C 4/CR 91/49

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

held on Friday 13 June 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 14 juin 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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The Government of El Salvador is represented by:

Dr. Alfredo Martínez Moreno,
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

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,

Mr. Elihu Lauterpacht C.B.E., Q.C., Director of the Research Centre for International Law, University of Cambridge, Fellow of Trinity College, Cambridge,

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)

as Counsel and Advocates;

and

Dr. Francisco José Chavarría,

Lic. Santiago Elías Castro,

Lic. Solange Langer,

Lic. Ana María de Martínez,

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assistés de :

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M. David Escobar Galindo, professeur de droit, vice-recteur de l'Université "Dr. José Matías Delgado" (El Salvador),

comme conseils et avocats;

ainsi que :

M. Francisco José Chavarría,

M. Santiago Elías Castro,

Mme Solange Langer,

Mme Ana María de Martínez,

Mr. Anthony J. Oakley,
Lic. Ana Elizabeth Villata,

as Counsellors.

The Government of Honduras is represented by:

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H.E. Mr. Pedro Pineda Madrid, Chairman of the Sovereignty and Frontier Commission,

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Mr. Derek W. Bowett, Whewell Professor of International Law, University of Cambridge,

Mr. René-Jean Dupuy, Professor at the *Collège de France*,

Mr. Pierre-Marie Dupuy, Professor at the *Université de droit, d'économie et de sciences sociales de Paris*,

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Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Universidad Complutense de Madrid,

Mr. Alejandro Nieto, Professor of Public Law, Universidad Complutense de Madrid,

Mr. Paul De Visscher, Professor Emeritus at the *Université de Louvain*,

as Advocates and Counsel;

H.E. Mr. Max Velásquez, Ambassador of Honduras to the United Kingdom,

Mr. Arnulfo Pineda López, Secretary-General of the Sovereignty and Frontier Commission,

Mr. Arias de Saavedra y Muguelar, Minister, Embassy of Honduras to the Netherlands,

Mr. Gerardo Martínez Blanco, Director of Documentation, Sovereignty and Frontier Commission,

Mrs. Salomé Castellanos, Minister-Counsellor, Embassy of Honduras to

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M. Derek W. Bowett, professeur de droit international à l'Université de Cambridge, Chaire Whewell,

M. René-Jean Dupuy, professeur au Collège de France,

M. Pierre-Marie Dupuy, professeur à l'Université de droit, d'économie et de sciences sociales de Paris,

M. Julio González Campos, professeur de droit international à l'Université autonome de Madrid,

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M. Alejandro Nieto, professeur de droit public à l'Université Complutense de Madrid,

M. Paul de Visscher, professeur émérite à l'Université catholique de Louvain,

comme avocats-conseils;

S. Exc. M. Max Velásquez, ambassadeur du Honduras à Londres,

M. Arnulfo Pineda López, secrétaire général de la Commission de Souveraineté et de frontières,

M. Arias de Saavedra y Muguelar, ministre de l'ambassade du Honduras à La Haye,

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Mrs. Lourdes Corrales,

as Members of the Sovereignty and Frontier Commission.

The Government of Nicaragua is represented by:

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Assisted by

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M. José Antonio Gutiérrez Navas

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M. Mario Felipe Martínez,

Mme Lourdes Corrales,

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assisté par

Mr. Ian Brownlie, Q.C., F.B.A., professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, Fellow de l'All Souls College, Oxford,

comme conseil et avocat;

et

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

comme conseil.

The PRESIDENT: Please be seated. The sitting is resumed. I note here the presence of the Minister for Foreign Affairs of Nicaragua, H.E. Mr. Enrique Dreyfus Morales. We are going to hear now the final presentation of Nicaragua on the intervention in this case and I give the floor to Minister Dreyfus Morales.

M. DREYFUS MORALES : Monsieur le Président, Messieurs les Juges, Mesdames et Messieurs, je voudrais tout d'abord faire part de l'honneur et du plaisir que j'éprouve à apparaître devant votre prétoire. Aussi, je saisis l'occasion pour adresser mes plus vives félicitations aux deux membres de la Chambres que vous composez, et qui ont été nommés Président et Vice-Président de la Cour.

Lorsque j'aborde l'affaire qui est à l'examen de cette salle, j'aimerais exprimer que, compte tenu des sentiments fraternels que le Nicaragua éprouve à l'égard d'El Salvador et du Honduras, je ne peux pas m'empêcher de regretter profondément les controverses qui ont eu lieu entre ces deux pays frères, et qui, en leur temps, ont conduit à la confrontation armée de 1969.

Le Nicaragua a pris part aux efforts de paix, et grâce à la médiation d'un illustre Sud-Américain, ces efforts ont abouti au traité général de paix de 1980, et par la suite, au compromis de 1986, par lequel les Parties ont soumis à cette salle les points sur lesquels ils n'étaient pas jusqu'alors parvenu à un accord.

Il s'avère tout à fait juste de rendre hommage à tous ceux qui ont collaboré pour atteindre la paix et la concorde.

Le Nicaragua est un pays attaché à la paix et respectueux du droit international. Notre politique étrangère a été marquée par le recours aux moyens pacifiques pour régler les différends. Tant et si bien que, dans les dernières années, le Nicaragua est peut-être le pays qui a comparu le plus souvent devant le prétoire de cette Cour.

L'intervention du Nicaragua dans le cas porté par El Salvador et le Honduras auprès de la Cour ne repose que sur l'obligation de sauvegarder ses droits et ses intérêts, lesquels pourraient être affectés par la décision juridictionnelle qui sera prononcée.

Ces droits et ces intérêts se rapportent à l'intégrité territoriale du Nicaragua, et par

conséquence, leur valeur est susceptible d'affecter non seulement la situation actuelle, mais encore celle de générations à venir.

Dans ce contexte, l'intervention du Nicaragua n'a certainement aucune motivation d'ordre politique, d'autant plus qu'il s'agit d'un différend qui oppose deux pays avec lesquels le Nicaragua maintient les relations les plus étroites.

Dans les limites imposées par la qualité d'Etat intervenant, le Nicaragua a colaboré effectivement avec cette Chambre, en lui apportant les éléments dont il dispose, afin que votre décision tienne compte de toutes les données du problème, et par voie de conséquence, qu'elle soit d'autant plus conforme à la justice et au droit.

Monsieur le Président, Messieurs de la Cour, il n'a jamais été dans l'esprit du Nicaragua de chercher à favoriser l'une ou l'autre Partie au différend. Mais plutôt, et comme je l'ai dit auparavant, le but seul de mon pays est celui de sauvegarder les droits et les intérêts qui pourraient se voir affectés par la résolution de cette Chambre.

El Salvador et le Honduras, étant tous les deux nos frères, il ne nous est pas permis de songer à faire la moindre distinction entre eux.

D'autre part, comme il est de votre connaissance, la thèse qui a été soutenue par le Nicaragua pourrait se résumer comme suit : le golfe de Fonseca se trouve en état d'indivision compte tenu du fait que la délimitation de la zone correspondant à chacun des Etats riverains n'a pas été tranchée jusqu'à présent, à l'exception de la délimitation qui a été établie par la commission mixte de 1900, entre le Nicaragua et le Honduras.

Or, le Nicaragua, n'étant pas partie au présent différend, n'a naturellement pas demandé qu'il lui soit indiqué la zone qui lui reviendrait.

Ceci est bien la thèse qui a été soutenue traditionnellement par le Nicaragua. Elle ne saurait pas être tenue comme une thèse isolée ou égoïste, puisque le Nicaragua se tient disposé à régler avec les autres riverains du golfe, les accords qui pourraient avoir trait aussi bien à la sécurité de la navigation qu'à la préservation et à l'exploitation des ressources naturelles; et enfin, à tout autre sujet qui pourrait s'avérer utile en ce qui concerne la coopération des riverains.

Dans ces buts, on a déjà intégré une commission mixte entre le Nicaragua et le Honduras, par laquelle on a établi un mécanisme de dialogue permanent et de communication entre les deux pays et qui a trait aux problèmes de pêche et de voisinage, mais sans que ceci autorise à penser à aucun moment que la délimitation déjà établie soit mise en cause.

Il ne me reste qu'à vous exprimer mes voeux les plus chers pour que la décision de cette Chambre soit un atout visant le renforcement de la paix et les bonnes relations entre les pays centraméricains.

En effet, la détente se fraie son chemin dans la mesure où les points de désaccord disparaissent. Dans cet esprit, cette Chambre jouira de la reconnaissance des Centraméricains, mais aussi de tous ceux qui chérissent la paix.

