C 4/CR 91/37

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Friday 31 May 1991, at 3 p.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

in the case concerning the Land, Island and Maritime Frontier Dispute
(El Salvador/Honduras: Nicaragua intervening)

VERBATIM RECORD

ANNEE l991

Audience publique de la Chambre

tenue le vendredi 31 mai 1991, à 15 heures, au Palais de la Paix,

sous la présidence de M. Sette-Camara, président de la Chambre

en l'affaire du Différend frontalier terrestre, insulaire et maritime
(El Salvador/Honduras; Nicaragua (intervenant))

COMPTE RENDU

Present:

Judge Sette-Camara, President of the Chamber
Judges Sir Robert Jennings, President of the Court
Oda, Vice-President of the Court
Judges *ad hoc* Valticos
Torres Bernárdez

Registrar Valencia-Ospina

Présents :

M. Sette-Camara, président de la Chambre
Sir Robert Jennings, Président de la Cour
M. Oda, Vice-Président de la Cour, juges
M. Valticos
M. Torres Bernárdez, juges *ad hoc*

M. Valencia-Ospina, Greffier

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H. E. Mr. Roberto Arturo Castrillo, Ambassador,
as Co-Agent;

and

H. E. Dr. José Manuel Pacas Castro, Minister for Foreign Relations,
as Counsel and Advocate.

Lic. Berta Celina Quinteros, Director General of the Boundaries' Office,
as Counsel;

Assisted by

Prof. Dr. Eduardo Jiménez de Aréchaga, Professor of Public International Law at the University of Uruguay, former Judge and President of the International Court of Justice; former President and Member of the International Law Commission,

Mr. Keith Highet, Adjunct Professor of International Law at The Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

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Prof. Prosper Weil, Professor Emeritus at the *Université de droit, d'économie et de sciences sociales de Paris*,

Dr. Francisco Roberto Lima, Professor of Constitutional and Administrative Law; former Vice-President of the Republic and former Ambassador to the United States of America.

Dr. David Escobar Galindo, Professor of Law, Vice-Rector of the University "Dr. José Matías Delgado" (El Salvador)

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and

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Lic. Santiago Elías Castro,
Lic. Solange Langer,
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comme conseils et avocats;

ainsi que :

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Mme Lourdes Corrales,

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assisté par

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et

Dr. Alejandro Montiel Argüello, ancien ministre des affaires étrangères,

comme conseil.

The PRESIDENT: Please be seated. The sitting is resumed and we are proceeding now with the consideration of the determination of the legal situation of the islands and I give the floor to

Professor Lima.

Mr. LIMA: Mr. President, distinguished Members of the Chamber, I once again have the pleasure and the honour to appear before the Chamber to make the first part of the oral rejoinder of El Salvador in respect to the determination of the juridical status of the islands.

I wish to commence my rejoinder, Mr. President, by making an observation which I could just as easily have made in my opening statement to the Chamber.

My distinguished opponent, Professor Sánchez Rodríguez, in his own opening statement to the Chamber in the course of the session held on 28 May last (C 4/CR 91/31, at pp. 64-68) engaged in a lengthy and elegant exposition, occupying no less than 15 pages of the verbatim record, which he entitled "Le droit applicable au différend insulaire", in which he reiterated (*ibid*., at p. 64) that

> "la position du Honduras consistant à affirmer que le principe de l'*uti possidetis* juris de 1821 constitue le droit applicable au différend insulaire sur Meanguera et Meanguerita est indiscutable".

Both I and my distinguished colleague Professor Keith Highet have of course already made the point that the dispute over the islands is not in fact confined to Meanguera and Meanguerita (see C 4/CR 91/33, at pp. 11-15 and 70-75 respectively).

However, I would like to re-emphasize this point, namely that the dispute applies to all the islands of the Golfo de Fonseca, other than the Islas de Farallones which both Parties agree belong to Nicaragua, by posing a very simple question. Next week, the Chamber will be considering the question of the juridical status of the waters of the Golfo de Fonseca. All the islands of the Golfo de Fonseca necessarily generate maritime spaces, irrelevant of precisely how these maritime spaces are actually described. After all, the land commands the sea. However, can the Chamber reach any conclusion as to the juridical status of the waters of the Golfo de Fonseca without considering all the islands of the Gulf?

However, my observation is not confined to this point, Mr. President. In the passage which I have just read from the opening statement, Professor Sánchez Rodriguez affirmed that "le principe de l'*uti possidetis juris* constitue le droit applicable au différend insulaire". El Salvador does not doubt this for one moment, Mr. President. But this does not mean that the Chamber is not entitled to look at anything other than the *uti possidetis juris*. Professor Highet summarized his arguments to this effect in the following passage of his opening statement (*ibid*., at p. 70): "our conclusion is that the Chamber in the present case must look at the effective exercise and display of State sovereignty over the islands as well as historical titles".

Nothing in the reply of Professor Sánchez Rodríguez has caused El Salvador to alter this position in any way.

I will now turn my attention, Mr. President, to the reply made by Professor Sánchez Rodríguez this morning. I will start by dealing with the point which he left until last.

El Salvador has throughout these proceedings been extremely conscious of the fact that the Rules of Court provide a framework for the way in which this case should be conducted. El Salvador also realizes that both Parties in these proceedings have presented documents to the Chamber rather late in the day. However, I was somewhat surprised by the introduction this morning by Professor Sánchez Rodríguez of a quotation from the transcript of a programme on one of the Salvadorian television channels, in which I was being interviewed by a journalist on a number of topics, including the history and development of the dispute which has led to these proceedings.

It does seem to me, Mr. President, that the introduction of such evidence amounts to a direct contravention of Article 56 of the Rules of Court, paragraph 4 of which states:

> "No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available."

To make matters worse, Professor Sánchez Rodríguez did not actually quote my words but, in the manner employed by Honduras throughout these proceedings, summarized them in such a

misleading manner as to make them totally valueless to any court, even if the evidence in question had been admissible in the first place. Do you think, Mr. President, that I would really have been sent here to defend the historical title to the islands of the Golfo de Fonseca if I had said on television that El Salvador had no title to Meanguera..

