Le VICE-PRESIDENT, faisant fonction du président : La prochaine audience sera consacrée à l'affaire opposant la République fédérale de Yougoslavie et le Royaume d'Espagne. La composition du siège demeurera la même, M. Torres Bernárdez, juge *ad hoc* pour l'Espagne, venant se joindre à ses collègues. Quelques minutes seront nécessaires pour que le réagencement de la salle soit opéré. J'inviterai alors le juge *ad hoc* d'Espagne à nous rejoindre.

J'invite maintenant M. Torres Bernárdez, juge *ad hoc* pour l'Espagne, à venir prendre sa place sur le siège, afin d'entendre les conclusions de l'Italie dans l'affaire entre la République fédérale de Yougoslavie et le Royaume d'Espagne.

J'invite maintenant l'agent de l'Espagne, M. Giralda, à prendre la parole.

Mr. GIRALDA:

Mr. President, Members of the Court,

1. It is a great honour for me to appear before the Court as Agent of the Kingdom of Spain.

I appear because of the respect which my country has for the Court, but I regret that I have to do so, for the first time, in order to respond to an application and a request for the indication of provisional measures - in both cases presented totally by surprise - which are devoid of any legal basis and are designed solely to distract the attention of world public opinion from the contempt which the Federal Republic of Yugoslavia displays for the most elementary principles of international law.

Spain, alongside its NATO allies, has drawn attention more than once to the apprehension expressed by the Security Council in regard to the humanitarian catastrophe in Kosovo. The Security Council has declared that it is gravely concerned at "the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties"; it has reaffirmed "the right of all refugees and displaced persons to return to their homes in safety", and it has underlined "the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so". The Security Council has also asserted, acting under Chapter VII of the Charter of the United Nations, that the unresolved situation in Kosovo "constitutes a continuing threat to peace and security in the region" (see Security Council resolutions 1160, 1199 and 1203 (1998)).

The United Nations Secretary-General, Mr. Kofi Annan, has very cogently summed up these concerns, which cannot be disregarded if we are to comprehend the background to the case before us. The Secretary-General, referring to well-known cases of genocide, said the following in the Commission on Human Rights on 7 April 1999:

> "there are signs to indicate that we may be witnessing the same thing [remember that he is talking of genocide], yet again, in Kosovo.

No matter how much the international community says 'never again', every time, this kind of situation repeats itself. The odious campaign of *ethnic cleansing* waged systematically by the Serbian authorities in Kosovo appears to have a single aim: to expel or murder the largest possible number of Kosovars of Albanian stock, thereby depriving a people of its most fundamental rights to life, liberty and safety and creating a humanitarian catastrophe throughout the region." *[Translation by the Registry]*

Later, I intend to spell out my country's categorical objection to the Court's jurisdiction in regard to the Application submitted by the Federal Republic of Yugoslavia on 29 April 1999 and, consequently, to the

request for the indication of provisional measures.

The reasons why Spain considers that the Court does not have jurisdiction in the present case are very clear, very specific and very evident to any State which is acting in good faith, as all States are required to do in exercising their rights and complying with their obligations. I could confine myself to explaining those reasons but, if you will permit, I shall begin my intervention by emphasizing the specifically unlawful nature of the claim of the Federal Republic of Yugoslavia, which has no compunction in using the jurisdiction of this distinguished Court for purposes which can only be described as political propaganda. This is obviously an abuse of the rights which the international legal order places at the disposal of States by providing them with a supreme judicial authority for the peaceful settlement of their disputes. The Federal Republic of Yugoslavia is undoubtedly aware that it bases its Application on two grounds of jurisdiction which are manifestly inapplicable to the circumstances. What is more, it shows contempt for the Court by seeking a political advantage, and at the same time it infringes the most elementary rules of the process of international adjudication.

