DISSENTING OPINION OF JUDGE VERESHCHETIN

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the Parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu,* in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where, in my view, the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life amongst non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, I cannot concur with the inaction of the Court in this matter, although I concede that in some of the cases insti-

tuted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

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Apart from the considerations set out in the preceding general statement, I would like to clarify my position with regard to the Applications by Yugoslavia instituted against Belgium, Canada, the Netherlands and Portugal.

I have no doubt that the prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court does exist in respect of these States and, as far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

The arguments to the contrary advanced by the respondent States and upheld in the Orders of the Court rest upon two cornerstone propositions. The first concerns all of the four States recognizing the compulsory jurisdiction of the Court, the second relates only to Belgium and the Netherlands. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the wording of the *ratione temporis* reservation contained therein, allegedly does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction allegedly does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands. I cannot give my support to either of the above basic propositions, for the following reasons.

As concerns the interpretation of the Yugoslav declaration of acceptance of the Court's jurisdiction, the reasoning of the Court centres upon the time-limit in the reservation to the above declaration, which stipulates that Yugoslavia recognizes the jurisdiction of the Court "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". The wording of this reservation is said to exclude even the prima facie jurisdiction of the Court over the disputes submitted for the Court's resolution, since the disputes in question, as well as the situations and facts generating the disputes, arose at least one month before the filing of the Applications. It is also suggested that the text of the Yugoslav reservation deprives the Court of the plausible consensual element in the declarations made by the Applicant and by the Respondents which is indispensable for the indication of provisional measures. I cannot agree with such an interpretation of the Yugoslav declaration, on a number of grounds.

It has to be admitted that the wording of the Yugoslav declaration is

not without ambiguity and, strictly speaking, it excludes from the Court's consideration disputes, situations and facts which occurred before the so-called "critical date", i.e., 25 April 1999, when the declaration was signed. On this basis one cannot, however, conclude that each and every dispute presented for resolution by the Court in the separate Applications of Yugoslavia must be viewed by the Court as a single dispute or disputes which existed before 25 April 1999 or, for that matter, that the Court cannot consider situations and facts relating to these disputes which arose after that date.

After the beginning of the bombardment of Yugoslavia by the NATO military alliance the dispute as a whole was treated and is being treated at various political levels, including the United Nations Security Council, as a dispute between Yugoslavia and NATO or as a dispute between Yugoslavia and all the 19 member States of NATO. The resolution of this general political dispute transcends the scope of the Court's competence. The Court is dealing with the specific legal disputes of Yugoslavia with the individual respondent States. Each of these separate disputes may have the same origin but they became distinct bilateral legal disputes between individual States only after they had been presented as "the claim of one party . . . positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328). In the cases under consideration, it coincided with the filing of the Applications by Yugoslavia against ten individual States. This individualization of the disputes, which occurred after "the critical date", was recognized by the Court when it affirmed the right of those respondent States whose nationals were not permanently represented on the bench to appoint judges *ad hoc*.

From a different perspective, even after "the critical date" Yugoslavia has, with good reason, complained of a number of new major breaches of international law by the NATO States. Each of these alleged new major breaches, whose existence was denied by the NATO States, may be seen as constituting specific disputes between the Parties concerned, disputes which clearly occurred after 25 April 1999.

The possibility of distinguishing between a "dispute of a general nature" on the one hand, and "specific disputes" on the other, was admitted by the Court in one of its recent cases (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 21, para. 29). Nothing in the jurisprudence of the Court justifies the suggestion that a specific legal dispute between the Parties may not be considered by the

Court solely on the ground that it is linked with, or part of, a dispute excluded from the Court's jurisdiction.

Another ground on which I disagree with the majority is their complete disregard of the clear intention of Yugoslavia. Quite recently the Court had occasion to reiterate its position on the necessity to take into account the intention of a State making a declaration. In the *Fisheries Jurisdiction (Spain* v. *Canada)* case the Court interpreted the relevant words of the declaration in question "having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court" (*Judgment, I.C.J. Reports 1998*, p. 454, para. 49; see also *Temple of Preah Vihear, I.C.J. Reports 1961*, p. 31).

