

Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1991

Public sitting of the Chamber

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

Judge Sette-Camara, President of the Chamber, presiding

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

VERBATIM RECORD

ANNEE 1991

Audience publique de la Chambre

tenue le vendredi 3 mai 1991, à 15 heures, au Palais de la Paix,

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

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

COMPTE RENDU

Present:

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

Présents :

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

 - M. Valencia-Ospina, Greffier
-

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
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Prof. Prosper Weil, Professor Emeritus at the *Université de droit,
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Dr. Francisco Roberto Lima, Professor of Constitutional and
Administrative Law; former Vice-President of the Republic and
former Ambassador to the United States of America.

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

as Counsel and Advocates;

and

Dr. Francisco José Chavarría,

Lic. Santiago Elías Castro,

Lic. Solange Langer,

Lic. Ana María de Martínez,

Le Gouvernement d'El Salvador est représenté par :

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S. Exc. M. Roberto Arturo Castrillo, Ambassadeur,

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S. Exc. M. José Manuel Pacas Castro, ministre des affaires étrangères,

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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. 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,

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M. Miguel Tosta Appel,

M. Mario Felipe Martínez,

Mme Lourdes Corrales,

comme membres de la Commission de Souveraineté et des frontières.

The PRESIDENT: We will resume our sitting, and I give the floor to President Jiménez de Aréchaga.

Dr. JIMINEZ DE ARECHAGA:

Cayaguanca and Las Pilas

Thank you, Mr. President. This is the oral rejoinder of El Salvador on the sector Cayaguanca and Las Pilas.

In his very intelligent pleading this morning, Professor Sánchez Rodríguez raised a number of points and questions. Given the short period of time which has been available to me for the preparation of this oral rejoinder, the only method which I can employ is to answer his observations *seriatim*.

I do, however, realize that there is a risk of becoming lost in minor issues and thus of losing the fundamental issue which arises here, namely the regularity and the applicability of the Formal Title-Deed of 1742 which is being relied on by Honduras in support of its claim to the whole of the vast mountainous area extending as far as the Sumpul River, an area which today comprises the Commons of La Palma, which is the area of land which Honduras wishes to amputate from El Salvador.

Professor Sánchez Rodríguez commenced by referring to silences and ambiguities in my previous statement.

His first point was the silence with respect to a discrepancy in the degree and the cardinal direction of a measurement. This assertion involves a common mistake which Honduras incurs repeatedly. The Formal Title-Deed of La Palma states that the course of the measurement went towards the south-west, adding immediately "aguas arriba de la quebradita" of Copantilla, in English "upstream along the little gorge". The controlling factor in cases like this is not the *initial* direction but the fact that the course of the measurement proceeded "*aguas arriba*", upstream, no matter what precise orientation was taken by the course of the river at any particular point.

So far as concerns the question of the *effectivités*, Professor Sánchez Rodríguez accused me of

remaining silent and failing to answer his observations. However, I must recall that I read a substantial passage of the Reply of Honduras (RH, para. 54, p. 238), which cannot possibly be interpreted in any other way than as a full recognition by Honduras that it does not claim any *effectivités* in this area. This was read in the record of the twelfth day of hearings (C 4/CR 91/12, p. 2891). I also referred to the fact that there will be a global consideration of the question of *effectivités* in a future pleading by another member of the legal team of El Salvador.

In this connection, Professor Sánchez Rodríguez accused me of "huir de *effectivités*", "escape from *effectivités*", both in the sector of Tepanguisir and in this present sector. However, I have presented to the Chamber what I think are two clear admissions by Honduras that the *effectivités* in these two sectors, beyond all the question of certificates of death, births, etc., the *effectivités* in these two sectors belong to El Salvador and not to Honduras. I refer to the statement made by Ambassador Max Velásquez Días, to which I made reference in relation to the sector of Tepanguisir, and to the admission in the Reply of Honduras (RH, para. 54, p. 238) to which I referred yesterday. Professor Sánchez Rodríguez may not have liked these references, but that does not make it right or fair for him to accuse me of avoiding this question.

