

73. CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA) (DECLARATION OF INTERVENTION)

Order of 4 October 1984

In its Order the Court decided, by nine votes against six, not to hold a hearing on the declaration of intervention submitted by El Salvador in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

In the same Order, the Court also decided, by 14 votes to one, to defer further consideration of the question of the admissibility of the intervention by El Salvador until a later stage of the proceedings.

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On the first point, Judges Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière voted against.

On the second point, Judge Schwebel voted against.

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The operative provisions of the Order are as follows:

“The Court,

“(i) By nine votes to six,

“Decides not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador,

“IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Oda, El-Khani, Mbaye, Bedjaoui.

“AGAINST: *Judges* Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière.

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“(ii) By fourteen votes to one,

“Decides that the Declaration of Intervention of the Republic of El Salvador is inadmissible insofar as it relates to the present phase of the proceedings instituted by Nicaragua against the United States of America.

“IN FAVOUR: *President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.*

“AGAINST: *Judge Schwebel.*”

Judges Nagendra Singh, Oda and Bedjaoui appended separate opinions to the Order; Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière appended a joint separate opinion and Judge Schwebel appended a dissenting opinion.

SUMMARY OF OPINIONS APPENDED TO THE ORDER OF THE COURT

Separate opinion by Judge Nagendra Singh

In his separate opinion Judge Nagendra Singh pointed out that since El Salvador's Declaration to Intervene at this stage of the proceedings really pointed to merits of the case and if a hearing was granted now there would inevitably be arguments on merits of the case which would lead to two hearings on merits—the first now and the second if and when the Court deals with the merits of the case. This would be confusing and undesirable as well as untenable. The Court, therefore, has put things in their proper order and sequence and noted the intention of El Salvador to intervene at the next phase of the case if and when the Court considers the merits of the dispute. El Salvador has therefore *not* had a raw deal, as it were, because the Court has kept alive the right of intervention which could be examined at the subsequent phase of the case. There was no point in giving a hearing at the present phase when the Court had by 14:1 come to the conclusion that the intervention of El Salvador was inadmissible. In the circumstances El Salvador will be heard at the proper time, taking into consideration the reasoning and arguments that had been submitted to the Court by El Salvador in support of their intervention.

Joint separate opinion by Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière

Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière appended a joint separate opinion to the effect that, although agreeing with the Court that El Salvador's Declaration of Intervention is inadmissible at the present stage of the proceedings, they are of the opinion that it would have been more in accordance with judicial propriety if the Court had granted a hearing to the State seeking to intervene.

Separate Opinion by Judge Oda

Judge Oda considered that El Salvador's Declaration of Intervention of 15 August 1984 was vague and did not appear to satisfy the requirements of Article 82 (b) and (c) of the Rules of Court for an intervention at the present stage, but it was later supplemented by its communications of 10 and 17 September which might meet the terms of Article 82. To his regret, the Court, which only had before it the views of Nicaragua and the United States on the first submission of El Sal-

vador, did not ascertain their views on the two subsequent communications from El Salvador, in particular on the admissibility of El Salvador's intervention at the jurisdictional stage.

If Nicaragua's observations had been interpreted, as Judge Oda believed they should, as objecting to El Salvador's intervention at that stage, Article 84, paragraph 2, would have clearly applied. He voted against a hearing only because his interpretation of the Court's view was that Nicaragua had not objected.

Judge Oda also regretted that 8 October had already been fixed for the commencement of the oral hearings between Nicaragua and the United States, even before the Court met to deal with El Salvador's Declaration on 4 October. In fact, El Salvador's request for an oral hearing and the admissibility of its intervention at the present jurisdictional stage were both dealt with on 4 October, after only one day's deliberations.

Had it not been for the above, El Salvador's Declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case.

Separate opinion by Judge Bedjaoui

Judge Bedjaoui indicated that in his opinion one could not be in favour of dismissing the request for intervention and at the same time in favour of holding a hearing in order to examine such a request. Since the Court had reached the conclusion that El Salvador's request for intervention was inadmissible, the holding of a hearing no longer logically had an object.

Dissenting opinion by Judge Schwebel

Judge Schwebel dissented from the Court's Order on two grounds. He maintained that the decision of the Court not to hold a hearing on the declaration of El Salvador was a departure from the due process of law which the Court has traditionally observed. He concluded that, while the matter was not altogether clear, El Salvador was entitled to intervene, and that, once the Court had declined to hear El Salvador, any doubts should have been resolved in favour of the admissibility of its declaration of intervention.

Judge Schwebel interpreted El Salvador's declaration as a request to intervene on the construction of articles of the Statute of the Court, the United Nations Charter and three inter-American treaties, as well as of declarations submitted to the Court under its Statute accepting its compulsory jurisdiction. In his view, Nicaragua, while purporting not to object to El Salvador's intervention, had raised objections which required a hearing under the mandatory provision of Article 84 (2) of the Court's Rules, which provides that, if an objection is filed to the admissibility of a declaration of intervention, “the Court shall hear the State seeking to intervene and the parties before deciding”. He maintained that El Salvador's declaration was admissible, first, because intervention under Article 63 of the Court's Statute may take place at a jurisdictional stage, and, second, because it may relate to the construction of conventions which include the United Nations Charter and the Court's Statute as well as the inter-American treaties which El Salvador had cited. If declarations adhering to the Court's compulsory jurisdiction were not to be treated as conventions, then the Court should have barred only that aspect of El Salvador's intervention.