

**WRITTEN OBSERVATIONS ON THE
DECLARATION OF INTERVENTION**

**OBSERVATIONS ÉCRITES
SUR LA DÉCLARATION D'INTERVENTION**

**LETTER FROM THE AGENT OF NICARAGUA TO THE REGISTRAR
SUBMITTING THE OBSERVATIONS OF NICARAGUA ON THE
DECLARATION OF INTERVENTION OF EL SALVADOR**

The Hague, 10 September 1984.

I have the honour to refer to the letter from the Deputy Registrar of 15 August 1984.

In response to the invitation in the aforementioned letter, Nicaragua respectfully submits the following observations in relation to the Declaration of Intervention of the Republic of El Salvador in the above entitled case, filed 15 August 1984.

1. Nicaragua has no objection in principle to a proper intervention by El Salvador in this case in accordance with Article 63 of the Statute of the Court and Articles 82-85 of the Rules of Court. Nicaragua's Application, in addition to claims under general international law, asserts claims under certain conventions. It is well-established that any State may intervene as of right under Article 63 in a case involving the interpretation of a convention to which it is a party if it meets the requirements of the Article and the relevant Rules.

2. Although Nicaragua has no intention to oppose El Salvador's intervention, it feels bound to call the Court's attention to certain deficiencies, both as to form and substance, in the Declaration of Intervention.

3. As to form: The declaration purports to be made under Article 63 of the Statute of the Court. (That Article permits intervention by a State that is party to a convention the construction of which is in question in the case.) Article 82 of the Rules of Court, which governs interventions under Article 63, provides that a declaration of intervention

"shall contain:

- ...
(b) identification of the particular provisions of the convention the construction of which [the declarant] considers to be in question;
(c) a statement of the construction of those provisions for which it contends;
..."

The Declaration of El Salvador contains no such "identification" and no such "statement".

4. The requirements of Article 82 of the Rules are not mere matters of form. They are necessary to ensure that the intervention falls properly within the provisions of Article 63 of the Statute, and to make clear what portions of the Court's judgment are binding on the intervenor in accordance with that Article.

5. As to substance: The Declaration states that El Salvador seeks to intervene for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's application of the claims set forth therein, that for multiple reasons the Court should declare itself unable to proceed concerning such application and claims, and that such application and claims are inadmissible.

To another point the Declaration states that El Salvador :

“also wishes to participate in order to make it a matter of record that contrary to what Nicaragua has asserted in its allegations in this case, El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua . . .”.

Article 63 of the Statute, however, does not permit intervention for the purpose of opposing jurisdiction or to make things a “matter of record”, but only for the purpose of the interpretation of an identified provision of a convention to which the intervenor is a party. This is the teaching of the Court’s ruling on the Cuban Declaration of Intervention in the *Haya de la Torre* case, where the Court said :

“the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention . . .”.

6. The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an “armed attack”. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d’Escoto Brockmann, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members.

7. Nicaragua calls attention to Article 85 of the Rules of Court, which provides :

“2. The time-limits fixed [for the submission of a written statement by the intervenor and for comments on that statement by the parties] shall, so far as possible, coincide with those already fixed for the pleadings in the case.”

In Nicaragua’s view, the prompt disposition of the present jurisdictional phase of the case and a speedy determination of the merits is a matter of utmost urgency. In agreeing in principle to the intervention of El Salvador, Nicaragua does so on the understanding that such intervention shall not become the occasion for delaying the proceedings.

(Signed) Carlos ARGÜELLO G.,
Agent of the Republic of Nicaragua.

**LETTER FROM THE AGENT OF THE UNITED STATES OF AMERICA
TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE
SUBMITTING THE OBSERVATIONS OF THE UNITED STATES ON THE
DECLARATION OF INTERVENTION OF EL SALVADOR**

14 September 1984.

I have the honor to acknowledge the receipt of your letter of 15 August 1984 transmitting a certified copy of El Salvador's Declaration of Intervention pursuant to Article 63 of the Statute of the Court in the case between Nicaragua and the United States, and fixing 14 September 1984 as the final date for the filing of written observations on this Declaration of Intervention by the Parties. I have also received a copy of El Salvador's letter to the Registrar of 10 September 1984 concerning its intervention, as transmitted by your letter of the same date. Following are the observations of the United States with respect to El Salvador's Declaration of Intervention.

