DISSENTING OPINION OF JUDGE TARASSOV

I have unfortunately been obliged to vote against the Order by which the Court has decided that the Application by Nicaragua for permission to intervene under Article 62 of the Statute in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* should be dealt with by the Chamber formed to deal with the case.

The Court substantiated its Order by invoking the existing rule according to which the request for permission to intervene should be dealt with by the organ which is to decide the merits of the case, because "every intervention is incidental to the proceedings in a case" (*Haya de la Torre, I.C.J. Reports 1951*, p. 76).

The decision of the Court would not have given rise to any doubts on my part if Nicaragua's Application had not raised some very important issues and had not related to the specific character of the case and the composition of the Chamber formed to deal with it. In fact this Application goes much further than does an ordinary request for permission to intervene.

First of all, the Applicant considers that the existing dispute relating to the legal situation in the islands and maritime areas both within and adjacent to the Gulf of Fonseca is of a trilateral, rather than a bilateral, character (para. 2 *(e)* of Nicaragua's Application). The Applicant further states that:

> "In a situation in which the consideration of the status of the Gulf necessarily involves the three riparian States, *two of these States have been given the opportunity to create a timetable and a procedural agenda from which Nicaragua is excluded* and the content of which was decided upon without Nicaragua's consent." (*Ibid.*, para. 13; emphasis added.)

This leads the Applicant to express the view that:

> "The practical consequence of a favourable response to the present request will be the *reformation of the Chamber* as presently constituted and the re-ordering of the written proceedings as arranged by the Order of 27 May 1987." (*Ibid.*, para. 23; emphasis added.)

Nevertheless, Nicaragua goes on to say that its intention is:

> "to propose not a reformation of the Chamber and its jurisdictional basis *tout court* but only the *making of those changes strictly necessary*

> *in order to maintain the minimum standards of efficacy and procedural fairness*" (Nicaragua's Application, para. 23; emphasis added).

It also says that, as an alternative follow-up to its Application, it may request that:

> "the Court should, in any case, *exclude from the mandate* of the Chamber any powers of determination of the juridical situation of maritime areas both within the Gulf of Fonseca and also in the Pacific Ocean and, in effect, *limit the Chamber's mandate* to those aspects of the land boundary which are in dispute between El Salvador and Honduras" (*ibid.*, para. 24; emphasis added).

In that event, Nicaragua would be willing:

> "to submit to the Court *or a Chamber duly appointed*, if El Salvador and Honduras so agree, the decision on the determination of the juridical situation of the maritime areas both within the Gulf of Fonseca and also in the Pacific Ocean" (*ibid.*; emphasis added).

All these statements make it quite clear that, in the Applicant's view, the present Chamber formed by the Court on the basis of a *compromis* between El Salvador and Honduras, without the participation of Nicaragua, can only become appropriate for the consideration of its Application if it is reformed, whether wholly or in part. Alternatively, the mandate of the present Chamber should be confined to the bilateral land frontier dispute between El Salvador and Honduras and a new chamber should be formed with the participation of Nicaragua on an equal footing with the initial Parties. It is obvious that all the proposed transformations, i.e., the full or partial reformation of the existing Chamber, or the modification or limitation of its mandate, cannot be effected by the existing Chamber itself. Only the full Court, which formed the present Chamber to deal with a land, island and maritime frontier dispute between El Salvador and Honduras and thus conferred upon it its mandate "to deal with the present case" (*I.C.J. Reports 1987, Order of 8 May 1987*, p. 12), has the power to undertake actions of that kind.

I believe that the Applicant, when making the above-mentioned submissions, was quite right to appeal to the body which is *fully empowered* to make the required changes. Moreover, the Applicant has opted for precisely this approach, emphasizing in its request that the matter raised by it is "exclusively within the procedural mandate of the full Court" (Nicaragua's Application, Preliminary Statements, last paragraph).

There are no provisions either in the Statute or in the Rules of Court which can be seen as prohibiting the full Court from considering these submissions of the Applicant. Neither the Statute and Rules of Court nor

the Court's own practice serve to deprive it entirely of functions relating to chambers, once those chambers have been formed. It is precisely the full Court that makes changes in the composition of a chamber, electing new members or approving new judges *ad hoc* to fill any vacancies that may arise and fixing time-limits for written proceedings. It is only natural that it should fall to the full Court to deal with a request for the *reformation* of the Chamber. It is a fact that Nicaragua's Application, intentionally addressed to the full Court, is also directly related to the composition of the Chamber. Of the five judges composing the Chamber, no more than a minority of two are currently Members of the Court. (The President of the Chamber, whose term of office in the Court has expired, continues to sit in the Chamber in accordance with Article 17 of the Rules of Court. The other two judges are judges *ad hoc* chosen by El Salvador and Honduras respectively.)