Pour finir mon intervention, je tiens aussi à vous exprimer mes voeux de succès les plus vifs dans l'accomplissement de vos très hautes fonctions.

Je vous remercie de tout coeur de l'attention que vous avez bien voulu m'accorder. Merci bien.

The PRESIDENT: I thank the Minister of Foreign Affairs for Nicaragua, H.E. Mr. Enrique Dreyfus Morales and I give the floor to the Agent of Nicaragua, Ambassador Carlos Argüello Gómez.

Mr. ARGUELLO GOMEZ: Mr. President, Members of the Chamber.

This final presentation will address several points that must be set straight. Unfortunately, the constraints of time and the nature of the intervention allowed to Nicaragua do not permit us to address all the questions of law that have surfaced during these oral proceedings. This notwithstanding, it has been a great privilege to have had the opportunity of addressing difficult legal issues before this distinguished Chamber and amidst the distinguished counsel of the Parties.

Mr. President, the first points I will address are some preliminary and essentially marginal questions that have been brought up for atmospheric reasons. Then tend to put in question the stability of the delimitation line established with Honduras in 1900.

Mixed Commission

During the afternoon sitting of last 5 June, counsel for Honduras read into the record quotes from a joint Nicaraguan/Honduran declaration made on 5 September 1990, establishing a Mixed Commission for Maritime Affairs (C 4/CR 91/41, pp. 32-33).

This declaration was brought to the attention of the Chamber as proof that the Government of Nicaragua did not consider that the boundary line fixed in 1900 was clear and definitive. In that respect, Professor Dupuy concluded:

> "il serait vain de tirer argument de l'accord de 1900 pour confiner le Honduras dans le fond de la baie puisque, tres manifestement, les deux Etats concernés ne l'ont pas entendu ainsi" (C 4/CR 91/41, p. 33).

The implication being that Nicaragua was not acting in a straightforward manner because, whilst the Agent and counsel for Nicaragua were representing one thing before the Chamber, the Government of Nicaragua was acting otherwise with the Government of Honduras.

Mr. President, last Friday I offered to address this point in our final presentation. The reason was that we did not then have faithful copies of the Declaration cited by Professor Dupuy, since it was not properly placed on record by Honduras, and, on the other hand, no-one in Managua had thought it of any relevance to this case. In the interim, Professor Bowett has again referred to this matter and, as late as yesterday evening, a copy of a written communication sent to the Registrar by the Honduran Agent was received in our fax machine. The Minister for Foreign Relations has already addressed this question and now I will add the following comments.

The Mixed Commission was established with the object of preventing and solving recurrent problems, mainly of fishing vessels crossing the boundary established in 1900 in the Gulf of Fonseca and the Atlantic Ocean. As the "whereas" clauses point out, the Declaration was made in the spirit that animated the Esquipulas Accords signed by the Central American Presidents. These accords can be perused in the Annexes of the Nicaraguan Memorial in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras*.)

The object of the Declaration, as its first clause indicates, was to:

> "Establish a Mixed Commission of Maritime Affairs, to be presided by the Ministers of Foreign Affairs of both Governments, or by their representatives. Its object is the prevention and solution of maritime problems between both countries."

Its second clause, which was quoted by Professor Dupuy and Professor Bowett, states:

> "The Mixed Commission will deal on a priority basis with the border affairs in the maritime areas of the Gulf of Fonseca and the Atlantic littoral and the fishing problems derived therefrom."

This, then, is the Mixed Commission. Its object is to create machinery to avoid minor incidents mainly caused by fishing vessels. These are problems that many neighbours have, and the efforts made to solve them cannot be used to put in doubt well-established boundaries. Its terms cannot be used to place in doubt the 1900 delimitation, which is as solid as the Award given by the King of Spain in 1906, and the Judgment given by the Court in 1960.

If the text of the birth certificate of this Commission has any bearing on these proceedings, one could point to the clear difference it establishes between the Gulf of Fonseca - not the Pacific Ocean - on the one hand, and what it refers to as the Atlantic littoral. Unless, of course, Honduras would like to turn the tables around and say that, in 1990, the reference to the Gulf of Fonseca should be understood to mean the Pacific Ocean.

A word on the joint naval patrols in the Gulf of Fonseca, mentioned in this context by Professor Dupuy. The Government of Nicaragua will only authorize joint naval patrols to the east of the line joining El Tigre, in Honduras, and Monney Penny Point, in Nicaragua.

Mr. President, the creation of this Mixed Commission was, as its preamble indicates, within the framework of Esquipulas, and refers to a situation arising from a period that must be well-remembered by at least three of the Members of the Chamber. Its object is to create mechanisms that will lower the tensions that have existed in the past in our region, not to change the established borders of Nicaragua, or any other State. Nicaragua was before this Chamber when this Commission was established and certainly had no intention of signifying any change in its position.

The last-minute attempt by Honduras to misrepresent the object of this Commission may be counterproductive to the end it sought, which was precisely, and I quote from it, "to fill the need to establish permanent mechanisms of dialogue and communication".

Question of map evidence

The *observations* of the Republic of Honduras to the Written Statement of the Republic of Nicaragua contain certain references to the delimitation with Honduras, which makes it necessary for me to put the record straight (Observations, pp 7-8). In particular, in relation to the delimitation in accordance with the Agreement of 1900 (Written Statement, Annex 1), the Government of Honduras makes the following statement:

> "There certainly appears to be some question between Honduras and Nicaragua, as to the terminal point of this boundary, specifically whether it lies as far seawards as Farallones. The Honduran position is supported by map evidence and subsequent practice of the Parties." (Footnotes have been omitted.)

The observations were substantially repeated by Professor Pierre-Marie Dupuy in his speech on Wednesday afternoon (C4/CR 91/41, pp. 32-32).

These references completely contradict the assertions of Honduras according to which these proceedings do not involve claims outside the western sector of the Gulf and they confirm the extent to which Honduras claims breach the principle of non-encroachment.

Mr. President, these references to an alleged boundary line in the vicinity of Farallones place the Government of Nicaragua in a delicate position.

On the one hand Nicaragua is not a party to the case and has only been permitted to intervene on certain conditions. In these conditions there can be no joining of issues on questions of delimitation with Honduras.

On the other hand it is necessary to put the record straight and that, Mr. President, is my present purpose.

The position of Nicaragua is that the delimitation established by Acta II of 1900 is definitive and thus the terminal point is at the line described so clearly in this Acta.

As a matter of international law for purposes of interpretation resort may be made to map evidence or the "subsequent practice by the Parties" if, and only if, the boundary description in the Treaty is ambiguous.

In general, and in view of obvious practical constraints in the present context, the Government of Nicaragua reserves its position on the map evidence.

In any case, Nicaragua considers that the more authoritative cartographic souces do not support the Honduran assertion that the boundary line of 1900 terminates near Farallones.

Two items may be referred to by way of illustration.

The first consists of a publication of the United States Department of State published by The Geographer of the Department, entitled *International Boundary Study* series.

No. 36 of the Series (dated 12 October 1964) is devoted to the *Honduras-Nicaragua Boundary*. The text consists of Acta II in English translation. No reference is made to a dispute concerning the maritime boundary, although it is normal for these studies to refer to outstanding problems. Moreover, the sketch-map forming part of the study shows a delimitation in the Gulf clearly inconsistent with the Honduran assertions.

The second item consists of the standard official map of Honduras published in 1966. This is, of course, a public document, but I have a copy available for the Chamber, which I shall hand to the Registrar. It shows the boundary of the *Actas of 1900* but no indication appears of a boundary in the vicinity of Farallones. Indeed, the map fails to reflect Honduran maritime ambitions *in toto*.

I think Mr. President, it will be difficult to be seen from there, but the line does not even reach the point that was drawn in Acta II, and this is an official map of Honduras.

Honduran Entitlement at the Mouth of the Gulf

Professor Bowett addressed the question of Honduran title to maritime areas outside the Gulf. We are not allowed to address this question posed in those words but we certainly are allowed to address any purported title of Honduras to a part of the mouth of the Gulf or of the corridor leading up to it. The Honduran title can only originate in a title to those waters at the closing of the Gulf. Unless, of course, we are submitted to an exercise of "leap-frogging" the Nicaraguan and El Salvador mainland and territorial waters and, with such gymnastics, land in the Pacific.