Be that as it may be, Mr. President, no one can be unaware of the fact that, when a country is contemplating proceedings in a tribunal such as the International Court of Justice, its Government obviously seeks the opinions of experts in the field, both national and international. The Government of El Salvador therefore formed a Commission of Lawyers to consider the strategy to be followed in the proceedings. All the Members of this Commission including myself, made suggestions, often contradictory, both of a political and of a technical nature.

It would be wholly inappropriate, Mr. President, and also a breach of national security, to make any comment on the political content of these discussions. However, the technical content of these discussions, or to be more precise, the strategy which was finally adopted, which did not in fact in all respects correspond to my original suggestions, necessarily has become a matter of public record, since it is evident from our written and oral pleadings in this case.

Why therefore should I not on television explain to the people of my country the strategy which I, as one of the members of the Commission of Lawyers, suggested that the Government of El Salvador should adopt? I was surely entitled to explain my own suggestions, whether or not they were finally adopted.

In any event, I fail to see how anything, no matter of what nature, said on a television programme can affect in any way whatsoever the outcome of this case. The introduction of such ridiculous evidence shows clearly, once again, the desperation of Honduras to find something on which to hang their claim to have jurisdiction over the islands of the Gulf of Fonseca.

Professor Sánchez Rodríguez said this morning that he would be happy to hear my explanation of these comments. Perhaps the fact that he has not actually bothered to attend the

session this afternoon to hear it is another illustration of how little importance my remarks on television actually have. In any event, Mr. President, I hope that my explanation would have satisfied Professor Sánchez Rodríguez had he been here to hear it.

I will next consider, Mr. President, Professor Sánchez Rodríguez' comments on matters relating to the interpretation of the Political Constitution of El Salvador of 1983.

In his opening statement, Professor Sánchez Rodríguez, as I have already said, treated us to a lengthy academic discusssion of the basic principles of Public International Law. I am not myself sufficiently expert in that field to evaluate the refresher course with which he provided us. This morning, on the other hand, he treated us to a somewhat shorter academic discussion on the interpretation of the Constitution of El Salvador. I have spent my entire adult life engaged in studying the Constitutional law of my country, and I can tell you, Mr. President, that Professor Sánchez Rodríguez knows absolutely nothing about the way in which the Constitution of El Salvador has been interpreted within El Salvador.

It has been fully accepted by the Salvadorian experts on constitutional law that the word *"irreduceable"* (the Spanish word is irreductible, which Professor Sánchez Rodríguez correctly translated into French as *irréductible*), the word "irreduceable" is only applicable to that part of the territory of El Salvador whose boundaries have already been validly delimited. It does not apply to the disputed sectors of the land frontier which the Chamber has to delimit in this case; once the delimitation is actually made, the duly delimited boundaries of these sectors will also become "irreduceable". Nor does it apply to any islands in respect of which there is still any territorial dispute.

In any event, Mr. President, what has the Political Constitution of El Salvador to do with this case? The General Treaty of Peace of 1980 has been duly ratified by the Legislative Assembly of El Salvador and so has the Special Agreement of 1986. It is on the basis of the combined effect of those two documents, not on the basis of the Political Constitution of El Salvador of 1983, that this

case has been presented by El Salvador to this Chamber of the International Court of Justice, and it is on that basis that this Chamber has to reach its decision.

I will now turn my attention, Mr. President, to the comments made by Professor Sánchez Rodríguez on my own opening statement.

I first note, Mr. President, that Professor Sánchez Rodríguez did not make any attempt to dispute my interpretation of the "Reales Cédulas" of 1563, 1564 and 1568. It therefore seems reasonable to assume that Honduras thus accepts the conclusions stated at the end of this section of my opening statement (C 4/C 91/33, p. 31), with the exception of two questions which he specifically raised. I will set out the question in his own words.

> "La première est la suivante : dans l'hypothèse où la thèse d'El Salvador serait la bonne, sur quelle base juridique El Salvador réclamerait-il la totalité du Golfe du Fonseca?" (C 4/CR 91/36, p. 14.)

My answer is that the whole of the Golfo de Fonseca was granted to the "Gobernación" of Guatemala by the "Reales Cédulas" of 1563 and 1564, which also excluded the Golfo de Fonseca from the "Gobernación" of Honduras. The two successor States to the "Gobernación" of Guatemala are the modern Republics of Guatemala and El Salvador. This matter has been resolved between the two of them, and has nothing whatever to do with the modern Republic of Honduras.

His second question was as follows:

> "la proposition de M. Lima est-elle compatible avec le texte de l'article 84 de la Constitution salvadorienne en vigueur, laquelle ne considère comme îles salvadoriennes que celle visées par l'arrêt de la Cour centraméricaine de 1917?" (*Ibid*.)

This question is very difficult to answer because Professor Sánchez Rodríguez has once again, either inadvertently or deliberately, omitted part of the relevant paragraph of Article 84, the phrase which immediately follows the reference to the Judgment of the Central American Court of Justice in 1917. The omitted paragraph is as follows. I will read it first in the original Spanish, and then its

translation into English:

> "que además le corresponden conforme a otras fuentes del Derecho Internacional" [the islands mentioned in the Judgment of the Central American Court].

Translated into English:

> "and additionally those [islands] which belong to it in accordance with other sources of International Law".

It is therefore simply not true that Article 84 only regards as Salvadorian islands those mentioned in the Judgment of the Central American Court of Justice in 1917.

How can I possibly be expected to answer a question on a constitutional provision when an essential part of it has been overlooked by the questioner? I am not surprised, Mr. President, that Professor Sánchez Rodríguez has had so many difficulties in interpreting the Constitution of El Salvador.

I now turn to consider the comments of Professor Sánchez Rodríguez in relation to the Convent of Nacaome.

