INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE

(EL SALVADOR/HONDURAS: NICARAGUA intervening)

VOLUME VI

Written Statement of Nicaragua; Written Observations of El Salvador and Honduras; Documents; Oral Arguments

---

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU DIFFÉREND FRONTALIER TERRESTRE, INSULAIRE ET MARITIME

(EL SALVADOR/HONDURAS; NICARAGUA (intervenant))

VOLUME VI

Déclaration écrite du Nicaragua; observations écrites d'El Salvador et du Honduras; documents; procédure orale

OBSERVATIONS OF HONDURAS ON THE WRITTEN STATEMENT OF NICARAGUA

These observations are filed in accordance with the Order of 14 September 1990 made in the case concerning the *Land, Island and Maritime Frontier Dispute*.

Necessarily, these observations are to be observations on Nicaragua's written statement. If that written statement had responded properly to the Court's Judgment of 13 September 1990, *and kept within the limits of intervention authorized by that Judgment*, the course open to Honduras would be clear: it should, so far as possible, comment on that written statement so as to give the maximum assistance to the Court.

Honduras notes, with regret, that this is not the case. On the contrary, as will be demonstrated below, virtually the whole of Part I of the written statement is written in defiance of that Judgment. It enters into matters on which the Court ruled specifically that Nicaragua had *no* right to intervene, or deals with matters extraneous to the issue on which the Court ruled Nicaragua did have a right to intervene.

That places Honduras in a difficult position. If, as Honduras submits, virtually the whole of Part I is irreceivable, is it in order for Honduras to comment on the substance of what Nicaragua has to say (apart from pointing out its irreceivability)? And would such comments by Honduras be equally irreceivable? And if Honduras passes over in silence the irreceivable comments by Nicaragua, does Honduras thereby run the risk that the comments will have some impact on the thinking of the Chamber, to the detriment of Honduras? For that was presumably Nicaragua's intention in making the comments. Finally, and perhaps most importantly, what guarantee does Honduras have that in the forthcoming oral proceedings Nicaragua will not pursue oral argument designed to reinforce these irreceivable comments and, in effect, flout the Court's Judgment? Should Honduras itself prepare oral arguments to meet this eventuality?

It is with these questions in mind that Honduras offers the following observations on Nicaragua's written statement.

1. The Limits of the Permitted Intervention

The Court's Judgment of 13 September 1990 is perfectly clear. It can be summarized in three propositions:

(a) Nicaragua may intervene on the question of the legal régime of the waters of the Gulf.

(b) Nicaragua may *not* intervene on the question of delimitation of those waters.

(c) Nicaragua may *not* intervene on the question of the legal situation of the maritime spaces outside the Gulf.

2. Part I of the Written Statement

Section B. Nicaragua's Attitude on Intervention

These paragraphs (paras. 5-13) are simply irrelevant. They are, on the one hand, a form of self-justification, attempting to justify Nicaragua's request for a

general right of intervention and criticizing the Chamber for its rejection of that request. And, on the other hand, they repeat the position assumed by Nicaragua that it was throughout willing to provide details of its legal interests in the issues of delimitation, and reference is made to the Italian request to intervene in the *Libya/Malta* case, where one Judge specifically put questions to the Italian Agent concerning Italy's interests. The implication is that the Chamber ought to have put similar questions to Nicaragua, to draw out specific information about Nicaragua's legal interests.

The short answer to this is that it is the intervenor's duty to demonstrate the existence of any legal interest likely to be affected by the decision. It is not the Court's duty to ferret out this information by questions to the Agent.

Geographical considerations (paras. 14-25)

This, unashamedly, deals with delimitation inside the Gulf. The extraordinary thing is that, even now, Nicaragua still totally fails to demonstrate that it has any clear legal interest in the waters of the western half of the Gulf (i.e. the area within which Honduras seeks a delimitation with El Salvador).

Even the discussion (at paras. 22-25) of Farallones, and the terminal point of the 1900 Honduran/Nicaraguan delimitation, is irrelevant to the western half of the Gulf. To avoid any confusion, further explanation as to this terminal point under the 1900 Agreement will be given below. But the essential point is that it does not, and cannot, affect any Honduras/El Salvador delimitation in the western half of the Gulf.

Alleged Honduran rights outside the Gulf (paras. 26-29)

All of this plainly exceeds the right of intervention granted. It is, moreover, full of errors. There has never been, to the knowledge of Honduras, any formal claim by Nicaragua that, as far as the mid-point on the closing-line of the Gulf, the waters are Nicaraguan territorial waters. Nor is there any evidence that, on this closing-line, Nicaragua shares a common boundary with El Salvador. The successive Constitutions of Nicaragua (see Annex 2 to the Nicaraguan Written Statement) for over a hundred years have referred to Nicaragua as a State with *two* neighbours only — Costa Rica to the south and Honduras to the north. And paragraph 27 does not reflect the Honduran position at all, as regards the status of the waters of the Gulf.