Professor Bowett presented what he called the "Honduran positive case" to a title at the mouth of the Gulf. The first element of this case, he asserted, was that "historically, Honduras has long been described as a coastal State in relation to the Pacific". And went on to say "Honduran

Constitutions have so described Honduras since 1839, and in effect, so does the 1987 Constitution of its neighbour, Nicaragua". Mr. President, this is simply incorrect as I will demonstrate.

Annex II.1.18 of the Honduran Memorial has the pertinent territorial references of the different Honduran constitutions since its independence. The first two constitutions of 11 December 1825 and that of 21 November 1831 do not refer to the Pacific Ocean but simply state that the "territory shall comprise everything which corresponds to and has always corresponded to the Bishopric of Honduras".

The Constitutions of 1839, 1848, 1865 and 1873 describe Honduran national territory, as follows:

> "to the east, south-east and south, the Republic of Nicaragua; to the east, north-east and north, the Atlantic Ocean; to the west, Guatemala; to the south, south-east and west, El Salvador; to the south, the Bay of Conchagua in the Pacific Ocean . . ."

I will not try to get into the mind of the Honduran legislators of last century, but it is interesting to see how Honduras' neighbours described themselves at the time.

Annex II.3.4 of the Honduran Memorial has a reference to the Political Constitution of the Republic of El Salvador in 1871. Article 4 reads:

> "The territory of El Salvador is bounded on the east by the Gulf of Goascoran, on the north, by the Republics of Guatemala and Honduras, on the west, by the River Paz, and on the south, by the Pacific Ocean."

Annex II of the Written Statement of Nicaragua contains the pertinent constitutional references to the national territory. In the contemporaneous Nicaraguan Constitution of 1858 we read in Section 1 of Chapter 1:

> "The Republic of Nicaragua . . . is bounded on the east and north-east by the Sea of the Antilles, on the north and north-west by the State of Honduras, on the east and south by the Pacific Ocean, and on the south-east by the Republic of Costa Rica."

So, both Nicaragua and El Salvador, at the pertinent period considered that they were bounded on the south with the Pacific Ocean. But, the Honduran legislators very appropriately referred to their southern border as being the Bay of Conchagua.

The Constitutions of Honduras of 1880, 1894, 1906 and 1924 all leave to internal law the determination of the limits of Honduras. None of the laws enacted during those years, and

transcribed in the Annexes, mentions the Pacific Ocean.

The Constitution of 1950 also leaves to internal law the determination of the territorial limits, but for the first time refers to "The submarine platform or continental and insular shelf, and the waters which cover it, in both the Atlantic and the Pacific Oceans . . .".

This is the first mention of the Pacific Ocean. Professor Bowett very happily refers to it and to a Decree of 1951 relating to continental shelf rights.

In effect, this is a general declaration extending the sovereignty of Honduras to the continental shelf. Yet nowhere do we find that as from this date, or thereabouts, that Honduras made any claim to Nicaragua or El Salvador that this declaration effected radical changes in the legal *status quo* at the mouth of the Gulf. It is true that the Preamble mentions "both the Atlantic and the Pacific Oceans", but the operative part of the decree is limited to the Atlantic Ocean. I am referring to the Decree of 1951. Article 3 of that Decree says:

> "The protection and supervision of the State is hereby declared to extend, in the Atlantic Ocean, over all waters lying within the perimeter formed by the coast of the mainland of Honduras and a mathematical parallel drawn at sea 200 miles therefrom."

There is no equivalent mention of the Pacific Ocean in this Decree of 1951.

Whilst we are in the realm of legislation that Honduran counsel said was not protested by Nicaragua, reference should be made to Honduran Congressional Decree No. 21 0f 19 December 1957 (St/Leg/Ser B/8. p. 10). Article 6 of Section 3 says:

> "The following also belong to the State of Honduras and are subject to its jurisdiction and control: the subsoil, air space, stratosphere, territorial sea, and the sea-bed and subsoil of the continental shelf, the continental and insular terrace and other submarine areas adjacent to its territory outside the area of the territorial sea and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources of the sea-bed and subsoil.
>
> In the cases to which the preceding paragraphs refer the dominium of the nation is inaliable and prescriptable."

Section 4:

> "In accordance with the foregoing statements the State reserves the right to determine the boundaries of areas for the control and protection of national resources in the continental and insular seas under the control of the Government of Honduras and to modify such boundaries according to circumstances arising out of new discoveries, studies in national interest which may emerge in the future."

Whiteman summarizes this decree in a note that states "The Decree of 19 December 1957, Article 6, does not specify any limit, but reserves the right to determine such limits in the future" (*Digest*, Vol. 4, pp. 26-27, ff. n.). I have these pertinent quotes, Mr. President, in my written notes.

Well, what then should Nicaragua have protested? I have gone through the Annexes presented by Honduras and have found no legislative indication - before the 1982 Constitution - that Honduras considered it had maritime spaces flowing in and out of the closing line of the Gulf.

In my previous intervention, I taxed the patience of the Chamber, going through the Honduran documentation related to their claims in the period leading up to the war in 1969 and the negotiations that ensued (C 4/CR 91/43, pp. 26-32). In his first intervention in reply to Nicaragua, Professor Bowett did not refer to the documents of this period and what they reflect. But, in his second intervention when referring to the Honduran Constitution of 1950 and the Decree of 1951 which we have mentioned above, he stated:

> "Not until 1974, nearly 25 years later, was there any hint that El Salvador was prepared to dispute the Honduran claim to a maritime area in the Pacific."

This fact is a very helpful confirmation of what I stated in my first intervention. That is, that the negotiations of Honduras with El Salvador indicate that the first time Honduras made any mention of a share at the closing line of the Gulf was in November 1973 and within the context of those negotiations. So it is not surprising that El Salvador, which was a Party to those negotiations, felt the need to react to the tendency shown by the Honduran claims only after 1973 when they were in a position to be able fully to appreciate them. Nicaragua did not enjoy the same knowledge.

There is one interesting detail that could be added to an understanding of what the Parties and Nicaragua understood the situation to be at the time of the war of 1969. Honduras prohibited any passage of Salvadorian goods through its territory. This was a great blow to the Central American Common Market since there was an important commerce in the region. The solution was that a ferry service was established in the Gulf that travelled from Potos$ in Nicaragua to the port of La Union in El Salvador. Mr. President, I have furnished the Parties and the Members of the Chamber with

copies of a map indicating the route traversed by the ferry. This situation lasted from the period shortly after the war until 1980 when the Peace Treaty was signed. At no time did Honduras protest that this ferry boat was crossing its waters.

Annex VIII.1 of the Honduran Reply contains a Report by the Honduran authorities concerning naval incidents between 1982 and 1988. The information of this Annex is interesting for what it contains and for what is lacking. First of all, there is no reference to incidents before 1982. With the exception of one reference to the year 1982 (Ann. VIII.1.A) which is not helpful since it does not indicate the location of the incident, all the other references are from 1985 to 1989.

On the part of Nicaragua, I can say that before 1980 there was never any incident reported at or near the mouth of the Gulf or within the Gulf between Nicaraguan Naval Forces and any Honduran Forces that might have entered that area. The only incidents had been at or around the 1900 delimitation line.

With respect to Honduras and El Salvador, the naval incidents reported by Honduras place the first incident beween their forces in the central area of the Gulf only in 1985.

In concluding on this point, I want to emphasize that Honduras claims to a corridor are of very recent manufacture. They do not date back to 1950 but very clearly arose in the context of a strategy of negotiations with El Salvador as from 1973. Undoubtedly, as "bolson" was added to "bolson" in the land negotiations, Honduras threw in this maritime package as a sort of what we regionally call an "ipegüe" a sort of gift from the baker. But even then, as we gather from the 1978 letter of Honduras which I have read into the record (C 4/CR 91/43, pp. 30-31) in my previous intervention, Honduras believed that the maritime part of the negotiations had to involve a second phase and a third party, Nicaragua. It was only later, as I pointed out in my previous intervention, that Honduras - to use a phrase from Honduran counsel (CR 91/44, p. 13) - saw an opportunity of dividing the spoils.

Community of interests

Counsel for Honduras have been at pains to show that there are other basis - apart from the

community of interests thesis - for the Honduran claims to a part of the closing line of the Gulf and its other maritime claims. But the fact is that the Submissions of Honduras have not varied at all. These Submissions are in its Reply of 12 January 1990, where we read:

> "the Republic of Honduras asks that it may please the Court:
>
> C. With respect to the maritime dispute:
>
> 1. concerning the zone subject to delimitation within the Gulf:
>
> - to adjudge and declare that the community of interests existing between El Salvador and Honduras by reason of their both being coastal States bordering on an enclosed historic bay produces between them a perfect equality of rights, which has nevertheless never been transformed by the same States into a condominium;
>
> - to adjudge and declare that the community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdictions over maritime areas situated beyond the closing line of the Gulf."