By virtue of the Court's Order of 14 May 1984, the current stage of proceedings in this case is confined to "the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the [Nicaraguan] Application . . .". Consistent with that Order, El Salvador seeks to intervene —

"for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's Application or the claims set forth therein, . . . and that such application and claims are inadmissible". (Declaration of Intervention, p. 451, *supra*.)

Specifically, El Salvador seeks to intervene with respect to certain questions of construction of the Charter of the United Nations, in particular Articles 39, 51 and 52, and of the Statute of the Court, which forms a part of the Charter, in particular Article 36. In making this intervention, El Salvador relies on the fact that it is a party to the Charter of the United Nations and to the Statute of the Court and on the fact that the referenced questions of construction of the Statute and Charter are at issue in the current stage of proceedings. El Salvador's request is timely, in that it has been filed before the date fixed for the opening of the oral proceedings on these questions. (Article 82 (1), Rules of Court.)

In view of these circumstances, the United States is of the view that El Salvador has a right pursuant to Article 63 of the Statute of the Court to intervene at this stage of the proceedings.

1. El Salvador Has the Right to Intervene Pursuant to Article 63 of the Statute of the Court

Article 63 of the Statute of the Court provides that:

"1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

This provision, apart from the paragraph numbering and punctuation, is identical to Article 63 of the Statute of the Permanent Court of International Justice, which in turn was based on similar articles in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. (This history is reviewed by Judge Oda in his dissenting opinion in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application by Italy for Permission to Intervene*, *Judgment*, *I.C.J. Reports 1984*, p. 3, at pp. 100-102 (diss. op. Oda).)

Article 63 gives each State the right to intervene in pending proceedings, provided that the case involves the construction of a convention and that the State seeking to intervene is a party to that convention. Thus M. de Lapradelle, Chairman of the Drafting Committee of the Advisory Committee of Jurists, explained the purpose of Article 63 in the Statute of the Permanent Court of International Justice as follows:

“[T]here is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case.” (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16-July 14, 1920*, p. 746 (1920).)

Similarly, in its first judgment, the Permanent Court of International Justice recognized the right to intervene under Article 63:

“[W]hen the object of the suit before the Court is the interpretation of an international convention, any State which is a party to this convention has, under Article 63 of the Statute, the right to intervene in the proceedings instituted by others . . .” (S.S. “*Wimbledon*”, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 12.)

This early authority has been confirmed by the present Court. For example, in *Haya de la Torre* the Court referred to Cuba’s “availing itself of the right which Article 63 of the Statute of the Court confers on States parties to a convention, . . .” (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71, at p. 76). Also, in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court observed:

“The Statute of the Court provides for two different forms of intervention: one under Article 62 . . .; and the other under Article 63 which gives parties to a convention the construction of which is in question in a case ‘the right to intervene in the proceedings’.” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Application by Malta for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 3, at p. 13.)

(See also, e.g., T. O. Elias, *The International Court of Justice and Some Contemporary Problems*, p. 93 (1983); G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-4”, 34 *British Year Book of International Law*, p. 1, at p. 124 (1958); M. Dubisson, *La Cour internationale de Justice*, p. 237 (1964).)

Thus, the only conditions for intervention under Article 63 of the Statute of the Court are that the construction of a multilateral convention be at issue and that the State requesting intervention be a party to the convention. Where these conditions are met, the State has an absolute right to intervene. The role of the Court in deciding “whether an intervention under Article 63 of the Statute is

admissible", as provided by Article 84 (2) of the Rules of Court, is in this respect a limited one:

"Although intervention under this Article [63] is as of right, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not . . . Given that these conditions are present, the Court is bound to admit the intervention, and has no discretionary power in the matter, as it would seem it must have under Article 62 . . ." (G. Fitzmaurice, *op. cit.*, p. 127.)

