Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Monday 10 June 1991, at 10 a.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 lundi 10 juin 1991, à 10 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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as Agent and Counsel;

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

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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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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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ainsi que :

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et

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comme conseil.

The PRESIDENT: Please be seated. The sitting is open. We continue the hearings on the intervention of the Republic of Nicaragua directly under Article 62 of the Statute and we have heard the presentation of the intervenor according to Article 85, paragraph 3, of the Rules and today we are going to hear the observations of the Parties. I give the floor to Professor Bowett.

Mr. BOWETT: Thank you Mr. President. Mr. President, may I begin by apologizing to the Court and to Nicaragua for my absence from the Court on Friday. I very much regret not being here in person to hear the pleadings of Nicaragua. My absence was due to the particularly hard form of force majeure in the form of the examinations in Cambridge. But I have had the opportunity to read those statements over the weekend and I am also grateful to my colleague, Mr. Lauterpacht, for bringing a copy of those pleadings so that I could read them over the weekend. But I assure you I meant no discourtesy, either to the Court, or to Nicaragua.

Now it is clear that Nicaragua has only just now begun to undertake the task it omitted to do during the main intervention proceedings. That is to say, to attempt to show that the claims of Honduras as regards delimitation do affect Nicaragua's legal interests. Well, it is a bit late in the day and all that Nicaragua has done, during these proceedings, has been done under the guise of a discussion of entitlement rather than delimitation so as to avoid too obvious a rejection of the Court's Order. But I am bound to say, Mr. President, that much of the oral argument by Nicaragua is still, under the terms of the Court's Order, irreceivable. It is an abuse of the Court's Order; it is a clever one, but it is an abuse nonetheless.

As to the substance of those pleadings on the issue of the status of the waters, we agree with Nicaragua; there is no condominium and there is no need for me to again repeat the views of Honduras on this issue.

As to the applicability of the concept of a community of interests, I fear that Nicaragua misunderstands the basis of that concept as it is used by Honduras. I have no wish to repeat Professor Dupuy's pleadings of Monday 3 June. But let me simply say that the geography of the Gulf, with the three riparian States, imposes on the Parties the need to recognize that there is such a

community of interests and the consequences are that, as between the three Parties, there is an equality of rights within the Gulf and there is an obligation on each one of them to grant reciprocal recognition and reciprocal respect for the rights of the other riparians. There is further an obligation of co-operation between the three riparians, an obligation to co-operate in matters of navigation, of fisheries, of pollution control and the like. No doubt it is an obligation to be implemented by means of further agreements. The basic obligation of co-operation is there and it derives from this concept of a community of interests, compelled upon the Parties by the geographical configuration of the Gulf of Fonseca.

Now I want to turn to Nicaragua's position in this case. As the Court will recall, much of the statement by the Agent of Nicaragua was essentially a complaint, a complaint that Nicaragua was not a party, and the clear suggestion was that if there was to be any delimitation Nicaragua should be a party, and indeed that if Nicaragua is not a party, Nicaragua will necessarily be prejudiced. I need scarcely remind the Court that the fact that Nicaragua is not a party is entirely Nicaragua's own choice. When Nicaragua intervened it made quite clear to the Court that it intervened, not as a party, since it did not wish to be a party. Indeed, from the time that the Peace Treaty between El Salvador and Honduras was concluded, over ten years ago, Nicaragua has known that the two Parties were discussing delimitation and at no stage did Nicaragua ask to be involved in those discussions to be a party to the discussions about delimitation. Of course there are now ongoing discussions between Nicaragua and Honduras on delimitation and the Court can be assured, that Nicaragua will ensure that in those discussions, the interests of Nicaragua will be safeguarded. It is also clear that Honduras has designed its whole pleadings in this case so as to ensure that there would be no prejudice to the interests of Nicaragua. If the Court recalls the very careful choice of the relevant coast, the very careful choice and definition of the relevant area, both inside and outside the Gulf, that choice was made deliberately so as to avoid any possible prejudice to the interests of Nicaragua.

Now, at the root of all this, in fact the boot is on the other foot, it is not that Honduras seeks to prejudice the interests of Nicaragua, it is rather the reverse, that Nicaragua seeks to prejudice the

interests of Honduras. Nicaragua expresses concern over the corridor, claimed by Honduras, between the island of Meanguera and the coast of Nicaragua. Nicaragua complains about the Honduran claim to a small place on the closing line. These claims put to you in the form of prejudice to Nicaragua are in fact ill-disguised attempts by Nicaragua to deny to Honduras the rights of Honduras as a coastal State.

Nicaragua sees an opportunity here to join with El Salvador in dividing the spoils — by spoils I mean the waters of the outer Gulf so called and the waters of the Pacific — to divide those areas between the two States to the exclusion of Honduras as a coastal State. That is prejudice. We are dealing with delimitation and with delimitation the name of the game is equity, it is not greed.

Now I turn to the delimitation issues, issues I must join since, although Nicaragua speaks of entitlement, we are in effect dealing with delimitation.