He states that "la juridiction de ce couvent a été établie pour la période allant du rapport du Padre Ponce en 1586" (C 4/CR 91/36, p. 11). This, Mr. President, is simply not the case. In my opening statement to the Court (C 4/CR 91/33, p. 36), I referred to a "Real Cédula" of 1713 in which the King of Spain clearly established that the district of Nacaome formed part of San Miguel. How could the matter then have been settled in a different way in 1586? Also I think we should remember that in 1675 the Bishop of Honduras asked the King of Spain for the transfer of Nacaome, and the King of Spain refused it. He says that in 1586 the matter was cleared.

Due to the deliberate confusion over dates which are contained in the written and oral pleadings of El Salvador, I must, Mr. President, request that the Chamber take extreme care to place each document relating to each jurisdiction in the correct chronological order. I will recall that in my opening statement I mentioned how important were the dates of the documents presented, and this is

one of the cases.

A further question which I was asked by Professor Sáanchez Rodríguez was how I explained the statement in the Laudo of the King of Spain in the *Arbitration between Honduras and Nicaragua* that in 1821 the "Alcaldía Mayor" of Tegucigalpa formed part of the "Gobernación" of Guatemala.

This question is in effect a reiteration of a statement made in the Memorial of Honduras:

> "Les limites de l'Intendance du Honduras, avec lesquelles coïncident les limites administratives et les limites ecclésiastiques, n'ont pas variées dans les 30 années qui suivent jusqu'à l'indépendance commune des cinq provinces d'Amérique Centrale, le 15 septembre 1821. La description de l'Alcaldía Mayor par Joseph del Valle en 1763, celle de la province par le Gouverneur Anguiano en 1804 et le recensement de l'evêque Cadinaíos en 1791 corroborent cette situation." (HM, p. 556.)

The statement in the passage from the Memorial of Honduras which I have just read out, that the boundaries of the Intendancy of Honduras were not changed during the 30 years prior to the independence of Central America, is a point on which the Parties are not in agreement. This was demonstrated in the oral arguments concerning the sixth disputed sector of the land frontier, the Estuary of the Goascorán River, to which I will be referring in a moment.

This disagreement is as to which "Gobernación" had jurisdiction over the "Alcaldía Mayor" of Tegucigalpa in 1821. I made it clear in my opening statement that no such "Alcaldía Mayor" was created in 1580, as is alleged by Honduras on the strength of a "Real Provisión" which in fact only created an "Alcaldía Mayor" of Mines of the Province of Honduras. This "Alcaldía Mayor" of Mines had jurisdiction, but obviously only in respect of matters concerning mining, over a large area including Choluteca.

However, every deed of appointment of the "Alcalde Mayor" of Mines of the Province of Honduras stated expressly that Choluteca remained subject to the jurisdiction of the "Gobernación" of Guatemala.

The "Alcaldía Mayor" of Tegucigalpa was in fact created in the course of the 18th century.

Initially, it was subject to the jurisdiction of the "Gobernación" of Guatemala. Subsequently, this "Alcaldía Mayor" was, by means of a "Real Cédula" of 1791, annexed to the Intendancy of Comayagua. Both Parties are in agreement that the "Gobernación" of Honduras thus acquired in 1791 jurisdiction over the "Alcaldía Mayor" of Tegucigalpa, which by then included Choluteca.

This fixed the boundaries of the Intendancy of Honduras 30 years prior to the independence of Central America. The disagreement between the Parties is as to whether or not those boundaries were subsequently changed prior to 1821.

El Salvador argues that the jurisdiction of the "Gobernación" of Honduras over the "Alcaldía Mayor" of Tegucigalpa lasted only until 1818, when the King of Spain issued another "Real Cédula" ordering that the "Alcaldía Mayor" of Tegucigalpa should be separated from the Intendancy of Comayagua and should become independent, subject to the jurisdiction of the presiding Governor of Guatemala. The text of this "Real Cédula" is to be found in the Annexes of the Counter-Memorial of El Salvador (Vol. V, Ann. VII, pp. 65 *et seq*.). In this way, the "Alcaldía Mayor" of Tegucigalpa ceased to form part of the Gobernación of Honduras three years before the independence of Central America and was therefore subject to the jurisdiction of the "Gobernación" of Guatemala at the critical date of 1821.

The above argument was put forward by Dr. Martínez Moreno in the course of the session held on 21 May last concerning the sixth disputed sector of the land frontier, the Estuary of the Goascorán River (C 4/CR 91/27, pp. 55-56). However, when Professor Bardonnet replied to this argument on the following day (C 4/CR 91/28, pp. 16-19), he made it clear that Honduras does not share the interpretation of the effect of the "Real Cédula" of 1818. Professor Bardonnet relied on a passage in the Laudo of the King of Spain in 1906 in the *Arbitration between Honduras and Nicaragua*, in which the King of Spain stated that the effect of the "Real Cédula" of 1818 was only to give the "Alcaldía Mayor" of Tegucigalpa a certain autonomy in the economic field rather than to separate it from the "Gobernación" of Honduras, to which it therefore continued to belong in 1821.

Dr. Martínez Moreno made it clear in his Rejoinder in the course of the session held on 23 May last (C 4/CR 91/29, pp. 12-16) that El Salvador does not accept this view of Honduras, on the grounds that it is contrary to the express words of the "Real Cédula" and is based entirely on an Arbitral Award given nearly a century after the independence of Central America.

Despite the question put to me by Professor Sánchez Rodríguez, it is not in fact necessary for me to say anything further about this disagreement between the Parties, since the matter has already been fully argued before the Chamber and, no matter how it is resolved, it does not affect the question of whether or not Honduras had in 1821 jurisdiction over the islands of the Golfo de Fonseca. This is because, even on the assumption that the argument put forward by Professor Bardonnet is actually correct (and I must emphasize, Mr. President, that El Salvador does not accept this), this does not necessarily lead to the conclusion that in 1821 Honduras had any such jurisdiction. Jurisdiction over the "Alcaldía Mayor" of Tegucigalpa does not of itself automatically prove jurisdiction over the islands. The existence of such jurisdiction has to be proved directly.