El Salvadoran acceptance of the Nicaraguan position (paras. 30-35)

This section is virtually all non-receivable. To argue that El Salvador accepts the reality of Nicaragua's interests *in delimitation* inside the Gulf is quite unacceptable at this stage.

There are, in fact, two paragraphs only in this section which are properly concerned with the legal status of the waters of the Gulf: these are paragraphs 33 and 34.

Nicaragua's obligations as an intervenor (paras. 36-44)

This section is, for the most part, irrelevant to the issue on which Nicaragua has been allowed to intervene.

Yet, paragraph 41 is worse, for it directly challenges the Court's Judgment. In effect, Nicaragua here maintains that, in accordance with the precedent estab-

lished for Italy in the *Libya/Malta* case, the Court cannot in this case delimit as between Honduras and El Salvador in an area subject to Nicaraguan claims. This observation is unacceptable for two reasons. First, and foremost, because it deals directly with delimitation, and, second, because Nicaragua has totally and consistently failed to demonstrate that it has any claims in the waters of the western parts of the Gulf and the maritime areas outside the Gulf.

However, it appears that Nicaragua is prepared to remedy this omission, even at this late stage. Paragraph 42 promises, in the section that follows, to inform the Chamber of these claims, in other words to make the demonstration of its legal interests in the delimitation *which it totally failed to do prior to Judgment*.

Section C. Nicaragua's Attitude on Delimitation (Paras. 41-52)

The title of this Section itself gives a forewarning that Nicaragua does not intend to confine itself to the limits' established by the Court to its right to intervene.

It begins (at para. 44) by identifying four elements of the situation inside the Gulf.

(a) The absence of any régime of condominium — the observation is relevant to the status of the waters of the Gulf, and is receivable.

(b) The absence of any régime of community of interests — this, although misconceived, is relevant and receivable.

(c) The existence of a delimitation between Nicaragua and Honduras in accordance with Acta II of 1900 — this statement of fact is, as such, unobjectionable if related to the status of the waters.

(d) Nicaragua's entitlement to a delimitation "in the western and southern parts of the Gulf" — this is certainly objectionable and irreceivable.

Nicaragua then proceeds to deal with three separate points.

(i) *The delimitation with Honduras in 1900* (paras. 45-47)

There is no doubt that this delimitation exists. For Honduras its relevance has always been to show that the littoral States accepted the necessity of delimitation, and rejected the El Salvadoran thesis of condominium, excluding delimitation. But the relevance of this 1900 Agreement ends there. It does not lie within the western half of the Gulf, the area relevant to a Honduras/El Salvador delimitation, and does not affect the task now before the Court.

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[1] and sub-

[1] For example, the map produced by the Honduran/Nicaraguan Mixed Boundary Commission Map, scale 1:1,160,000; the 1905 Mixed Commission Map, scale 1:250,000; the 1907 Mayes Map of Honduras, scale 1:700,000; the 1915 Bontz Map of El Salvador, Showing Routes of Communication, US Hydrological Survey, scale 1:480,000; the 193S Aguilar Paz Map of Honduras, an official map of Honduras, scale 1:500,000 and reproduced in 1934, 1953 and 1954. Then there are the official maps of Nicaragua, of 1966, 1970 and 1972 which though they do not show the line going as far as Farallones, do show the line as stopping just short of Farallones.

sequent practice by the Parties[2]. But in any event, this cannot be a point relevant to the present dispute. It can be resolved, on a bilateral basis, between the two Parties.

(ii) *Delimitation within the Gulf* (paras. 48-51)

None of this is receivable. Honduras does not choose to be drawn into a debate over the controversial propositions made by Nicaragua. It does note, however, the statement that:

> "the alignment claimed by Nicaragua within the Gulf is not affected by the contingency that Honduras will be recognized as entitled to Meanguera".

Honduras agrees that the Court can proceed to resolve the dispute over sovereignty over Meanguera, between El Salvador and Honduras, without concerning itself with the question of how, if at all, its decision will affect Nicaragua's future delimitation inside the Gulf.

(iii) *Delimitation outside the Gulf* (para. 52)

This, too, is not receivable and Honduras does not wish to comment on Nicaragua's views except to say that, in due course, Honduras is perfectly prepared to negotiate a maritime boundary with Nicaragua in accordance with equitable principles.

