DISSENTING OPINION OF JUDGE KREĆA

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I. Composition of the Court in This Particular Case

1. In the context of the conceptual difference between the international magistrature and the internal judicial system within a State, the institution of judge *ad hoc* has two basic functions:

> "*(a)* to equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties; and *(b)* to create a nominal equality between two litigating States when there is no Member of the Court having the nationality of either party" (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 1124-1125).

In this particular case room is open for posing the question as to whether either of these two basic functions of the institution of judge *ad hoc* has been fulfilled at all.

It is possible to draw the line between two things.

The first is associated with equalization of the Parties in the part concerning the relations between the Applicant and the respondent States which have a national judge on the Bench. *In concreto*, of special interest is the specific position of the respondent States. They appear in a dual capacity in these proceedings:

primo, they appear individually in the proceedings considering that each one of them is in dispute with the Federal Republic of Yugoslavia: and,

secondo, they are at the same time member States of NATO under whose institutional umbrella they have undertaken the armed attack on the Federal Republic of Yugoslavia. Within the framework of NATO, these respondent States are acting *in corpore*, as integral parts of an organizational whole. The *corpus* of wills of NATO member States, when the undertaking of military operations is in question, is constituted into a collective will which is, formally, the will of NATO.

2. The question may be raised whether the respondent States can qualify as parties in the same interest.

In its Order of 20 July 1931 in the case concerning the *Customs Régime between Germany and Austria*, the Permanent Court of International Justice established that:

> "all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest for the purposes of the present case" (*P.C.I.J., Series A/B, No. 41*, p. 88).

The question of qualification of the "same interest", in the practice of the Court, has almost uniformly been based on a formal criterion, the criterion of "the same conclusion" to which the parties have come in the proceedings before the Court.

In the present case, the question of "the same conclusion" as the relevant criterion for the existence of "the same interest" of the respondent States is, in my opinion, unquestionable. The same conclusion was, in a way, inevitable in the present case in view of the identical Application which the Federal Republic of Yugoslavia has submitted against ten NATO member States, and was formally consecrated by the outcome of the proceedings before the Court held on 10, 11 and 12 May 1999, in which all the respondent States came to the identical conclusion resting on the foundation of practically identical argumentation which differed only in the fashion and style of presentation.

Hence, the inevitable conclusion follows, it appears to me, that all the respondent States are *in concreto* parties in the same interest.

3. What are the implications of this fact for the composition of the Court in the present case? Article 31, paragraph 2, of the Statute says: "If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge."

The Statute, accordingly, refers to the right of "any other party", namely, a party other than the party which has a judge of its nationality, in the singular. But, it would be erroneous to draw the conclusion from the above that "any other party", other than the party which has a judge of its nationality, cannot, under certain circumstances, choose several judges *ad hoc*. Such an interpretation would clearly be in sharp contradiction with *ratio legis* of the institution of judge *ad hoc*, which, in this particular case, consists of the function "to equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties" (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 1124-1125). The singular used in Article 31, paragraph 2, of the Statute with reference to the institution of judges *ad hoc* is, consequently, but individualization of the general, inherent right to equalization in the composition of the Bench in the relations between litigating parties, one of which has a judge of its nationality on the Bench, while the other has not. *The practical meaning of this principle applied* in casum *would imply the right of the Applicant to choose as many judges* ad hoc *to sit on the Bench as is necessary to equalize the position of the Applicant and that of those respondent States which have judges of their nationality on the Bench and which share the same interest.* In concreto, *the inherent right to equalization in the composition of the Bench, as an expression of fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges* ad hoc, *since even five out of ten respondent States (the United States of America, the United Kingdom, France, Germany and the Netherlands) have their national judges sitting on the Bench.*

Regarding the notion of equalization which concerns the relation between the party entitled to choose its judge *ad hoc* and the parties which have their national judges on the Bench, the fact is that the Federal Republic of Yugoslavia, as can be seen from the Order, did not raise any objections to the circumstance that as many as five respondent States

have judges of their nationality on the Bench. However, this circumstance surely cannot be looked upon as something making the question irrelevant, or, even as the tacit consent of the Federal Republic of Yugoslavia to such an outright departure from the letter and spirit of Article 31, paragraph 2, of the Statute.

The Court has, namely, the obligation to take account *ex officio* of the question of such a fundamental importance, which directly derives from, and vice versa, may directly and substantially affect, the equality of the parties. The Court is the guardian of legality for the parties to the case, for which *presumptio juris et de jure* alone is valid — to know the law *(jura novit curia)*. As pointed out by Judges Bedjaoui, Guillaume and Ranjeva in their joint declaration in the *Lockerbie* case: "that is for the Court — not the parties — to take the necessary decision" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, *I.C.J. Reports 1998*, p. 36, para. 11).

A contrario, the Court would risk, in a matter which is *ratio legis* proper of the Court's existence, bringing itself into the position of a passive observer, who only takes cognizance of the arguments of the parties and, then, proceeds to the passing of a decision.

4. The other function is associated with equalization in the part which is concerned with the relations between the Applicant and those respondent States which have no national judges on the Bench.

The respondent States having no judge of their nationality on the Bench have chosen, in the usual procedure, their judges *ad hoc* (Belgium, Canada, Italy and Spain). Only Portugal has not designated its judge *ad hoc*. The Applicant successively raised objections to the appointment of the respondent States' judges *ad hoc* invoking Article 31, paragraph 5, of the Statute of the Court. The responses of the Court with respect to this question invariably contained the standard phrase "that the Court . . . found that the choice of a judge *ad hoc* by the Respondent is justified in the present phase of the case".

Needless to say, the above formulation is laconic and does not offer sufficient ground for the analysis of the Court's legal reasoning. The only element which is subject to the possibility of teleological interpretation is the qualification that the choice of a judge *ad hoc* is "justified in the present phase of the case". *A contrario*, it is, consequently, possible that such an appointment of a judge *ad hoc* would "not be justified" in some other phases of the case. The qualification referred to above could be interpreted as the Court's reserve with respect to the choice of judges *ad hoc* by the respondent States, a reserve which could be justifiable on account of the impossibility for the Court to perceive the nature of their interest — whether it is the "same" or "separate" — before the parties set out their positions on the case.

The meanings of equalization as a *ratio legis* institution of judges *ad hoc*, in the case concerning the Applicant and respondent States which

are parties in the same interest, and which do not have a judge *ad hoc* of their nationality on the Bench, have been dealt with in the practice of the Court, in a clear and unambiguous manner.

In the *South West Africa* case (1961) it was established that, if neither of the parties in the same interest has a judge of its nationality among the Members of the Court, those parties, acting in concert, will be entitled to appoint a single judge *ad hoc* (*South West Africa, I.C.J. Reports 1961*, p. 3).

If, on the other hand, among the Members of the Court there is a judge having the nationality of even one of those parties, then no judge *ad hoc* will be appointed (*Territorial Jurisdiction of the International Commission of the River Oder, 1929, P.C.I.J., Series C, No. 17-II*, p. 8; *Customs Régime between Germany and Austria, 1931, P.C.I.J., Series A/B, No. 41*, p. 88).

This perfectly coherent jurisprudence of the Court applied to this particular case means that none of the respondent States were entitled to appoint a judge ad hoc.

Consequently, it may be said that in the present case neither of the two basic functions of the institution of judge *ad hoc* has been applied in the composition of the Court in a satisfactory way. In my opinion, it is a question of the utmost specific weight in view of the fact that, obviously, its meaning is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

II. Humanitarian Concern in This Particular Case

5. Humanitarian concern, as a basis for the indication of provisional measures, has assumed primary importance in the more recent practice of the Court.

Humanitarian concern has been applied on two parallel tracks in the Court's practice:

(a) *In respect of the individual*

In this regard the cases concerning *LaGrand (Germany* v. *United States of America)* and the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)* are characteristic.

In both cases the Court evinced the highest degree of sensibility for the humanitarian aspect of the matter, which probably found its full expression in the part of the Application submitted by Germany on 2 March 1999:

> "The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected

by law." (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 12, para. 8).

The following day, the Court already unanimously indicated provisional measures because it found that in question was "a matter of the greatest urgency" (*ibid.*, p. 15, para. 26), which makes it incumbent upon the Court to activate the mechanism of provisional measures in accordance with Article 41 of the Statute of the Court and Article 75, paragraph 1, of the Rules of Court in order: "to ensure that Walter LaGrand is not executed pending the final decision in these proceedings" (*ibid.*, p. 16, para. 29).

Almost identical provisional measures were indicated by the Court in the dispute between Paraguay and the United States of America which had arisen on the basis of the Application submitted by Paraguay on 3 April 1998. On the same day, Paraguay also submitted an "urgent request for the indication of provisional measures in order to protect its rights" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 9 April 1998, I.C.J. Reports 1998*, p. 251, para. 6). As early as 9 April 1998 the Court unanimously indicated provisional measures so as to: "ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings" (*ibid.*, p. 258, para. 41).

