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 1988*, 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, 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-entioned 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*." *(Ibid.)*

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 Umweltbundesamt (UBA). 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 18 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 32 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. Absolute Nullity of the United States Reservation to Article IX of the Genocide Convention

8. In its Order, the Court accepts the assertion of the Respondent that the Court does not have jurisdiction over the Applicant's claim based on the Genocide Convention due to the fact that the United States entered a clear reservation to Article IX of the Genocide Convention. As the United States reservation requires specific consent before any case regarding genocide can be brought against it and as the United States does not consent to this particular case, relevant jurisdictional *nexus* in the Court's Order has not been met.

The reservation reads:

> "*Reservations:*
>
> '(1) That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted

to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.'

Understandings:

'(1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II.

(2) That the term "mental harm" in article II *(b)* means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.' " (*Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1997*, United Nations Publication ST/LEG/SER.E/16, p. 88.)

9. The first reservation of the United States with respect to Article IX of the Convention has been expressed *lege artis*. Article IX of the Convention is by its nature a procedural provision in regard to which the parties to the Convention act in accordance with the principle of the autonomy of will.

The matter becomes more complicated in respect of "understandings" contained therein. As a matter of law, it should be pointed out that, "understandings" are, *ex definitione*, a relevant form of expressing a reservation in the sense that a party to a treaty is giving a restrictive interpretation of its provision or of a part. For a reservation in a substantive sense presupposes not only the exclusion of application of a provision or

of a part of a treaty but also presupposes a restriction in its interpretation or application.

It clearly stems from Article 2, paragraph 1 *(d)*, of the Vienna Convention on the Law of Treaties, reading:

> "'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State" (*United Nations Conference on the Law of Treaties, First and Second Sessions, Official Records*, United Nations, 1971, p. 289).

In its Opinion of 28 May 1951, the Court pointed out that:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)." (*Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

In its Judgment of 11 July 1996 in the *Genocide* case, the Court stated "[i]t follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31).

It is obvious that the first and second of the "understandings" lodged by the United States are actually reservations incompatible with the object and purpose of the Genocide Convention (Jordan Paust, "Congress and Genocide: They're Not Going to Get Away with It", *Michigan Journal of International Law*, Vol. 11, 1989-1990, pp. 92-98).

Since:

> "At least Arts. II, III and IV of the Genocide Convention, which are agreed to codify customary international law, therefore represent *jus cogens*. This means that no derogation from these provisions is permissible, so long as the international community of States as a whole does not develop a new rule. Therefore, to the extent that any reservations to the Genocide Convention purport to derogate from

> the scope or nature of any State's obligations in respect of genocide, as set out in the core provisions of the Genocide Convention, those reservations would be void under the *jus cogens* doctrine." (M. M. Sychold, "Ratification of the Genocide Convention: The Legal Effects in Light of Reservations and Objections", *Schweizerische Zeitschrift für internationales und europäisches Recht*, 4/1998, p. 551.)

10. The norms of *jus cogens* are of an overriding character; thus, they make null and void any act, be it unilateral, bilateral or multilateral, which is not in accordance with them. Such a logical conclusion based on the peremptory or absolutely binding nature of *jus cogens* norms, expressing in the normative sphere the fundamental values of the international community as a whole, have been confirmed in the *North Sea Continental Shelf* cases. In those cases, the Court was faced with the contention that the "equidistance principle" contained in Article 6 of the 1958 Geneva Convention on the Continental Shelf had become *tractu temporis* a rule of customary international law. The Court in its Judgments said:

> "it is characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; — whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded." (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 38-39, para. 63.)

Leaving aside some conceptual confusion in this passage regarding the relation between rules of general international law and norms constituting *corpus juris cogentis*, it appears that the Court was quite clear that rules applying to purely conventional rules and obligations cannot be *per analogiat* applied to norms having the character of *jus cogens*.

The only possible way of excluding nullity effects in regard to the United States' reservation to Article IX of the Genocide Convention may lie in the interpretation that nullity affects only "understandings" and that it is has no legal consequences for the reservation itself.

Such an interpretation would run counter to the fundamental rule of inseparability of the acts, be it unilateral, bilateral or multilateral, conflicting with a norm belonging to *corpus juris cogentis*. In its commentary to Article 44 (5) of the Vienna Convention on the Law of Treaties, the International Law Commission stated unequivocally:

> "rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 239, para. 8).

As Sir Gerald Fitzmaurice pointed out:

> "there are the cases in which overriding rules of *ius cogens* produce a situation of irreducible obligation and demand that illegal action be ignored and not allowed to affect the obligations of other States" (G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1954-1959", 35 *British Year Book of International Law*, 1955, p. 122).

Accordingly, the overriding character of norms of *jus cogens* which are the very basis of the international community as a whole makes impossible separability of an act of the United States containing both reservations and "understandings" which are in conflict with the norm having a peremptory nature.

IV. 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:

> "and whereas the United States further contends that there is no 'legally sufficient . . . connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention'; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific intent required by the Convention to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such', which intent could not be inferred from the conduct of conventional military operations against another State." (Order, para. 22.)

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 con-

ditions 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.

V. Other Relevant Issues

14. In paragraph 15 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, un-

fortunately, 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.

15. The formulation of paragraph 33 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.

16. 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 organizations. *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.

17. A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 18 and 31 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 18 and 31. 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.