3. The Community of Interests: Part II of the Written Statement

Nicaragua declines to recognize the existence of a community of interests between the three riparian States in the Gulf of Fonseca. Adopting a deliberately formalistic attitude, it suggests that the notion of a community of interests applied to a maritime region such as the Gulf of Fonseca is characterized by its "novelty" (para. 58). It suggests that the Honduran contention is an inaccurate transposition into the field of maritime law of a concept properly confined to the law of international rivers, and taken from the case on the *International Commission on the River Oder*, decided by the PCIJ (page 59). Nicaragua suggests furthermore that the implications of the concept of a community of interests between the three States in the Gulf, as developed by Honduras, are incompatible with the principles and rules of the contemporary law of the sea (pp. 62 *et seq.*)

It is clear that Nicaragua presents an analysis of the concept of community of interests which is deliberately formalistic and obscures the *"ratio legis"* which lies behind this concept.

In reply to the Nicaraguan allegations on this point, three basic and interrelated comments need to be made.

1. In the first place, to deny the existence of a community of interests in the Gulf is, in effect, to deny the very specific geographical and legal characteristics of the Gulf itself.

[2] For example the regular Honduran naval patrols to Farallones and even beyond — indeed beyond the closing-line — as shown on Map C.2 attached to the Honduran Memorial. Nicaragua made no comment on, or objection to, this map.

This is in substantial contradiction with several of the arguments used by Nicaragua itself to demonstrate that it possesses an interest of a legal nature, such as to justify its intervention in the present case.

2. In the second place, to confine the application of the concept to the law of international rivers, assuming such a concrete body of law to exist, constitutes a misunderstanding of both the foundation and the true scope of the concept.

3. Finally, it is quite inaccurate to describe as contradictory the legal implications derived from the existence of a community of interests in the Gulf and the application of the relevant rules of the new law of the sea. In fact, on the contrary, it can be seen that this concept and the new law of the sea coincide to provide the application of those "equitable principles" which play so significant a role in the contemporary maritime law. These three points can be developed in the following way.

1. The Denial by Nicaragua of the Special Geographical and Legal Character of the Gulf of Fonseca

In its Request to intervene, in its oral pleadings before the court to support that Request, and even in the Written Statement newly before the Court, Nicaragua has always insisted on the very special geographical characteristics of the Gulf (see the Request to Intervene, para. 2 *(c)*, to which the Court itself drew attention in its Judgment of 13 September 1990, para. 37). It was Nicaragua that in that same Request referred to "the leading role of coasts and coastal relationships in the legal régime of maritime delimitation" (Request, para. 2 *(f)*).

Nicaragua has repeatedly emphasized the special physical characteristics of the Gulf, in particular its limited area, and the existence of three riparian States in order to explain that the decision to be given by the Chamber as between El Salvador and Honduras must necessarily affect the interests of Nicaragua in the Gulf. In short, Nicaragua has always insisted on the particular characteristics of this region so as to justify its claim to intervene in the present case. But, as will be emphasized below (cf. *infra*, 2), the community of interests simply signifies that we are in a situation in which the facts of the situation, in particular the geographical facts, produce legal consequences which cannot be ignored.

At one extreme we have the view of El Salvador, that the Gulf of Fonseca is juridically a condominium, a highly exceptional situation since it involves a radical departure from the normal principle of the exclusive territorial competence of each sovereign State.

At the other extreme, we have the view of Nicaragua, that one can treat the Gulf in exactly the same manner as any other body of water adjacent to the coasts of several States. To deny the special character of the Gulf of Fonseca is to devalue the special status of the Gulf which, as the Honduran Memorial demonstrated (cf. Memorial, Vol. II, pp. 646 *et seq.*) has attracted the attention of all the authors, beginning with Gilbert Gidel, for whom the Gulf constituted the unique example of a multinational, historic bay, shared by three riparian States.

Finally, it should be noted that the present position of Nicaragua contradicts the position adopted by Nicaragua in the dispute with El Salvador before the Central American Court of Justice. In that case Nicaragua had emphasized that the Gulf was a "closed seal", of a "territorial" character, in which sovereignty rested with Nicaragua, Honduras and El Salvador.