In the passage from the Memorial of Honduras which I read some little time ago, Honduras cited certain documents as corroboration of its statement that the boundaries of the Intendancy of Honduras had not changed during the 30 years prior to the independence of Central America. It is difficult to see how these documents, the latest of which was produced precisely 30 years prior to the independence of Central America, can possibly corroborate anything that may or may not have occurred subsequent to the date on which they were written.

However, perhaps these documents may serve to corroborate the jurisdiction of Honduras over the Golf of Fonseca in 1821. It must be remembered, Mr. President, that these documents were presented to the Chamber by Honduras. They are to be found in the Annexes to the Memorial of Honduras. Thus, Honduras must accept their contents, whether beneficial or prejudicial to the arguments which it is trying to maintain.

I will consider first the census prepared by Mgr. Fernando Cardiñanos, tenth Bishop of

Honduras in 1791. He produced an outstanding and very well documented report of the state of the parishes which constituted his Diocese. The curacies of Choluteca, Nacaome, and Goascorán were duly described in this report. *Neither the descriptions of these curacies nor any other part of this report contained any account of any extension of jurisdiction to the islands of the Golfo de Fonseca.* In this respect, his report coincides exactly with the contents of the report produced by he "Alcalde Mayor" of Tegucigalpa, Ortiz de Leton, in 1743.

Turning now to the report of Ramón de Anguiano, Intendent of Comayagua, this comprised a study entitled "Poblacíon de las Provincias de Honduras in 1804" and consisted of a review of the political and administrative divisions of those Provinces. The description of Nacaome mentioned the parishes of Nacaome and Goascorán and the description of Choluteca mentioned the curacy of the Villa de Choluteca. However, there was not the slightest mention of any exercise by Honduras in 1804, the time of this report, of any jurisdiction over either the waters or the islands of the Golfo de Fonseca.

What conclusion can be drawn from these documents? The islands of the Golfo de Fonseca were not mentioned in either the report of Cardiñanos or in the report of Anguiano. The administrative boundaries of the Intendancy of Honduras, which coincided with the ecclesiastical boundaries, had not changed, as Honduras has expressly affirmed. Consequently, the only conclusion which can be drawn is that the islands of the Golfo de Fonseca were never within the jurisdiction of Honduras.

The omission of the islands from the descriptions of the religious jurisdictions of Nacaome, Choluteca and Goascorán in the documents cited by Honduras constitute a vital and important proof in favour of El Salvador. An exactly similar conclusion was reached - as we have said many times - by the Tribunal of Arbitration presided by Chief Justice Hughes in the frontier dispute between Guatemala and Honduras.

These documents do not support in any way the proposition which they are said by Honduras

to corroborate. Instead, they serve to confirm the arguments which have been advanced by El Salvador, namely that the Province of Honduras never had jurisdiction over the islands of the Golfo de Fonseca, to which it has never had or ever produced any title whatsoever, in spite of the fact that they mention *uti possidetis juris* of 1821. Not a single document or title has been presented.

Professor Sánchez Rodríguez made no attempt to explain or justify the various misrepresentations of documents by Honduras to which I made reference in my opening statement. The only comment which he made on the Lorenzo de Irala case was to say "je renvoie à la position soutenue par le Gouvernement du Honduras, attendu que le document est totalement dépourvu, en soi, de toute force probante". I, for my part, reaffirm my own comments in my opening statement. He made no comment whatsoever on the best, or worst, example of all, the famous case of the "Jueces Reformadores de Milpas" in which Honduras omitted the most important part of the document referring to the jurisdiction of El Salvador on those islands.

I hope, without much confidence, that this means that the Government of Honduras has recognized the existence of these misrepresentations in their written statements. I cannot however leave the subject without referring to one further example of this practice.

In its Memorial, Honduras has not been content just to make subtle changes in the names of administrative entities and to use indiscriminately a variety of names in order to try to escape from its lack of solid evidentiary support. In addition, in the "extracts" of original documents which it has presented in its Annexes Honduras has resorted to a similar tactic. This tactic consists in suppressing words which appear in the original documents, in order to give a favourable meaning to the documents presented to the Chamber.

For example, in the Annexes to the Memorial of Honduras (MH, Vol. V, p. 2297), there appears an "extract", translated into French by Honduras as follows:

> "Mémoire de tous les villages faisant partie de la juridiction de Santo Miguel et de la

> ville de Choluteca qui est un district du port de Fonseca de la province du Honduras ..." [Traduction française du Honduras.]

Set out in this form the document appears to be stating that Choluteca is a district of the Province of Honduras. But the original document, which is filed in the Registry of the Court, states:

> "Mémoire de tous les villages faisant partie de la juridiction de Santo Miguel et de la ville de Choluteca qui est un district du port de Fonseca *et de la province du Honduras* ..." (Emphasis added.)

The suppressed word "et" completely changes the content of the original document; with the word "et", the document is stating that the townships of all the Province of Honduras are included as well as the townships of San Miguel and Choluteca. The latter version is in fact the correct one, because in the list in the original document the townships of the Province of Honduras are indeed included. However, they do not seem to appear in the list which Honduras gives in its "extract".

Honduras analyses the above-mentioned document in its Memorial (MH, pp. 542-543) as follows:

> "Un élément précieux pour la présent étude nous est fourni par le Mémorial des villages qui se trouvent dans la juridiction de San Miguel et de la ville de Choluteca, établi par Pedro de Valverde en 1590. Il se trouve dans celui-ci, après un long exposé sur les villages, un paragraphe appelé "Iles" et un paragraphe indiquant à propos de Meanguera ce qui suit:
>
> > 'La Miangola: cette île possède un village de la juridiction de la Choluteca avec vingt Indiens, ils mangent du maïs.'"