These paragraphs, whatever their legal import, do not lend themselves to misunderstanding. They request the Chamber to adjudge and declare that the community of interests implies a right over maritime spaces beyond the closing line.

Professor Pierre-Marie Dupuy has depicted the origins and the fruitful faculties of this territorial bearing concept:

> "le fait que le golfe soit une baie historique, mais aussi une baie historique multinationale, explique ainsi que les trois riverains soient liés par la communauté d'intérêts.
>
> Ceci a pour conséquence . . . qu'à l'égard de la ligne de fermeture du golfe . . . le Honduras a les mêmes droits que ses deux voisins, à la fois sur la ligne elle-même et, à partir d'elle, sur une zone maritime dans le Pacifique." (C 4/CR 91/41, p. 42.)

He has added to the ideas expressed in the Submissions, the concept of an historic bay as being the basis of the community of interests. So what? How can putting a historic multinational bay into a mixer together with its progeny entitled "community of interests", and juggling them with ad hoc principles of international law, place Honduras in the Paific Ocean ?

Professor Bowett, attempting to build up the importance of this concept of a "community of interests", produced this interesting revelation:

> "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*." (C 4/CR 91/44, p. 18; emphasis added.)

This passage gives the game away. First of all, it recognizes that the entitlement to a closing-line is based only on the idea of a "community of interests". This is what we have understood all along and we have not agreed. We have also said all along that, even if there was such a community of interests, as envisaged by Honduras, the existence of such a community cannot be declared in the absence of Nicaragua. Now we find Professor Bowett not only implicitly agreeing, but going further. The existence of the "community of interests" blocks any possibility, or, to use his words, "precludes any claims" by the two riparians to divide the waters between them to the exclusion of the third riparian . . . but, apparently, only if the third riparian is not Nicaragua.

A short word on the concept of "historic bay" of Fonseca

Counsel for Nicaragua as well as the Minister for Foreign Affairs of El Salvador have each pointed to several examples of States situated at the back of bays, or other masses of land abutting upon the sea, that have not made any claims to maritime spaces beyond the landmasses that encompass them or claimed corridors running through those landmasses.

Honduras has waived these examples aside, saying that the character of historic bay possessed by the Gulf of Fonseca differentiates it from these examples. If the implication is that this historic title gave equal rights to the three riparians at the closing-line of the Gulf, then these rights must be part of the special régime of the Gulf. Let us review the record to see if there is any indication that this was part of the régime of the Gulf.

The first important date is that of the line drawn in Acta II of 1900. We all know where this line ended - nowhere near the closing-line of the Gulf. If at this important time the historic nature of the bay gave rights to the riparians at the closing-line, then it is incredible that Honduras should have accepted the line fixed by the Mixed Commission in 1900. At the very least, it should have reserved its rights. There is no evidence that this possibility was ever discussed in this period.

The second important period is 1917. The proceedings before the Central American Court and that Court's Judgment - though erroneous in its vision of a condominium - do serve to provide an insight into what was understood to be the special régime of different areas within the Gulf of Fonseca. Nowhere in that Judgment do we find an indication that the Court, El Salvador, Nicaragua or Honduras itself understood that the historic character of the Gulf gave rights to Honduras that reached to the closing-line. Quite the contrary: even the condominium that the Court thought to exist in part of the waters of the Gulf did not extend to the closing-line. I have gone through this material extensively in my previous intervention and will not repeat it now (C 4/CR 91/43, pp. 34-43).

If the historic nature of the bay was not considered to give any presence to Honduras as late as 1917, then, when did this régime come into being? The main characteristic of historic waters is that they enjoy a special régime. When did the special régime of the Gulf of Fonseca place Honduras outside the Gulf?

A geographical comparison

Mr. President, before finishing, I will make a geographical comparison that struck me, but referring to another part of the world of greater extension than the Gulf of Fonseca, but, like the Gulf, and like any other part of the world, having its own geographical characteristics. The reason why I have chosen it is because the Court has dealt with it in a landmark case. I refer to the geographical area of the North Sea.

We have provided Members of the Chamber with a reproduction of a sketch of the North Sea used by the Court in its Judgment in that case. The curious observation is that one State in the area is at great disadvantage because of its geographical location. I am not referring to Germany because there was no question as to the fact that it had a right to a part of that sea. As the Court pointed out

> "in the resent case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature . . ." (*I.C.J. Reports 1969*, p. 3, para. 91).

What I want to consider is the situation in the North Sea from the point of view of Belgium.

What claims did Belgium have on the North Sea in 1969? Did they then claim a corridor or maritime spaces reaching to the more or less mid-point of the North Sea, where the claims of its two neighbours, Great Britain and the Netherlands, met? Apparently they did not have as imaginative legal talent as Honduras.

Let us transpose the arguments of Honduras to the situation of Belgium. Belgium, Great Britain and the Netherlands were members of the European Community: ergo, community of interests. Belgium and the Netherlands had been one nation: ergo, equality of rights. What could have been simpler? Yet no one thought at the time, nor do they think so now, that Belgium could encroach on the continental shelf rights of its neighbours in the North Sea.

The geographical situation of the North Sea provides other interesting points of comparison that will be addressed by Professor Brownlie.

A final point

In yesterday's sitting, counsel for Honduras pointed out that in 1917 Nicaragua did not believe it had a common boundary with El Salvador. This argument was based on quotes from the 1917 Judgment (C 4/CR 91/47, p. 25).

Since it is the privilege of the Agent to answer the easy points, I will do so, and end my presentation by simply recalling that in 1917 the generally-accepted claims to territorial sea did not go beyond 3 miles. It is reasonable to assume that this fact was in the mind of the Nicaraguan officials who made the statements quoted by counsel from the 1917 Judgment.

Mr. President, the presence before the Chamber at different moments of these oral pleadings of Their Excellencies the Ministers for Foreign Relations of El Salvador, Honduras and Nicaragua emphasize the importance this case has for our three nations. It is true that what is at stake for Nicaragua is limited to the maritime aspects of the case. Yet it is certain that if the positions were reversed and Nicaragua had come before this Chamber with Honduras, to the exclusion of El Salvador, the honourable Agent of El Salvador would be here in my place. The same would go for the honourable Agent of Honduras, if Nicaragua had such an understanding with El Salvador.

Mr. President, this ends my presentation, and I would ask that you give the floor to Professor Brownlie. Thank you.

The PRESIDENT: I thank the Agent of Nicaragua, Mr. Carlos Argüello, and I give the floor to Professor Brownlie.

Mr. BROWNLIE: Thank you, Mr. President. My purpose in my second speech is threefold. First, I need to deal with certain points raised by my friend, Professor Bowett, which are essentially debating points but which nonetheless have to be dealt with.

Secondly, in the light of the speeches made, both this week and the previous week, on behalf of Honduras, I find it necessary to make a general assessment of the Honduran arguments so far as they affect the claim to the Meanguera corridor.

And thirdly, and lastly, I shall respond to the remarks made by Professor Bowett concerning the application of equitable principles in the region of the Gulf.

The debating points

And I start by referring back to the Honduran argument presented on Monday morning by Professor Bowett.

In the first place Honduras complained that Nicaragua presented a discussion of delimitation *"under the guise of a discussion of entitlement"* (C4/CR 91/44, p. 10).

Mr. President, this rotund dismissal of a major argument based upon a familiar legal concept will simply not do.

Nicaragua carefully expounded the distinction between entitlement and delimitation and provided ample authority in support. Perhaps I can add one more illustration which involves the *Fisheries* case, a decision cited from time to time in the Honduran pleadings.

The *Fisheries* case concerned the validity in general international law of the Norwegian system of straight baselines. Only when the Court had established that validity could it proceed to

the next stage of that adjudication, which related to the way in which the system had been applied in the actual drawing of individual baselines (*I.C.J. Reports 1951*, p. 140).

And so it was only at page 140 of that Judgment that the Court moved on to dealing with the validity of the individual baselines. And in this context I think it will help if I affirm the position of Nicaragua concerning the Meanguera corridor.

Our position is completely clear. In our view the Honduran claims which surfaced in the 1970's involve a challenge to legal status quo which has endured since 1900. This *status quo* is acknowledged in the Honduran diplomatic note to El Salvador dated 30 September 1916 (Honduran Memorial, Vols. IV and V, Ann. XIII.2.40), an item which has been more than a little neglected in the Honduran presentations.