This position, adopted more than eighty years ago, seems to accord with the one adopted by the Nicaraguan delegation to the United Nations General

Assembly during its last session (1990). Only four days before delivering its written statement to the Chamber of the Court, i.e. on Tuesday 11 December 1990, Mr. Mayorga Cortes took the floor at the sixty-fourth session of the Assembly and, having taken note of the Chamber's decision on the Nicaraguan application to intervene in this case, declared in relation to this case:

> "What the Government of Nicaragua wants to stress is that the Gulf of Fonseca is the core of a geographical zone belonging, without any dispute by third parties, to the three coastal States, each of which possesses its own geographical area of jurisdiction. Human activity throughout the area has polluted the environment, which poses a growing threat to the resources of the basin. In our view, the three coastal States have a shared interest in restoring the balance of nature and promoting the sustained development of the Gulf's resources. Using the Gulf as an opportunity for co-operation on joint projects does not contradict the practical need to define the areas of jurisdiction of each of the coastal States. This is the spirit that inspires Nicaragua."[3]

This is a very important statement indeed, on which two major observations should be made.

First, one can find here, in the words of the Nicaraguan Delegate, an exact description of what a "community of interest" is, in the same sense as the Honduran Government has always understood it, on the basis of the jurisprudence of the Permanent Court. The view that the zone of the Gulf belongs "to the three coastal States, each of which possesses its own geographical area of jurisdiction", the recognition that "the three coastal States have a shared interest" (the official translation into French by the United Nations Secretariat being "communauté d'intérêt")[4], the view that this geographical and legal situation offers "an opportunity for co-operation on joint projects", the observation that this last element "does not contradict the practical need to define the areas of jurisdiction of each of the coastal States" are all totally in accord with the Honduran view and could have been taken from its written pleadings presented to this Chamber[5].

Second, it is clear that this statement, made to the United Nations General Assembly, was a very official one, delivered by the Nicaraguan Delegate in the name of his Government, and it cannot be reconciled with the contrary position taken by the same Government, practically at the same time, in its statement to the Chamber. Of these two irreconcilable views, it is the view expressed to this Chamber which is self-serving and should be rejected.

2. The True Nature of the "Community of Interests"

Nicaragua is perfectly correct in observing (at page 59, para. 7) that the notion of a community of interests had been developed by the Permanent Court in a case concerning an international river (the Oder) and its tributaries. But

---

[3] See Annex to the present Observations.

[4] *Ibid.*

[5] One should recall that the Honduran delegation to the Honduran-Salvadoran Mixed Joint Commission made a proposal for co-operation, in the administrative, environmental, scientific and economic fields to the Salvadoran part, during the meeting of this body which took place on 23 and 24 July 1985, see Honduran Memorial, p. 688, para. 99, and Annex V.1.22, p. 916, to the same Memorial.

Nicaragua deliberately distorts reality, and ignores the inherent logic of the Court's reasoning, in restricting the notion to the régime of an international river. Nicaragua in effect suggests that only one kind of physical situation, the international river, is capable of generating between States of the area identity and equality of rights, and the duty of mutual respect for those rights. The Nicaraguan thesis, which seeks to confine "community of interests" to the law of international rivers, assumes that such a specific body of law existed. This was far from clear at the time of the Permanent Court's judgment in the *River Oder* case. It is true that, with the recent work of the ILC on non-navigational uses of the international waterways, one can begin to postulate a general régime for such waterways, but hitherto, and given the great diversity of situations in which States bordered the same river, the assumption that a specific legal régime existed was highly questionable.

Independently of the particular facts of the *River Oder* case, what gave this case a special importance was the way in which the Permanent Court developed, using the highly suitable phrase "community of interests", a new legal concept. Its purpose was to demonstrate the equality of rights, and the reciprocal respect for those rights, existing in a geographical situation in which a number of States find that the exercise of their sovereign rights necessarily impinges upon the exercise of similar rights by neighbouring States. This is exactly the kind of situation existing in the Gulf of Fonseca, as rightly depicted in the statement made by Mr. Mayorga-Cortes, the Nicaraguan Delegate to the United Nations General Assembly, last December.

One of the fields in which this same phenomenon of equal, reciprocal and even inter-dependent rights has been observed is, in fact, the law of the sea.

The provisions of the 1982 Law of the Sea Convention are highly illuminating in this respect.

As regards the management of adjacent maritime zones, Part XII of the Convention, dealing with the protection of the marine environment, imposes on coastal States within the same region the duty to consult and co-operate[6].

Again, in Article 63 (Part V) of the same Convention, one finds, in the context of fisheries, an illustration of the necessary co-operation between two or more States sharing the stocks occurring within their respective exclusive economic zones[7].

---

[6] See in particular Articles 197, 207, para. 4, 210, para. 4, 212, para. 3.