By means of this quotation, Honduras is seeking to prove that Meanguera was within the jurisdiction of Honduras, on the grounds that Choluteca was within the Province of Honduras. Since the document is dated 1590, it therefore follows from the discussion in my first statement to the Court in the session held on 29 May (C 4/CR 91/33, at pp. 32-48) as to the ecclesiastical and civil jurisdiction over Choluteca that, in 1590 - the date of this document, Choluteca formed part of the jurisdiction of the "Gobernación" of Guatemala, not of the "Gobernación" of Honduras. As I showed in my earlier statement, it was not until 1672 that Choluteca became part of the jurisdiction of Honduras; indeed, as I showed, on 28 February 1590, the same year as the document which I have

been discussing, Pedro Girón de Alvarado was appointed by "Real Cédula" as "'Alcalde Mayor' of the cities of San Salvador, San Miguel and the Villa of Choluteca and their districts and jurisdictions" (CMES, p. 175 and the Annexes thereto, Vol. VII, p. 66).

Consequently, all that is proved by the document presented by Honduras, in spite of the original alteration which I have mentioned, is that at that point of time Meanguera belonged to the jurisdiction of the "Gobernación" of Guatemala through the "Alcaldías Mayores" of San Salvador, San Miguel and Choluteca, and not to the jurisdiction of Honduras.

With this final illustration of the pleading techniques adopted by Honduras in these proceedings, I come to the end of my rejoinder. This also concludes, Mr. President, my participation in these proceedings on behalf of my country. It therefore only remains for me to express to you, Mr. President, and to the other distinguished Members of the Chamber, my thanks for the attention and the courtesy with which you have followed my exposition. I now ask you, Mr. President, to give the floor to Professor Keith Highet, who will continue this rejoinder on behalf of El Salvador. Thank you very much.

The PRESIDENT: I thank Professor Lima and I give the floor to Professor Keith Highet.

Mr. HIGHET: Thank you Mr. President, Members of the Chamber. I would hope to wrap up my rebuttal of Professor Sánchez Rodríguez in about 30 minutes as far as I can estimate.

I will present my response to Professor Sánchez Rodríguez in the following general manner.

(i) I will go as best I can through his speech this morning and will meet the points that require answering.

(ii) I will point out what appears to be the result of the fact that Honduras has not been able to respond, or has not wished even to mention in some cases, the variety of points that

we did make on the historical record of the 19th century, in particular.

(iii) And specifically, I will also touch on his comments relating to the evidence of the witness and the Meanguera Dossier.

(iv) Finally, I will draw some brief conclusions.

* * *

The first general section, Mr. President, of Professor Sánchez Rodríguez's argument that requires a response is at pages 17 and 18 of compte rendu 91/36 of 31 May.

I am thinking of the place where Professor Sánchez Rodríguez puts a series of nine questions to which he would like answers - sort of rolling juridical catechism which, as far as I can understand his questions, I will surely try to answer.

The first question was: whether this case involves a succession of rights from Spain? It obviously does in a historical sense. The better question is: to what extent, and how, is that succession of rights or inheritance of colonial territories, to be given effect in law many years later, and in particular, where - as in the case of the islands of Meanguera and Meanguerita - there is a clear and unequivocal exercise of State sovereignty by one State, but not by the other?

The second question was related to the first. It asks if there is a validity to the distinction between original and derived title? Of course there must be, and we would say that the most important question is whether the acts of continuous and peaceful display and exercise of governmental functions confirm the colonial title or whether they indicate that the Parties themselves did not believe in that title and acted otherwise.

And in a case - not this one, we say - but in a case where that ancient legal title is hard to decipher or is unclear - such as in the *Minquiers and Ecrehos* case, then evidence of continuous possession and control to the present day has to be taken into account in order to properly reflect the legal situation - a form, if you will, of consolidation of titles affected by acquiescence, tolerance, or

even the overt acceptance of a *status quo*.

The third question, Mr. President, was whether the distinction between attribution and delimitation of territory is valid when we are talking about islands? Very much so, we would think. As I recall our point in the El Salvador Counter-Memorial, Part II, pages 141 et seq., it was that attribution of territory suggested different legal tests than did matters of delimitation. To quote one of the numerous authorities cited in the Counter-Memorial:

> "the essence of the matter [that is to say, the difference between delimitation and attribution] is not the determination of the boundary line, but a question of title to an already more or less determined parcel of territory[1]".

I fear that in my discussion of the uniqueness of islands I did not get my point across to Professor Sánchez Rodríguez. Islands present precisely the kinds of case where there is indeed, by the very geography, "an already more or less determined parcel of territory". It is easy to see. Even though most of the islands cases have indeed been issues of *res nullius* and not of State succession or *uti possidetis*, this remains true.

In fact, if one considers *Minquiers and Ecrehos* in its complete context, the historical titles invoked unconvincingly in a sense by both sides still did exist. But the Court did not look to those titles. Yet how were they different from the question of State succession: from mediaeval England to the modern United Kingdom, and from mediaeval Normandy and France to the modern French State? In a sense, by implication, this is how the facts come across. One can take the State succession argument too far, and it can surely become as artificial as some applications of *uti possidetis juris* have been.

As Professor Brownlie has written:

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[1]Para. 5.3, citing Sir Robert Y. Jennings, *General Course of International Law*, Receuil des Cours, Vol. 121, pp. 428-429.

> "The operation of such a principle [as *uti possidetis*] does not give very satisfactory solutions, since much depends on the concept of possession to be employed, and, furthermore, the old Spanish administrative boundaries are frequently ill-defined or difficult of proof. It must be emphasized that the principle is by no means mandatory and the states concerned are free to adopt other principles as the basis of a settlement[2]."

Professor Sánchez Rodríguez then argued that we were somehow seeking the repeal of the rule established in the *Burkina Faso/Mali case*. I thought I had been quite clear about this. In no way did I seek to criticize that careful and painstaking decision. I only point out that it must be carefully viewed in relation to the terms of the "compromis" actually agreed to by Burkina Faso and Mali, and, of course, applied by the Chamber in that case. That "compromis" very clearly sought the application of *uti possidetis juris*. This is very different from this case, Mr. President. Here the second sentence of Article 26 of the General Peace Treaty very deliberately alludes to a broad variety of other features that may be considered and where the provisions of Article 5 of the "compromis" further permit the Chamber to take such factors into account.