It is only in these proceedings that the community of interests thesis emerges as an invented basis of entitlement.

The reality is that Honduras has presented a discussion of entitlement under the guise of the invented concept of a community of interests and its alleged attributes in the sphere of delimitation.

The claim to the Meanguera corridor necessarily involves the principle of entitlement. From Nicaragua's point of view it is not a question of saying that the boundary marked on Map C5 does not involve Nicaraguan waters.

Such a delimitation with El Salvador presupposes an entitlement which involves both the western sector and the eastern sector of the Gulf. The other margin of the corridor is, in Honduran thinking, a line which extends the boundary of Acta II of 1900 to the vicinity of Farallones which is a Nicaraguan island in the eastern sector of the Gulf.

Thus Nicaragua's concern is with the general validity of the Honduran claim to a corridor to the Pacific.

Delimitation is secondary, like the validation of the individual baselines in the Norwegian system of straight baselines.

An example will highlight the Nicaraguan viewpoint on this. The waters and sea-bed of the Black Sea are attributed in the central and eastern areas to either Turkey or the Soviet Union, and a

shelf boundary exists. If we suppose a non-riparian State were, on the basis of some alleged legal title, to claim an area of sea-bed or waters in the areas attributed to Turkey and the Soviet Union, it would in our submission, be completely inadequate to characterize the question as one of delimitation.

If someone claims a corridor through your land, the issue of boundary lines is either irrelevant or, if title is established by the claimant, then it is consequential and secondary.

So much for entitlement and its relation to delimitation.

I can now deal with the remaining debating points.

Honduras, in the light of Professor Bowett's speech on Monday morning, still appears not to appreciate the nature of intervention. Article 62 of the Statute refers to an interest of a legal nature "which may be affected". As the Chamber pointed out in its Judgment of 13 September last year, the State seeking to intervene has only to show that its interest "may" be affected, and not that it will or must be affected (*I.C.J. Reports 1990*, p. 117, para. 61).

And in this context it has to be emphasized that the Honduran pleadings persistently link the community of interests with delimitation. For example the Counter-Memorial of Honduras has the special rubric: *"B. the determination of the legal situation of the waters of the Gulf implies delimitation"* (French text, Vol. II, p. 684; Eng. trans., Vol. II, p. 148).

It was also confusing to hear counsel for Honduras refer to the proceedings on the request for permission to intervene as "the main intervention proceedings". This is to treat the passport application as more significant than the journey.

And so I come to my final preliminary point. In these proceedings the Parties have a credibility problem vis-a-vis Nicaragua. Thus Honduras from time to time criticizes Nicaraguan positions but then at other times adopts our view-point concerning for example a Salvadorian claim to a condominium. Similarly, El Salvador adopts the part of Nicaragua's Written Statement relating to the community of interests, whilst criticizing Nicaragua on other points.

The alternating criticism and plaudits reminds me of an old friend who was a prisoner of war in Germany. The camp he patronized longest, before escaping, had a commandant whose policy

involved alternate periods of harsh treatment and kind treatment of the prisoners. The prisoners characterized this policy as one of "boots and flowers".

Mr. President, this is how it has sometimes seemed to the Nicaraguan delegation as we listen to the speeches from our elegantly positioned table in the Great Hall of Justice.

General Assessment of the Honduran Arguments

I now move on to make a general assessment of the Honduran arguments. The nature of the Honduran arguments is crucial in relation to maritime entitlements and the pleadings in this case have developed in a rather lop-sided fashion. This is the result of the Salvadoran reluctance to join issue on delimitation, leaving Honduras to deploy a series of rather eccentric arguments.

The first eccentricity is the incredible diversity of material deployed to support the alleged community of interests. Writers on rights of neighbourhood march with the *River Oder Commission* case, the *Corfu Channel* case, and the *North Sea* cases. And the fellowship is as casual as the fellowship of people involved in some disaster at sea.

The second eccentricity is the indifference to the concept of the critical date. A package of claims is presented to the Chamber on a variety of legal bases which have no relationship with one another in point of time.

In any dispute certain dates will naturally assume a logical and inevitable prominence in evaluating the facts. In the Honduran argument the possible critical dates or critical periods appear to be as follows. I say, "appear to be", because the Honduran pleadings are often obscure in this respect and a process of careful deduction is called for.

A. The Honduran Memorial and the speeches of counsel establish that the Gulf was an "historic bay" by 1916 - that is their view - and, it would appear, at least by 1900.

The Memorial treats the Judgment of 1917 as reflecting a *status quo*, a pre-existing status of the Gulf (MH, Chap. XIX).

B. The appearance of the community of interests as a claim has to be dated at the time of the Honduran Memorial in 1988.

This claim thus has no critical date independently of the proceedings and it is not mentioned in any single Honduran diplomatic document.

And in my first speech I pointed out the absence of any reference to community of interests in Honduran diplomatic documents (C4/CR 91/43, p. 58). And I would draw the attention of the Chamber to the fact that counsel for Honduras has made no response to that statement.

The absence of such references is, after all, not surprising. Displomatic correspondence would be unlikely to reflect non-existent legal concepts unheard of either in the literature or in the practice of States.

C. The third apparent critical date is 1950 or 1951. The Honduran Memorial gives some prominence to the Decree No. 25 of 17 January 1951, relating to the continental shelf (MH, French text, Vol. II, pp. 673-4, para. 70; English text, Vol. II, p. 115). Professor Bowett has also focused on the years 1950 and 1951 in his speeches this week.

Mr. President, this does not exhaust the subject of critical dates, and in the Counter-Memorial, Honduras gives prominence to the Peace Treaty and the negotiations in the period 1980-1985 (CMH, French text, Vol. II, p. 675-676; English text, Vol. II, p. 143).

However, for present purposes it can be assumed that the best candidates are 1900, 1950 (or 1951), and 1988.

Of course, these dates are not efficient critical dates, for the reasons I shall now give.

The first reason is the status of the concept of a community of interests as a legal non-entity, a complete figment of the Honduran Memorial of 1988.

The second reason is that the bases of entitlement used by Honduras are as follows:

(a) *primarily and expressly*, the concept of community of interests;

and

(b) *indirectly and on an ancillary basis*, historic title by virtue of the status, or alleged status, of the Gulf of Fonseca.

Mr. President, when I refer to the "bases of Honduran entitlement" in this context, I mean the bases as they are presented in, or emerge from, the Honduran pleadings.

I now come to a central source of weakness and confusion in the formulation of the claims of Honduras.

This consists of a failure to create a legally sensible articulation of the bases of entitlement and the various critical dates offered by Honduras.

The Honduran pleadings fail to explain how a historic title acquired in or before 1900 can provide a basis for a continental shelf claim in 1950, or how either of these could provide a basis for the community of interests package of claims, which emerges in 1988.

But, Professor Bowett, on behalf of Honduras, considers that he has an answer to this problem. Thus on Monday morning he had this to say:

> "Nicaragua alleges that the Honduran claims are of very recent origin. Well, 1950, that was when Honduras claimed the shelf in the Pacific"

Further on, he said:

> "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 is scarcely surprising that you cannot find evidence of the Honduran claims back in the 19th Century."

But, Mr. President, this is not an answer to the problem. Professor Bowett states that, as the law develops, so new claims can be justified and, in certain conditions, I concede, that may be true.

In the context of the present proceedings, however, his statement underlines the problems rather than removing them.

What then are the problems?

First, the historic title relied on by Honduras dates back to 1900 - or even earlier. But historic title is not evolutionary. It cannot, as such, provide a basis for a continental shelf claim in 1950.

Secondly, the historic title of 1900 - or earlier - cannot provide a basis for a regime of community of interests first formulated in 1988.

Or, to put the matter another way, a claim based on changes in the law after 1945 cannot be

based upon a community of interests formulated in 1988, and founded upon an historic title dating back to 1900.

Thirdly, in its pleadings, Honduras has in fact relied on the concept of community of interests as the basis of entitlement, in respect of all aspects of its maritime claims.

In terms of the normal logic of critical dates and intertemporal law, a basis of entitlement invented in 1988 could not provide a basis of title in respect of events in 1950, or at any other much earlier date, even if that basis of entitlement were recognized by the law.

There is, of course, a further problem presented by the Honduran pleadings. Whilst the basis of entitlement expressly relied upon is the community of interests, and to a certain extent historic title, these alleged bases of title do not provide a *modus operandi* for maritime delimitation.