It is evident that humanitarian concern represented an aspect which brought about unanimity in the Court's deliberations. This is clearly shown not only by the letter and spirit of both Orders in the above-mentioned cases, but also by the respective declarations and the separate opinion appended to those Orders. In the process, humanitarian considerations seem to have been sufficiently forceful to put aside obstacles standing in the way of the indication of provisional measures. In this respect, the reasoning of the Court's senior judge, Judge Oda, and that of its President, Judge Schwebel, are indicative.

In paragraph 7 of his declaration appended to the Order of 3 March 1999 in the case concerning *LaGrand (Germany* v. *United States of America)*, Judge Oda convincingly put forward a series of reasons of a conceptual nature which explained why he "formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Germany's request". But, Judge Oda goes on to "reiterate and emphasize" that he "voted in favour of the Order solely for humanitarian reasons" (*I.C.J. Reports 1999*, p. 20).

President Schwebel, in his separate opinion, has not explicitly stated humanitarian considerations as the reason that guided him in voting for the Order; however, it is reasonable to assume that those were the only considerations which prevailed in this particular case in view of his "profound reservations about the procedures followed both by the Applicant and the Court" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 22).

As far as the Applicant is concerned:

> "Germany could have brought its Application years ago, months ago, weeks ago or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*." (*I.C.J. Reports 1999*, p. 22.)

The Court, for its part, indicated provisional measures, as President Schwebel put it, "on the basis only of Germany's Application".

(b) *In respect of a group of individuals or the population as a constitutive element of the State*

The protection of the citizens emerged as an issue in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*:

> "In its submission, Nicaragua emphasized the death and harm that the alleged acts had caused to Nicaraguans and asked the Court to support, by provisional measures, 'the rights of Nicaraguan citizens to life, liberty and security'." (R. Higgins, "Interim Measures for the Protection of Human Rights", in *Politics, Values and Functions, International Law in the 21st Century*, 1997, Charney, Anton, O'Connell, eds., p. 96.)

In the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Court found the source for provisional measures in:

> "incidents . . . which not merely are likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes" (*Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 19).

Humanitarian concern in this particular case was motivated by the risk of irreparable damage:

> "the facts that have given rise to the requests of both Parties for the indication of provisional measures expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage" (*ibid.*, p. 10, para. 21).

It can be said that in the cases referred to above, in particular those in which individuals were directly affected, the Court formed a high

standard of humanitarian concern in the proceedings for the indication of interim measures, a standard which commanded sufficient inherent strength to brush aside also some relevant, both procedural and material, rules governing the institution of provisional measures. Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

6. In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. This fact needs to be stressed in view of the special circumstances of this case.

Unlike the cases referred to previously, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. Such a conclusion may be inferred from at least two elements:

— *primo*, the Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. The aim of the attack is horrifying, judging by the words of the Commander-in-Chief, General Wesley Clark, and he ought to be believed:

> "We're going to systematically and progressively attack, disrupt, degrade, devastate, and ultimately, unless President Milosević complies with the demands of the international community, we're going to completely destroy his forces and their facilities and support." (BBC News, http://news.bbc.co.uk/english/static.NATOgallery/air default.stm/14 May 1999).

"Support" is interpreted, in broad terms, extensively; to the point which raises the question of the true object of the air attacks. In an article entitled "Belgrade People Must Suffer" Michael Gordon quotes the words of General Short that he "hopes the distress of the public will, must undermine support for the authorities in Belgrade" (*International Herald Tribune*, 16 May 1999, p. 6) and he continued:

> "I think no power to your refrigerator, no gas to your stove, you can't get to work because bridge is down — the bridge on which you held your rock concerts and you all stood with targets on your heads. That needs to disappear at three o'clock in the morning." *(Ibid.)*

That these are not empty words is testified to by destroyed bridges, power plants without which there is no electricity, water supply and production

of foodstuffs essential for life; destroyed roads and residential blocks and family homes; hospitals without electricity and water and, above all, human beings who are exposed to bombing raids and who, as is rightly stressed in the Application in the *LaGrand (Germany* v. *United States of America)* case, have the "inherent right to life" (International Covenant on Civil and Political Rights, Art. 6), whose importance and sanctity are well established in international law. In the inferno of violence, they are but "collateral damage".

— *secundo*, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time. In the oral proceedings before the Court, the Agent of the United States explicitly stressed that depleted uranium is in standard use of the United States Army (CR 99/24, p. 21).

The assessment of the effects of depleted uranium should be left to science. The report by Marvin Resnikoff of Radioactive Management Associates on NMI elaborated upon these effects:

> "Once inhaled, fine uranium particles can lodge in the lung alveolar and reside there for the remainder of one's life. The dose due to uranium inhalation is cumulative. A percentage of inhaled particulates may be coughed up, then swallowed and ingested. Smoking is an additional factor that needs to be taken into account. Since smoking destroys the cilia, particles caught in a smoker's bronchial passages cannot be expelled. Gofman estimates that smoking increases the radiation risk by a factor of 10. Uranium emits an alpha particle, similar to a helium nucleus, with two electrons removed. Though this type of radiation is not very penetrating, it causes tremendous tissue damage when internalized. When inhaled, uranium increases the probability of lung cancer. When ingested, uranium concentrates in the bone. Within the bone, it increases the probability of bone cancer, or, in the bone marrow, leukemia. Uranium also resides in soft tissue, including the gonads, increasing the probability of genetic health effects, including birth defects and spontaneous abortions. The relationship between uranium ingested and the resultant radiation doses to the bone marrow and specific organs . . . are listed in numerous references.
>
> The health effects are also age-specific. For the same dose, children have a greater likelihood than adults of developing cancer." (*Uranium Battlefields Home & Abroad: Depleted Uranium Use by the U.S. Department of Defense*, Rural Alliance for Military Accountability *et al.*, March 1993, pp. 47-48.)

A scientific analysis of the concrete effects of armed operations against

Yugoslavia has been presented by the Federal Environmental Agency [Umweltbundesamt]. The essentials of the expertise are as follows[1]:

[Translation by the Registry]

"The longer the war in Yugoslavia lasts, the greater the risk of long-term damage to the environment. Such damage threatens to extend beyond national frontiers, and it may no longer be possible fully to make it good. The Federal Environmental Agency [Umweltbundesamt (UBA)] comes to this conclusion in an internal paper examining the ecological consequences of the war in Yugoslavia, prepared for the meeting of European Environment Ministers at the beginning of May in Weimar. Catastrophes 'like Seveso and Sandoz' are, in the opinion of the Agency, 'a perfectly probable damage scenario'.

. . . . . .

[1] "Je länger der Krieg in Jugoslawien dauert, desto grösser wird die Gefahr von langfristigen Schädigungen der Umwelt. Diese drohen sich über die Landesgrenzen hinaus auszubreiten und können möglicherweise nicht mehr vollständig beseitigt werden. Zu dieser Einschätzung kommt das Umweltbundesamt (UBA) in einem internen Papier, das sich mit den ökologischen Auswirkungen des Krieges in Jugoslawien befasst und für die Vorbereitung des Treffens europäischer Umweltminister Anfang Mai in Weimar erstellt wurde. Katastrophen 'wie Seveso und Sandoz' sind nach Ansicht des Amtes 'ein durchaus wahrscheinliches Schadensszenario'.

. . . . . .

Umweltgifte, die nach Zerstörungen von Industrieanlagen austreten, könnten sich weiter ausbreiten. 'Bei Sicherstellung sofortigen Handelns, das unter Kriegsbedingungen aber unmöglich ist, bleibt die Wirkung dieser Umweltschädigungen lokal begrenzt. Längere Verzögerungen führen zu einem übertritt der Schadstoffe in die Schutzgüter Boden, Grund- und Oberflächenwasser, erhöhen das Gefährdungspotential für den Menschen und den Sanierungsaufwand beträchtlich.'

Diese Folgen müssen nicht auf Jugoslawien beschränkt sein. Schadstoffe aus Grossbränden könnten grenzüberschreitend verteilt werden. Weiter heisst es in dem Papier: 'Die Einleitung der Gefahrstoffe in Oberflächenwasser kann zur weiträumigen Schädigung der Ökosysteme führen. Die Deposition von Gefahrstoffen in Böden kann je nach Eigenschaft der Stoffe und Böden zu langanhaltenden Versuchungen mit weitgehenden Nutzungseinschränkungen führen.'

Die Gefahr einer 'tiefgreifenden Zerstörung wesentlicher Bestandteile von Trinkwasserversorgungssystemen' sei für mittlere und grosse Städte sowie Ballungsgebiete am grössten. Schon geringe Mengen von Substanzen der petrochemischen Industrie könnten 'grosse Grundwasservorräte unbrauchbar machen'.

Wie gefährlich die freigesetzten Stoffe insgesamt sind, lässt sich nach Ansicht der UBA-Experten nur schwer abschätzen, 'weil durch die Zerstörung ganzer Industriekomplexe Mischkontaminationen verschiedenster Schadstoffe gebildet werden', die noch wenig erforscht seien. Noch komplizierter sei die Beurteilung von Umweltschäden durch Brände und Explosionen. 'Hier treten bezogen auf Schadstoffinventar und Ausbreitung weit weniger kalkulierbare, zum Teil grossflächige Umweltschädigungen ein.'