Similarly, the distinguished President of the Court has written:

"Intervention under Article 63 is open to all those States that can show that the construction of an international convention, to which they are all parties, is involved; no other requirement need be fulfilled before an intervening State can participate in such proceedings before the Court. *Intervention under Article 63 is, on this basis, automatic* for the State intending to intervene." (T. O. Elias, *loc. cit.* (emphasis supplied).)

The "automatic" nature of intervention under Article 63 is illustrated by the decision of the Permanent Court of International Justice in *S.S. "Wimbledon"*, in accepting the request by Poland to intervene:

"It will suffice for the Court to note that in this case the interpretation of certain clauses of the Treaty of Versailles is involved in the suit and that the Polish Republic is one of the States which are parties to this treaty.

In view of the facts established above, which are conclusive, and of the statements made at the hearing by the representatives of the applicant Powers, who left the matter to the decision of the Court.

the Court records that the Polish Government intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute." (*Judgments, op. cit.*, p. 13.)

The use of "records" here rather than "decides" emphasizes that acceptance of the intervention follows necessarily from a determination that the factual conditions are met; the latter are, in the words of the Judgment, "conclusive". Similarly, as discussed below, this Court in *Haya de la Torre* based its decision on the finding that "the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute . . ." (*op. cit.*, p. 77).

The facts supporting El Salvador's right to intervene are clear. El Salvador is a party to the Charter of the United Nations, including the Statute of the Court. The Charter, including the Statute, are conventions and as such are subject to Article 63. (See, e.g., *Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 15, at p. 23; *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, at p. 96.) Questions of interpretation of the Charter and Statute are incontestably at issue in this phase of the case. El Salvador is accordingly entitled to intervene pursuant to Article 63 in this stage of proceedings, automatically and as of right.

2. *El Salvador's Intervention Is Related to Questions of Treaty Interpretation in Issue in This Phase of the Proceedings*

While a State may have the right to intervene in any case concerning the interpretation of a treaty to which it is a party, the intervention must relate to the questions of treaty interpretation which are in issue before the Court. This is principally illustrated by the case of *Haya de la Torre*.

In *Haya de la Torre*, the Government of Cuba filed a Declaration of Intervention, to which it attached a Memorandum constituting, in the view of the Court, its written observations pursuant to Article 66 (4) of the 1946 Rules of Court (the predecessor of present Article 86 (1)). The Government of Peru objected to the admissibility of this intervention, *inter alia*, on the grounds that in substance, Cuba's views were related to questions decided in an earlier judgment and were aimed, in effect, at reconsideration of that judgment.

The Court observed

“that every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings” (*Haya de la Torre*, *op. cit.*, p. 76).

The Court further observed that Cuba's

“Memorandum . . . is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention.” (*Ibid.*, p. 77.)

Nonetheless, as Cuba did identify a question of interpretation of a treaty to which it was a party, which was at issue in the pending proceedings, Cuba's intervention was admissible to that extent:

“Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute . . .”

The Court has subsequently confirmed its holding in *Haya de la Torre*:

“In [*Haya de la Torre*] the Court stressed that, under Article 63, intervention by a party to a convention the construction of which is in issue in the proceedings is a matter of right. At the same time, however, it also underlined that the right to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case.” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *op. cit.*, p. 15.)

(See also, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *op. cit.*, p. 99 (diss. *op. Oda*.)

The limited scope of intervention under Article 63 is also reflected in the text of the Article itself, which limits the binding effect of a judgment on the intervening State. As specified by Article 63 (2), when a State intervenes in proceedings, “*the construction given by the judgment will be equally binding upon it*” (emphasis supplied).

Thus, notwithstanding that a State may have the right to intervene, “[t]he intervention must be adequately related to the subject-matter of the current proceedings” (Fitzmaurice, *op. cit.*, p. 128 (emphasis in original)).