As an example of the lack of respect and absence of legal rigour underlying the submission of this Application, I should like to cite the following elements:

- First, the accusations contained in the Application are totally unreal and devoid of any factual basis. With clear exaggeration, we are charged with massive destruction, serious harm to the environment and even the use of prohibited weapons which Spain does not possess. Yet the other Party adduces no shred of evidence in support of what it asserts. There is not even any attempt to establish a relationship between cause and effect, and even less are there indications whereby these facts could be imputed to acts of the countries concerned, and of Spain in particular.

- Secondly, the declaration made under Article 36, paragraph 2, of the Statute establishes that the Federal Republic of Yugoslavia accepts the jurisdiction of the Court solely with regard to situations or facts subsequent to the date of signature of the declaration. That took place on 25 April 1999. But the acts to which the Application of the other Party refers are earlier than 25 April. What then is the new dispute which is submitted to the Court? It is clear that the terms of the declaration deposited by the Federal Republic of Yugoslavia exclude from the Court's jurisdiction the questions addressed by that State in its Application of 29 April, that is to say, four days later. Thus the sole purpose of the Application - political propaganda - comes clearly into view.

- Finally, it is evident that none of the treaties alleged by the Federal Republic of Yugoslavia to be so-called "legal grounds" for its Application provide an adequate basis for conferring jurisdiction on the Court. Quite simply, they are a lengthy list of instruments which have no application in the present case, among them the 1948 Convention on Free Navigation on the Danube, to which Spain is of course not a party.

2. Mr. President, Members of the Court, before I set forth the reasons why the Kingdom of Spain rejects the grounds of jurisdiction invoked by the Federal Republic of Yugoslavia, a word should be said about the reasons why, in our view, it is not appropriate in any event to indicate provisional measures in the present case. Article 41 of the Statute of the Court enables it to adopt such measures "if it considers that circumstances so require". The conditions which flow from this rule were stated by the Court in a recent decision:

> "Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency." (Case concerning *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 9 April 1998,* para. 35.)

Two principles necessarily connected with the present case can be deduced from the spirit of the conditions which I have just quoted:

Firstly, in regard to the request of the Federal Republic of Yugoslavia for the indication of provisional measures, consideration must be given to the exceptional nature which, generally speaking, such measures should possess. Provisional measures should not be adopted in circumstances in which they might be used as a subterfuge for obtaining a decision on the merits. As a distinguished Member of the Court has pointed out, "in recent cases . . . the applicant states appear to have aimed at obtaining interim judgments that would have affirmed their own rights and preshaped the main case" (Judge Oda, "Provisional Measures. The Practice of the International Court of Justice", *Fifty Years of the International Court of Justice*, p. 553).

Clearly, the Court cannot, I repeat, *cannot* indicate provisional measures unless it is assured beforehand that prima facie it has jurisdiction to do so. The Court pointed out as much, for example, in the case concerning *Passage through the Great Belt (Order of 29 July 1991)* and in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Order of 8 April 1993)*. This assurance naturally calls for the strictest possible examination, since such measures seriously affect the sovereignty of States and the nature of jurisdiction, and must therefore be utilized with caution and adopted only in properly founded cases. Moreover, the measures must be both urgent and necessary in order to safeguard the rights of the two Parties. In this respect, we believe that those two conditions should be assessed in their factual context and in the light of the consequences which the provisional measures requested by the other Party might have for the true victims of this conflict, namely, the Kosovar Albanian population, who have been displaced by force and subjected to massive violations of human rights. We have to ask ourselves whether the application of provisional measures might not in fact aggravate the situation and whether, far from contributing to the equilibrium contemplated by Article 41 of the Statute, when it speaks of "provisional measures . . . to preserve the respective rights of either party", it might not leave the Applicant at liberty to continue the violations which it is being sought to halt.