Die Verbrennungsprodukte seien 'zum Teil hoch toxisch und kanzerogen'. Je nach klimatischen Bedingungen könne es 'zu einer grossflächigen Verteilung dieser Stoffe' kommen, 'die eine vollständige Beseitigung nahezu unmöglich macht' . . .

Die Wechselwirkungen der Produkte mit den eingesetzten Waffen dürften 'völlig unbekannt' sein." (TAZ, *Die Tageszeitung*, Berlin, 20 May 1999.)

Environmental toxins released by the destruction of industrial plant could spread further. 'If immediate action is taken, which is, however, impossible under war conditions, the effect of this environmental damage will remain restricted to local level. Longer delays will result in toxic substances passing into the soil, groundwater and surface water, and substantially increase the potential danger to man, and the cost of cleansing operations.'

These consequences are not necessarily limited to Yugoslavia. Harmful substances deriving from major conflagrations can be diffused beyond frontiers. The paper continues: 'Passage of harmful substances into surface water can lead to extensive damage to ecosystems. The deposition of hazardous substances in the soil can, depending on the nature of those substances and of the soil, result in long-term contamination, imposing far-reaching limitations upon utilization.'

The danger of 'extensive destruction of essential components of drinking-water supply networks' is biggest with regard to middle-sized and large cities and conurbations. Even small amounts of substances from the petrochemical industry can render 'extensive groundwater reserves unusable'.

According to the Federal Environmental Agency experts, the overall risk posed by the substances released is difficult to assess, 'because the destruction of entire industrial complexes results in mixed contamination by a wide variety of harmful substances' — an area in which there has as yet been little research. Even more problematic, in the experts' view, is the assessment of environmental damage caused by fires and explosions. 'Here, in terms of identification of the harmful substances involved and the possibility of their diffusion, environmental damage is far harder to predict, but will on occasion be extensive.'

The substances produced by the fires are described as 'in part highly toxic and carcinogenic'. Depending on climatic conditions, 'widespread diffusion of these substances' could occur, 'which would render full cleansing almost impossible'.

The effects of the interaction of those substances with the weapons employed were said to be 'completely unknown'." (TAZ, *Die Tageszeitung*, Berlin, 20 May 1999.)

Therefore, it is my profound conviction, that the Court is, *in concreto*, confronted with an uncontestable case of "extreme urgency" and "irreparable harm", which perfectly coincides, and significantly transcends the

substance of humanitarian standards which the Court has accepted in previous cases.

7. I must admit that I find entirely inexplicable the Court's reluctance to enter into serious consideration of indicating provisional measures in a situation such as this crying out with the need to make an attempt, regardless of possible practical effects, to at least alleviate, if not eliminate, an undeniable humanitarian catastrophe. I do not have in mind provisional measures in concrete terms as proposed by the Federal Republic of Yugoslavia, but provisional measures in general: be they provisional measures *proprio motu*, different from those proposed by the Federal Republic of Yugoslavia or, simply, an appeal by the President of the Court, as was issued on so many occasions in the past, in less difficult situations, on the basis of the spirit of Article 74, paragraph 4, of the Rules of Court.

One, unwillingly, acquires the impression that for the Court in this particular case the indication of any provisional measures whatever has been *terra prohibita*. *Exempli causa*, the Court, in paragraph 19 of the Order, says that it:

> "deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law including humanitarian law",

or, in paragraph 49 of the Order, that the Parties: "should take care not to aggravate or extend the dispute", and it is obvious that both the above pronouncements of the Court have been designed within the model of general, independent provisional measures.

III. Jurisdictional Issues

Jurisdiction of the Court Ratione Personae

8. The membership of Federal Republic of Yugoslavia in the United Nations is in the present case one of the crucial issues within the jurisdiction of the Court *ratione personae*.

The respondent State, when referring to the United Nations resolution 777 (1992) of 19 September 1992 and to the United Nations General Assembly resolution 47/1 of 22 September 1992, also contends that "the Federal Republic of Yugoslavia cannot be considered, as it claims, to be the continuator State of the former Socialist Federative Republic of Yugoslavia", and that, not having duly acceded to the Organization, it is not a Member thereof, is not a party to the Statute of the Court and cannot appear before the Court.

It is worth noting that the respondent State did not invoke this argument with respect to the Genocide Convention as another basis of juris-

diction invoked by the Applicant, although the connection between the legal identity and continuity of the Federal Republic of Yugoslavia with the status of the Contracting Party of the Genocide Convention is obvious (see para. 12, below). One can guess the reasons for the State to take such a position.

Sedes materiae the question of Federal Republic of Yugoslavia's membership in the United Nations can be reduced to a couple of qualifications:

8.1. *General Assembly resolution 47/1 was adopted for pragmatic, political purposes*

The adoption of that resolution cannot, in my opinion, be divorced from the main political stream taking place in international institutions during the armed conflict in the former Yugoslavia. It appears that as a political body the General Assembly of the United Nations, as well as the Security Council which recommended that the Assembly adopt resolution 47/1, perceived such a resolution as one of political means to achieve the desirable solution to the relevant issues in the crisis unfolding in the former Yugoslavia.

Such a conclusion relies on the fact that in adopting resolution 47/1, the General Assembly basically followed the opinions of the so-called Badinter Commission engaged as an advisory body in the work of the Conference on Yugoslavia with the aim of finding a peaceful solution to the relevant issues. In its Opinions No. 1 and No. 8, the Commission elaborates the point on territorial changes in the former Yugoslavia which has, in its opinion, resulted in the emergence of six equal, independent State entities corresponding in territory to the Republics as the constituent parts of the Yugoslav Federation. In its Opinion No. 9 the Commission proceeds from the point of finalization of the "process of break up of SFRY" and elaborates on the effects of the alleged break up from the standpoint of succession of States. In that context, it, *inter alia*, established

> "the need to terminate SFRY's membership status in international organizations in keeping with their statutes and that not a single successor state may claim for itself the rights enjoyed until then by the former SFRY as its member state" (The Peace Conference on Yugoslavia, Arbitration Commission, Opinion No. 9, para. 4).

Introducing draft resolution 47/L.1, Sir David Hannay (United Kingdom) said, *inter alia*,

> "the fact that the Council is ready to consider the matter again within the next three months is significant. The tragic situation in the former Yugoslavia is a matter of the highest concern to all members of the international community. The International Conference on

the Former Yugoslavia, which opened in London on 26 August and which now meets in Geneva, brings together the efforts of the United Nations and the European Community. *We must do everything in our power to encourage the parties, with the assistance of the Conference Co-Chairman, to settle their differences at the negotiating table, not on the battlefield. That the Council has decided to consider the matter again before the end of the year will, we trust, be helpful incentive to all the parties concerned, as an effective means of supporting the Co-Chairman of the Conference on Yugoslavia in their heavy task.*" (United Nations doc. A/47/Pv.7, p. 161; emphasis added).

8.2. *From a legal aspect, resolution 47/1 is inconsistent and contradictory*

The operative part of resolution 47/1 reads as follows:

"*The General Assembly*,

1. *Considers* the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and, therefore, decides that the Federal Republic of Yugoslavia should apply for membership in the United Nations and shall not participate in the work of the General Assembly."

The main elements of the solution in General Assembly resolution 47/1 are the following:

The opinion that the Federal Republic of Yugoslavia cannot automatically continue the membership of the SFRY in the United Nations. The stand of the main political bodies of the United Nations (the Security Council and the General Assembly) was formulated in terms of an "opinion"; namely, such a conclusion clearly stems from the fact that the relevant part of General Assembly resolution 47/1 begins with the words "considers". It is significant to note that the General Assembly's opinion does not conform fully with the meaning of the Opinions Nos. 1, 8 and 9 of the so-called Badinter Arbitration Commission. Namely, in its Opinions 1 and 8 the Commission elaborates the point on the break up of SFRY which has, in its opinion, resulted in the emergence of six equal, independent State entities corresponding in territory to the Republics as the constituent parts of the Yugoslav Federation. Resolution 47/1 proceeds from a more moderate starting point. It apparently does not terminate the Federal Republic of Yugoslavia's membership in the Organization. It simply establishes that "the Federal Republic of Yugoslavia cannot *automatically continue the membership* . . . in the United Nations Organization" (emphasis added). *A contrario*, this means that the Federal Republic of Yugoslavia's membership in the Organization can be

continued but not automatically. True, the resolution does not elaborate how that can be achieved but, if we interpret it systematically and together with Security Council resolutions 757 and 777, we will come to the conclusion that the Federal Republic of Yugoslavia's membership in the Organization can be continued in case such a request is "generally accepted". That the legal meaning of the resolution does not imply the termination of the Federal Republic of Yugoslavia's membership in the Organization is also clear from the letter of the Under-Secretary-General and Legal Counsel of the United Nations addressed on 29 September 1992 to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and Croatia in which he stated, *inter alia*,

> "the resolution does not terminate nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and the nameplate remain as before . . . Yugoslav mission at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia."