What is significant about the Nicaraguan position, even at this stage, is that Nicaragua makes no claim to any part of the maritime area, in the relevant area as defined by Honduras for the purposes of this case. That is to say, there is still no Nicaraguan claim to any of the waters in the western half of the Gulf or, indeed, to any of the Pacific west of the perpendicular projected from the middle of the closing line out to a distance of 200 miles. The Court will recall that it was that perpendicular that was designed specifically to separate the area relevant to a delimitation between El Salvador and Honduras to the west and the area relevant to a future delimitation between Honduras and Nicaragua to the east. And so, in effect, Nicaragua will not be affected by any delimitation effected by this Court, within the relevant area. All that will happen as a result of the Court's decision will be that that decision will determine which Party is the Party with which Nicaragua must negotiate in the future to complete the delimitation inside and outside the Gulf.

Nicaragua obviously still labours under some grievance that the Court has refused to follow the so-called "Italian precedent". The Court's decision refusing Italy the right to intervene in the *Malta/Libya* case. But, of course, that case was very different because, in that case, the Court declined to delimit in the areas claimed by Italy precisely because Italy had made claims in those areas and, therefore, the area left, not subject to Italian claims, was restricted. But here we have no

such restriction. Nicaragua makes no claims in the relevant area, deemed relevant for the delimitation between Honduras and El Salvador.

Now I turn to what I would describe as the "myth" of the so-called Honduran threats to the maritime entitlements of Nicaragua. Nicaragua alleges that Honduras seeks to disrupt the 1900 boundary, the boundary under treaty between Honduras and Nicaragua; that Honduras seeks to challenge the *status quo*. This is nonsense. Our pleadings have specifically invoked that 1900 Agreement and, in fact, negotiations are now proceeding between Nicaragua and Honduras on the basis of that Agreement; not to revise it or challenge it, but to continue from it. Obviously the 1900 line did not continue throughout the whole course of the waters of the Gulf; it stopped, and one can only suppose the reason why it stopped is tolerably clear. Honduras could not conclude an agreement going right to the closing line of the Gulf with Nicaragua in 1900 because Nicaragua knew that there was a dispute over Meanguera. There was a contest over sovereignty over that island between El Salvador and Honduras and, therefore, Nicaragua could not conclude a delimitation agreement with Honduras which would assume that it was Honduras who was the sovereign over Meanguera. That is the most likely explanation as to why the 1900 line stopped at that point, but after the decision of this Court, when that issue of sovereignty over Meanguera is resolved, then the line can be continued in bilateral discussions between the two Parties, Honduras and Nicaragua.

Nicaragua alleges that the Honduran claim is "revisionist" — curious term that, it sounds as though we are departing from Marxist orthodoxy. But what exactly are we supposed to be revising? I simply cannot tell from the Nicaraguan pleadings what it is that we are alleged to be revising. Nicaragua alleges that the Honduran claims are of very recent origin. Well, 1950, that was when Honduras claimed the shelf in the Pacific. Is 40 years "of very recent origin"? There have been no protests over these 40 years from any State, let alone from Nicaragua. The Court will recall that to emphasize this point about the recent origin of the Honduran claims, the Agent of Nicaragua sought to demonstrate that recent origin by citing reports of 1888, 1890 and even a Honduran note of 1917. Now, Mr. President, there is surely a very short answer to this. Prior to the 1950s, there was no

continental shelf regime. States did not claim continental shelves, by and large, prior to the 1950s. What all States claimed prior to the 1950s was a territorial sea, some perhaps a contiguous zone beyond, and indeed most States were then claiming a territorial sea of only 3 miles. So it scarcely surprising that you cannot find evidence of the Honduran claims back in the 19th Century. Indeed, on this line of argument, I could demonstrate, I think conclusively, to the Court by many many citations from British practice, that throughout the 19th and indeed for most of the 20th Century, the first half of the 20th Century, Great Britain made no claim to any area of the North Sea beyond 3 miles. What does that signify? Does it signify that because of that 19th Century practice, Great Britain is now denied a right to claim a continental shelf in the North Sea? That clearly cannot be so. And, of course, this explains why, in 1917, the Central American Court saw no reason to discuss Honduran exclusive claims in the so-called outer Gulf, because, once you are in the outer Gulf, you are in an area which is beyond 12 miles from the Honduran coast. Indeed for the same reason the Court could not consider the closing line of the Gulf as "territorial" because both the riparian States on the two opposite sides at that stage claimed only 3 miles territorial seas, so there was no question of looking at the closing line as "territorial" in 1917. So, Mr. President, the law has changed, we now have the Continental Shelf doctrine and just as Great Britain has claimed large areas of the North Sea by claims of recent origin so has Honduras made claims to a shelf in the Pacific in 1950, and without protest. The basis of that claim is that Honduras is a coastal State, it has an inherent right, a right which appertains to Honduras *ipso jure* over the maritime areas which are properly in law regarded as the natural prolongation of the Honduran coast. Of course you will not find that claim documentated in the 19th or early 20th Century; it could not be so prior to the evolution of the regime of the continental shelf.