So far as concerns ambiguities, Professor Sánchez Rodríguez complained that he did not know whether the formal title-deed to the Commons of La Palma of 1829 constitutes a juridical title or a proof of *effectivités*. My answer to that question is that it is both of these two things. Despite the fact that the Formal Title-Deed was formally issued in 1829, its text, particularly the request in pages 1 and 2, makes it extremely clear that it corresponded to an "ejido de reducción" which existed in the colonial period prior to the independence of Central America. This fact, fully proven by the content of this formal title-deed, may be considered as giving to the document the status of a formal title-deed appropriate for the proof required by the principle of *uti possidetis juris*.

But, if this formal title-deed is not recognized as such by reason of its date, it nevertheless constitutes what I may describe as a formidable exercise of territorial sovereignty by the Salvadorian public authorities, none other than the granting of a territory to an Indian community with lasting effect, which is clearly demonstrated by the fact that the grant is still effective today.

So, the Formal Title-Deed to the Commons of La Palma falls fairly and squarely within Article 26 of the General Treaty of Peace of 1980. If the Chamber finds that this formal title-deed does not fulfil all the requirements contained within the first sentence of Article 26, it nevertheless clearly falls within the second sentence of Article 26.

Professor Sánchez Rodríguez accused me of *inexactitude* because I referred to the Formal Title-Deed to the Commons of La Palma as conferring an "ejido de reducción", asserting that "cette qualification ne vaut que dans le système colonial espagnol". In other words, with the disappearance of the "système espagnol" in 1821, all this question of "ejidos de reducción" and "ejidos de composición", according to Professor Sánchez Rodríguez, would disappear. I am bound to observe that Professor Sánchez Rodríguez is wrong on an important point of law. The Spanish legal system continued to be applicable for a number of years in the former Spanish colonial provinces after their independence from Spain: this is evidenced, for example, by the fact that the Formal Title-Deed to the Commons of La Palma itself employs the expression "ejido de reducción" to describe the Commons which it was adjudicating in 1829.

I venture to correct a distinguished Spanish professor on this point of law because, after all, those of us who come from Southern and Central America were for a period of our history subject to *Derecho Indiano*, which never applied in Spain itself, and consequently we have had to study *Derecho Indiano* in our law schools.

Professor Sánchez Rodríguez is therefore wrong in believing that there were no "ejidos de reducción" after the independence of Central America. The Spanish law of the Indies which applied to Central America prior to its independence continued in force for a number of years thereafter; consequently, the authorities of El Salvador were perfectly capable of granting an "ejido de reducción" to La Palma after independence, and they did so.

The Formal Title-Deed to the Commons of La Palma of 1829 which appears in the Counter-Memorial of El Salvador (CMES, Vol. II, Ann. III.1) clearly conferred an "ejido de reducción", not merely an "ejido de composición". I am not merely asserting such a conclusion: I can prove it.

The Salvadorian authority granted to the Indian community of La Palma, represented by its municipal officers, 40 "caballerías" as Commons, gratuitously without any payment being required on the basis of the laws of the Indies (*ibid.*, at p. 25 (English translation) and at p. 111 (original Spanish)).

The Formal Title-Deed itself asserts that this was a grant by way of "reducción"; this word is actually utilized in the text of the document which I have mentioned, at page 25 of the English translation and page 111 of the original Spanish.

In addition, a number of "caballerías" were granted as an enlargement of the Commons and for them a very moderate payment was demanded by way of "composición".

What is important, however, is that no distinction or separation whatever was made between the land adjudicated as an "ejido de reducción" and the rest of the land acquired by the process of "composición".

The whole of the land adjudicated was submitted to exactly the same legal régime and that legal régime was one which applied to "ejidos de reducción". All of the land was regarded as communal property; all of it was to be exploited in common and could not be alienated either in whole or in part; all of it constituted a public utility, belonging to the Municipal Council or "Cabildo", and, consequently, all of it was subject to the administrative control of the "Alcaldía Mayor" of San Salvador.

The Formal Title-Deed itself expresses this unity and identification of the whole land as one by stating expressly that the additional "caballerías" were embraced within the "ejido de reducción" (*ibid.*, at p. 29 (English translation) and at p. 124 (original Spanish)) - the Spanish word used is "comprendidas", whose literal translation into English is "comprised" the land of the "ejido de reducción".

On the other hand, the land grants made by Honduras during the period of the Central American Federal Republic were granted to private landowners by composition and so, as Honduras has itself proclaimed, these only granted private proprietary rights or "droits fonciers", "limites de terres" which cannot serve as any form of basis for international boundaries.