8.3. *A ban on participation in the Organization's work*

That the relevant part of the resolution refers to a ban is borne out by the use of the imperative wording ("shall not participate"). This ban is, *ratione materiae*, limited along two different lines:

(a) it refers to the direct participation in the General Assembly. Indirect participation in the work of the General Assembly is not excluded. Elements of indirect participation are implied given that the Mission of the Federal Republic of Yugoslavia to the United Nations continues to operate and, in particular, "may receive and circulate documents". It follows from the Under-Secretary-General's interpretation that the term "General Assembly" has been used in the resolution in its generic sense, considering that it also includes the auxiliary bodies of the General Assembly and conferences and meetings convened by the Assembly;

(b) the ban does not apply to participation in the deliberations of other bodies in the United Nations Organization.

8.4. *The decision that the Federal Republic of Yugoslavia should apply for membership*

This part of resolution 47/1 is legally ambiguous and contradictory both in form and in substance.

From the formal point of view, the "decision" that the Federal Republic of Yugoslavia should apply for membership in the Organization proceeds from the irrefutable assumption that the Federal Republic of Yugoslavia wishes to have the status of a member even if it may not continue the membership in the Organization. Such an assumption is illogical, although it may prove correct in fact. Membership in the Organization is voluntary and therefore no State is under obligation to seek admission. The relevant wording in the resolution has not been correctly drafted from a legal and technical point of view for it has a connotation of such an irrefutable assumption. A correct wording would have to state a reservation which would make such a decision conditional upon Yugoslavia's *explicitly expressed wish* to become a member in case it is irrevocably disallowed from continuing its membership in the Organization.

From the actual point of view, it is unclear why the Federal Republic of Yugoslavia should submit an application for membership if "the resolution does not terminate . . . Yugoslavia's *membership* in the Organization". An application for admission to membership is, *ex definitione*, made if a non-member State wishes to join the Organization. What could in terms of concrete relations be the outcome of a procedure initiated by Yugoslavia by way of application for membership? If the outcome of the procedure were admission to membership, such a decision by the General Assembly would be superfluous from the point of view of logic, given that resolution 47/1 has not terminated Yugoslavia's membership in the Organization. Presumably, the authors of resolution 47/1 have another outcome in mind. Maybe to confirm or to strengthen Yugoslavia's membership in the Organization by such a procedure. This could be guessed from the wording in the resolution which says that "the Federal Republic of Yugoslavia cannot automatically continue the membership". This term or phrase literally means that the idea behind the procedure would be to re-assert or strengthen the Federal Republic of Yugoslavia's membership in the Organization but, confirmation of membership could hardly have any legal meaning in this particular case — for a State is either a member or not. It appears that the meaning of such an act could be only non-legal; namely, political. Finally, the resolution advises the Federal Republic of Yugoslavia to apply for admission to membership. The logical question arises: why would a State whose membership in the Organization has, in that very same Organization's view, not been terminated, submit a request for the establishment of something that is in the nature of an indisputable fact?

Finally, due regard should be paid to the concluding paragraph of resolution 47/1 which says that the General Assembly takes note "of the Security Council's intention to review the matter before the end of the main part of the 47th Session of the General Assembly". A statement like this is unnecessary if it was the intention of the authors of the resolution to bring, by its adoption, to an end the debate on the continuity of the

Federal Republic of Yugoslavia's membership in the Organization. It seems to suggest that the idea behind resolution 47/1 was to maintain the pace of updating the Organization's political approach to the Yugoslav crisis in the framework of which even the question of the Federal Republic of Yugoslavia's membership in the Organization carries, in the latter's opinion, a certain specific weight. The question of the Federal Republic of Yugoslavia's membership in the United Nations Organization is a formal one and was opened by Security Council resolution 757 of 30 May 1992, which in its operative part has set into motion the mechanism of measures stipulated in Chapter VII of the United Nations Charter relying on the assessment that "the situation in Bosnia-Herzegovina and in other parts of the former Socialist Federal Republic of Yugoslavia poses a threat to peace and security".

It is not difficult to agree with Professor Higgins (as she then was) that, judged from the legal point of view, the consequence arising out of resolution 47/1 "is abnormal to absurdity" (Rosalyn Higgins, "The United Nations and the Former Yugoslavia", *International Affairs*, Vol. 69, p. 479).

8.5. *The practice of the Organization relating to the issues raised by the content of resolution 47/1*

A couple of relevant facts regarding the practice of the Organization concerning membership of the Federal Republic of Yugoslavia raise the question of whether the Organization acted *contra factum proprium* if:

(a) resolution 47/1 was adopted at the 47th Session of the General Assembly. The delegation of the Federal Republic of Yugoslavia took an active part as a full member in the proceedings of the 46th Session, and the Credentials Committee unanimously recommended approval of the credentials of the Federal Republic of Yugoslavia (United Nations doc. A/46/563, dated 11 October 1991). In the light of the fact that Croatia and Slovenia had seceded from Yugoslavia on the eve of that Session, the Organization's attitude to the Federal Republic of Yugoslavia's participation in the 46th Session means that the Organization accepted the Federal Republic of Yugoslavia as a territorially diminished predecessor State according to

> "criteria laid down in the wake in the partitioning of India in 1947 and consistently applied ever since — criteria that by and large have served the United Nations and the international community well over the past decades" (Yehuda Z. Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break?", *American Journal of International Law* (1992), Vol. 86, p. 833);

(b) the delegation of the Federal Republic of Yugoslavia also took part in the 47th Session of the General Assembly which adopted the resolution contesting the right of Federal Republic of Yugoslavia to continue automatically membership in the Organization. Not one delegation made any objection to the delegation of Federal Republic of Yugoslavia taking the seat of SFRY in the General Assembly. It follows from that that the delegations had "at least tacitly accepted the right of the 'Belgrade authorities' to request Yugoslavia's seat — the seat of one of the founding members of the United Nations" (Blum, *op. cit.*, p. 830);

(c) during all the time since the General Assembly passed resolution 47/1, the Federal Republic of Yugoslavia has continued to pay its financial contributions to the Organization (see Annexes to CR 99/25). Yugoslavia is mentioned as a Member State in the document entitled "Status of contributions to the United Nations regular budget as at 30 November 1998" published by the United Nations Secretariat in its document ST/ADM/SER.B/533 of 8 December 1998. In the letter addressed to Vladislav Jovanović, Chargé d'Affaires of the Permanent Mission of the Federal Republic of Yugoslavia to the United Nations, the competent authorities of the Organization cited Article 19 of the United Nations Charter and accompanied the citation with the formulation:

> "in order for your Government not to fall under the provisions of Article 19 of the Charter during any meetings of the General Assembly to be held in 1998, it would be necessary that a minimum payment of $11,776,400 be received by the Organization to bring such arrears to an amount below that specified under the terms of Article 19" *(ibid.)*;

(d) in the practice of the United Nations Secretary-General as the depositary of multilateral treaties, Yugoslavia figures as a party to the multilateral treaties deposited with the Secretary-General as an original party. The date when the SFRY expressed its consent to be bound is mentioned as a day on which Yugoslavia is bound by that specific instrument. *Exampli causa* in the "multilateral treaties deposited with the Secretary-General" for 1992, and in the list of "participants" of the Convention on the Prevention and Punishment of the Crime of Genocide, Yugoslavia is included and 29 August 1950 is mentioned as the date of the acceptance of the obligation — the date on which SFRY ratified that Convention. Such a model is applied, *mutatis mutandis*, to other multilateral conventions deposited with the Secretary-General of the United Nations.

On the basis of existing practice, the "Summary of practice of the Secretary-General as depositary of multilateral treaties" concludes:

> "[t]he independence of the new successor State, which then exercises its sovereignty on its territory, is of course without effect as concerns the treaty rights and obligations of the predecessor State as concerns its own (remaining) territory. Thus, after the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory. The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations . . . was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State." (ST/LEG.8, p. 89, para. 297.)

On 9 April 1996, on the basis of protest raised by a few Members of the United Nations, the Legal Counsel of the United Nations issued under "Errata" (doc. LLA41TR/220) which, *inter alia*, deleted the qualification of the Federal Republic of Yugoslavia as a predecessor State contained in paragraph 297 of the "Summary". In my view, such a deletion is devoid of any legal relevance since a "Summary" by itself does not have the value of an autonomous document, a document which determines or constitutes something. It is just the condensed expression, the external lapidary assertion of a fact which exists outside it and independently from it. In that sense, the Introduction to the "Summary of the practice of the Secretary-General as the depositary of multilateral treaties" says, *inter alia*, that "the purpose of the present summary is to highlight the main features of the *practice followed* by the Secretary-General in this field" (p. 1, emphasis added) but not to constitute the practice itself.

9. As regards the membership of the Federal Republic of Yugoslavia of the United Nations, the Court takes the position that

> "Whereas, in view of its finding in paragraph 30 above, the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (Order, para. 33).

The Court retained the position of an ingenious but, for the purposes of the present proceedings, unproductive *elegantiae juris processualis*. The

Court's jurisdiction *ratione personae* is directly dependent on the answer to the question whether the Federal Republic of Yugoslavia can be considered to be a member State of the United Nations, both vis-à-vis the optional clause and vis-à-vis the Genocide Convention.