Whilst I am speaking of novelties there is a question which I would like to pose. When exactly did Nicaragua, or El Salvador for that matter, claim the waters of the outer Gulf as territorial waters? Where is the documentary evidence of that claim? Or when and where did they claim sovereignty over the waters up to the mid-point of the closing line as territorial waters? Where is the evidence of that claim? When was that claim made? It is extraordinary what silence these pleadings

have disclosed on that rather fundamental question. I suggest to you that the novelty of the claim lies not in the Honduran claim, which is a 40 years of age, the novelty of the claim lies in these new claims put forward by Nicaragua, on the one side, and El Salvador, on the other. The notion that these waters in the outer Gulf are, as Nicaragua supposes, in part Nicaraguan territorial waters is just an invention that has never been claimed. The Honduran vessels, merchant vessels, which navigate through those waters have never been subjected to a regime of innocent passage by Nicaragua. Honduran naval patrols have never been interfered with and, of course, naval patrols would not be innocent passage, so that State activity by Honduras cannot be explained away by the recognition of innocent passage by Nicaragua. And you will see that this rather novel thesis by Nicaragua involves Nicaragua in some rather curious inconsistencies. Professor Brownlie suggested that the whole Gulf is an historic bay and therefore properly regarded as internal waters by third States, by non-riparian States; but apparently vis-à-vis Honduras the so-called outer Gulf is territorial waters to be divided between Nicaragua and El Salvador. Now that is a really rather baffling dichotomy; you have waters which are internal vis-à-vis the world at large, but territorial so far as Honduras is concerned. We are singled out for this special treatment, special treatment which I can only describe as prejudicial. You will note that Nicaragua fails to produce any evidence, any document, any map, to show that there was this imaginary closing line to divide the inner Gulf from the outer Gulf, a closing line from Punta Chiquirin in the west to Moneypenny point on the Nicaraguan coast. That division is entirely the product of a fertile imagination. We have no evidence of any kind that such a line was ever recognized.

Nicaragua alleges that the community of interests invoked by Honduras is simply a device to establish a Honduran presence on the closing line. Again I am afraid Nicaragua misunderstands the essential basis of the Honduran case. The Honduran case is quite clear and it is manifest in our pleadings that the entitlement of Honduras is based on its coasts; if you read the written pleadings and you see how Honduras has identified the relevant coast, measured them, specifically in miles, identified the relevant area, there cannot be any doubt that the basis of the Honduran claim is that the entitlement derives from the Honduran coast. Now within a Gulf or a bay of a historical character

the waters, all the waters, are internal and it follows therefore that the closing line across the mouth of the bay or Gulf becomes a baseline, a baseline which divides the internal waters from the territorial waters beyond. But that baseline across the mouth of the Gulf represents *all* the coasts within the Gulf. It is a notional coast which, as a baseline, represents the rather circuitous coast lying within the bay or Gulf and it represents *all* the coasts within the Gulf; not some of them, *all* of them. It therefore follows that Honduras, which has the largest coast within the Gulf as compared with either El Salvador or Nicaragua, has an entitlement by virtue of its coast to a part on that closing line. The relevance of community of interests which has been so misunderstood is simply that, as I have already said, that concept requires from each of the riparian States reciprocal recognition of their juridical equality and it precludes any claims by two of the riparian States to exclusively divide the waters of the Gulf, or the closing line of the Gulf, between them to the exclusion of the third riparian. They cannot do that. They cannot deny a legal entitlement by invoking a method of delimitation — equidistance — based upon notions of absolute proximity. The Court will recall that Nicaragua finds the Honduran claim to 200 miles based upon a restricted presence on that baseline to be inequitable, extravagant. But, Mr. President, the closing line of the Gulf will generate a 200-mile economic zone. Whoever owns that closing line of the Gulf will have 200 miles from that closing line by virtue of its legal entitlement to the closing line. Now, there seems nothing extravagant about that if the closing line is owned half by Nicaragua, half by El Salvador. Why has it suddenly become so extravagant and inequitable if Honduras is entitled to a small part of that closing line?

Then Nicaragua alleges that the Honduran claim is incompatible with legal principle. Nicaragua says that it involves "a radical departure from existing concepts of entitlement and the principle of non-encroachment". How so? The Honduran claim is based upon its coasts. It is absolutely consistent with the basis in law of entitlement to maritime areas. No, says Nicaragua, Honduras is an "occluded riparian". Now, "occluded" is a fancy term for enclaved and the view is, apparently according to Nicaragua, that any prolongation of the Honduran coasts, any representation or participation of Honduras on the closing lines, by virtue of its coasts, is barred by Nicaraguan and

El Salvadorian claims. And to support that notion of a "barring", of an enclaving or "occluding", we were given a number of quite extraordinary examples from State practice, examples which are really no examples at all, like comparing apples with pears. They start with the so-called example of the Anglo-French Award of 1977. Now in fact if you look at that Award it goes in exactly the opposite direction, because it shows that the French coast at the back of *la baie de Granville* had a legal natural prolongation out into the middle of the English Channel, "leapfrogging", as it were, the English Channel Islands. So, far from the claim of the coast at the back of the Gulf being barred by the presence of the Channel Islands, that coast at the back of the Gulf had a legal entitlement to a shelf area beyond the Channel Islands. If the Channel Islands no more barred the French claim to prolongation, then can the Nicaraguan Islands in the Farallones in this case?