It is prevailing curiosity of the Honduran pleadings that, when the subject of delimitation is approached, the principles of the Law of the Sea are suddenly invoked.

And thus, as I explained in my first speech, the question of entitlement in terms of the Law of the Sea - which is of the highest relevance - has been submerged by the fictitious concept of the community of interests. Delimitation, therefore, in Law of the Sea terms, appears from nowhere and the real question, which is entitlement, tends to be ignored.

And, in the view of Nicaragua, this eccentricity concerning the critical date and the applicable legal regime is the direct result of the need to provide some kind of legitimacy for revisionist claims formulated very recently - say, in 1973 or 1974, or 1982 - and to do this by way of concepts which avoid the problems which would have been presented by using equitable principles, in relation to entitlement and not just in relation to delimitation.

I can now move on to consider certain other eccentricities of the Honduran pleadings.

The third eccentricity involves the so-called baseline at the mouth of the Gulf. If this is referred to as a closing-line, then not much harm is done, as a closing-line is a datum, a part of the geographical framework and a possible basis for legal analysis of some kind. But to call it a baseline, which is a legal thing, simply does not make sense.

A baseline can only create entitlements when it is an aspect of a real coast. The idea,

expressed by my friend, Professor Bowett, that the so-called baseline "represents" the coasts of the riparian States is, with respect, simply bizarre.

Such an idea emphasizes the artificiality of the Honduran efforts to find a credible basis for the Meanguera corridor and its ramifications.

The norm applied in the Law of the Sea is that, both entitlement and delimitation are derived from the possession of coasts actually abutting upon the disputed area.

The fourth eccentricity of the Honduran case is the obsession with the status of the waters of the Gulf as internal waters. This obsession is particularly strange in view of the fact that, when it comes to delimitation, the Honduran Government invokes the equitable principles associated with the division of disputed areas of continental shelf.

The fifth eccentricity of the Honduran pleadings is the use of one fiction as the foundation for further fictitious constructions. I shall give two examples of this.

First, there is the fact that in major parts of the Gulf and its neighbourhood, Honduras has no actual coasts. The solution to this is to create a fictitious coast, the so-called baseline at the mouth of the Gulf. In this context, as Professor Bowett told the Chamber on Monday, Honduras has a natural prolongation, which apparently provides a sort of sea-bed version of the Meanguera corridor.

But how can a fictitious coast have a natural prolongation?

Entitlement is based on the possession of land territory, not fictitious coasts or lines representing coasts. A closing line cannot have a natural prolongation either in law or in fact.

The second example of the use of multiple fictions is this. Honduras produces dates - for example, 1950 - at which her maritime claims were allegedly made. Having produced such unreal dates, which vary in any case, Honduras in the person of Professor Bowett, complains that Nicaragua failed to protest in face of these unreal claims.

The Agent of Nicaragua has presented an analysis of some three items in this context. And this general assessment of the Honduran argument can now be concluded with a return to the subject of entitlement.

Honduras refuses to take this subject seriously. Mr. Lauterpacht, speaking on behalf of El Salvador, was rather more open-minded but still tended to see the jurisprudence perhaps too exclusively in terms of delimitation.

No doubt the Parties will take their choices about which risks they will take in front of the Chamber.

For its part Nicaragua is concerned about the proper classification of the legal issues. For Nicaragua the Honduran claim to the Meanguera corridor involves a major claim to an entitlement which on its face has no justification in general international law.

This lack of justifiction results, in our submission, in an essential lack of validity. Thus the claim to a corridor to the west of the legally definitive terminus of the boundary established between Honduras and Nicaragua in 1900 is invalid in general international law and, consequently, in our submission, is inopposable to any other State, whether or not it is a party to the present proceedings.

There is, of course, nothing unusual about such concept of validity, and in fact Honduras has invoked it for its own purposes during the oral arguments in relation to El Salvador's claim to a 200-mile territorial sea in 1950. I refer to one of Professor Bowett's speeches (C 4/CR 91/44, pp. 22-23).

In this context it is worth recalling that in the Fisheries case the Court was particularly careful in assessing the situation in terms of general international law (*I.C.J. Reports 1951*, pp. 138-139). And so the Court avoided deciding that case on the basis of British acquiescence as it might have done, as Judge Hackworth, I think, would have been prepared so to do. The issue in front of the Court was the validity of the system of delimitation, and this in general international law terms. And so the Court recognized (*ibid.*, p. 132), and this was emphasized also by Judge Hsu Mo in his separate opinion (*ibid.*, p. 154).

The invalidity of a state of affairs which is, or would be, contrary to international law was recognized by this Court in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*I.C.J. Reports 1971*, p. 16).

Paragraph 2 of the *Dispositif* of that Opinion, adopted by 13 votes to 2, is of particular

interest. This provided that:

> "The Court is of opinion ...
>
> (2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration . . ." (*I.C.J. Reports 1971*, p. 58, para. 133).

Of course, the background to that case was very different from this case but the point in principle relating to invalidity is clearly relevant for present purposes.

And with that, Mr. President, I close my general assessments of the Honduran pleadings and if it is convenient for you, Sir, it would be perhaps convenient for me if we could break now for coffee. Thank you.

The PRESIDENT: I thank Professor Brownlie and we will take a break of 15 minutes.

The Chamber adjourned from 4.20 p.m. to 4.40 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I give the floor again to Professor Brownlie.

The application of equitable principles

Thank you Mr. President. I shall now approach my third subject which is a response to statements by my distinguished opponents on the principles and rules concerning entitlement in the context of the Law of the Sea.

For this purpose I would like to revert to my archetypical international lawyer who, for the first time, unencumbered with the pleadings, is presented with a map of the Gulf of Fonseca.

He would no doubt check the distances involved and the Agent of Nicaragua in his first speech presented the figures adopted by the Central American Court (C 4/CR 91/43, pp. 22-23). By any standards what we have is a small distance delimitation within the Gulf.

In such a situation, no less than in long distance delimitation, geography obviously is paramount. As the Court stated in the *Fisheries* case, when explaining its preference for the outer edge of the "skaergaard" or rock rampart, rather than the mainland of Norway, as the relevant low-water mark the Court said "This solution is dictated by geographical realities." (*I.C.J. Reports 1951*, p. 128.)

The geography provides the basis for the determination of the relevant coasts and base-points. Coasts provide the basis for title. But, Mr. President, the coasts must be those actually abutting upon the coasts of the disputed area. And I have references in the transcript to the Anglo-French case (*RIAA*, Vol. XVIII, p. 115, para. 248) and the Gulf of Maine case (*I.C.J. Reports 1984*, p. 337, para. 224) on this point. The coast must be those actually abutting upon the waters of the disputed area.

Our archetypical international lawyer would at this point think surely of Article 12 of the Territorial Sea Convention of 1958, or Article 15 of the 1982 Convention which is essentially the same set of provisions and if I can, with your permission, read Article 15 of 1982, the rubric is:

"*Delimitation of the territorial sea between States with opposite or adjacent*

coasts.

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Now it is reasonable to suppose that this represents general international law. And, in spite of the proviso concerning historic title (to which I shall return), this provision clearly accepts that the median line is the normal solution for, what I may call, small-distance delimitation.

Moreover, even if all or part of the Gulf does not have the status of territorial sea, it would surely be contrary to common sense to suppose that this would make a substantial or, indeed, any difference.

On this basis it is obvious to our competent international lawyer that Honduras would not be entitled to a corridor.

And, of course, Honduras has invoked historic title and the question is, what difference, if any, does this make?

Mr. President, the role of historic title in this case has always been a source of mystery.

It is sometimes presented as the basis for the claim to a community of interests, and sometimes as a sort of subsidiary or alternative basis of title.

But the community of interests includes a package of maritime claims, including a claim to shelf rights. Thus the historic title which dates back, apparently, to 1900 and before, appears subsequently, as a basis of title to claims which, even in the Honduran perspective, were formulated not before 1950.

Nicaragua's position is that the question of entitlement remains substantially the same whether the waters are internal (for certain purposes), or territorial sea, or partly territorial sea and partly shelf.

Honduras has offered no evidence to establish historic title, that is title to maritime territory, in particular areas of the region of the Gulf.

I would like now to round off the subject of historic title with two general observations.

First, the invocation of historic title always involves the element of an adverse acquisition of rights in the face of existing law. As Judge Fitzmaurice has said in his commentary on the *Fisheries* case:

> "Yet this element is of the essence of the matter, for a title or right based on historic considerations only becomes material when (and indeed assumes that) the actions involved are not or could not be justified according to the recognized rules, and can therefore be justified, if at all, only by reference to some special factor such as a historic right." (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, I, p. 158.)