It would of course be unreasonable to expect the Court to decide on whether or not the Federal Republic of Yugoslavia is a Member of the United Nations. Such an expectation would not be in accord with the nature of the judicial function and would mean entering the province of the main political organs of the world Organization — the Security Council and the General Assembly.

But it is my profound conviction that the Court should have answered the question whether the Federal Republic of Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely, the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. That is the import of resolution 47/1 *ratione materiae*. And nothing beyond that. In that respect the position of the Court is identical to the position of other organs of the United Nations. *A contrario* there would, *exempli causa*, be no need for a General Assembly recommendation by resolution 47/229 concerning the participation of the Federal Republic of Yugoslavia in the work of the Economic and Social Council. In other words, resolution 47/1 makes no mention, explicitly or tacitly, of the International Court of Justice; the same is true of the other documents adopted on the basis of the above-mentioned resolution. It follows from this that General Assembly resolution 47/1 has produced no effect on the status of the Federal Republic of Yugoslavia as a party to the Statute and this is confirmed, *inter alia*, by all issues of the *Yearbook* of the International Court of Justice since 1992.

I am equally convinced that, both the content of the resolution, which represents *contradictio in adiecto*, and the particular practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

10. The position of the Court with respect to the Federal Republic of Yugoslavia membership of the United Nations can be said to have remained within the framework of the position taken in the Order on the indication of provisional measures in the *Genocide* case of 8 April 1993.

Paragraph 18 of that Order states:

> "Whereas, while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the

> United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 14).

The objection may be raised that the wording of paragraph 18 is of a technical nature, that it is not a relevant answer to the question of Federal Republic of Yugoslavia membership of the United Nations; however, it is incontestable that it has served its practical purpose because, it seems,

> "the Court was determined to establish its jurisdiction in this case *[Application of the Convention on the Prevention and Punishment of the Crime of Genocide]* whilst at the same time avoiding some of the more delicate, and indeed profound, concerns about the position of the respondent State vis-à-vis the Charter and Statute" (M. C. R. Craven, "The Genocide Case, the Law of Treaties and State Succession", *British Year Book of International Law*, 1997, p. 137).

The Court tacitly persisted in maintaining this position also in the further requests for the indication of provisional measures (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 13 September 1993*), as well as in the Judgment on preliminary objections of 11 July 1996.

Even if such a position can be considered to be understandable in the second proceedings for the indication of provisional measures, it nevertheless gives rise to some complicated questions in the proceedings conducted in the wake of the preliminary objections raised by Yugoslavia.

In these proceedings, the Court was confronted, *inter alia*, also with the question as to whether Yugoslavia is a party to the Genocide Convention. It is hardly necessary to mention that the status of a Contracting Party to the Genocide Convention was *conditio sine qua non* for the Court to proclaim its jurisdiction in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.

The Court found that it has jurisdiction *ratione personae*, supporting this position, in my opinion, with a shaky, unconvincing explanation (see dissenting opinion of Judge Kreća, *I.C.J. Reports 1996 (II)*, pp. 755-760, paras. 91-95). For the purposes of this case, of particular interest is the position of the Court "that it has not been contested that Yugoslavia was party to the Genocide Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17). The absence of contest was the decisive argument for the Court to state that "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case" *(ibid.)*.

The Court has, deliberately, I presume, failed to state who did not contest that Yugoslavia is a party to the Genocide Convention. If it had in mind the Applicant (Bosnia and Herzegovina), it is hardly necessary to note that the State which is initiating proceedings before the Court would not deny the existence of the title of jurisdiction; and, in the case in question, the Genocide Convention was the only possible ground of the Court's jurisdiction. If, however, the Court had third States in mind, then things do not stand as described by the Court, stating that "it has not been contested". By refusing to recognize the Federal Republic of Yugoslavia and its automatic continuation of membership of the United Nations, the member States of the world Organization contested *eo ipso* that the Federal Republic of Yugoslavia is automatically a party to multilateral treaties concluded under the aegis of the United Nations and, consequently, also a party to the Genocide Convention. The Federal Republic of Yugoslavia can be considered to be a party to the Genocide Convention only on the grounds of legal identity and continuity with the Socialist Federal Republic of Yugoslavia because, otherwise, it constitutes a new State, and it did not express its consent to be bound by the Genocide Convention in the manner prescribed by Article XI of the Convention, nor did it send to the Secretary-General of the United Nations the notification of succession. A *tertium quid* is simply non-existent, in particular from the standpoint of the Judgment of 11 July 1996 in the *Genocide* case, in which the Court did not declare its position on the so-called automatic succession in relation to certain multilateral treaties (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 612, para. 23).

All in all, the Court in the present Order remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case".

Such is the Court's restraint with respect to this highly relevant issue and its reluctance to make its position known may well create the impression quite differently from that expressed by Craven in regard to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case — that "the Court was determined to establish its jurisdiction [over the] case whilst at the same time avoiding some of more delicate, and indeed profound, concerns about the position" of Yugoslavia vis-à-vis the Charter and the Statute and its inevitable legal consequences upon proceedings pending before the Court.

Jurisdiction of the Court Ratione Materiae

11. I am of the opinion that in the matter in hand the Court's position is strongly open to criticism.

The Court finds:

> "whereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26)" (Order, para. 40).

The intent is, without doubt, the subjective element of the being of the crime of genocide as, indeed, of any other crime. But, this question is not and cannot, by its nature, be the object of decision-making in the incidental proceedings of the indication of provisional measures.

In this respect, a reliable proof should be sought in the dispute which, by its salient features, is essentially identical to the dispute under consideration — the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.

In its Order on the indication of provisional measures of 8 April 1993, in support of the assertion of the Respondent that, *inter alia*, "it does not support or abet in any way the commission of crimes cited in the Application . . . and that the claims presented in the Application are without foundation" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 21, para. 42), the Court stated:

> "Whereas the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision" (*ibid.*, p. 22, para. 44)

and

> "Whereas the Court is not called upon, for the purpose of its decision on the present request for the indication of provisional measures, now to establish the existence of breaches of the Genocide Convention" (*ibid.*, para. 46).

The rationale of provisional measures is, consequently, limited to the preservation of the respective rights of the parties *pendente lite* which are the object of the dispute, rights which may subsequently be adjudged by

the Court. As the Court stated in the *Land and Maritime Boundary between Cameroon and Nigeria* case:

> "Whereas the Court, in the context of the proceedings concerning the indication of provisional measures, cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments, if appropriate, in respect of the merits, must remain unaffected by the Court's decision" (*Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, para. 43).

12. Fundamental questions arise regarding the position of the Court on this particular matter.

The relationship between the use of armed force and genocide can be looked upon in two ways:

(a) is the use of force *per se* an act of genocide or not? and,

(b) is the use of force conducive to genocide and, if the answer is in the affirmative, what is it then, in the legal sense?

It is incontrovertible that the use of force *per se et definitione* does not constitute an act of genocide. It is a matter that needs no particular proving. However, it could not be inferred from this that the use of force is unrelated and cannot have any relationship with the commission of the crime of genocide. Such a conclusion would be contrary to elementary logic.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide defines the acts of genocide as

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *(d)* Imposing measures intended to prevent births within the group;
> *(e)* Forcibly transferring children of the group to another group."

Any of these acts can be committed also by the use of force. The use of force is, consequently, one of the possible means of committing acts of genocide. And, it should be pointed out, one of the most efficient means, due to the immanent characteristics of armed force.

Extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to

"inflicting on the group conditions of life" bringing about "its physical destruction".

Of course, it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For, the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of a precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of the State.

Of course, to be able to speak about genocide it is necessary that there is an intent, namely, of "deliberately inflicting on the group conditions of life" bringing about "its physical destruction in whole or in part".

In the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of intensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

The Court took just such a position in the Order of 8 April 1993 on the indication of provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.

Paragraph 44 of that Order stated:

> "Whereas the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention as requiring the indication of provisional measures, but cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision" (*I.C.J. Reports 1993*, p. 22).

The question of "intent" is a highly complicated one. Although the intent is a subjective matter, a psychological category, in contemporary criminal legislation it is established also on the basis of objective circumstances. Inferences of intent to commit an act are widely incorporated in legal systems. *Exempli causa*, permissive inferences as opposed to a mandatory presumption in the jurisprudence of the United States of America may be drawn even in a criminal case.

In any event, there appears to be a clear dispute between the Parties regarding "intent" as the constitutive element of the crime of genocide.

The Applicant asserts that "intent" can be presumed and, on the other hand, the Respondent maintains that "intent", as an element of the crime of genocide, should be clearly established as *dolus specialis*. Such a confrontation of views of the Parties concerned leads to a dispute related to "the interpretation, application or fulfilment of the Convention", including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention.

13. At the same time, one should have in mind that whether "in certain cases, particularly that by the infliction of inhuman conditions of life, the crime may be perpetrated by omission" (Stanislas Plawski, *Etude des principes fondamentaux du droit international pénal*, 1972, p. 115. Cited in United Nations doc. E/CN.4/Sub.2/415 of 4 July 1978).