It is clear that the Court, which is responsible for the Chamber it has formed, has full confidence in the high professional skills of its members and in their judicial impartiality. It should be presumed that the Applicant has the same confidence. It is nonetheless very difficult to ignore the fact that the initial Parties have exercised a certain and by no means negligible influence on the composition of the Chamber, not only by choosing their respective judges *ad hoc* but also by giving the President of the Court their views "regarding the composition of the Chamber", in application of Article 17 of the Rules of Court, even though Article 26, paragraph 2, of the Statute expressly provides that the parties are only required to approve the Court's determination of "*The number of judges* to constitute such a chamber . . ." (Emphasis added.)

Article 17, paragraph 2, of the Rules of Court permits a broader interpretation of this provision of the Statute, enabling the President to ascertain the views of the parties regarding those judges whom they would wish to be elected as members of a chamber. The Court, when forming a chamber, normally complies with those views. It follows that the initial parties do exercise an influence not only on the numerical, but also on the *personal* composition of the chamber.

The intervening State does not have this possibility and its procedural position before a chamber is not on a par with the position of the initial parties. Such an inequality might be especially harmful to the intervening party if it were to seek the reformation of the existing composition of a chamber or a modification of that chamber's mandate.

In the observations of Nicaragua on the question whether the Application for permission to intervene falls within the jurisdiction of the Chamber formed to deal with the case or that of the full Court, the Applicant says that:

> "To consider that a challenge to the formation of the Chamber, made because of the extent of the competence *ratione materiae* with

> which it was anointed, should be aired before the same Chamber, would certainly be a complete surrender of the sovereign will of the intervening party, to the will of the original parties as reflected in the formation of the Chamber."

The Court could not fail to take any account of the Applicant's arguments and, by a purely administrative decision, simply transfer the request to the President of the Chamber without giving it any consideration. By its decision of 14 December 1989 the Court, as can be seen from the present Order, afforded the two Parties to the case:

> "the opportunity of submitting to the Court their observations on the question ... raised [by Nicaragua], i.e., whether the Application for permission to intervene is to be decided by the full Court or by the Chamber..."

In accordance with the same decision of 14 December 1989, copies of those observations were transmitted to Nicaragua which then submitted its further observations. In the observations of Honduras dated 15 January 1990, the Government of that State informed the Court that, in its view "[t]he full Court has no jurisdiction over the case between Honduras and El Salvador..." and "that Nicaragua's application to intervene must be heard by the Chamber and not by the full Court".

The Government of El Salvador, in its observations dated 8 January 1990, informed the Court of its intention "to oppose the Nicaraguan application to intervene, including the request for reformation of the Chamber...". However, this opposition to Nicaragua's proposed intervention and the proposed reformation of the Chamber did not lead El Salvador to concur with Honduras in rejecting, in principle, the possibility that the full Court might consider Nicaragua's Application. Its stated view was that:

> "Believing that the reasons for opposing the application are equally valid before the full Court or before the Chamber, the Government of El Salvador has no observations to make on the preliminary question of whether the Nicaraguan application falls within the jurisdiction of the Chamber or that of the full Court."

What main conclusions can be drawn from these views of the initial Parties? In the first place, it is quite clear that their general attitude is not favourable to that aspect of Nicaragua's Application that relates to its request that the full Court, not the Chamber, should consider its suggestions regarding a possible reformation of the Chamber or reformulation of its mandate, and that they are, to put it bluntly, not in favour of any intervention by Nicaragua in the case. Could such a negative attitude have some impact upon the way in which the Applicant's request may be considered by the Chamber in its present composition? In theory, there could not be any such impact as all the members of a chamber, including the judges *ad hoc*, are independent of the parties and preserve their full impar-

tiality during the whole of the proceedings in the case. Nobody, of course, should still be mindful of the procedural positions of the Parties during the formation of the chamber, and the various options available to them at that time. The same considerations hold good for all chambers and might be only slightly more specific in case of chambers formed on the basis of a *compromis.* Parties which have agreed by *compromis* to submit their dispute to a chamber may, if they both are not satisfied with the course of the proceedings or with the intermediate decisions of the chamber, put an end to it by a simple withdrawal of their *compromis* — although, in theory, the fact that this possibility exists can in no way exert pressure on the chamber. However, the problem is whether it is right that a State which has to protect what may be vital interests, and which finds itself in procedural circumstances like those currently affecting the procedural position of Nicaragua, should find itself entirely at the mercy of a theoretical construction of this kind. I am of the opinion that the Court, taking account of all the circumstances of the case and of the different submissions made in the Nicaraguan Application which, as was shown earlier, goes far beyond a simple request for permission to intervene and raises issues with which the Chamber is not competent to deal, should itself give the Applicant an opportunity to defend its own position before it in oral proceedings — or at least to defend its position with regard to the procedural issues. I think that such an attitude on the part of the Court would be particularly justified in that its governing documents provide it with no direct indications as to how to deal with an application for permission to intervene in a case pending before a chamber, in the event that such an application simultaneously makes a request for the reformation of that same chamber[1]. Any decision of the Court will accordingly establish an important precedent for future practice. This is why its decision on this matter should be based, not merely on a set of formal rules relating exclusively to simple requests for permission to intervene, but on a thorough analysis of all the procedural situations brought into being by Nicaragua's requests and on a complete disclosure of the real procedural positions of each Party involved.