The second example we were given is that of Sweden apparently being occluded in the Baltic and being denied shelf rights in the North Sea by the median line agreed between Denmark and Norway through the Skaggerak and the Kattegat. Well, as far as I am aware the Baltic is not an historic bay, or any bay at all, it has no closing line, there has never been any suggestion of a line at the entrance of the Baltic which represents all the coasts inside the Baltic, and presumably Sweden never thought and never claimed, that it had any rights as a coastal State in relation to the North Sea.

Then we were given an example of the Gulf of Aqaba, well, it had the same answer. The Gulf of Aqaba is not an historic bay, it is not internal waters, there is no closing line and I frankly have never heard of any claims, even suggestions, by Israel or Jordan, that they should, by virtue of their coasts at the top of the Gulf, have some kind of claim to parts of the Indian Ocean.

Take the next example, Singapore and the Malacca Straits, it is the same answer. That is not a bay, there is no closing line to that Strait, I have never heard of any claims by Singapore to a prolongation either in the Indian Ocean to the west, or in the South China Seas to the east.

Then we have the example of the Red Sea, the Strait of Bab el Manded. Well, again the Red Sea is not a historic bay, the waters are not internal, there is no closing line, and we simply do not know what delimitations will in the future be made in the Gulf of Aden, beyond the Red Sea.

Lastly, Chile/Argentina. Again the Straits of Magellan are not internal waters, they are not a bay or gulf, there is no closing line, and in any event, the parties have agreed what they have agreed, as they have a right to do.

Now, at the end of this list of extraordinary examples, the Court is presented with a sort of bogey man, a sort of frightening prospect, which is designed to deter the Court. We are told that to uphold the Honduran claim would be "inimical to the stability of territorial settlements in other parts of the world". What an astonishing suggestion! None of the examples given offer any real parallel. And there is not the least risk of the Court's Judgment in this case, whatever it may be, upsetting established delimitation agreements.

It is perhaps of some interest for the Court to look to see how far the Nicaraguan claim is consistent with legal principle. Now the first principle that Nicaragua invokes is "appurtenance". We are not told which areas are appurtenant to which coasts, that might be giving the game away; but appurtenance is the first principle. Well, appurtenance to what? Do they mean Farallones? Is it seriously suggested that this small uninhabited island can bar the prolongation of the Honduran 40-mile coast, the longest coast in the Gulf, from any natural prolongation? Or do they perhaps mean the peninsular of Cosiguina? Well, it is not clear what they mean.

The one clear statement is that the Honduran claim to what is called the "Meanguera corridor" has no basis in law. Now that conclusion is not argued, it is not reasoned and we are left with the inescapable conclusion that in effect Nicaragua is relying upon absolute proximity and strict equidistance as the basis for its own legal entitlement. Now, that *is* really contrary to legal principle! Moreover, it begs the question, "Can Nicaragua simply assume that Honduras can have no legal rights to the waters lying between Meanguera and the Nicaraguan mainland"? But this cannot be assumed by Nicaragua. There are, in fact, two possibilities. Either, first possibility, the Court finds that Meanguera does belong to Honduras. In this case, obviously Honduras has rights in the waters lying between the island of Meanguera and the mainland coast of Nicaragua, and there will have to be a delimitation between the two States in those waters on the basis of, perhaps, equidistance, or whatever other method in all the circumstances produces an equitable result. The other possibility,

hypothetically, is that Meanguera belongs to El Salvador. Now, in this case, the Court can hold either that Honduras has no legal interests in the waters in question, the waters lying between the island and Nicaragua, or it can accept the Honduran arguments that, by virtue of its coast, it does have a right to a prolongation, through however narrow a corridor, out into the outer Gulf and onto the closing line across the Gulf. But that is a question of legal entitlement to be decided on the basis of the coasts of the Parties. You do not answer that question of legal entitlement simply by invoking a delimitation method, equidistance, as if this automatically determined the questions of legal entitlement. You do not by invoking equidistance automatically determine whether or not there is a right in Honduras to a corridor. And, of course, if Honduras is entitled either to all the seas, or even to a corridor, then delimitation will have to be in the future between Nicaragua and Honduras. But on the corridor theory it would be a delimitation between the *eastern* boundary of this corridor and the Nicaraguan mainland. But, of course, if that island does belong to El Salvador, the Court will not determine that eastern boundary at all. Because, at this stage, the Court is only, on this hypothesis, deciding the *western* boundary of the corridor. It will not decide the width of that corridor and even less will it decide the course of the eastern boundary to that corridor. For both of those questions will arise only in some future delimitation between Honduras and Nicaragua. They are simply not questions before this Court and they cannot be resolved merely by invoking the method of equidistance.

Now, as I say, Nicaragua really avoids these questions and mechanically invokes equidistance as if that provided all the answers. That cannot be done. The Nicaraguan argument has to do very much more than that in order to succeed. Nicaragua would have to show that the maritime areas it claims must be regarded, in law, as the prolongation of the Nicaraguan coast and cannot be regarded as the prolongation of the Honduran coast. And, further, Nicaragua would have to show that the overall result obtained, both inside and outside the bay, would be proportionate, fair and equitable.