Since,

> "Experience provides that a state of war or a military operations régime gives authorities a convenient pretext not to provide a population or a group with what they need to subsist — food, medicines, clothing, housing . . . It will be argued that this is inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." (J. Y. Dautricourt, "La prévention du génocide et ses fondements juridiques", *Etudes internationales de psychosociologie criminelle*, Nos. 14-15, 1969, pp. 22-23. Cited in United Nations doc. E/CN.4/Sub.2/415 of 4 July 1978, p. 27.)

Of the utmost importance is the fact that, in the incidental proceedings, the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of intensive bombing, there is an objective risk of bring about conditions in which the survival of the group is threatened.

Jurisdiction of the Court Ratione Temporis

14. The *ratione temporis* element of jurisdiction is considered by the Court to be the linchpin of its position regarding the absence of jurisdiction in this particular case. In its Order the Court states, *inter alia*:

> "Whereas it is an established fact that the bombings in question began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999; and whereas the Court has no doubt, in the light, *inter alia*, of the discussions at the Security Council meetings of 24 and 26 March 1999 (S/PV.3988 and 3989), that a 'legal dispute' (*East Timor (Portugal* v. *Australia)*,

I.C.J. Reports 1995, p. 100, para. 22) 'arose' between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole;

Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium" (Order, paras. 28 and 29).

It appears that such a stance of the Court is highly questionable for two basic reasons:

— firstly, for reasons of a general nature to do with jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other; and,
— secondly, for reasons of a specific nature deriving from the circumstances of the case in hand.

14.1. As far as the jurisdiction of the Court is concerned, it seems incontestable that a liberal attitude towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. The ground of such an attitude is the fact stressed by the Court almost regularly, so that:

"it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction;

. . . . . .

the[se] considerations . . . suffice to empower the Court to entertain the Request for interim measures of protection;

. . . . . .

the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*Anglo-Iranian Oil Co., Order of 5 July 1951, I.C.J. Reports 1951*, p. 93),

and

"on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case . . . it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection,*

Order of 17 August 1972, I.C.J. Reports 1972, p. 15, para. 15; and, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 33, para. 16).

It is hardly necessary to note that the formulation "need not . . . finally satisfy itself that it has jurisdiction on the merits of the case" relates to jurisdiction *in toto* and that, consequently, it includes also jurisdiction *ratione temporis*. The application of the above general attitude of the Court towards jurisdiction *ratione temporis* may be illustrated by two characteristic cases:

(a) In the disputes concerning *Lockerbie*, the Court established, *inter alia* that:

> "in the course of the oral proceedings the United States contended that the requested provisional measures should not be indicated because Libya had not presented a prima facie case that the provisions of the Montreal Convention provide a possible basis for jurisdiction inasmuch as the six-month period prescribed by Article 14, paragraph 1, of the Convention had not yet expired when Libya's Application was filed; and that Libya had not established that the United States had refused to arbitrate" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 122, para. 25),

and that,

> "in the context of the [proceedings in the *Lockerbie* case] on a request for provisional measures, [the Court] has, in accordance with Article 41 of the Statute, to consider the circumstances drawn to its attention as requiring the indication of such measures, but cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision" (*ibid.*, p. 126, para. 41).

(b) The question of jurisdiction of the Court *ratione temporis* in the proceedings for the indication of provisional measures also arose in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. In its Order on the request for the indication of provisional measures of 8 April 1993, the Court stated, *inter alia*:

> "Whereas the Court observes that the Secretary-General has treated Bosnia-Herzegovina, not as acceding, but as succeeding to

> the Genocide Convention, and if this be so the question of the application of Articles XI and XIII of the Convention would not arise; whereas however the Court notes that even if Bosnia-Herzegovina were to be treated as having acceded to the Genocide Convention, with the result that the Application might be said to be premature when filed, 'this circumstance would now be covered' by the fact that the 90-day period elapsed between the filing of the Application and the oral proceedings on the request (cf. *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34); whereas the Court, in deciding whether to indicate provisional measures, is concerned not so much with the past as with the present and with the future; whereas, accordingly even if its jurisdiction suffers from the temporal limitation asserted by Yugoslavia — which it does not now have to decide — this is not necessarily a bar to the exercise of its powers under Article 41 of the Statute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 16, para. 25).

As far as the nature of the proceedings for the indication of provisional measures is concerned, they are surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. That is why in the practice of the Court "prima facie jurisdiction" is almost uniformly referred to when the indication of provisional measures is involved. Although the explicit definition of "prima facie jurisdiction" is of course hard to find in the Court's jurisprudence, its constitutive elements are relatively easy to determine. The determinant "prima facie" itself implies that what is involved is not a definitely established jurisdiction, but a jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined *in concreto* as the "title of jurisdiction". Is reference to the "title of jurisdiction" sufficient *per se* for prima facie jurisdiction to be constituted? It is obvious that the answer to this question must be in the negative.

But, it could be said that the "title of jurisdiction" is sufficient *per se* to constitute prima facie jurisdiction except in case "the absence of jurisdiction on the merits is manifest" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 15, para. 15; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 33, para. 16).

In other words, in question is the case when absence of jurisdiction is obvious and manifest *stricto sensu*, i.e., when States try to use the Court in situations when there is no ground for jurisdiction whatsoever.

Well-established jurisprudence of the Court clearly shows that the absence of temporal element of jurisdiction of the Court, even if manifest, does not exclude jurisdiction of the Court if the temporal defect can be easily remedied.

In its Judgment on preliminary objections raised by Yugoslavia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* of 11 July 1996, the Court stated *inter alia*:

> "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy. Hence, in the case concerning the *Mavrommatis Palestine Concessions*, the Permanent Court said:
>
> 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.' (*P.C.I.J., Series A, No. 2*, p. 34.)
>
> The same principle lies at the root of the following *dictum* of the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*:
>
> 'Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.' (*P.C.I.J., Series A, No. 6*, p. 14.)
>
> The present Court applied this principle in the case concerning the *Northern Cameroons* (*I.C.J. Reports 1963*, p. 28), as well as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* when it stated: 'It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.' (*I.C.J. Reports 1984*, pp. 428-429, para. 83.)
>
> In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application

> was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26.)

The definitive and final establishment of the temporal element of jurisdiction in the proceedings for the indication of provisional measures is resisted, in addition to the nature of the proceedings as such, also by the nature of *ratione temporis* jurisdiction of the Court. Namely,

> "jurisdiction *ratione temporis* does not exist as an independent concept of the law governing international adjudication, and more specifically of the law governing the jurisdiction and competence of the Court. It is a dependent concept, giving rise to a particular problem of determining the nature and effect of that dependency on the personal or the material jurisdiction of the Court, as the case may be." (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, p. 583.)

14.2. Is it possible to argue that in the case in hand the reserve *ratione temporis* in the Yugoslav declaration of acceptance of compulsory jurisdiction of the Court is of such a nature that one could say that the "absence of jurisdiction on the merits" — is manifest?

There is no doubt that there exists a fundamental difference between the Parties concerning the qualification of the nature of the armed attack on the Federal Republic of Yugoslavia. The Respondent finds that two months of bombing and other acts aimed against the Federal Republic of Yugoslavia represent "a continued situation", an inextricable organic unity of a variety of acts, while Yugoslavia maintains that in question is a

> "breach of an international obligation . . . composed of a series of actions or omissions in respect of separate cases, [that] occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act" (*The International Law Commission's Draft Articles on State Responsibility, Part 1, Articles 1-35*, Art. 25 (2), p. 272).

In this respect, the Application has invoked Article 25 (2) of the Draft Articles on State Responsibility, prepared by the International Law Commission, which stipulates, *inter alia*, that:

> "the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated" *(ibid.)*.

This fundamental difference in the outlook on the armed attack on the Federal Republic of Yugoslavia, represents, legally speaking, "a disagreement over a point of law . . . a conflict of legal views or of interests between two persons" as defined in the *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

Consequently, in question is a dispute between the Parties, which is not, *per se*, a matter of jurisdiction, in particular not a matter of prima facie jurisdiction; however, the Court's decision on this dispute may have an effect on its jurisdiction *ratione temporis*.

The Court, faced by a dispute of this kind, theoretically had two options at its disposal:

(a) to resolve it *lege artis*. This possibility is, from the aspect of the Court's well-settled jurisprudence, only theoretical. Because we are dealing here with a matter which, as a rule, is not solved in the proceedings for the indication of provisional measures but in the procedure dealing with the merits of the case;

(b) to establish, as it has become customary for the Court, that there is a disagreement over a point of law, but that it

> "cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 126, para. 41).

However, the Court has chosen a third, and, in my opinion, the least acceptable solution. The Court did not enter into the resolution of the case in hand; moreover, it has not even determined its basic features, nor established that the dispute, by its nature, is not appropriate for being dealt with in the proceedings the main purpose of which is to preserve the rights of either Party, rights to be confronted at the merits stage of the case. But, it has simply accepted one of the conflicting legal views and thus made an interesting turnaround — by entering the sphere of interim judgment, without a formal judgment.