3. Mr. President, Members of the Court, the Federal Republic of Yugoslavia invokes grounds of jurisdiction which run counter to the character of the Court's jurisdiction. The principle - which flows from the sovereignty and equality of States - of the consensual or voluntary nature of that jurisdiction is laid down in Article 36 of the Statute and extends to "all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force". Paragraph 2, in conjunction with paragraph 3 of Article 36, establishes the principle of reciprocity when jurisdiction is accepted as compulsory *ipso facto* by virtue of a unilateral declaration. We shall see shortly that this principle has not been respected in the present case.

As I said at the start of my statement, there are precise reasons for deciding against the Court's jurisdiction in relation to the Application brought against the Kingdom of Spain, as well as the request to the Court for the indication of provisional measures. However, before explaining these, I should like to recall the position adopted by Spain on a preliminary issue. That is the question whether the Federal Republic of Yugoslavia has the status of a Member of the United Nations. If not, it is not a party to the Statute of the International Court of Justice, a status that derives *ipso facto* from membership of the United Nations, under Article 93, paragraph 1, of the Charter.

In resolution 777, adopted on 19 September 1992, the Security Council declared that it:

> "considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General Assembly".

Giving effect to this recommendation, on 22 September 1992 the General Assembly of the United Nations adopted resolution 47/1, which repeats in essence the terms of the resolution just quoted.

Spain, in line with the acceptance of this principle by the international community, takes the view that the Federal Republic of Yugoslavia cannot be considered, as claimed, the successor to the former Socialist Federal Republic of Yugoslavia, but rather as one of a number of different successor States. As the Federal Republic of Yugoslavia has not been formally admitted to membership, we consider that it is not a Member of the United Nations, is not therefore a party to the Statute of the Court and, as a result, has no right to appear before the Court.

4. Mr President, Members of the Court,

I should like now to turn to the two grounds of jurisdiction relied on by the opposing Party in its Application. I repeat that, as in the rest of the Application, these grounds are expressed in a vague way, not stating precisely the legal reasons why, according to the Federal Republic of Yugoslavia, they should apply to its relations with Spain. They read as follows:

> "The Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide."

As far as Article 36, paragraph 2, of the Statute of the International Court of Justice is concerned, it is sufficient to recall a known and public fact: on 29 October 1990, Spain deposited at the seat of the United Nations a unilateral declaration accepting the compulsory jurisdiction of the International Court of Justice, I quote:

> "in relation to any other State accepting the same obligation, on condition of reciprocity, in legal disputes not included among the following situations and exceptions:
>
> . . . . . .
>
> *(c)* disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court."

This limitation in relation to time is both precise and unequivocal and should not be a matter for either interpretation or doubt. *In claris non fit interpretatio.* The Court has held that a declaration under Article 36, paragraph 2, as a unilateral declaration: "should be interpreted as it stands, having regard to the words actually used" (*Anglo-Iranian Oil Co., I.C.J. Reports 1952*, p. 105).

More recently, in a case affecting my country directly, the Court held that:

> "The Court will . . . interpret the relevant words of a declaration . . . in a natural and reasonable way, having due regard to the intention of the State concerned . . ." *(Fisheries Jurisdiction (Spain* v. *Canada), Judgment, 4 December 1998.)*

Spain's intention in formulating its declaration could not have been clearer: it was done precisely to prevent applications of the type recently filed by the Federal Republic of Yugoslavia on the basis of a unilateral declaration whose sole aim is to ambush other States who have accepted the jurisdiction of the Court in good faith. Spain is one of many States which, using reservations like these *ratione temporis*, have protected themselves against such action, on the basis of the doctrine established by the Court in the *Corfu Channel* case (*I.C.J. Yearbook 1996-1997*, p. 223). Moreover, Spain's intentions are to be sought also in our declaration, taken as a whole, and in particular in paragraph 1 *(b)*, which contains an exception to jurisdiction in the case of a unilateral declaration referring to a specific dispute.