In its Orders in the present cases, the Court, by refusing to take into account the clear intention of Yugoslavia, has taken an approach to the Yugoslav declaration which could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

In relation to Belgium and the Netherlands, apart from the jurisdiction under Article 36, paragraph 2, of the Court's Statute, Yugoslavia invoked additional grounds of jurisdiction, namely the Convention on Conciliation, Judicial Settlement and Arbitration signed on 25 March 1930 by Yugoslavia and Belgium and the Treaty of Judicial Settlement, Arbitration and Conciliation signed on 11 March 1931 by Yugoslavia and the Netherlands.

Both instruments provide for the right of the parties, under certain conditions, to apply unilaterally to the Permanent Court of International Justice for the resolution of their disputes. Moreover, the Agreements stipulate that if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice "shall indicate within the shortest possible time the provisional measures to be adopted" (Art. 30 of the Convention between Belgium and Yugoslavia; Art. 20 of the Treaty between the Netherlands and Yugoslavia). Also, significantly, the Agreements provide that they "shall be applicable between the High Contracting Parties even though a third power has an interest in the dispute" (Art. 35 and Art. 21 respectively). Finally, the Agreements contain a clause whereby disputes relating to their interpretation shall be submitted to the Permanent Court of International Justice (Art. 36 and Art. 22 respectively).

In the course of the hearings, a number of objections were raised by the respondent States against reliance on these agreements by the Court in order to establish its jurisdiction. I propose to deal only with the principal objection finally upheld by the majority of the Court. It concerns the timing of the invocation by Yugoslavia of the additional bases of jurisdiction.

It will be noted that, in filing its Applications, Yugoslavia reserved the right to amend and supplement them. Such a reservation to an application instituting proceedings is standard, and in relation to grounds of jurisdiction has for a long time been interpreted by the Court as permitting the addition of a basis of jurisdiction, provided that the Applicant makes it clear that it intends to proceed upon that basis, and also provided that the result is not to transform the dispute brought before the Court by the Application into another dispute, different in character. The above approach to the additional grounds of jurisdiction is clearly expressed in the following pronouncements of the Court.

In the Judgment of 26 November 1984 in the *Nicaragua* case, the Court observed 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), Jurisdiction and Admissibility, I.C.J. Reports 1984,* pp. 426-427, para. 80.)

In its Order dated 13 September 1993 in the *Genocide* case, the Court pointed out that:

> "Whereas the Applicant cannot, simply by reserving 'the right to revise, supplement or amend' its Application or requests for provisional measures, confer on itself a right to invoke additional grounds of jurisdiction, not referred to in the Application instituting proceedings; whereas it will be for the Court, at an appropriate stage of the proceedings, to determine, if necessary, the validity of such claims; whereas however, as the Court has recognized, 'An additional ground of jurisdiction may . . . be brought to the Court's attention' after the filing of the Application,
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> 'and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis . . . 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 . . .' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80);
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> whereas the Court thus concludes 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, I.C.J. Reports 1993,* pp. 338-339, para. 28.)

In my view, the conditions set out by Article 38 of the Rules of Court and in its jurisprudence are fully satisfied in the present cases. The jurisprudence of the Court clearly shows that *for the purposes of a request for indication of provisional measures* additional grounds of jurisdiction may be brought to the Court's attention after filing of the Application. In such a case, the Court should be primarily concerned with determining objectively whether the additional grounds of jurisdiction "afford[s] a basis on which the jurisdiction of the Court to entertain the Application might prima facie be established".

The legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude *a priori* the additional basis of jurisdiction from its consideration, solely because the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents. It will also be recalled that it is for the Court to determine the validity of the new basis of jurisdiction, which at this stage of the proceedings may not and should not be decided conclusively.

The refusal of the majority to take into consideration the new bases of jurisdiction clearly goes contrary to Article 38 of the Rules of Court and

its jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the case-law of the Court and customary rules of interpreting legal instruments. In my view, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

(Signed) Vladlen S. VERESHCHETIN.