SEPARATE OPINION OF JUDGE RUDA

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

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

I. The United States Agent's Letter of 18 January 1985

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

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

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

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

6. No reservation made by a State, at any stage of the proceedings, could derogate from this solemn obligation, freely entered into, which is, moreover, the cornerstone of the system, centred upon the Court, for the judicial settlement of international disputes. The United States, like any other party to the Statute, is bound by the decisions taken by the Court and there

is no right to be reserved but the right to have them complied with by such other parties as they may bind.

II. Proviso *(c)* to the United States Declaration of 1946

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

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

III. Self-Defence

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

10. In paragraph 230 the Court expresses the following :

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

And the Court added in paragraph 247 :

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

11. I fully agree with this statement and others made by the Court in the same sense. It does not mean, of course, that assistance to rebels in another country could not be considered illegal under other rules of international law, such as the obligations not to intervene in the internal affairs of

another State and to refrain in international relations from the threat or use of force against the territorial integrity or political independence of another State. But here the question to be decided in regard to the plea of the United States is whether the justification of self-defence in the case of assistance to rebels is valid or not under customary international law. My reply, just like the one given by the Court, is in the negative.

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

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

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

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

IV. The 1956 Treaty of Friendship, Commerce and Navigation

16. I voted in the 1984 Judgment, together with another judge, against accepting the 1956 Treaty of Friendship, Commerce and Navigation as a basis for the jurisdiction of the Court to entertain the dispute and I have expressed my reasoning in a separate opinion. However, I consider that in regard to the present Judgment I was obliged to vote on the question whether the United States has acted in breach of this Treaty. The question of jurisdiction and that of the breach of a treaty are of a different juridical nature ; the Court could be incompetent for lack of consent to go into the merits of a dispute, but that does not mean that the States in the controversy might have not violated a rule of international law. Once the Court has established its competence, a judge is bound to decide on the merits of the case, even if he was in the minority on the question of jurisdiction. Otherwise, in the event that a judge had voted against both sources of

jurisdiction, as has happened in this case, that judge would have no standing for participating in the merits stage, which would be an absurd proposition.

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

(Signed) J. M. RUDA.