SEPARATE OPINION OF JUDGE LAUTERPACHT

OUTLINE

I. INTRODUCTION

1. Although I would in some respects (as will appear later) have preferred the Court to have gone into greater detail than it has, I have nonetheless felt able to vote in favour of the operative parts of the Court's Order. As the overall balance of the present opinion is essentially supportive, rather than contradictory, of the reasoning of the Court, it may more appropriately be called a separate than a dissenting opinion.

1. The Unprecedented Human Dimension of This Case

2. In the present proceedings the Court is confronted by a case with a human dimension of a magnitude without precedent in its history. This case is not to be compared with litigation relating to maritime or territorial limits, nor with assertions of State responsibility for denials of justice, wrongful expropriation or the destruction of an aircraft. Even such cases as those relating to *South West Africa* and to *Military and Paramilitary Activities in and against Nicaragua*, though involving the fundamental human rights and security of many individuals, cannot be likened in scale to the deliberate infliction of death, injury and dreadful personal suffering that has marked and continues to mark the present conflict in Bosnia-Herzegovina.

2. The Court's Concern with the Gravity and Urgency of the Case

3. So to describe the character of the present case is not to say that the Court should approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element — albeit one of the greatest importance — in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organized.

3. The Position of the Ad Hoc *Judge*

4. What is true for the Court as a whole is every bit as compelling for an *ad hoc* judge. The fact that he is appointed by a party to the case in no way

reduces the operative force of his solemn declaration under Article 20 of the Statute, made in the same form as that of the titular judges, that he will exercise his powers impartially and conscientiously.

5. At the same time, it cannot be forgotten that the institution of the *ad hoc* judge was created for the purpose of giving a party, not otherwise having upon the Court a judge of its nationality, an opportunity to join in the work of this tribunal. The evidence in this regard of the attitude of those who participated in the drafting of the original Statute of the Permanent Court of International Justice can hardly be contradicted. This has led many to assume that an *ad hoc* judge must be regarded as a representative of the State that appoints him and, therefore, as necessarily pre-committed to the position that that State may adopt.

6. That assumption is, in my opinion, contrary to principle and cannot be accepted. Nonetheless, consistently with the duty of impartiality by which the *ad hoc* judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write. It is on that basis, and in awareness that the tragedy underlying the present proceedings imposes on me an especially grave responsibility, that I approach my task.

4. The Nature of Requests for Provisional Measures

7. Counsel for Yugoslavia, during his address to the Court in the course of the hearings on the first request, described the proceedings as "incidental", coupling with that description the adjectives "summary" and "peremptory", seemingly with the implication that the Court should limit as much as possible its consideration of the substance of the case and that whatever the Court might say or order could have little or no lasting legal effect. In the same line of thought, counsel for Yugoslavia further contended that Bosnia-Herzegovina was really asking, in the guise of a request for provisional measures, for "an interim judgment on the merits of the case" — something which he appeared to consider was not permissible. A few words are, therefore, needed about the character of requests and orders for provisional measures.

8. Nowhere in the Statute or Rules of Court are requests for provisional measures specifically described as "incidental". The only use of that word is in the heading of Section D of Part III of the Rules, "Incidental Proceedings". This covers not only interim protection but also preliminary objections, counter-claims, intervention, special references to the Court and discontinuance. About such matters as preliminary objections, counter-claims and intervention there is evidently nothing of an insub-

stantial, summary or superficial nature. They involve material points of gravity to which the Court at the appropriate time gives full and detailed consideration. Orders of the Court relating to them are binding. Between these items and requests for interim protection there is no difference in kind except in the necessarily threshold quality of the latter, the urgency that attaches to them, as is recognized in Article 74 of the Rules, and, possibly, the degree to which the measures indicated are binding.

9. In practical terms it is, of course, inherent in the urgent treatment of a request for provisional measures that normally it is not possible to treat the jurisdictional and substantive issues as extensively as in other incidental proceedings. For one thing, much of the evidence put before the Court is likely to be *ex parte* and the Respondent may not be able to react to it in detail. But there is nothing in the Statute or the Rules that prevents the Court from dealing as fully as it wishes with requests for provisional measures. Nor is this situation changed by the oft-employed formula, repeated in paragraph 60 of the Court's Order of today's date, to the effect that the decision given upon the request "in no way prejudges" issues of jurisdiction, admissibility or substance. This means that the Court reserves to the parties the right to return to such issues at the merits stage of the case and to itself the right to amend its findings of fact or its holdings of law in the light of such later consideration. But it does not mean that the Court is precluded, in dealing with a request for provisional measures, from reaching relevant findings of fact or holdings of law which will remain valid and effective unless and until subsequently altered. It is in this sense that one should also read the statement, in paragraph 48 of today's Order, that the Court "cannot make definitive findings of fact or of imputability" and that:

> "the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for these facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision".