[1] This lacuna in the guiding documents of the Court is quite understandable, however, as the Statute of the Court and the Rules of Court (even the most recent 1978 version) were elaborated and adopted at a time when *ad hoc* chambers for the most part did not exist. It is well known that, if procedural rules are to be both sound and helpful, they must be developed on the basis of prolonged practical experience and embody the sum total of such experience. The theoretical elaboration of the present rules in this field was mainly based on the good intention of making it easier for States to attain a peaceful settlement of their disputes while enhancing the activity of the International Court of Justice. It is significant that it is precisely the practical experience of recent chamber cases that has aroused interest in this useful and promising institution among the judges of the International Court of Justice (see dissenting opinion of Judge Shahabuddeen to this Order, p. 21, *infra,* footnote).

Unfortunately, the Court was satisfied with very short (one or two pages) written observations of El Salvador and Honduras and those States were, moreover, in accordance with the decision of the Court, permitted to deal only with the one question of "whether the Application for *permission to intervene* . . . [was] to be decided by the full Court or by the Chamber" (emphasis added). The Court did not invite the Parties in the case to express their opinions regarding the proposed reformation of the Chamber and the other procedural questions raised in the Application.

Under such circumstances, I am convinced that oral proceedings with the participation of all the States concerned are more than necessary. However, the Order of the Court is in fact *based only on the view of one State* out of the three which were permitted to submit their observations, i.e., on the view of Honduras. As has been shown, El Salvador evaded the question put to it merely by saying that "the Government of El Salvador has no observations to make". Nicaragua once again reiterated its earlier submission that "the full Court has the competence to decide the issue raised . . . and in the circumstances of this case should decide in favour of exercising that competence".

I am convinced that such differences of opinion should have been seen as an additional reason for the Court to hold hearings. I am also aware of yet another consideration in support of this view. According to Article 27 of the Statute, a judgment given by an *ad hoc* chamber is to be considered as rendered by the full Court. As a result of the present Order adopted by a majority of judges, the Applicant will have no more than two possible courses of action — it can either abandon its intention of preserving and defending its interests against possible violation as a result of judicial processes in the International Court of Justice or it can submit its Application to the Chamber. If it opts for the latter course, the Applicant will have to abide by the decision of five judges, only two of whom are Members of the Court, but whose decision will have the status of a judgment of the Court. In the event that permission to intervene is summarily rejected, or if the judgment on its merits fails to provide a proper safeguard of its lawful interests as an intervening Party, the Applicant will not be able to appeal, as the Court's judgment will have been rendered!

However, in theory, it might be possible in such a situation for the judgment to be adopted by a majority of non-members of the Court, with both Members of the Court voting against it. This possibility is no mere paradox — there are very important practical consequences for the Applicant. If the case were not to be considered by a chamber of the Court but by an Arbitration Tribunal, and if the decision of that Tribunal were to be seen by the third State as harmful to its interests, such a State would have the possibility of trying to defend those interests before the International Court of Justice, regardless of the fact that the Tribunal in question might have consisted entirely of Members of the International Court. However since, in the instant case, the Parties have decided not to submit their dispute to arbitration, but to refer it to a chamber of the Court, the third State is automatically deprived of that recourse to the full Court. Only as a

result of hearings, with the full participation of all the States concerned and in which all those States would have had equal procedural rights, could the Court have properly arrived at a prima facie conclusion as to whether or not there were any possibilities of intrusion into the sphere of interests of the third State. Were it to have found that there were no such possibilities, it might have rejected the submissions of the State seeking permission to intervene without referring its Application to the Chamber.

At the same time, the Court could have given some kind of assurance to the Applicant that its lawful rights would not be adversely affected (as was given to Italy in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case). If, on the contrary, the Court were to have found that certain interests of the third State could be called into question or directly threatened by a decision of the Chamber given as between the initial Parties, the Court would have been able to establish, in consultation with the President of the Chamber and those same Parties, such procedural guarantees as would effectively have enabled that State to defend its rights. While both the Parties to the main dispute and the Applicant have expressed, in a preliminary form, their very different views on the question of where the Application should be dealt with, one cannot exclude the possibility that they might have been able, with the help of the Court, to find some mutually acceptable compromises in the course of oral proceedings.

My vote against the present Order constitutes a reflection of my sincere hope that the decision of the Court, contained in this Order, will not be given the status of a precedent, serving to preclude — on purely formalistic grounds — any possibility of the Court considering questions relating to cases being dealt with by chambers but which those chambers are not able to resolve. Any such justification of future inaction could not only lead to a depreciation of the Court's own role, but might also bring about an unfortunate depreciation of the functioning of chambers by placing an insurmountable barrier between them and the full Court and, as a consequence, estranging them from the principal judicial organ of the United Nations. If that happened, *ad hoc* chambers would be transformed into some kind of hybrid between international judicial process and arbitration.

(Signed) Nikolai K. TARASSOV.