But it is also rewarding to reflect on the time gaps - the chronology. In Burkina Faso we were only talking about a period of little more than 20 years - between 1960 and 1983 - between the expiration of colonial rule in French West Africa and the "compromis". In the present case we are talking about 165 years - a period eight times as long. Surely there must be some recognition of the fact that even in French Equatorial Africa and even in areas where maps and documents were, as they were in the Burkina Faso case, conflicting and confusing, there was still far greater contemporaneity than there could possibly be in the present case.

That is precisely why Article 26 of the Peace Treaty permits equal treatment of the Spanish colonial titles and the

> "other elements of proof and arguments and reasons of a juridical, historic or human nature or of whatever other kind that may be adduced by the Parties that is recognized by international law".

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[2]Brownlie, *Principles of Public International Law*, 3rd ed., 1979, p. 138.

One can also see another interesting pattern emerge from the record of the cases. *The Aves Island* case was decided in 1865, and looked back to the early 19th and late 18th centuries. Let us say there was a 100-year gap in that case, at the most. *Bolivia/Peru* was decided in 1909, *Costa Rica/Panama* in 1914, *Colombia/Venezuela* in 1917, *Guatemala/Honduras* in 1933. The farthest these cases were chronologically separated from the so-called critical date of 1821 was 112 years. In our case the gap is 170 years.

Turning to Professor Sánchez Rodríguez's fourth question, he asked whether, if there are specific rules governing State succession in respect of islands in international law, they might be considered as reflecting uti possidetis? To try to answer this, I am not aware of any specific rules concerning islands as such. That was not my point. My point was that an island is by its very definition insular, and is "an already more or less determined parcel of territory".

The fifth question of Professor Sánchez Rodríguez was whether the principles of *uti possidetis* are substantially different in juridical terms from the principles of State succession from a colonial predecessor? It is the same, I suppose, in most respects, except that the question is itself confusing. It is confusing because it mixes up the ideas of international recognition, international succession, and internal domestic administrative boundaries that are then, at the time of independence, theoretically crystallized into the reality of international territory that is in fact "inherited".

The sixth question is one about hierarchy: which has precedence: the exercise and display of State sovereignty or the principle of State succession? Mr. President, these are apples and oranges. They are in two wholly different universes of discourse. The exercise and display of State authority is a proof of the exercise of sovereignty and may well, through a process of carefully controlled and measured judicial tests, become consolidated into contemporaneous title. The principle of State succession adds nothing new to that. There was State succession only formally in Las Palmas, where the United States could not take that which Spain had no title to give.

We were surely not dealing with *terra nullius* in *Minquiers and Ecrehos*, but we were not

technically dealing with State succession either, although it is tempting to view a distinction between mediaeval and modern sovereignty. One cannot therefore really talk about a hierarchy of "effectivités" and State succession. One can talk about "effectivités", and the title that appears to have been obtained by State succession, or declared and recognized by the *uti possidetis juris* if that is not the same thing; but then one must go further and test the original title against acts of recognition and acquiescence and the exercise and display of State sovereignty in regard to the territory ever since - to show, as best one can, what the States concerned really knew what they were doing, and what they actually had inherited.

That is why we have said all along that our case falls within the first or third definition in the Burkina Faso context.

The seventh question about non-application of general rules of State succession to former colonial countries is quite honestly beyond the scope of this case for most purposes, and is not in our judgement called for in response by the dispute at hand.

The eighth question gets even worse: it is really a leading one. It asks us why we are applying the rules of international law about territorial sovereignty over *terrae nullius* to Meanguera and Meanguerita? That is not true. We are just trying to follow the law, as recognized by the "compromis". Part of that law is the important case of *Minquiers and Ecrehos*. That case was not a case of *res nullius* or *terrae nullius*, or unexplored lands. It was in fact a case involving ancient titles and also evidence of the more recent exercise and display of State sovereignty.

His last question is to our mind, with respect, completely confused. It asks "how can we read the renvoi to principles and rules of international law into Article 26 of the General Peace Treaty if the reference to those principles is contained in article 5 of the *Compromis*, which was subsequent in time to the General Peace Treaty"? That really is the question.

Well, Article 26 says (in my own translation) that the Mixed Boundary Commission to which that Article was addressed, is to take into account Spanish colonial titles, and is to take into account

equally *any other* juridical arguments and reasons brought in by the Parties that are recognized by international law.

One of those reasons or arguments is precisely the one we have been making.

The Mixed Boundary Commission having not reached agreement, the matter was then of course placed before the Chamber by the *Special Agreement*, which contained a *renvoi*, "where pertinent", to the provisions of the General Peace Treaty but above all to the "rules of international law applicable between the Parties." The rules of international law so applicable include the modern law of territory as well as the *uti possidetis juris*, where relevant and where it can or should be correctly applied.

It is an endless loop. Each renvoi confirms the other. There is no inconsistency. The question, with respect, should be re-drafted and possibly not asked at all.

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I am now released from the catechism and I would like to address myself to the more general issues that emerged in the rest of Professor Sánchez Rodríguez's statement this morning.

He brought up the question of "critical date". His remarks seemed to impute to me the position that Honduras has advanced all five dates in her litany of dates as "critical dates". And he said: "Pour quelle raison, tout d'un coup - à notre grande surprise le Professeur Highet cherche-t-il à en faire des dates supposément critiques?" (C 4/CR 91/36, p. 20.)

Well I thought I had been rather clear about it; at page 76 of C 4/CR 91/33 of 29 May I said very clearly that I was wary of using the term "critical date" and that "I would prefer the term, 'cut-off date', or something similar ..."

The point is that it is *Honduras* that uses dates in an inconsistent and confusing manner. One is not allowed to bring electrical power to Meanguera because that violates the *status quo* and is

prevented under Article 37 of the General Peace Treaty. Well, apart from being absurd, that is one kind of idea, as I said - and I note with pleasure, Mr. President, that Professor Sánchez Rodríguez did not question my reading of that Article of the General Peace Treaty.

The best general definition would be that a "critical date" is a "date after which any actions of the parties can no longer affect the issue[3]". That is it in a nutshell. For us that would clearly have to be 1986. It could, it could even be 1980 - our case would not be affected by it. But it is ridiculous to assert that the provisions of Article 57 of the General Peace Treaty does anything of the kind. It provides quite a different function.