In other words, the qualification or limitation upon the effect of the Court's findings at the interim protection stage is procedural rather than substantive. Though such findings may later be changed, they are not in the interim ineffective nor should they be disregarded.

10. This analysis is to some extent foreshadowed and supported by certain observations of Judge Jiménez de Aréchaga in his declaration in the *Nuclear Tests* case. Though addressed only to the question of jurisdiction,

his remarks are no less applicable to other questions of law and fact that may arise in the course of the proceedings on a request for provisional measures:

> "[I]n view of the urgent character of the decision on provisional measures, it is obvious that the Court cannot make its answer dependent on a previous collective determination by means of a judgment of the question of its jurisdiction on the merits.
>
> This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether — in the light of the grounds invoked and of the other materials before him — the Court will possess jurisdiction to entertain the merits of the dispute. From a subjective point of view, *such an appreciation or estimation cannot be fairly described as a mere preliminary or even cursory examination of the jurisdictional issue: on the contrary, one must be satisfied that this basic question of the Court's jurisdiction has received the fullest possible attention which one is able to give to it within the limits of time and of materials available for that purpose.*" (*I.C.J. Reports 1973*, p. 107; emphasis added.)

11. The freedom of the Court to reach conclusions of fact or law when considering requests for provisional measures is not affected by the argument (as presented by the Respondent) that the particular request is really a request for an interim judgment. The Respondent has in this connection invoked the refusal by the Permanent Court of International Justice of a request by Germany in the *Factory at Chorzów* case (*P.C.I.J., Series A, No. 12*, p. 10) for an interim payment of 30 million marks, in a case arising out of the expropriation of an industrial undertaking in breach of a treaty, on the ground that the request was "designed to obtain an interim judgment on the merits". However, this case was distinguished in the hostages case (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 7) in which the United States sought in its original application both the release of the hostages and reparation for their detention. In its request for provisional measures the United States sought the immediate release of the hostages. The Court made the requested Order uninhibited by the fact that it was thereby ordering something that substantially pre-empted the remedy sought in the main case.

12. The Respondent has also raised the objection that "the Applicant seems to be trying to reopen matters already decided". It is true that there is a significant measure of overlap between what the Applicant sought, and to some extent obtained, in its request of 20 March 1993 and the request it made on 27 July 1993. But whatever may be the degree of overlap — and it is not total — the question is not really *simpliciter* whether the subject-matter of the first request may be revisited. It is, rather, the question of whether that subject-matter may be revisited in the light of clear

evidence that the Respondent has continued the course of conduct which the Court has prohibited and has, therefore, acted in breach of the first Order.

13. The situation falls within the scope of Article 75, paragraph 3, of the Rules of Court, which permits the "making [of] a fresh request in the same case based on new facts" — and it has been so held by the Court in paragraph 22 of today's Order. The rejection by the then President of the Court of the second Nicaraguan request for interim measures in the *Military and Paramilitary Activities in and against Nicaragua* case (see *I.C.J. Reports 1986*, pp. 143-144, paras. 286-289) must be distinguished in the light of all the circumstances of that case. They were — especially in terms of scale, urgency and threat to human life — markedly less exigent than those in the present case.

II. JURISDICTION

14. The special circumstances attending this case suggest that some explanation is required of the general basis of the Court's operation. The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent. This can be given in various forms: a treaty undertaking to that effect; a contracting-in to the compulsory jurisdiction of the Court under the so-called "optional clause" (Article 36 (2) of its Statute); or an acceptance of jurisdiction by a respondent through its conduct following upon a unilateral commencement of proceedings by an applicant — a method known as *forum prorogatum*. Whatever form the consent may take, the range of matters that the Court can then deal with is limited to the matters covered by that consent. Thus, jurisdiction conferred on the Court by the Genocide Convention can extend only to cases involving the interpretation, application or fulfilment of the Convention. Even if the complaints relate to appalling atrocities amounting to violations of, for example, the Geneva Conventions on the Protection of Victims of War, of the various human rights conventions or even of principles of customary international law, they cannot be brought before the Court on the basis of the jurisdictional provision in the Genocide Convention unless they are also acts covered by the terms of that Convention.