Secondly, if a new form of entitlement or delimitation is contended for, the Court will normally seek evidence of the consent of other States, or at least a lack of opposition.

And this was particularly true in the *Fisheries* case. As the Court stated: "The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact." (*I.C.J. Reports 1951*, p. 138.) And the Court concluded in the long two-page passage dealing with this question of the attitude of third States:

> "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.
>
> the Court is thus led to conclude that the method of straight baselines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law." (*Ibid.*, p. 139.)

And, in our submission, the Honduran reliance on historic title should be evaluated in the light of these factors. And there is no evidence that the title to which they now refer has received the kind of notice and acceptance which the Court required in the Norwegian *Fisheries* case.

I shall now leave the question of historic title and move to the broader questions of general international law referred to in the speeches of counsel for El Salvador and Honduras.

And the first such question is that of inherent rights.

In his speech on Monday morning Professor Bowett made the point that the shelf claim of Honduras is based upon inherent right, and this view has been expressed by Honduras on several occasions.

And, of course, it goes without saying that shelf rights arise *ipso facto* and by operation of law. And so Article 2, paragraph 3, of the Continental Shelf Convention of 1958 provided that:

> "The rights of the coastal State over the continental shelf do not depend on occupation effective or notional, or any express proclamation."

But the Honduran reasoning has a fatal flaw. It is all very well to talk about inherent rights, but such rights, like such shelf rights, have to be generated, there has to be a basis of title, that is to say a coast abutting upon the area concerned. Rights may be inherent but they must have a legal origin in the first place.

The provisions of the Shelf Convention, and those of the 1982 Convention, refer after all to "the rights of the coastal State". It is coastal States which may have inherent rights, not States which do not have coasts in the disputed area.

And this, Mr. President, is another example of the elision of entitlement in terms of the Law of the Sea.

Instead of a discussion of entitlement in normal terms, the quality of being a coastal State, Honduras always offers a formula, or a choice of formulae:

"the equality of the riparians";

"inherent right";

"the baseline";

community of interests"; or

"historic title".

And thus formulae are substituted for coastal geography, for geographical realities.

Both El Salvador and Nicaragua have used comparable geographical situations to demonstrate that the Honduran claims are incompatible with prevailing legal principles.

The response of counsel for Honduras has been to assert that the cases invoked do not involve

historic bays. This is probably true but the fact is inconsequential. It is simply, in our submission, a *non sequitur* to assert that the legality of entitlements can only depend upon the existence or not of historic title. This is particularly the case when the historic title invoked by Honduras relates not to specific areas of water or sea-bed but to a generalized and territorially non-specific community of interests.

In his speech on Monday afternoon, Professor Bowett reverted to the terminology of the Law of the Sea to explain the basis of entitlement. In his words:

> "As a matter of law, there is no reason why a coast at the back of a bay, or gulf, or even a concave coast should not be entitled to a natural prolongation out into the open seas. If such a natural prolongation is consistent with an equitable result, then the coastal State's title merits legal recognition." (C4/CR 91/45, p. 16.)

No doubt this refers to entitlement outside the Gulf but it must necessarily refer to the entitlement to the Meanguera corridor generally.

Mr. President, the first point to notice is the absence of a reference to community of interests or historic title.

All of a sudden we are presented with natural prolongation, which is a concept essentially concerned with entitlement.

And it is at least a recognizable element of the Law of the Sea.

I say recognizable element by way of concession. Because Professor Bowett has reported the legal principles in a rather strange form.

Natural prolongation in the current law is now seen as a general reference to title and its current role otherwise is problematical.

In the *Tunisia/Libya* case the Court decided that natural prolongation was not per se the producer of an equitable result. I shall not trouble the Court by reading it but it does reveal the limited role of natural prolongation and that in a Judgment given in a case where natural prolongation was very much the subject of the pleadings.

> "Both Parties to the present case have in effect based their argument upon the idea that because a delimitation should, in accordance with the Judgment in the *North Sea Continental Shelf* cases, leave to each Party 'all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea' (*I.C.J. Reports 1969*, p. 53, para. 101 (C) (1)), therefore the determination of what constitutes such natural prolongation will produce a correct delimitation. The Court in

> 1969 did not regard an equitable delimitation and a determination of the limits of 'natural prolongation' as synonymous, since in the operative clause of its Judgment, just quoted, it referred only to the delimitation being effected in such a way as to leave 'as much as possible' to each Party the shelf areas constituting its natural prolongation. The Court also clearly distinguished between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area: 'the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries' (*I.C.J. Reports 1969*, p. 32, para. 46). The Court is therefore unable to accept the contention of Libya that 'once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature'. It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no further, so that the two prolongations meet along an easily defined line. Nor can the Court approve the argument of Tunisia that the satisfying of equitable principles in a particular geographical situation is just as much a part of the process of the identification of the natural prolongation as the identification of the natural prolongation is necessary to satisfy equitable principles. The satisfaction of equitable principles is, in the delimitation process, of cardinal importance, as the Court will show later in this Judgment, and identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases; but the two considerations - the satisfying of equitable principles and the identification of the natural prolongation - are not to be placed on a plane of equality." (*I.C.J. Reports 1982*, pp. 46-47, para. 44.)

And the Judgment of the Court in the *Libya/Malta* case reveals that in small-distance delimitation, it is the principle of distance, not prolongation, distance, which is the basis of title. If I could remind the Chamber of the relevant passage in the Judgment:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the 'rift zone' cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese Shelf and the northward extension of the Libyan as if it were some natural boundary." (*I.C.J. Reports 1985*, p. 35, para. 39.)

Now in our submission the principle of distance establishes that in many geographical situations, the applicable equitable principle will be that of the equal division of the disputed areas.

Now Professor Bowett has shown considerable interest in the *Gulf of Maine* case and it is the

Judgment in that case which precisely explains the significance of the principle of equal division and that is reiterated in a whole series of passages in that very elaborate Judgment (*I.C.J. Reports 1984*, pp. 300-301, para. 115; pp. 312-313, para. 157; pp. 327-332, paras. 195-210).

And in fact the principle of equal division originates in the Judgment in the *North Sea* cases, (*I.C.J. Reports 1969*, p. 36, para. 57), a passage also given prominence in the Judgment in the *Libya/Malta* case (*I.C.J. Reports 1985*, p. 47, para. 62).

In terms of small-distance delimitation the principle of equal division is also to be found after all in Article 15 of the 1982 Convention on the Law of the Sea.

The Chamber will be aware that principles have to be applied and that the best evidence of what is equitable is likely to be found in the jurisprudence.

And the cases most often referred to in these proceedings have been the *North Sea* cases, the *Anglo-French* case, and the *Gulf of Maine* case.

Mr. Lauterpacht suggested that these decisions were perhaps less relevant by reason of the fact that they were not much concerned with entitlement. But on this point I would tend to agree with Professor Bowett.

At any rate I turn first to the *Anglo-French* case.

Professor Bowett has insisted that the treatment of the Channel Islands clearly provides support to the case of Honduras (his speech on Wednesday morning, 12 June; and see also his earlier speech, C4/CR 91/45, pp. 16-17).

He considered that the natural prolongation of France was allowed, in his phrase, to "leap-frog" over the Channel Islands.

But that was not how the Court of Arbitration actually reasoned.

Mr. President, it is very unsatisfactory to quote particular paragraphs and I do not propose to do that; I can only respectfully suggest that the Chamber refresh its memory by re-reading paragraphs 180 to 202 of the Anglo-French decision. Such a perusal would, in my submission, reveal that the Court approached the legal and geographical framework in a different way.

Moreover, the United Kingdom had argued for a link or corridor with the sea-bed round the

Channel Islands. That is a link between the dominant United Kingdom share of the continental shelf to the north of the median line down the centre of the channel and the sea-bed around the Channel Islands themselves and that link was denied. And this was a major issue in that case.

And it was denied in accordance with a concept of geographical balance, which is certainly not in harmony with the concept of the Meanguera corridor. I refer in particular to paragraphs 183 and 199, dealing with the concept of geographical balance.

It would be a reasonable inference from the *Anglo/French* case that, if Honduras had title over some islands near the mouth of the Gulf, the appurtenant waters and sea-bed would, in fact, be enclaved. The real parallel is with the situation of the State seeking an entitlement in respect of areas considerably displaced from the more significant coast of that State.