On another of his observations, Professor Sánchez Rodríguez wants to put me in a dilemma, namely whether to accept the Formal Title-Deed of 1742 or reject it *in toto*. This is not a confession by a criminal which as a matter of penal law cannot be divided.

The Formal Title-Deed of 1742 is a document which contains two distinct parts. The first part is a normal Formal Title-Deed to Commons approved by the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala which awarded to the inhabitants of Citalá the lands of Jupula in dispute between the Indian communities of Citalá and Ocotepeque and which also at the same time withdrew the earlier title-deed which had been issued to the community of Ocotepeque (the word "recojase", in other words "let it be taken back", is used in the Spanish original text). This first objective of this Formal Title-Deed of 1742 was accomplished in the normal manner, following a measurement and the establishment of boundary markers, in accordance with the strict requirements of Spanish law. The second part of the Formal Title-Deed, the part relied on by Honduras, constitutes merely a vague reference authorizing the Indian community of Ocotepeque to cultivate and grow corn in a mountainous area "vers l'est", towards the eastern side of the peak of Cayaguanca. It is no more than a permission "d'usage" which never received any approval whatsoever from the "Juez Privativo de Tierras" of the "Real Audiencia" of Guatemala, and was given without any measurement whatsoever being carried out and without a single boundary marker being erected.

If this constitutes a valid Formal Title-Deed, I wonder why Honduras is being so modest in its claims on that basis; why it does not claim the whole of the Salvadorian territory beyond the Sumpul River as well. After all, the Sumpul River and the lands beyond it also lie to the east of the peak of Cayaguanca. Why stop at the Sumpul River?

The issue, then, is to define the scope of that alleged mountain. It would certainly not be reasonable to contend that the whole mountainous area of 108 "caballerías" was awarded to the inhabitants of Ocotepeque as a sort of compensation for the lands of Jupula when the latter had only an extension of 16 "caballerías".

Furthermore, in the light of the resources available at that time and in that part of the world

for agricultural exploitation, it is totally inconceivable that the inhabitants of Ocotepeque would have been able to grow corn on land 2,730 metres above sea level; this is the height of the Cerro El Pital.

I will also refer to other geographic and cartographic observations which support the position of El Salvador as to the identification and location of the mountain of Cayaguañca.

The Formal Title-Deed of 1742 describes the mountain of Cayaguañca as lying "above the Jupula River". A look at the official Honduran Map 2359 II shows that the Jupula River begins or has its headwaters in the second sector of the frontier which has already been delimited, namely on the Salvadorian side of the frontier, before the meridian of the peak of Cayaguañca.

It follows that the mountainous area of Cayaguañca lying "above the Jupula River" is the one for which El Salvador contends and not the one claimed by Honduras.

In this respect it is not sufficient evidence simply to assert, as Professor Sánchez Rodríguez does, that this whole area "est et a traditionnellement été connu comme 'mont' ou 'montagne' de Cayaguañca". Where is the evidence of this crucial identification? The official Honduran Maps which El Salvador has presented apply this name only to a limited area surrounding the peak.

So far as concerns the cartography and the lack of validity and accuracy of the maps, I made a reference to the *Burkina Faso/Mali* case. But this cannot be considered as an inexactitude on my part. The practice and doctrine of international law is consistent on this point and I only quoted the dictum in the *Burkina Faso/Mali* case because it constitutes the most recent judicial statement on the subject. I am sure that a professor of international law as distinguished as my opposing counsel will have no difficulty in finding other appropriate references to the same effect, beginning with the classical work of Sandifer.

Professor Sánchez Rodríguez objected to the interpretation which I gave to the Note of 1936 because this Note does not mention the territory of El Salvador.

The reason for this is that the Salvadorian official signing the Note just wanted to advise his superiors that the generals engaged in revolutionary activities were not on the Salvadorian side of the frontier. They were beyond it, namely on the Ocotepeque side of the Cerro El Pital.

Professor Sánchez Rodríguez asked me whether El Salvador is making any claims to "tierras

realengas", Royal landholdings, in this sector. The answer to his question is no. I think that El Salvador has stated - or should have stated - in the course of the debate on the General Principles which took place at the commencement of these hearings, that the claim made by El Salvador in respect of "tierras realengas" would be considered in relation to the disputed sector of Nahuaterique, which is where, in our opinion, that question actually arises.