Nicaragua shows none of these things. Nicaragua has not even attempted to do so. Nicaragua could have intervened and become a Party; it did not. It could have demonstrated how its legal interests were adversely affected by the Honduran claims; it did not. Even at this stage, however

improperly, it could have demonstrated how inequitable would be the result sought by Honduras; but it did not. Nicaragua simply talks of appurtenance, equal division, the procedural disadvantages imposed on Nicaragua, entirely of its own making, I may add. And it urges on the Court what it calls "judicial restraint". Now what Nicaragua really means by "judicial restraint" is quite clear. Nicaragua wants the Court to set aside the task of seeking an equitable result, to assume that equidistance must prevail and to contemplate the division of the Gulf, or the major part of the Gulf, and the waters in the Pacific equally between Nicaragua and El Salvador, to the complete exclusion of Honduras. Now these are not very attractive aims and no wonder they are presented to the Court with the maximum obscurity.

That concludes my statement, Mr. President.

Mr. PRESIDENT: I thank Professor Bowett and I give the floor to Professor Lauterpacht.

Mr. LAUTERPACHT: Mr. President, I now follow my learned friend, Professor Bowett, by way of response to the speeches made on behalf of Nicaragua.

Now, I am not going to attempt to reply to what Professor Bowett said, at any rate, indeed, at all, and especially not in relation to what he says as regards the position outside the closing line of the Gulf. He will be dealing with that in relation to El Salvador later and I will, in due course, be responding to that specifically. It is just possible, however, that my speech may be slightly longer than I had expected and that it may go on beyond the normal coffee break and I hope you will allow me your indulgence.

My response falls into three parts. There are three preliminary points, as the first part, some references to the 1917 Judgment, as the second part and, in the final part 3, concluding points.

As to the first of the preliminary point, Mr. President, El Salvador notes the statements that Nicaragua has made in connection with the recent nature of the claims by Honduras in the Gulf of Fonseca and the Pacific. I may say straight away that there is no question here of accepting the suggestion of Honduras that the claims of El Salvador and Nicaragua are greedy claims, rather, as the novelty of the claims of Honduras indicates, the greed lies in a different quarter.

The Nicaraguan statements contained a very clear statement of the position of the Honduras claims, as at the date of the Cruz-Letona Agreement, in the period before the armed conflict in 1969 and it finally identified the emergence of the current Honduras claim to extend its closing lines in November 1973, when Honduras sought a position on the baseline or the closing line of the Gulf of Fonseca that corresponds to a third of the distance between Punta Amapala and Punta Cosiguina. That is merely a noting of one important Nicaraguan point.

The second preliminary point is this. It relates to the task of the Chamber. Nicaragua has properly emphasized the dependence of delimitation upon the solution of disputes relating to title and El Salvador joins in that identification. It is important, I think, that the Chamber should note especially the citation by Nicaragua of the Honduras statement of 1978 in the mediation proceedings which appear at Annex IV.1.44 to the Honduras Memorial, where it was stated that in the opinion of the Government of Honduras "a final solution in this area, by means of an international treaty, necessarily involved two distinct stages". Those stages correspond in effect to the determination of the status of the area and subsequently to delimitation. And this passage emphasizes the dependence of delimitation in the Gulf of Fonseca upon the location of the mouth of the Goascorán River and the sovereignty over the islands, particularly those of Meanguera and Meanguerita.

The third preliminary point relates to the true definition of the Gulf of Fonseca and, in particular, the concept of what one may call, the small Gulf. El Salvador appreciates the contribution that Nicaragua has made to the definition of the Gulf of Fonseca as an historical bay. It is important to recall the references that were made, both by the El Salvador Minister for Foreign Affairs and by myself, to the smaller bay as it was understood in the El Salvador pleadings in the 1917 case. The Chamber will recall that I referred back to the Cruz-Letona line in this connection, and that I, at that time, regretted the absence of a definition of a starting-point of the line that was described in the Cruz-Letona Agreement. You will remember that the line there described began in the Pacific. Subsequently I picked up the illustration of that line in the maps that I described to you the other day. But I was unable to say whether the starting-point in the Gulf of that line was correct. But now Nicaragua has very helpfully provided the missing link by its references to various

documents emanating from 1888, in which the precise co-ordinates of the terminns of that dividing line are given. Those co-ordinates are latitude 13°12' N and longitude 81°36' W; and they are to be found in the reports of the surveying engineers that appear in the Annexes to the Honduras Memorial, Annexes III.2.15 and 16. My failure to bring these to your attention earlier represents one of those unfortunate consequences of participating in a large case and being involved, principally, in only a given part of it, and one tends to concentrate one's reading on the documents relative to that part and, therefore, sometimes to miss pertinent documents that are associated with the presentation of another part. Hence, the fact that I am involved primarily in the maritime matters meant that I did not study closely the documents relating to the land boundary. It is in those documents that one finds these reports of the surveyors that give one the precise references to the bearings of the Cruz-Letona line. That line is important, as will be repeated later, in relation to the definition of the Pacific and why is the Pacific important to be defined? It has come out again this morning so I may as well take the point while I remember it.