IV. Additional Ground of Jurisdiction

15. During the second day of the oral proceedings before the Court, the Applicant presented, vis-à-vis Belgium as the respondent State, an additional, new basis of jurisdiction; namely, Article 4 of the 1930

Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia, which reads:

> "All disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice unless the Parties agree in the manner hereinafter provided, to resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

In his presentation counsel of Belgium explained, systematically and in detail, both formal and substantive, reasons against establishing jurisdiction of the Court on the basis of Article 4 of the said Treaty.

The formal reason is associated with the time of the Applicant's invoking of the above Treaty as a basis of jurisdiction. Belgium, as the respondent State, finds that it has been submitted at a late stage in the proceedings "shortly before the close of the hearings" (CR 99/26, p. 3), and that, therefore, it is inadmissible.

The Court finds:

> "Whereas the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never before occurred in the Court's practice; whereas such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice; and whereas in consequence the Court cannot, for the purpose of deciding whether it may or may not indicate provisional measures in the present case, take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999." (Order, para. 44.)

Such a position of the Court is far from being tenable.

The position of the Court with respect to additional grounds seems well settled in the Court's jurisprudence. In its Judgment of 26 November 1984 in the *Nicaragua* case, the Court stated that:

> "The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified 'as far as possible' in the application. An additional ground of jurisdiction may however be brought to the

> Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans, I.C.J. Reports 1957*, p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173)." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, pp. 426-427, para. 80.)

The question of admissibility of additional grounds was considered by the Court also in the second request for the indication of provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.

By a second request filed in the Registry on 27 July 1993, Bosnia and Herzegovina requested that the Court indicate additional provisional measures. By letters dated 6 August, 10 August and 13 August 1993, the Agent of Bosnia and Herzegovina submitted that the Court's jurisdiction was grounded not only on the jurisdictional bases previously put forward but also on additional grounds.

In its Order of 13 September 1993, in paragraph 28, the Court concluded that:

> "for the purposes of a request for indication of provisional measures, it should therefore not exclude *a priori* such additional bases of jurisdiction from consideration, but that it should consider whether the texts relied on may, in all the circumstances, including the considerations stated in the decision quoted above, afford a basis on which the jurisdiction of the Court to entertain the Application might prima facie be established" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 339).

16. Consequently, it follows that, from the standpoint of the Court's jurisprudence, three conditions are essential for additional grounds to qualify as admissible:

(a) that the Applicant makes it clear that it intends to proceed upon that basis;

(b) that the result of invoking additional grounds is not to transform the dispute brought before the Court by the application into another dispute which is different in character; and

(c) that additional grounds afford a basis on which the jurisdiction of the Court to entertain the application might be prima facie established.

It is difficult to deny that all the three relevant conditions have concurred in the case in hand for additional grounds to be admissible.

The very fact that the Applicant invoked Article 4 of the Treaty of 1930, with reliance on the reserve regarding the right to amend the Application, offers *per se* sufficient ground for the conclusion that it intends to proceed upon that basis. Furthermore, in the request the Applicant clearly stated that in question is a Supplement to the Application against Belgium "for violation of the obligation not to use force", which implies that additional ground does not transform the dispute brought before the Court into another dispute which is different in character. (As an example of additional grounds objectively leading to the transformation of the dispute before the Court into another dispute which is different in character, one may mention grounds presented by Bosnia and Herzegovina in a second request for the indication of provisional measures filed with the Registry of the Court on 27 July 1993: namely, that it is difficult to prove that the 1919 Treaty concluded between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities or the

> "Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 341, para. 33)

are directly linked with the object of the dispute in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and do not transform the dispute brought before the Court into another one.)

And finally it seems to me to be indisputable that the 1930 Treaty was concluded and designed for the purpose of dealing with disputes which may arise between the Contracting Parties through "conciliation, judicial settlement and arbitration" *per definitionem* affords a basis on which the jurisdiction of the Court to entertain the Application may be established.

Accordingly, it remains to be established whether the Applicant invoked additional grounds *in extremis* at a late stage of the proceedings.

Article 38, paragraph 2, of the Rules of Court provides that "[t]he Application shall specify *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based" (emphasis added). The phrase "as far as possible" clearly indicates that the Application need not necessarily specify all the legal grounds upon which the jurisdiction of the Court is "said to be based". The jurisprudence of the Court, as may be seen from the cases referred to above, has been established in accordance with this, I would say, the only possible interpretation of Article 38, paragraph 2, of the Rules of Court.

Neither the Statute nor the Rules of Court contain provisions which, directly or indirectly, define what is an "early" or a "late" stage of the proceedings.

It is certain that the standpoints of litigating parties cannot *per se* be taken as a reliable and convincing criterion. Their perception of "the early or timely" and "late" is, quite understandably, burdened with subjectivism.

Hence, it seems necessary to resort to some, at least basically, objective criterion for the assessment of what is a "late stage of the proceedings".

From the aspect of the Rules of Court it may be contended that the "late or latest" stage of the proceedings coincides with the formal closure, at least when the proceedings for the indication of provisional measures are involved. Such an interpretation seems suggested by Article 74, paragraph 3, of the Rules of Court which, *inter alia*, provides that "[t]he Court shall receive and take into account any observations that may be presented to it *before the closure of the oral proceedings*" (emphasis added.) The broad, general formulation "any observations" implies that "observations" may be presented either orally or in written form.

Such a broadly conceived right of the parties in the proceedings for the indication of provisional measures, in particular when grounds for jurisdiction are in question, must be brought into correspondence with the essential need for the Court to find, within a short time-limit commensurate with the urgency of the proceedings, a satisfactory solution both with respect to prima facie jurisdiction and with respect to other relevant facts.

The imperative wording of the relevant provision does not allow departure. However, it is up to the Court to find a practical solution in each particular case, without derogating from the substance of this provision, a solution in which, in keeping with the fundamental equality of the parties, would make it possible for the other party to state its position with respect to the relevant matter — in this particular case with respect to additional grounds of jurisdiction.

In the case in hand the Court proceeded in this way, affording an opportunity for the party within the appropriate time-limit which corresponded to the time-limit in which the parties in the second round of hearing had to respond to the allegations of the parties submitted in the first round.

The argument used by the Court, *inter alia*, to vindicate the qualification that additional ground of jurisdiction, as contained in Article 4 of the Treaty of 1930, is inadmissible is nothing more than just a formal justification of convenience.

If one follows the logic that an action in a litigation is inadmissible just because the Court is confronted with it for the first time, then one might well presume that the Court, after being constituted in 1946, would have found itself commencing its function in an exceptionally difficult situa-

tion without previously having had the opportunity to familiarize itself with the course of the litigation and with the actions of the parties.

17. In addition to the formal question, questions of a substantive nature arise. The basic question of a substantive nature is whether the Federal Republic of Yugoslavia is a Contracting Party to the 1930 Treaty. The matter this time boils down to the qualification of the territorial changes which have occurred in the former Socialist Federal Republic of Yugoslavia and their consequences for the status of the Federal Republic of Yugoslavia.

In concreto, the matter may be viewed on several levels:

(a) if the Court has found that the Federal Republic of Yugoslavia is a Member of the United Nations irrespective of the basis and modalities of its position — whether from the standpoint of the proceedings before the Court or in general — then *ipso facto* it may be inferred that the Federal Republic of Yugoslavia is a Contracting Party to the Treaty of 1930, with reliance on the rule embodied in Article 35 of the Convention on the Succession of States with respect to international treaties which establishes that:

> "When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:
>
> *(a)* the States concerned otherwise agree;
>
> *(b)* it is established that the treaty related only to the territory which has separated from the predecessor State; or
>
> *(c)* it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation." (Vienna Convention on Succession of States in Respect of Treaties, Art. 35, United Nations Conference on Succession of States in Respect of Treaties, *Official Records*, Vol. III, p. 194.)

(b) if the Court has found that the Federal Republic of Yugoslavia cannot automatically continue the membership of the Socialist Federal Republic of Yugoslavia in the United Nations on the basis of General Assembly resolution 47/1, such a position of the Court need not necessarily lead to a conclusion that the Federal Republic of Yugoslavia is not a Contracting Party to the Treaty of 1930. The notions of "continuity of membership in the United Nations" and "legal identity and continuity" are not identical.

The automatic continuation of membership in the United Nations is, undoubtedly, one of the forms in which the legal continuity of a State

affected by territorial changes is expressed. However, it does not automatically follow from the above that the continuity of membership in the United Nations covers fully the notion of legal continuity of a State; namely, although it may be a very important component of legal continuity of a State, especially for political reasons, the membership in the United Nations taken *per se* can neither constitute that continuity nor nullify it. A State's membership in international organizations gives constitutional effect to the notion of continuity but only in company with other relevant elements to which it is organically linked. This refers in the first place to diplomatic relations and the status of a party to treaties in force.