In the view of the United States, there is no room for doubt that El Salvador's intervention is directly related to the subject-matter of the current phase of proceedings. As stated in its Declaration of Intervention and confirmed by its letter of 10 September, El Salvador intends to address certain preliminary questions of treaty interpretation which specifically and exclusively relate to jurisdiction and admissibility. It is amply evident from the Nicaraguan and United States pleadings that these questions are in issue in the current stage of proceedings.

El Salvador has stated moreover that, while reserving its rights, it seeks at present to intervene only with respect to the current phase of proceedings. This Court has already confirmed that intervention may be limited solely to one or another stage of proceedings. In *Nuclear Tests (New Zealand v. France)*, the Court found that Fiji's requested intervention under Article 62 "by its very nature presupposes that the Court has jurisdiction to entertain the dispute . . . and that New Zealand's application against France in respect of that dispute is admissible". Accordingly the Court deferred consideration of its acceptance until after the determination of jurisdiction and admissibility. (*Nuclear Tests (New Zealand v. France)*, *Application to Intervene, Order of 23 July 1973, I.C.J. Reports 1973*, p. 324.)

It follows that an intervention may also, by its nature, relate solely to jurisdiction and admissibility. For example, the possibility of intervention pursuant to Article 63 solely with respect to questions of jurisdiction and admissibility has been recognized by the Court in *Corfu Channel, loc. cit.*, and by Judge Lauterpacht in *Certain Norwegian Loans, Judgment (I.C.J. Reports 1957, p. 9, at pp. 63-64 (sep. op. Lauterpacht))* and *Interhandel, Interim Protection, Order of 24 October 1957 (I.C.J. Reports 1957, p. 105, at p. 120 (sep. op. Lauterpacht))*.

It is, accordingly, in the nature of intervention under Article 63 that it could be limited to one or another stage of proceedings, depending on the questions of treaty interpretation which form the basis for the right to intervene. Moreover, the interpretation contended for by the intervening State may itself imply such a limitation. This would appear to be the case here, since a major purpose of El Salvador's intervention is to argue that consideration of the merits of the Nicaraguan Application would be contrary to the Charter of the United Nations, with serious prejudice to El Salvador's interests and rights.

In sum, the United States respectfully submits its view that El Salvador is entitled to intervene in this case pursuant to Article 63 of the Statute of the Court, as a State party to multilateral conventions whose construction is at issue in this phase of the case. Further, as we understand the object and scope of El Salvador's proposed intervention, it is appropriately related and inherently limited to the current phase of proceedings. Accordingly, the United States sees no ground for objection to the admissibility of this intervention.

(Signed) Davis R. ROBINSON,
Agent of the United States of America.

**LETTER FROM THE AGENT OF EL SALVADOR TO THE REGISTRAR
OF THE INTERNATIONAL COURT OF JUSTICE**

Rome, 17 September 1984.

Re: Declaration of Intervention of the Republic of El Salvador.

We refer to the observations submitted by Nicaragua on the Declaration of Intervention of El Salvador.

1. Nicaragua purports not to object to the intervention. Indeed, it even "agrees" to it. If this agreement is taken at face value, then neither of the existing Parties entertains any objection with respect to El Salvador's participation as an intervenor under Article 63 of the Statute. In these circumstances it would seem appropriate that the Court record the intervention forthwith as "automatic".

2. Nicaragua does, however, go on to suggest that the Declaration has certain deficiencies.

A. The alleged deficiency of form is frivolous. Nicaragua and the Court are fully on notice of the issues of treaty interpretation regarding jurisdiction and admissibility. El Salvador's Declaration of Intervention appropriately identifies those issues and El Salvador's construction. Moreover, El Salvador's 10 September 1984 communication (to which Nicaragua fails to refer) resolves any conceivable ambiguity by carefully and particularly identifying the provisions of the conventions to which El Salvador is a party whose interpretation is at issue in this present jurisdictional and admissibility stage of the proceeding, and the constructions for which it contends.