15. The possibility must be recognized and accepted that there are a number — alas, a very great number — of substantive rights protected by international law which, for want of a suitable jurisdictional link to the Court, cannot be made the subject of consideration and decision by it. This is not the fault of the Court. It is simply a reflection of the present unsatisfactory state of the international legal system — a reflection, many

consider, of a lack of appropriate political will on the part of States, not a reflection of any shortcoming in the Court. If jurisdiction exists, the Court will exercise it. That, after all, is what the Court is for.

16. In the present case, the Applicant has invoked at different times a number of different possible sources of jurisdiction: (1) in its original request, it referred to Article IX of the Genocide Convention; (2) in the same document it also relied upon a letter dated 8 June 1992 from the Presidents of the Republic of Montenegro and of the Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia; (3) in the context of its present request the Applicant added that,

> "jurisdiction ... is also grounded in the Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the four Geneva Conventions of 1949, the First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter";

and (4), also in the course of the present proceedings, reference was made to the Treaty of Saint-Germain-en-Laye of 1919 providing for the protection of minorities in the Kingdom of the Serbs, Croats and Slovenes. Further to the four grounds mentioned above, there is (5) the matter of the possible operation of *forum prorogatum*, as raised in the question put to both Parties during the course of the hearings on 26 August 1993. I shall deal with each of these items in turn.

1. The Genocide Convention

17. In paragraph 26 of its Order of 8 April 1993 the Court accepted that Article IX of the Genocide Convention appears to afford a basis on which the jurisdiction of the Court might be founded. At the same time, the Court made it clear that this was only "to the extent that the subject-matter of the dispute relates 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". The Court's Order of today's date confirms that decision. I agree with this conclusion but would wish to add a further consideration. In determining whether particular acts or omissions amount to " 'genocide or ... any of the other acts enumerated in Article III' of the [Genocide] Convention" it must be borne in mind that conduct which may prima facie appear not to fall within those categories may in truth do so if such conduct can in fact be shown to cause, or contribute to, with sufficient directness, genocide or genocidal activity.

2. The Letter of 8 June 1992

18. This letter was considered by the Court in paragraphs 27-32 of its Order of 8 April 1993. The Court concluded that it was "unable to regard the letter of 8 June 1992 as constituting a prima facie basis of jurisdiction in the present case". Nonetheless, the Applicant again invoked this letter in the present proceedings. The arguments which it has adduced in this connection do not appear to provide any basis for altering the reasoning or conclusion of the Court in its Order of 8 April 1993. The Court has so held in paragraph 32 of today's Order and I agree.

3. The Reference to Customary and Conventional Laws of War, etc.

19. Recourse by the Applicant to customary international law and the treaties on the laws of war, etc., as a ground of jurisdiction appears to be founded on some misconception. The customary international law and the treaties invoked by the Applicant, though no doubt pertinent in a situation of international hostilities as a source of substantive rules of law applicable to the conduct of the warring parties, can serve only that purpose. The mere existence of relevant substantive rules of law does not by itself confer in respect of matters governed by them any jurisdiction whatsoever upon any international tribunal. As already stated, there are many rules of law the operation of which is not supplemented by any provision conferring jurisdiction upon any international tribunal. The provisions cited by the Applicant fall into this category. The Court so holds in paragraph 33 of today's Order and I agree. The only text mentioned by the Applicant which had any jurisdictional function was the Nuremberg Charter. That document established the jurisdiction of the International Military Tribunal in respect of the trial of major war criminals after the Second World War. Its function has been exhausted for nearly half a century and it can play no role in the present dispute.

4. The "Minorities" Treaty, 1919

20. Lastly, the Applicant, in an amendment to its second request filed on 6 August 1993, introduced as a ground of jurisdiction in the present case the "Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes (Protection of Minorities)" signed at Saint-Germain-en-Laye on 10 September 1919. This called for the protection of the minorities in Yugoslavia and provided for the compulsory settlement of disputes by the Permanent Court of International Justice.

21. There are several difficulties about recourse to this Treaty in the present case. The Court refers to some of them in paragraphs 29-31 of today's Order. Here, it is sufficient to mention two. The first is substantive. The specific obligation under the Treaty mentioned by the Applicant is contained in Article 2:

> "The Serb-Croat-Slovene State undertakes to assure full and complete protection of life and liberty to all inhabitants of the Kingdom without distinction of birth, nationality, language, race or religion."