By its conduct after the secession of the former Yugoslav federal units Belgium recognized, at least *de facto*, the legal identity and continuity of the Federal Republic of Yugoslavia. Namely, Belgium ranks among the group of countries which have *in continuo* and without any interruption in time at all continued to maintain diplomatic relations with the Federal Republic of Yugoslavia, relations which it had previously established and maintained in various periods of time with the former Socialist Federal Republic of Yugoslavia. Even when it recognized the seceded Yugoslav federal units as sovereign and independent States, and established diplomatic relations with them, Belgium did not, in the form of an instrument appropriate to inter-State relations, express an official, legally relevant, position to the effect that it considers the Federal Republic of Yugoslavia a new State and that it is bringing diplomatic relations in line in accordance with that fact.

Hence there follows the inevitable conclusion that Belgium knew or was obliged to know that the Treaty of 1930 is in force and that, consequently, it is binding on it. It is hard to believe that a State, as a professionally and intellectually highly organized international legal subject, is not aware of its rights and obligations.

Generally speaking, two assumptions are possible:

(a) that Belgium was not aware that the Treaty of 1930 is in force. If this assumption is correct, Belgium was mistaken with respect to its rights (error *in jus*). According to the general legal principle — *ignorantia legis nocet* — also embodied in the Law of Treaties (1969), such a mistake is irrelevant;

(b) Belgium was aware of the fact that the Treaty of 1930 was in force but, for some reasons, it did not disclose it in the proceedings before the Court. For practical purposes of the proceedings before the Court, the difference between assumptions under *(a)* and *(b)* is here "immaterial".

The position of the Court expressed in paragraph 44 of the Order is far from being acceptable.

By the clear and unambiguous indication in that regard of the wording of Article 74, paragraph 3, of the Rules of Court, the Court was under the obligation to receive and take into account observations of the Federal Republic of Yugoslavia which relates to the Treaty of 1930 as additional grounds of jurisdiction. Article 4 of the Treaty is a prima facie basis of the jurisdiction of the Court in the proceedings for the indication of provisional measures requested by the Applicant. The Court, pursuing the logic which it implemented in the *Genocide* case, need not have entered into the matter of succession of States.

In the second proceedings for the indication of provisional measures in the *Genocide* case, in connection with the contentions of Bosnia and Herzegovina as to the 1919 Treaty as a basis of jurisdiction, the Court concluded:

> "the Court will not have to pronounce on the question whether Articles 11 and 16 of the 1919 Treaty are still in force, nor on their interpretation; whereas the 1919 Treaty on the face of its text imposes an obligation on the Kingdom of the Serbs, Croats and Slovenes to protect minorities within its own territory; whereas accordingly, if, and in so far as, Yugoslavia is now bound by the 1919 Treaty as successor of that Kingdom, its obligations under it would appear to be limited to the present territory of Yugoslavia" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 340, para. 31).

In addition to the reasons associated with the consistency of the Court's jurisprudence in essentially identical situations, analogy in the present case derives also from the fact that the Treaty of 1930 may be considered as a treaty implementation of the general cogent obligation to settle disputes between the Contracting Parties in a peaceful way.

Even if the document in which the Applicant pointed to the Treaty of 1930 as additional grounds of jurisdiction were declared "inadmissible", the Court could not have ignored the fact that the Treaty exists. In that case, the Court could have differentiated between the document as such and the Treaty of 1930, *per se*, as a basis of jurisdiction. The more so, as the content of the Order seems to suggest a note of regret that, in the circumstances of undeniable urgency and irreparable damage, for reasons of a formal nature, the Court could not pronounce its jurisdiction.

But, as it stands now, it is reminiscent of a figure of speech devoid of substance.

V. Other Relevant Issues

18. In paragraph 16 of the Order the Court states:

> "Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia."

The phrasing of the statement seems to me unacceptable for a number of reasons. First, the formulation introduces dual humanitarian concern. The Court is, it is stated, "deeply concerned", while at the same time the Court states "the loss of life". So, it turns out that in the case of "all parts of Yugoslavia" the Court technically states "the loss of life" as a fact which does not cause "deep concern". Furthermore, the wording of the formulation may also be construed as meaning that Kosovo is not a part of Yugoslavia. Namely, after emphasizing the situation in Kosovo and Metohija, the Court uses the phrase "in all parts of Yugoslavia". Having in mind the factual and legal state of affairs, the appropriate wording would be "in all other parts of Yugoslavia". Also, particular reference to "Kosovo" and "all parts of Yugoslavia", in the present circumstances, has not only no legal, but has no factual basis either. Yugoslavia, as a whole, is the object of attack. Human suffering and loss of life are, unfortunately, a fact, generally applicable to the country as a whole; so, the Court, even if it had at its disposal the accurate data on the number of victims and the scale of suffering of the people of Yugoslavia, it would still have no moral right to discriminate between them. Further, the qualification that "human tragedy and the enormous suffering in Kosovo . . . form the background of the present dispute" not only is political, by its nature, but has, or may have, an overtone of justification of the armed attack on Yugoslavia. Suffice it to recall the fact that the respondent State refers to its armed action as humanitarian intervention.

It is up to the Court to establish, at a later stage of the proceedings, the real legal state of affairs, namely, the relevant facts. At the present stage, the question of the underlying reasons for the armed attack on the Federal Republic of Yugoslavia is the object of political allegations. While the Respondent argues that what is involved is a humanitarian intervention provoked by the "human tragedy and the enormous suffering", the Applicant finds that *sedes materiae* the underlying reasons are to be sought elsewhere — in the support to the terrorist organization in Kosovo and in the political aim of secession of Kosovo and Metohija from Yugoslavia.

Consequently, we are dealing here with opposed political qualifications

in which the Court should not, and, in my view, must not, enter except in the regular court proceedings.

19. The formulation of paragraph 50 of the Order leaves the impression that the Court is elegantly attempting to drop the ball in the Security Council's court. Essentially, it is superfluous because, as it stands now, it only paraphrases a basic fact that "the Security Council has special responsibilities under Chapter VII of the Charter". It can be interpreted, it is true, also as an appeal to the United Nations organ, specifically entrusted with the duty and designed to take measures in case of threat to the peace, breach of the peace or act of aggression; but, in that case the Court would need to stress also another basic fact — that a legal dispute should be referred to the International Court of Justice on the basis of Article 36, paragraph 3, of the United Nations Charter.

20. The Court, by using the term "Kosovo" instead of the official name of "Kosovo and Metohija", continued to follow the practice of the political organs of the United Nations, which, by the way, was also strictly followed by the respondent States.

It is hard to find a justifiable reason for such a practice. Except of course if we assume political opportuneness and involved practical, political interests to be a justified reason for this practice. This is eloquently shown also by the practice of the designation of the Federal Republic of Yugoslavia. After the succession of the former Yugoslav federal units, the organs of the United Nations, and the respondent States themselves, have used the term Yugoslavia (Serbia and Montenegro). However, since 22 November 1995, the Security Council uses in its resolutions 1021 and 1022 the term "Federal Republic of Yugoslavia" instead of the former "Federal Republic of Yugoslavia (Serbia and Montenegro)" without any express decision and in a legally unchanged situation in relation to the one in which it, like other organs of the United Nations, employed the term "Federal Republic of Yugoslavia (Serbia and Montenegro)". The fact that this change in the practice of the Security Council appeared on the day following the initialling of the Peace Agreement in Dayton gives a strong basis for the conclusion that the concrete practice is not based on objective, legal criteria but rather on political criteria.

By using the word "Kosovo" instead of the name "Kosovo and Metohija", the Court, in fact, is doing two things:

(a) it gives in to the colloquial use of the names of territorial units of an independent State; and

(b) it ignores the official name of Serbia's southern province, a name embodied both in the constitutional and legal acts of Serbia and of the Federal Republic of Yugoslavia. Furthermore, it runs contrary to the established practice in appropriate international orga-

nizations. *Exempli causa*, the official designation of the southern Serbian province "Kosovo and Metohija" has been used in the Agreement concluded by the Federal Republic of Yugoslavia and the Organisation for Security and Co-operation in Europe (*International Legal Materials*, 1999, Vol. 38, p. 24).

Even if such a practice — which, in my opinion, is completely inappropriate not only in terms of the law but also in terms of proper usage — could be understood when resorted to by entities placing interest and expediency above the law, it is inexplicable in the case of a judicial organ.

21. A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 19 and 48 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law (see dissenting opinion of Judge Kreća in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II)*, pp. 774-775, para. 108).

On the other hand, it seems that in this Order the term "humanitarian law" has been used with a different meaning, more appropriate to the generally accepted terminology. The relevant passage in the Order should be mentioned precisely because of the wording of its paragraphs 19 and 48. The singling out of humanitarian law from the rules of international law which the Parties are bound to respect may imply low-key and timid overtones of vindication or at least of diminishment of the legal implications of the armed attack on the Federal Republic of Yugoslavia.

Humanitarian law, in its legal, original meaning implies the rules of *jus in bello*. If, by stressing the need to respect the rules of humanitarian law, which I do not doubt, the Court was guided by humanitarian considerations, then it should have stressed *expressis verbis* also the fundamental importance of the rule contained in Article 2, paragraph 4, of the Charter, which constitutes a dividing line between non-legal, primitive international society and an organized, *de jure*, international community.

(Signed) Milenko KREĆA.