My friend, Professor Bowett, has said that Honduras laid claim to the continental shelf areas in the ocean by its declaration of 1950 in which it spoke about having rights in the Atlantic and in the Pacific. This point was made in the earlier Honduras written pleadings. The response given to this point in the El Salvador pleadings was that when Honduras, in official documents, referred to the Pacific, it did not mean the Pacific in the sense of the outer ocean, it meant the Pacific in a rather general sense, that is to say, the water lying to the south of Honduras, namely the waters comprised in the Gulf of Fonseca. And a number of illustrations of this practice were given in the El Salvador written pleadings. But the most cogent illustration of this practice is to be found in the Cruz-Letona Agreement. Because there you have in an Agreement between the two sides, admittedly not ratified but nonetheless of evidential value, a statement that the dividing line in the waters starts in the Pacific. And yet, with the assistance of the maps, and most recently, with the assistance of the additional references to these documents I have just mentioned, we can specifically identify the starting-point of the Cruz-Letona line being "in the Pacific" as actually being at a place or location lying between Tigre and Meanguera. And this for all effective purposes identifies what Honduras

understands as being the Pacific. The waters, even in the Gulf of Fonseca, and not beyond the waters of the Gulf of Fonseca, are understood, by Honduras, to be the Pacific. There is no indication anywhere, as I recall it, of any claim by Honduras in relevant times that its interests in the Pacific lie outside the Gulf of Fonseca. Now, that is an important point and we are grateful to Nicaragua for its help in this connection.

I come now to the second part of my comments, namely, those related to the 1917 Judgment. The first point here is connected with the standing of the Central American Court of Justice. Nicaragua has said that the Judgment suffered from the birth defects of the Court itself. The quotation given in the Nicaraguan text is abbreviated, the quotation is from Judge Hudson, and is a bit misleading. Judge Hudson in his book on the Permanent Court did not describe the Central American Court as a political agency tout court but explained that contemporary opinion "seems to have regarded the Court as a political agency for conciliation and mediation and for the maintenance of peace but not as a political body applying the law". And interestingly enough the same Judge Hudson said in a different work, his smaller work on international tribunals, published subsequent to the last edition of his major work on the Permanent Court, that it was Nicaragua's refusal to accept two decisions of the Central American Court that "was a contributing factor influencing the failure to renew the convention under which that Court existed". And that is a quotation from *International Tribunals, 1944*, page 131.

But whatever the weakness of the Judgment of the Court may be, it cannot justify either of two things. The first thing that it cannot justify is the Nicaraguan statement that the Judgment suffered from the birth defects of the Court itself, because there is no connection, no connection whatsoever, between the birth defects of the Court, whatever they may be, and the suffering of the Judgment, whatever that may be. It is a curious expression that actually says nothing at all. And the second point that the alleged weakness of the Court's Judgment does not justify is any implication that the Judgment was not *res judicata* between El Salvador and Nicaragua. So that brings me to my second point in connection with the 1917 Judgment, which relates to its status as between El Salvador and Nicaragua.

Nicaragua's position, as stated in its written statement, was that "it did not admit" the binding force of the Judgment. In the language, of at any rate common-law pleaders, a statement that something is not admitted is not the equivalent of saying something is denied, and Nicaragua has not said that it denies the binding force of the 1917 Judgment. It says that the Judgment was erroneous, but error, as I said in an earlier statement, is irrelevant because this Chamber is not a court of appeal from the 1917 Court. Nicaragua says that no State other than El Salvador has asserted that the Judgment was binding. Well that is not surprising because, after all, El Salvador and Nicaragua were the only two States that were parties to the case directly and El Salvador is the only State that would wish to insist that the Judgment was binding and it has so insisted. And, therefore, the silence of everybody else is neither here nor there.

The third matter, still under the heading of the 1917 Judgment, is that of the binding effect of that Judgment on Honduras. Nicaragua argues that the Chamber can make no finding on the application of the 1917 Judgment if the three Parties affected by the decision are not all Parties to the present proceedings. This cannot be right. It is not right for the following series of considerations.

First of all, El Salvador invokes the 1917 Judgment as the legally relevant instrument in three ways: it is relevant because it is a reflection of rights in the sense that it reflects prior customary international law rights; it is relevant secondly because it is a source of rights, in that, as between El Salvador and Honduras, Article 25 of the Statute of the Central American Court operates and Honduras is bound to give its moral support to the Judgment; and thirdly, the Judgment is relevant as a source of rights in the sense that Honduras did not in 1917 deny the effect of the Judgment. It had already reserved its position in 1916 on one aspect of the question of condominium, and subsequent to 1917, basically the conduct of Honduras has conformed to the Judgment. Now, having said that, I go on to the second element in this bit of reasoning. The rights and duties created by the 1917 Judgment are separate or several rights and duties, in that they are possessed by each State individually, and this is so notwithstanding the existence of the condominium. In other words, there are a series of bilateral and reciprocal rights and duties within the framework of condominium. If, therefore, and this is the third point, the Judgment is legally relevant as between El Salvador and

Honduras, this Chamber can apply it, as between El Salvador and Honduras, without involving Nicaragua, save to the extent that the Court recognized in its Judgment of September last year. To hold otherwise, to consider that this Chamber is in some way inhibited by the fact that Nicaragua is not formally a Party to this case from considering the effect and role of the 1917 Judgment in the relationship between Honduras and El Salvador, would mean that wherever you have a multilateral instrument, its terms cannot be invoked by one Party against another, unless all the Parties to that instrument are involved as Parties to the proceedings. Now that was certainly not the position that Nicaragua took in its case in this Court against the United States.