And it is equally ridiculous to assert that 1854 is a date - a "critical date" - either when the dispute crystallized or, as Honduras would have it, a "critical date" in the sense I have just mentioned. Of course, as we accept, 1821 is a critical date, but only one with a lower-case "c". It is an *important* date. It is not the real "critical date" - the date after which no actions of the Parties in respect of the islands can be taken into account. That just could not be true. That would accord neither with the General Peace Treaty between the Parties, nor with the *Compromis* nor with general principles of international law, including particularly the *Minquiers and Ecrehos* case of this Court.

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[3]R.Y. Jennings, Acquisition of Territory in International Law (1963), p. 32.

The *Aves Island* case was mentioned by Professor Sánchez Rodríguez. I was asked to explain the *ratio decidendi* in it (C 4/CR 91/36, p. 22). We all know the case and we know that the Queen of Spain's decision was one based on Spanish historical title. What Professor Sánchez Rodríguez might have forgotten was the penultimate *considerandum* in that case, which, if you will spare me Mr. President, I will read:

> "Considérant que, même en faisant abstraction de ce qui précède, il n'en reste pas moins que, si on peut dire que l'île d'Aves ne fut jamais réellement et vraiment occupée par l'Espagne et habitée par les Espagnols, la résidence temporaire de quelques indigènes de Saba et de Saint-Eustache n'est qu'une occupation précaire *qui ne vaut pas possession*; et bien que, à raison des immersions auxquelles elle est exposée, l'île ne soit pas susceptible d'une habitation permanente, si les Hollandais . . ."

The Queen wrote or her counsellors wrote

> " . . . la croyant abandonnée, l'avaient occupée dans l'intention de l'acquérir, ils auraient construit quelque édifice et essayé de rendre l'île habitable d'une manière constante, ce qu'ils n'ont pas fait[4]."

And I would thus say that the Queen of Spain quite sensibly looked at *effectivités*, or the possibility of *effectivités*, or the possibility of actual facts of possession or the exercise of State authority, and found them wanting.

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[4]Venezuela/Holland (1865), 2 Moore, Arbitrations 5037 (Spanish Report); 2 *De Lapradelle et Politis, Receuil des Arbitrages Internationaux,* p. 408 at 413, emphasis added.

Professor Sánchez Rodríguez says that El Salvador has expressly recognized that it has no proof of effective ownership of control over Meanguerita. Well that is not really what we said. And the answer to this point is obvious. Meanguerita is small and uninhabitable. There is no fresh water in the island. We have evidence that there is no water. It is steep, as you can see from the photographs. It is difficult, if not impossible, of access from the water. It lies just offshore Meanguera. It is patrolled, of course, it must be patrolled, and has been for years by Salvadorian patrol boats just as is Meanguera. It has always been shown as an islet belonging to El Salvador in all official Salvadorian maps and statements.

Just because it is uninhabited and uninhabitable does not mean that it does belong to El Salvador. The same could be said of the Farallones of Nicaragua. What display of sovereignty and control over the Farallones has Nicaragua shown? And what of the tiny islets and keys off the coast of Honduras that are not inhabited?

Meanguerita, moreover, has never benefitted from any presence of Honduras. One can put it this way: to the extent that any display of State sovereignty or authority can be shown over Meanguerita, in these terms, it has been shown by El Salvador and by El Salvador alone.

Mr. President, I leave aside as an unnecessarily awkward subject the concept of "contiguity". And if this comment by Professor Sánchez Rodríguez had occurred in his main argument, I would have been delighted to engage him on the issue. But it is also true that Meanguerita is absolutely contiguous and adjacent to Meanguera. And it would be inconceivable to split this little island off on a technical ground in a paper claim by Honduras.

Speaking of continuity, we have also been asked why in the past we have not claimed Zacate Grande. What we say is although that we have not claimed that island, it should belong to us under grounds of *uti possidetis juris* taken alone, and that Honduras cannot resile from her own legal theory. Just because she has no facts or evidence to back up her territorial claim to the islands of

Meanguera and Meanguerita, Honduras has been forced into an artificially narrow application of *uti possidetis juris* in this case, and that is quite obvious, and that is also inconsistent with the *Compromis* and is inconsistent with the General Peace Treaty. However she cannot then protest the rigorous application of her own rule. It is not El Salvador that must explain why she has never *claimed* Zacate Grande as Professor Sánchez Rodríguez asks; it is *Honduras* that must justify on these grounds, why she can retain it.

I was gratified to note that many points that I had made were simply swept aside by Professor Sánchez Rodríguez and never really discussed.

I take it then, Mr. President, that Honduras has no answer whatever to the analysis and characterization that I gave to the 19th century occasions concerning which their written pleadings were so expansive and detailed, or to the conclusions which I drew from examining those incidents. This includes the history and the facts that I went through with the Chamber; the history of the two Constitutions; and the term "Enseñada de Conchagua". It includes the Chatfield affair, and the letters of Admiral Hornby and Captain Henderson. It includes the recently filed papers about Echeline, Rios and so forth, and the corn planting. It includes all the events of that highly significant year, 1854, and my conclusions that they amount to no more than a tempest in a teacup.

It includes the Zuniga report - he was the sceptical auditor, you will recall. It includes the one-day survey of Meanguera: it was to my recollection the only one that happened. It also includes my conclusions about the 1879 sale of land on Meanguera by El Salvador. Most importantly, Mr. President, it concedes that what I have said is true; that there have been no real Honduran claims, and no real Honduran protests to any of this. The key point about the Cruz-Letona debates was not discussed either - the point that that would have been the appropriate time to bring up the matter that Mr. Cruz had sold the island away, or handed it over. That was not discussed, and that is conceded by Honduras. I therefore take it that my observations on that matter are not susceptible of rebuttal on the record.

Nor is there any debate or mention at all of the capture of the General Saenz, and its mischaracterization by the Honduran Reply.