B. The alleged deficiency as to substance is equally spurious. Nicaragua suggests that Article 63 intervention is inapposite to the jurisdictional phase of the proceeding even if conventions to which the intervenor is a party are centrally at issue in that stage. This makes no practical sense and totally contradicts the plain meaning of Article 63, which makes no such distinction.

3. Nicaragua refers to Article 85 of the Rules of Court. This is a mistake. Article 85, by its express terms, governs only procedures for interventions under Article 62 of the Statute of the Court. El Salvador intervenes, as a matter of right, under Article 63. The rule that governs procedure in such cases is Article 86, which provides as follows:

"1. If an intervention under Article 63 of the Statute is admitted, the intervening State shall be furnished with copies of the pleadings and documents annexed, and shall be entitled, within a time-limit to be fixed by the Court, or by the President if the Court is not sitting, to submit its written observations on the subject-matter of the intervention.

2. These observations shall be communicated to the parties and to any other State admitted to intervene. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention."

Article 86 clearly provides that El Salvador is entitled to receive the pleadings and annexes of the Parties, is entitled to a reasonable time thereafter to prepare

and present its written observations on the convention provisions at issue in the jurisdictional phase of the case, and is then entitled to participate in the subsequent oral proceedings before the Court. El Salvador submits that a period of six weeks would be an appropriate time-limit for the preparation of its observations, on the understanding that this is the amount of time permitted to the Parties to prepare their submissions.

4. Nicaragua's observations constitute an attempt to object to El Salvador's Declaration of Intervention while, at the same time, preventing El Salvador from exercising its procedural right to oral proceedings before the Court in the event of an objection. On the one hand, Nicaragua purports not to object in order to avoid triggering El Salvador's automatic right to a hearing under Article 84 (2) of the Rules of Court when an "objection" is received. On the other hand, Nicaragua then launches a full-scale attack on both the form and the substance of the Declaration in what constitutes as strong and clear an "objection" as one can imagine. Nicaragua, in short, disclaims opposing El Salvador's intervention, but then offers lengthy alternative explanations why the Court should find the intervention inadmissible. It is inconceivable that the Court should proceed in the peremptory and injudicious fashion that Nicaragua invites. Either Nicaragua should be taken at its word and the Declaration of Intervention admitted as the exercise of an automatic right fully consistent with Article 63 of the Statute and Article 84 of the Rules due to the absence of any objection from either Party, or Nicaragua's observations must be recognized as the objection that the document undeniably is and El Salvador allowed the oral proceedings which Article 84 (2) of the Rules requires when an objection is received.

5. El Salvador's interest in the question whether this Court has jurisdiction and whether the Nicaraguan application is admissible is authentic and vital to its own national interest. The authority of the recognized government is under armed attack. That armed attack is being carried out by an externally supported minority. That minority refuses to accept the democratically expressed will of the people of El Salvador. Nicaragua's denial that it supports that minority is contradicted by the facts set forth in El Salvador's Declaration of Intervention.

6. In the face of that armed attack on the duly constituted, recognized authority, El Salvador's elected government is actively seeking an end to the conflict. To that purpose it is pursuing all negotiating avenues to peace within its own territory and throughout Central America. El Salvador is persuaded in the consideration of its own survival as a nation that to subject an isolated aspect of the Central American conflict to judicial determination at this time would cut straight across the best hopes for a peaceful solution. It would as well conflict with the Charters of the United Nations and the Organization of American States, of which El Salvador is a ranking member.

7. This is the reason El Salvador has invoked its automatic right to intervene at this stage of the proceedings. This is also why it would be unjust as well as wrong in law for the Court to accept Nicaragua's thinly veiled invitation to reject that intervention out of hand, in violation of El Salvador's substantive rights under the charter of the Court and procedural rights under the Rules of Court.

In the name and on behalf of
the State of El Salvador,

(Signed) IVO P. ALVARENGA,

Ambassador,

Agent to the International Court of Justice.

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