Professor Sánchez Rodríguez also accused me of remaining silent with respect to the Title-Deed of Las Nubes. However, I read a statement by the promoter of the measurement in which he recognized that the land which he was claiming was not "limitrofe" with the Commons of La Palma. Indeed, the land which the private owner requested should be adjudicated to him by the process of "composición" was to the west of Ocotepeque, it was so far from the area in dispute that the request itself indicates that the land lies to the west of Ocotepeque (cf. HR, Annexes, Vol. I, Ann. II.3, p. 85). The Volcan Titles of 1824 and 1838, which were referred to this morning, are also wrongly located. These Titles refer to places called Tepescuinthe and Los Cedros, which are to the north of the area in dispute in this sector. Besides, the inhabitants of La Palma were never summoned to this measurement to protect their Commons. All this simply means that this land has been placed by Honduras in an incorrect location on the graphic representation of a map which immediately follows page 240 of the Reply of Honduras. It is all too easy to assert rights by drawing squares on a map and colouring them.

Anyway, the Title-Deeds of this type, conferring private proprietary rights by the process of "composición", which were introduced by Honduras at the very last minute in its Reply, cannot be compared to the "ejido de reducción" which was granted in the Formal Title-Deed to the Commons of La Palma of 1829, and so cannot affect in any way the land so adjudicated as Commons to the indigenous Community of La Palma.

According to the Spanish law of the colonial period, these Title-Deeds conferring private proprietary rights can neither affect nor detract from the Commons granted to the Indian Communities as "ejidos de reducción". The protection of these Commons of the Indian communities against the attempts of Spanish settlers to usurp them is one of the "leitmotifs" of the *Derecho*

Indiano, based on the teachings of Vitoria.

Professor Sánchez Rodríguez also asserts that, in order to prove *effectivités*, it is necessary to consider "l'exercice de fonctions étatiques", and asks "où sont donc les preuves de cet exercice de fonctions étatiques?"

My answer to him is that the process of issuing the Formal Title-Deed to the Commons of La Palma constitutes a categorical example of the exercise of State functions by the Salvadorian authorities. This exercise of State functions, carried out after the adjoining landowners had been duly summoned (CMES, Annexes, Vol. II, p. 3), was not opposed either by the Honduran authorities or by the inhabitants of Ocotepeque.

The grant of the Commons of La Palma was not a single isolated transitory action which ceased to have effect once it had been adopted. It constituted for the authorities of El Salvador a lasting grant of land and a delegation of municipal functions which continues even today some 162 years later. The rights derived from this Formal Title-Deed to Commons continue to be exercised today by the rightful successors in title to the original "ejido de reducción" which was granted.

El Salvador needs no additional acts as proof of *effectivités* but it will nevertheless provide them in the course of the later global discussion on this subject in respect of the marginal areas.

As to the final question put to me by Professor Sánchez Rodríguez, I can answer that, for instance, the Formal Title-Deed to the Commons of Ocotepeque of 1818 shows that provincial boundaries could be modified by the grant of "ejidos de reducción" (HM, Anns. Vol. IV, Ann. 9, p. 1677). This shows that, as El Salvador contends, the so-called provincial limits were not sacrosanct, were not incapable of being modified; these boundaries could be altered since the "Juez Privativo de Tierras" was entitled to allow the grant of "ejidos de reducción" regardless of any existing provincial boundaries.

So far as concerns the Formal Title-Deed of Ocotepeque of 1818, I shall merely recall that I showed yesterday, Mr. President, that the boundaries fixed by this Formal Title-Deed to the Commons of Ocotepeque, which embraced all the "ejidos" of this community, did not go beyond the

red line which our cartographer of El Salvador drew between the Peña de Cayaguanca and the Cerro San Antonio. I am sure you will recall his demonstration.

Mr. President, Members of the Chamber, I have arrived at the end of my oral rejoinder. As a famous advocate once said, I apologize to the Court for this long statement, but I have had no time to make it shorter.

The PRESIDENT: I thank President Jiménez de Aréchaga. That concludes our hearing on the second descriptive sector of the land frontier. The Chamber adjourns until Monday at 10 o'clock.

The Chamber rose at 3.35 p.m.
