

## DECLARATION OF JUDGE GAJA

While I agree with the Court's Order on all points, I feel that some further explanation should be given for the decision not to remove this case from the List.

Article 38, paragraph 5, of the Rules of Court states that a case should not be entered on the General List when the applicant State only relies on the possibility of *forum prorogatum* until the defendant State consents to the jurisdiction of the Court for the case. Should a case of this type nevertheless have been entered on the List, Article 38, paragraph 5, implies that it should be struck off. The same should apply when the applicant State relies on a jurisdictional basis that is manifestly inexistent. This has been done by the Court — rightly in my opinion — in the parallel Orders given in the cases *Legality of Use of Force (Yugoslavia v. Spain)* and *(Yugoslavia v. United States of America)*.

I come now to the situation in which the Applicant invokes a jurisdictional clause in a treaty, but has not shown that a reasonable connection exists between the dispute submitted to the Court and the treaty including the clause. This case seems to me analogous to the ones I have considered above only if no such connection could be established at subsequent stages of the proceedings. When on the contrary a reasonable connection may conceivably appear in the future, it would be too drastic a solution to remove the case from the List. The applicant State should therefore be given an opportunity to develop its position in a memorial — whether or not its arguments are meritorious.

As a matter of judicial policy, this way of proceeding seems preferable because it allows the Court to establish the truth of any allegation of a wrongful act as serious as genocide.

A starting point for this solution is that, as the majority of the Court held in the Judgment on the preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1996, p. 616, para. 32)*, the Genocide Convention imposes on States parties to it the obligation not to commit genocide. It appears to me clear that were State organs involved in genocide, the State would grossly infringe its obligation to prevent genocide as set out in Article I of the Convention.

(Signed) Giorgio GAJA.