If the United Kingdom was not permitted a link with the Channel Islands, it is unlikely that a State in the position of Honduras would be allowed a corridor, parts of which would be more than 200 miles from its coasts.

The alleged "leap-frogging" was, in fact, a reflection, first of all, of the overall legal and geographical framework in the English channel and, secondly, of the predominant interest - that is the phrase used by the Decision - of France, in the continental shelf off its coast. Paragraph 188 of the Decision refers to this predominant interest.

I now move on to look briefly at the *Gulf of Maine* case.

Professor Bowett recruited this decision to his cause and made the following claim: "Think of the *Gulf of Maine* case" he said, and he refers to the folder.

> "Now at Figure 4 you will see how the United States conceived of the argument that the long American coast at the back of the Gulf had a natural prolongation extending out into the sea areas beyond the Gulf. It had a legal entitlement to maritime areas in front of that long coast and, even though, in terms of proximity, the Canadian coast of Nova Scotia was nearer, if you examine the Court's Judgment, you will see that it was the length of the American coast at the back of the Gulf that determined the course of the boundary in both the second and the third sectors of the delimitation line decided upon by the Court."

And he concludes:

"Now that can only mean that the coast at the back of the Gulf generated legal title to these areas lying outside the Gulf." (C4/CR 91/45, p. 18.)

Once again, Mr. President, the rather careful reasoning of the Chamber in the *Gulf of Maine* case can only be appreciated by a reading of the actual sequence of paragraphs in that lengthy Judgment (*I.C.J. Reports 1984*, pp. 333-337, paras. 214-223).

Now, in our submission, Professor Bowett in fact misreports what occurred. He misreports the process of reasoning and, if I may say so, Mr. Lauterpacht did not perhaps sufficiently clarify the issue in his speech today.

The line involved the second of the three segments of the delimitation and in paragraph 216 of the Judgment there is great emphasis on the *quasi* parallelism of the United States and Canadian coasts facing one another as opposite coasts within the Gulf. In paragraph 216 also, there is a reference to the median line being applicable, in principle, in that geographical situation.

In paragraph 218, there is a reference to the situation at the back of the Gulf, which is dominated by American coasts and the need for a limited process of correction of the median line. And so, what happened was, that the line of division was in principle a median line produced by the geographical situation opposite facing coasts, not coasts at the back of the Gulf. And the situation at the back of the Gulf, the roll of United States coasts was allowed to produce a very limited correction in the actual position of the median line. And so you have this process of correction which appears in paragraph 222. And it is difficult to see a jurisprudence which carries out such cautious operations providing support for the type of corridor which is proposed by Honduras in these proceedings.

I now move on to the *North Sea* cases and I would like to look at them in perhaps a different light to that of Professor Bowett. He has insisted on a comparability between the situation in Germany and that of Honduras at the back of the Gulf of Fonseca. And the Chamber has access to this very familiar illustration in so far as it may be needed. In fact, if the sketch-maps in the *North Sea* cases are perused, I think a more viable comparability emerges.

In my submission, the role of Honduras is not accurately represented by Germany alone. It is more accurately represented by taking the coasts of Germany, Denmark and The Netherlands

conjointly. If that is done and a comparison is made with the Gulf of Fonseca, it will be seen that that comparison makes more geographical sense. And then, so far as parallels can be said to exist, it is the opposite coasts of the United Kingdom and Norway which emerge as occupying the role of Nicaragua and El Salvador, and not the coasts of the neighbouring States of Holland and Denmark.

On this basis, the riparians, as it were, at the back of the North Sea, do not in fact get much in the way of an extension. It may be too obvious to make the point, that no North Sea State has proposed a baseline at its northern entrance, which would represent the coasts of the riparians in the southern areas of the North Sea.

And so, Mr. President, I come to my conclusions. On entitlements, there is, one supposes, a certain problem for the Chamber. The question of entitlements and delimitation, of course, has to be decided contingently upon an interpretation of the Special Agreement. And on that we have offered no views.

So, the problem is this, what is the applicable law which may be applied by the Chamber if it decides that entitlements and delimitation fall within the mandate given by the Special Agreement? To what extent is the Chamber permitted, so to speak, to go outside the applicable law offered by the Parties, especially in a situation where it has tended to be one Party which has offered applicable law and not the other? Is it in fact necessary for the Chamber to decide to apply general international law rules?

And, in our submission, on the contingency that the Chamber interprets the Special Agreement in such a way as to allow decisions affecting entitlements and delimitation, then it should be, in our respectful submission, the rules of general international law concerning Law of the Sea entitlements, which would be naturally applicable. And, most obviously, Article 15 of the 1982 Convention, reflecting Article 12 of the Territorial Sea Convention of 1958. This may seem very obvious, but it is rather necessary, perhaps, to restore the issues in the case to what, in our view, is the obvious source of applicable law.

So, in our view, the applicable principles and rules are those of the Law of the Sea and, looking at the Law of the Sea, taking that as the properly applicable law, in our view, there is no

entitlements in any case. But in terms of abutting coasts and appurtenance, and the rules which emerge the techniques of delimitation which would emerge from the geography, then the Honduran claims are difficult to justify. In our view, it makes no difference whether the waters of the Gulf are classified as internal or territorial sea, or continental shelf, or partly territorial sea and partly shelf.

Mr. President, that concludes my speech. I would like to thank the Chamber a second time for its great courtesy and patience. Thank you very much.

Mr. PRESIDENT: I thank Professor Brownlie. I understand the Agent of Honduras has further comment. Ambassador Valladares Soto.

Mr. VALLADARES SOTO: Thank you, Mr. President. I want to make an oral protest in this hearing, considering that the Agent of Nicaragua, Mr. Argüello and Professor Brownlie have dealt with matters to which they were not entitled to do according to the sentence issued by this Chamber. They have dealt with matters concerning delimitation and they have questioned the rights of Honduras in connection with the waters outside the Gulf. So I beg the President to establish our protest in the act concerning this meeting.

Thank you very much, Mr. President.

The PRESIDENT: I thank Ambassador Valladares Soto, and of course his protest is going to be duly addressed and the Chamber will consider it in due time. I understand the Agent of Nicaragua requests the floor.

Mr. ARGUELLO GOMEZ: Thank you, Mr. President. In relation to the Honduran protest, all I can say is that Nicaragua's Agent and counsel have tried in all possible ways to remain within what we have understood to be the limits set by the Chamber. Any other decision in this matter, of course, rests in the hands of the Chamber.

At this point, to aid the Chamber, we have prepared a sort of summary of the position of Nicaragua in this procedure of intervention which we are exploring; there is nothing very clearly written about it, so we have taken the decision, in accordance with Article 62 of the Statute and

Article 85 of the Rules of Court, to present the following, what we have called "formal conclusions", on behalf of the Republic of Nicaragua.

1. The *status quo* in the region of the Gulf of Fonseca is based upon the definitive boundary between Nicaragua and Honduras recognized in Acta II adopted in 1900, together with the principles and rules of general international law relating to the entitlements of coastal States, and the recognition by the coastal States of the right of innocent passage for Honduran vessels in accordance with local custom.

2. The Honduran claims presented in the form of a concept of a community of interests may affect the legal interests of Nicaragua directly and substantially, in particular, because, as the pleadings and submissions reveal, the community of interests would entail an entitlement to areas of maritime territory incompatible with the inherent rights of Nicaragua.

3. International law does not recognize a concept of community of interests, either in a form which could override the application of the principles of the Law of the Sea, or in any other form.

4. The Honduran claim to an entitlement involving a corridor of maritime territory or exclusive jurisdiction to the west of the legally definitive terminus of the boundary established between Honduras and Nicaragua is invalid in general international law and consequently is inopposable to any other State, whether or not a party in the present proceedings.

5. The legal entitlements of the coastal States, including Nicaragua, remain the same whether the waters of the Gulf are classified as internal waters or as territorial sea or as continental shelf.

6. Without prejudice to the above, there are substantial considerations of judicial propriety on the basis of which Honduran maritime claims, which form part of the submissions relating to a community of interests, should be treated as inadmissible.

7. No régime of condominium exists in the Gulf of Fonseca or any part thereof.

8. The Republic of Nicaragua reaffirms its position in respect of all questions of delimitation contained in its Written Statement of 14 December 1990.

Thank you very much, Mr. President, Members of the Chamber.

Mr. PRESIDENT: I thank Ambassador Arguello and the sitting is adjourned until tomorrow

at 10 o'clock.

The Chamber rose at 5.15 p.m.

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