As a result, if one bears in mind the particular terms of the Spanish declaration and the fact that the declaration by the Federal Republic of Yugoslavia accepting the jurisdiction of the Court was made on 25 April 1999, that is four days before the institution of proceedings on 29 April 1999, it is clear that the condition in paragraph 1 *(c)* of our declaration, which limits Spain's acceptance of the jurisdiction of the Court, has not been met. It follows that the reciprocity to which the text of our declaration refers, as does Article 36 of the Statute, is missing. The Court therefore has no jurisdiction, even prima facie.

Finally, I must consider Article IX of the New York Convention of 1948 on the Prevention and Punishment of the Crime of Genocide, which refers to the Court disputes relating to its interpretation, application or fulfilment. This Article is also relied on by the Federal Republic of Yugoslavia in its Application as a basis for the Court's jurisdiction.

I completely agree with the views expressed on this issue by several of my colleagues representing other States, who have argued that the Court should not accept the applicant State's reliance on this Convention as a basis for

jurisdiction. Such reliance is clearly fraudulent and artificial and has no relevance to the present case or to the conduct of the Kingdom of Spain and its allies. The dispute here is not one about the application of the Convention, and it is evident that the request for provisional measures has not been conceived with the aim of safeguarding the rights protected by the Convention.

Moreover, there is no need to linger on this question, since, in the specific case of Spain, there exists a precise basis for excluding the Court's jurisdiction under Article IX. The instrument whereby Spain acceded to this Convention, deposited with the Secretary-General of the United Nations on 13 September 1968, stipulates that the Spanish Government accedes to the Convention "with a reservation in respect of the whole of Article IX" (Notification by the depositary: Doc. C.N.158.1968.TREATIES-1, 7 October 1968). This reservation having given rise to no objection by the opposing Party, that Article is inapplicable to the mutual relations between Spain and the Federal Republic of Yugoslavia. It cannot therefore be a basis for the jurisdiction, even prima facie, of the Court.

Additionally, I wish to state expressly that the Kingdom of Spain does not accept the jurisdiction of the Court under Article 38, paragraph 5, of the Rules.

Mr. President, as I have just explained, there is not the slightest sign, nor any plausible theory, why the Court should have jurisdiction prima facie. Nowhere is there any evidence that this essential requirement has been met. In order to request the indication of provisional measures, the Federal Republic of Yugoslavia should first have explained on what provision or provisions its claim was based. Why did it fail to provide these explanations and confine itself to a terse reference to the bases of jurisdiction? Simply because it knew in advance that its request for provisional measures had not the slightest basis in law. Further, it failed to take into account paragraph 1 *(c)* of the Spanish declaration, which limits its effect in time; it failed equally to take into account the reservation made by Spain concerning Article IX of the Genocide Convention; and it even failed to take into account the scope *ratione temporis* of its own declaration. All these elements permit us to characterize the procedure followed by the Federal Republic of Yugoslavia in relation to Spain as totally lacking in legal rigour and in the most elementary good faith.

For all of the reasons explained above, Mr. President, the Kingdom of Spain considers that the International Court of Justice has no jurisdiction to entertain the Application of the Federal Republic of Yugoslavia. In particular, the Court has no jurisdiction prima facie to indicate provisional measures.

In conclusion, the Kingdom of Spain respectfully requests the Court to:

1. Declare that the Court has no jurisdiction to adjudicate upon the Application filed by the Federal Republic of Yugoslavia;

2. Reject the request from the Government of the Federal Republic of Yugoslavia with a view to the indication of provisional measures in relation to the Kingdom of Spain;

3. Decide to remove this case from the General List of the Court.

Mr. President, Members of the Court, thank you for your kind attention.

Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Giralda. Le premier tour des audiences dans l'affaire relative à la *Licéité de l'emploi de la force (Yougoslavie c. Espagne)* est ainsi conclu. L'audience est suspendue jusqu'à 15 heures.

L'audience est levée à 13 h 10.