I come to the fourth point that arises under the Judgment of 1917, and that is the question of the status of the waters of the Gulf. The Nicaraguan Agent analysed the position and El Salvador agrees with the first four points of that analysis. The Agent of Nicaragua then referred to a finding of the 1917 Judgment that the Gulf of Fonseca was held in condominium. Now, as to that, firstly the Nicaraguan Agent did not deny the quality of condominium to the Gulf and El Salvador welcomes the identification that the waters of the Gulf are held in condominium. I should, perhaps, add a reference here to an authority which I found at the weekend, which is an interesting report by Mr. Garcia Amado, which is contained in a publication of the Max Plank Institute for Comparative Public Law and International Law, on the Judicial Settlement of International Disputes, published in 1974. There, in considering the work of the Central American Court, Mr. Garcia Amado reviews its jurisprudence and as regards the *El Salvador/Nicaragua* case, he has this to say:

> "that El Salvador contended *inter alia* that the 1914 Convention between Nicaragua and the US would violate her rights of condominium in the Gulf of Fonseca. The Court first resolved to direct the Parties to maintain the *status quo ante* and later it decided that the concession of a naval base in the Gulf violated the rights of condominium".

Those are his words, "the rights of condominium" of El Salvador. And later in the same report, Mr. Garcia Amado said that:

> "The doctrinal position taken by the Court in some of the legal questions it had to decide has been praised by some, particularly in regard to the condominium rights that it recognized in one case for coastal States of a gulf or bay."

So there we have supplementary authority on the quality of the waters of the Gulf of Fonseca

being held in condominium.

Another element in the comments of the Nicaraguan Agent on the Gulf of Fonseca was this; in relation to the condominium he said "that it could be brought to an end by a request taking the form of a delimitation". Now this is the first time in this case that there has been any reference to the possibility of a termination of the condominium. Now the basis, as I understood it, on which the learned Agent made this point was because condominium had its origin in Roman Law. Under the way in which Roman Law is applied in the local systems (it was appropriate to apply the domestic law or the local laws) provision for the termination of a condominium was made, if one of the Parties should so request. But, Mr President the Nicaraguan Agent stopped short of actually saying that there had a been a request for the termination of the condominium in the form of a delimitation. And quite rightly so in my submission, because, although admittedly the legal origin of the concept of condominium lies in an analogy with private law, the way in which that concept was developed, more important, the context in which the concept was developed, is one that excludes in this particular situation the possibility of one party to the condominium bringing it to an end by unilateral action. Why so? Because the context in which the concept of condominium was established and applied here was that of the complaint of El Salavador against Nicaragua that the agreement with the United States, the Bryan-Chamorro treaty, was a violation of the rights of the riparian States. As the Foreign Minister of El Salvador pointed out, the case had a political function to attempt to prevent Nicaragua giving the United States base rights within the Gulf. Once the Central American Court of Justice had helped this, it would have been absurd for the possibility to have existed that Nicaragua could immediately give notice of the termination of the condominium and thus recreate, or create afresh, a context in which it could give the United States precisely the rights which the Central American Court of Justice had said the United States could not have. So what ever may happen to condominium in private law, in this particular situation clearly the condominium could not be brought to an end by the act of one or indeed of even two Parties; the only way to bring this condominium to a close, as I suggested earlier, is by an act of the three riparians collectively.

Nicaragua also said that the condominium did not give Honduras rights in the outer part of the

Gulf of Fonseca and on this El Salvador agrees with Nicaragua that the rights of condominium as identified and very closely analysed in the 1917 Judgment do not extend to giving Honduras rights of condominium in the outer part of the Gulf. Professor Brownlie also added remarks on condominium in so far as that status is not derived from the 1917 Judgment but exists under customary international law. This part of his argument does not call for a reply now for two reasons: one that it has already been amply covered by El Salvador; and secondly that it is not really open to Nicaragua to argue against condominium since as a Party to the 1917 Judgment it is bound by it, so that as between El Salvador and Nicaragua the concept of condominium is based exclusively on the 1917 Judgment. The 1971 Judgment as between those two States is the sole source for the existence of the condominium relationship and Nicaragua is not entitled to go outside it. So much then for the second main part of my comments. I now come to three concluding points.

Firstly, on the question of community of interests: the El Salvador Foreign Minister has already expressed El Salvador's commitment to the concept of a community of interests as a general proposition. We said that we did not dissent from it. Professor Brownlie very aptly characterized the concept of community on interests as a forensic invention, at any rate in its application to this case. But there are two points that Professor Brownlie did not pursue and which require comment. First he did not refer to the point made by El Salvador, that if the concept of community of interests implies equality it must mean that the treatment by Honduras of Meanguera and Meanguerita should be the same for El Salvador now as it was for Honduras in 1900. If Meanguera and Meanguerita were taken into account for the purposes of the 1900 delimitation on the basis, as is inescapable, that they belonged to El Salvador, they must enjoy that status for any subsequent decision. I am perfectly aware that my learned friend Professor Bowett has said that one reason why, or that *the* reason why, the 1900 delimitation line did not extend further was because they were aware that the status of Meanguera and Meanguerita was in doubt. It is not a very convincing argument, Mr. President, when one looks back at the documents that existed pre-1900 and which showed the acceptance by Honduras of Meanguera and Meanguerita as El Salvador territory. So really the point about community of interests and equality can be expressed in terms of equality of the analysis

or identification of the status of the islands of Meanguera and Meanguerita; what was good in 1900 must remain good today.