[7] "*Article 63*

Stocks Occuring Within the Exclusive Economic Zone of Two or More Coastal States or Both Within the Exclusive Economic Zone and in an Area Beyond and Adjacent to It

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the acjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

Even more specifically, Part IX, devoted, to enclosed seas and semi-enclosed seas, seems to apply very accurately to the Gulf of Fonseca[8]. Article 123, which is its main provision, reads as follows:

> "States bordering on enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> *(a)* to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> *(b)* to co-ordinate the iraplementation of their rights and duties with respect to the protection and preservation of the marine environment;
> *(c)* to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> *(d)* to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

This article describes very well the kind of co-operation which should be rationally implied by the common interests shared by co-riparian States of the same closed sea. The co-operation invoked both by the Honduran Government during its previous negotiations with El Salvador (1985) and by the Nicaraguan Delegate to the United Nations General Assembly (1990) could find their place in the general context of the rules defined in the above-mentioned provision, which shows perfectly what are the general trends in the contemporary law of the sea, in favour of strengthening the solidarity created between several States by the facts of nature.

It seems that, in its statement to the Chamber, Nicaragua resents the expression "community of interests", and regards it as a watered-down version of the El Salvadorian thesis of a condominium. The importance does not lie in the actual expression, and Nicaragua is free to offer an alternative. The importance lies in the concept. Honduras considers this concept applies not simply in the situation faced by the Permanent Court in the *River Oder* case, but in a whole series of situations in which the geographical circumstances impose on States the necessity for this reciprocal respect for their equal rights.

It is necessary to recall the point made by Honduras in its Memorial, which is precisely that the essential difference between a condominium and a community of interests is that the former is dependent on a formal agreement: it results from the concerted will of the Parties. Whereas the community of interests is imposed by the facts of nature, by the geographical circumstances, independently of the will of the Parties.

The rejection of a community of interests by Nicaragua, in front of the Chamber, is curiously out of keeping with contemporary trends. For these trends emphasize the interdependence of States, an interdependence imposed by the facts of their relationship. This is seen on a global scale, but even more prominently on a regional or local scale when the obligations of co-ordination become paramount.

---

[8] Article 122 gives to an "enclosed sea" the following description:

> "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

3. The Identity of Result Achieved by the Concept of Community of Interests and the Relevant Rules of the Law of the Sea

As mentioned above, far from rejecting the concept of a community of interests, the modern law of the sea recognizes that such a community of interests does exist, whether or not that precise terminology is used. In a more general sense, it would be both artificial and arbitrary to suggest that a contradiction exists between the result achieved via the concept of a community of interests, and the result achieved by the application of the relevant rules of the contemporary law of the sea.

In particular, as is well known, the rules governing the delimitation of maritime zones are dominated by the application of "equitable principles", and the need to achieve an equitable result, taking account of all relevant circumstances.

In the present case, the existence within the Gulf of the Honduran coast, its length and its configuration are precisely the relevant circumstances that require to be taken into account in the law of delimitation. They must equally be taken into account if the concept of community of interests is applied. For if El Salvador and Honduras have equal rights, it is not possible to give effect to El Salvador's coast, but ignore that of Honduras. Similarly, as regards the closing-line across the mouth of the Gulf, whether one applies "equitable principles" or equality of rights, it is inconceivable that Honduras should be denied any part of that closing line.

As regards the maritime areas outside the Gulf, similar considerations apply. Equitable principles require that Honduras, as a coastal State, has an entitlement to those maritime zones which attach to its coast. The idea of a community of interests produces an identical result, for there would be no equality of rights if El Salvador had such an entitlement whilst Honduras had none.

Far from being in contradiction, the use of the concept of community of interests and the taking into account of "relevant circumstances", because they involve reference to the same geographical factors, coincide to produce an equitable result. Equity, understood as an inherent feature of the application of a rule of law, lies equally at the foundation of the concept of a community of interests. It is an essential component of the contemporary international law governing maritime zones.

(Signed) Dr. R. VALLADARES SOTO,
Agent.

Annex

FORTY-FIFTH SESSION, GENERAL ASSEMBLY,
PROVISIONAL VERBATIM RECORD OF THE SIXTY-FOURTH MEETING

Held at Headquarters, New York, on Tuesday, 11 December 1990, at 10 a.m.
(Provisional: A/45/PV.64, 2 January 1991; English)

QUARANTE-CINQUIÈME SESSION, ASSEMBLÉE GÉNÉRALE,
PROCÈS-VERBAL PROVISOIRE DE LA 64e SÉANCE

Tenue au Siège, à New York, le mardi 11 décembre 1990, à 10 heures
(Provisoire: A/45/PV.64, 2 janvier 1991; français)

[Not reproduced]