

Sixth: In respect of the damage caused by the general embargo on trade which is the subject of the findings contained in subparagraphs 10 and 11 of the operative part of the Judgment: the sum at present value of US$325,400,000.

Seventh: In respect of the damage caused to development potential of Nicaragua consequential upon the unlawful conduct of the United States as defined in subparagraphs 3 to 9 inclusive of the operative part of the Judgment: the sum at present value of at least US$2,546,400,000, which quantifies GDP losses but not their social consequences which cannot be valued technically in monetary terms.

Eighth: Without prejudice to the claim expressed in Submission 7 in respect of the damage to the social development of Nicaragua, in accordance with the considerations set forth in paragraphs 355 to 372 of Chapter 6: a sum of not less than US$2,000 million.

Ninth: In respect of the serious violations of the sovereignty of Nicaragua specified in subparagraphs 5 and 6 of the operative part of the Judgment and also in paragraph 251 of the Judgment: pecuniary satisfaction in the sum of US$1,068,700,000.

Tenth: On the basis of the elements of affront to international public order established in Chapter 8 of the present Memorial and the other principles

invoked therein: accessory compensation for moral damage in the sum of: US$2,443,200,000.

494. B. In the light of the continuing character of certain of the violations of international law obligations for which the United States has been held responsible, the Government of Nicaragua respectfully reserves the right to produce further evidence of damage, loss and injury flowing from such violations at the stage of the oral hearings.

495. C. On the basis of the considerations set forth in paragraphs 477 to 482 of the concluding Chapter, the Government of Nicaragua respectfully requests the Court:

Eleventh: To award Nicaragua a sum as effective and complete compensation for all the damage that will be proved at the date of the Judgment (or of the closure of the proceedings), whether or not such damage is caused by breaches of international law extending in time or by acts not extending in time; and

Twelfth: To maintain the rights of Nicaragua to compensation for all damage which might occur as a result of these breaches having a continuing character, and as a consequence to maintain the power to reopen the proceedings if and when the circumstances generally and the interests of justice, in particular, make such a course necessary.

496. D. On the basis of the considerations advanced in paragraphs 489 to 490 of the concluding Chapter, the Government of Nicaragua respectfully requests the Court to:

Thirteenth: Offer indications on the precise procedural implications of Nicaragua's claim for costs.

497. E. The Court is requested to:

Fourteenth: Include post-Judgment interest in the award of compensation resulting from the present proceedings.

Respectfully submitted,

(Signed) Carlos ARGÜELLO GÓMEZ,
Agent for the Republic of
Nicaragua.

29 March 1988.

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[1] Not reproduced. *[Note by the Registry.]*

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