The second point in connection with community of interests is this: that Professor Brownlie made no reference to the manner in which Professor Dupuy Junior dealt with the concept of community of interests in response to the Nicaraguan written statement and the arguments of the El Salvador Foreign Minister. By implication Professor Brownlie appeared to be assuming that the original position of Honduras on the concept of community of interests remained fully operative. The Chamber will recall that in its written pleadings Honduras had shown a certain ambivalence. On the one hand in its reply, in the substantive part of its reply, it said that it did not rely on the community of interests as a basis for getting into the outer Pacific and yet in the actual submissions it said that it did. Now the Minister pointed out to this ambivalence, or indeed contradiction, and invited Honduras to explain it. Professor Dupuy gave some attention to this matter at pages 40-43 of the transcript of the afternoon session of 5 June (C 4/CR 91/41) and when I replied on the basis of my limited aural appreciation of Professor Dupuy's remarks, I observed at C 4/CR 91/42 of the afternoon session of 6 June, page 41, as follows: "and here, as I understand my friend, that is Professor Dupuy, he has effectively given up the concept of community of interests as an independent source of proprietary or sovereign rights outside the Gulf of Fonseca; what I understood him to say was that community of interests only operates to create rights of property or sovereignty in combination with the existence of an historic bay. No historic bay, no sovereign rights, even if there is a community of interests. So what it really boils down to — this is still quoting my earlier statement — so what it really boils down to, Mr. President, in my submission is we have to forget about community of interests as having an independent role". Either there is some other source for rights outside the Gulf or there is not. Now, Professor Brownlie did not pick up this concession by Professor Dupuy, which is of major importance. Indeed, he appears to regard the community of interests concept as having been maintained by Honduras as the basis of its entitlement or claim to zones of exclusive jurisdiction. I therefore would not wish my general endorsement of what Professor Brownlie said to obscure my understanding of the present status of

that bit of the Honduras argument. If my understanding is incorrect, Honduras still has plenty of opportunity to clarify the matter. Indeed, since Professor Dupuy Junior did not deal expressly with the discrepancy between the two parts of the Honduras Reply, the substantive part and the Submissions, it is really incumbent upon Honduras to make its position clear.

I come next to a few comments on the matter of entitlement. Clearly, I am not going into the whole substance of that question which really belongs to the argument on the Pacific. But Professor Brownlie did come, under the heading of the protective function of intervention, to discuss the nature of Nicaragua's entitlement as a coastal State. It is desirable that El Salvador should express its agreement with Nicaragua's statement of the law in this regard, and this extends to taking note of the fact that Nicaragua appears to be claiming a 12-mile belt of territorial sea. So far as El Salvador is concerned the same applies to it. My learned friend, Professor Bowett, this morning asked, but where is the evidence of this claim by Nicaragua and El Salvador to a 12-mile territorial sea? Well, of course, it lies in the fact that back in 1950 both those countries made declarations extending their waters to 200 miles and that declaration still stands. It is the intention of El Salvador, in due course, when the 1982 Law of the Sea Convention enters into force for it, to take the steps necessary to conform its claim to territorial waters proper to the terms of that Convention. But, for the time being, there is ample evidence of its claim to at least 12 miles, in its earlier and long-standing claim to 200 miles.

If my understanding of the issues in this case is correct, the question of entitlement, as opposed to delimitation, is likely to occupy a major place in the last phase of the case. And, so, I shall not enter further into that question now. But all I need to do is say that El Salvador fully shares the views expressed by Nicaragua on this subject and, in particular, the emphasis by Nicaragua that entitlement must logically come before delimitation.

And my concluding point, Mr. President relates to the question of judicial propriety. Professor Brownlie concluded his speech with a reference to what he called "the consideration of judicial propriety". This he translated as a matter of practical application into terms of restraint in favour of the interests of third States. El Salvador endorses the desirability of the exercise of judicial

restraint in this case. But the El Salvador's submission extends beyond the protection of the position of third Parties. For El Salvador, judicial restraint should also take the form of three things: first, a refusal to enter into the question of delimitation; secondly, a refusal to abandon the application of the principle of *res judicata* as between El Salvador and Nicaragua, and, thirdly, and above all, a refusal to extend even further the notions of equity and equitable principles as applied to delimitation into the quite different area, as yet not affected by those ideas, of entitlement.

Thank you, Mr. President.

Mr. PRESIDENT: I thank Professor Lauterpacht. That concludes our hearings on the intervention granted to the Republic of Nicaragua under Article 62 of the Statute and the Parties agreed nevertheless that Nicaragua should be given another opportunity of speaking once again in a later stage of the present hearings, if new points are raised by the Parties that would affect the legal interests of Nicaragua.

So, this afternoon, we begin hearings on the legal situation of the waters outside the Gulf of Fonseca. The sitting is adjourned.

The Chamber rose at 11.25 a.m.