SEPARATE OPINION OF PRESIDENT NAGENDRA SINGH

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

I

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

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

There can be no doubt therefore of the innate legal existence of this basic reasoning, irrespective of the later developments which have now found a place in the treaty provisions as reflected in Article 2, paragraph 4, and Article 51 of the United Nations Charter. However it is pertinent that the origin of legal regulation of use of force is much older than the United Nations Charter and this has been acknowledged to be so. If an issue was raised whether the concepts of the principle of non-use of force and the exception to it in the form of use of force for self-defence are to be characterized as either part of customary international law or that of conventional law, the answer would appear to be that both the concepts are inherently based in customary international law in their origins, but have been developed further by treaty-law. In any search to determine whether these concepts belong to customary or conventional international law it would appear to be a fallacy to try to split any concept to ascertain what part or percentage of it belongs to customary law and what fraction belongs to conventional law. There is no need to try to separate the inseparable, because the simple logical approach would be that if the concept in its origin was a customary one, as in this case, and later built up by treaty law, the Court would be right in ruling that the present dispute before the Court does not arise under a multilateral treaty, so as to fall outside the Court's jurisdiction because of the Vandenberg Reservation invoked by the Respondent.

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

In this context the Court's approach has indeed been cautious. For example, the requirement "to report" under Article 51 of the Charter is not insisted upon as an essential condition of the concept of self-defence but

mentioned by the Court as an indication of the attitude of the State which is invoking the right of self-defence but certainly not closely following the treaty. The Court's observations in paragraph 200 of the Judgment are indeed to the point in this connection. In the present case therefore the Court's approach has been a logical one, inasmuch as it has decided not to apply the multilateral treaties to the resolution of this dispute but to confine its observations to the basis of customary international law, ruling that it had jurisdiction to apply customary law for the settlement of the case before the Court. It is felt that this is not only the correct approach in the circumstances of this case for many reasons, but also that it represents the contribution of the Court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens,* and is the very cornerstone of the human effort to promote peace in a world torn by strife. This aspect does need to be emphasized.

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

Even if the Charter were not a codification of existing customary law on non-use of force and self-defence, and there were a clear progressive development leading on to the banning of reprisals involving the use of force, it needs to be stated that this developmental aspect, or the precise formulatory aspect, is surely now a part of international law, whether it be categorized as customary or as one of the "general principles of law recognized by civilized nations". To invoke these could not amount to defeating the intention of the State invoking the Vandenberg Reservation, because no party before a tribunal could ever plead that it could totally opt out of all the four corners of the law both conventional – because of the reservation – and customary, because the latter was identical in content to the former and hence inapplicable. Could a party then claim not to have any law applicable to its conduct ? The Vandenberg Reservation was not intended to be a self-assessing reservation, but if this approach were adopted it would certainly become much worse indeed, a self-defeating one in relation to the due process of law. Therefore the Court confined

itself to applying customary international law in this case and held treaty-law as inapplicable. It could hardly promote in the settlement of the dispute the concept of total evasion of law as pleaded, when the sole intention of use of the optional clause under Article 36, paragraph 2, of the Statute could be to confer some basis of jurisdiction on the Court, however hedged about with reservations.

II

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

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

Furthermore, it has been argued that the Court should in its Judgment have passed strictures on the conduct of Nicaragua if it found that, by the said flow of arms to El Salvador, Nicaragua was violating the principle of non-intervention in the affairs of a State, because the arms supply was

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

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

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

Again, in paragraph 135 of the Judgment, where the evidence of Mr. David MacMichael is relied upon, the Court has not lost sight of the basic values in assessing the testimony and has noted the probative importance of a witness

> "called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua has been engaged in the supply of arms to the armed opposition in El Salvador 'whose testimony' *only partly contradicted that allegation*" (emphasis added).

Similar observations of the Court in paragraph 146 are pertinent to mention here.

Furthermore, leaving aside revision under Article 61 of the Statute, the validity of a judgment is not a matter to be challenged at any stage by anyone on any grounds. The decision of the Court is the result of a collegiate exercise reached after prolonged deliberation and a full exchange of views of no less than 15 judges who, working according to the Statute and Rules of Court, have examined the legal arguments and all the evidence before it. In this, as in all other cases, every care has been taken to strictly observe the procedures prescribed and the decision is upheld by a clear majority. What is more, the binding character of the judgment under

the Statute (Art. 59) is made sacrosanct by a provision of the United Nations Charter (Art. 94) : all Members of the United Nations have undertaken an obligation to comply with the Court's decisions addressed to them and to respect the judgment.

III

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

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

IV

I cannot conclude this opinion without emphasizing the key importance of the doctrine of non-intervention in the affairs of States which is so vital for the peace and progress of the international community. To ignore this doctrine is to undermine international order and to promote violence and bloodshed which may prove catastrophic in the end. The significant contribution which the Latin American treaty system along with the United Nations Charter make to the essentials of sound public order embraces the clear, unequivocal expression given to the principle of non-intervention, to be treated as a sanctified absolute rule of law whose non-observance could lead to disastrous consequences causing untold misery to humanity. The last subparagraph (16) of the operative paragraph 292 of the Judgment, which has been adopted unanimously by the Court, really rests on the due observance of the basic principles of non-use of force and non-intervention in the affairs of States. The Court has rightly held them both as principles of customary international law although sanctified by treaty law, but applicable in this case in the former customary manifestation to fully meet

the viewpoint of the Respondent which the Court has rightly respected. However, the concepts of both these principles do emerge in their manifestation here fully reinvigorated by being further strengthened by the express consent of States particularly the parties in dispute here. This must indeed have all the weight that law could ever command in any case and no reservations could ever suppress this pivotal fact of inter-state law, life and relations. This in my view is the main thrust of the Judgment of the Court, rendered with utmost sincerity in the hope of serving the best interests of the international community.

(Signed) NAGENDRA SINGH.