I will now turn briefly to the witness. He was never asked why his mother did not receive Salvadorian citizenship. I should have done so, because I have a pretty good impression that she just got bogged down by the red tape. That is neither here nor there. The odd thing was that Professor Sánchez Rodríguez - and I was delighted by this - was able to use his magnifying-glass to determine that the mother of the witness was allowed to vote in an election. Perhaps the real answer to that might be that she thought she was Salvadorian. I cannot imagine voting in an election without thinking that you can vote. Perhaps everybody else thought so too. In a sense that proves our point, not his.

We are chided, gently, for bringing in the emotional and human elements of this case. Of course we are. The fact is that the case does have human elements. That is precisely why Article 26 of the General Peace Treaty is worded the way it is. It would be a serious disservice to all concerned not to deal with these issues. The Chamber cannot avoid them. We certainly cannot avoid them. The only reason that Honduras seems to be able to avoid them is because Honduras has no contact with Meanguera, and because its case is wholly artificial. The mere suggestion that was made by Professor Sánchez Rodríguez that it could be reasonable or even conceivable for the Chamber to take this island of 3,510 Salvadorians and two resident Hondurans and decide that the island could perfectly well be under Honduran sovereignty is a perfect illustration of that artificiality. It would be a disaster. It would produce a result guaranteed to create years of discord, rather than settling the matter. It is precisely for that kind of reason, Mr. President, that Article 26 of the General Peace Treaty should be applied in both its sentences.

I should also mention that although Professor Sánchez Rodríguez's analysis of the *Nicaragua* case is very instructive, one must always recall that a lot of the hesitation and care shown by the Court in that case was, I believe, precisely because one party to the case was not present in the

courtroom, and could not therefore cross-examine the witnesses or test the evidence of the applicant. The evidence had to be sorted through, "with exacting care[5]", and the Court acted under Article 53 of the Statute. But here, in this case today, with ample opportunity to cross-examine, only two questions were put. There is still opportunity to cross-examine, if Honduras would wish. The witness is present in the Peace Palace now and he is fully at the disposition of the Chamber and of the delegation of Honduras. We submit that the Chamber will know perfectly well what weight to give to the testimony it heard on Wednesday afternoon.

The witness is also criticized, Mr. President, for saying that he did not have a knowledge "in general" of the history of Meanguera, and yet for supplying some precise dates. I think that the record speaks for itself. The reason he knew those dates as distinguished from the general history of the island which was the question the Professor asked him, is obvious either from the context of the questions put, or from the fact that he has for a good number of years been a public official on that island. That is precisely why we chose him: because he had a good stable knowledge of the day-to-day administration of Meanguera by the Salvadorian authorities. His father had also been an official. Surely that must include dates such as those when the various buildings and services came to the island since the 1930s. That is pretty well known in a small place like Meanguera.

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[5]"A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevance of facts for the purpose of determining liability and assessing damages. As the *Corfu Channel* case showed, the Court is in the position to perform that task *with exacting care*." H. Lauterpacht, *The Development of International Law by the International Court* (1958) at 48 (emphasis added).

I should also mention a different point, no longer on the witness: the equidistance point. I put my magnifying glass to work on their map and I must now agree that the distances between Tigre and Meanguera and Punta San José in Nicaragua are about the same. I had been misled by the presence of Meanguerita, as well as by our map. However, my first basic point remains unaffected. It is that if one were doing a measurement that would include Salvadorian territories as such it is still not equidistant from that as it does not take Meanguerita into account. It is not equidistant from Meanguera and Meanguerita.

The second basic point is also unaffected. The distinction between modern maritime delimitation and the situation in 1900 is of course valid, but it does not change the point. Even in 1900 the parties to the delimitation would have known that they were not doing a complete job. If Honduras had thought at that time that she owned Meanguera and Meanguerita, the parties would have known that they were not doing a complete job if they did not continue the line at least to a point midway between Farallones and the southern end of Meanguera. How could it have been otherwise?

Finally, the Meanguera dossier is criticized - I think - because it does not in its various documents specify that each person is of Salvadorian nationality. But when does any country keep its own records with indications of its own citizenship liberally sprinkled about? What kind of sense does that make? Does a normal electoral roll, for example on the Isle of Wight, recite "British subject" after each name? I doubt it. I could go on, but I could stop here, for the point is frankly not worth much of a response.

Finally, we have been asked if our claim on El Tigre is a "paper claim". I would say that it is supported by as much evidence of State authority in the record as is the claim of Honduras to Meanguera and Meanguerita: the same kind of evidence that we have about potential auctions, surveys and the like. But a "paper claim" is one that is being vigorously pressed by a Party and that does not have any substance. It is just not a valid claim, made on a technical ground, which in

international law can, as we know, be very important. We press for Tigre, in the sense that we would like to have the result of *uti possidetis juris* apply - if it is indeed going to be applied - across the board. But we do not press for Tigre on grounds of the exercise and display of State sovereignty. Yet Honduras has claimed a variety of acts to demonstrate that same thing about Meanguera and Meanguerita - all the 19th century material that has been gone into in detail and, I trust, disposed of, and not responded to by Honduras this morning.

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Mr. President, in closing, I would say that if this were a legal action in my own country, we would file a motion for summary judgment on the issue of Meanguera and Meanguerita. We think that the arguments of El Salvador have not been met, that our proofs have not been answered or displaced by other proofs, and I would thus reassert the conclusions that I gave at the end of my argument yesterday morning, except for one thing. I would now be even more emphatic about them. Thank you Mr. President.

The PRESIDENT: I thank Professor Keith Highet. That concludes our hearings on the question of determination of the legal situation of the islands. On Monday we are going to begin hearings on the second part of Article 7, paragraph 2, of the Special Agreement, namely the determination of the legal situation of the maritime spaces. We shall begin as agreed by considering the legal situation of the waters inside the Gulf of Fonseca, the question, needless for me to say, the question for which Nicaragua was granted intervention under Article 62 of the Statute of the Court. So we adjourn until Monday morning at 10 o'clock.

The Chamber rose at 5.50 p.m.