The discharge of this obligation is limited territorially to "inhabitants of the Kingdom". Although there are other possibly pertinent provisions in the Treaty which are not expressed in terms of "all inhabitants of the Kingdom", they nonetheless refer to "Serb-Croat-Slovene nationals". Clearly the people of Bosnia-Herzegovina, principally the Bosnian Muslims, whose rights are the subject of the present proceedings, are not "inhabitants of the Kingdom" nor are they "Serb-Croat-Slovene nationals".

22. The second difficulty, though procedural in character, is no less formidable. Article 11 of the Treaty confers jurisdiction upon the Permanent Court of International Justice in respect of disputes "of opinion as to questions of law or fact arising out of these Articles". The Articles in question include those relating to the protection of minorities. At the same time, however, the right to bring proceedings under the Articles is limited to "any one of the Principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations". The Applicant in this case clearly does not fall into either of these categories.

23. The Applicant has sought to overcome this procedural obstacle on the basis of the provision in Article 16 of the Treaty that

> "All rights and privileges accorded by the foregoing Articles to the Allied and Associated Powers shall be accorded equally to all States Members of the League of Nations."

The Applicant argues that the fact that this Article appears at the end of Chapter II of the Treaty dealing with the commercial and other matters does not mean that its operation is limited to the matters covered in that Chapter, the more so as the Article contains provisions on language and ratification which evidently apply to the Treaty as a whole. In my view, if the intention had been to confer upon all Members of the League of Nations the same procedural rights as Article 11 confers upon the Principal Allied and Associated Powers in respect of the minorities provisions of Chapter I, the most likely place in which that would have been done would have been Article 11 itself, not Article 16. But even if the applicability of Article 16 is conceded this does not help the Applicant. It still remains in the position of not having been a Member of the League of Nations.

5. Forum Prorogatum

24. There remains for consideration in connection with jurisdiction the question of *forum prorogatum*. This is the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court. The principal illustration of that process is the *Corfu Channel* case (*Preliminary Objection, I.C.J. Reports 1947-1948*, pp. 27-28) in which the United Kingdom unilaterally instituted proceedings against Albania on the basis of a recommendation of the Security Council. Albania, though entering an objection to the Court's jurisdiction on the ground that the case should have been referred to the Court by special agreement, nevertheless stated in the same document that it accepted the jurisdiction of the Court for that case. The Court held that that acceptance was effective as a "voluntary and indisputable acceptance of the Court's jurisdiction" and observed also that "neither the Statute nor the Rules require that this consent should be expressed in any particular form" (*ibid.*, p. 27).

25. The episode which gives rise to the question of whether *forum prorogatum* provides any basis for an extension of the Court's jurisdiction in this case is the letter dated 1 April 1993 from Mr. Vladislav Jovanovic, Federal Minister for Foreign Affairs of Yugoslavia, to the Registrar of the Court. Paragraph 4 reads as follows:

> "The Yugoslav Government welcomes the readiness of the International Court of Justice to discuss the need of ordering provisional measures to bring to an end inter-ethnic and inter-religious armed conflicts within the territory of the 'Republic of Bosnia and Herzegovina', and in this context, it recommends that the Court, pursuant to Article 41 of its Statute and Article 73 of its Rules of Procedure, order the application of provisional measures, in particular:
>
> [i] to instruct the authorities controlled by A. Izetbegovic to comply strictly with the latest agreement on a cease-fire in the 'Republic of Bosnia and Herzegovina' which went into force on 28 March 1993;
>
> [ii] to direct the authorities under the control of A. Izetbegovic to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof, since the genocide of Serbs living in the 'Republic of Bosnia and Herzegovina' is being carried out by the commission of very serious war crimes which are in violation of the obligation not to infringe upon the essential human rights;
>
> [iii] to instruct the authorities loyal to A. Izetbegovic to close immediately and disband all prisons and detention camps in the

'Republic of Bosnia and Herzegovina', in which the Serbs are being detained because of their ethnic origin and subjected to acts of torture, thus presenting a real danger for their life and health;

[iv] to direct the authorities controlled by A. Izetbegovic to allow, without delay, the Serb residents to leave safely Tuzla, Zenica, Sarajevo and other places in the 'Republic of Bosnia and Herzegovina', where they have been subject to harassment and physical and mental abuse, and having in mind that they may suffer the same fate as the Serbs in eastern Bosnia which was the site of the killing and massacres of a few thousand Serb civilians;

[v] to instruct the authorities loyal to A. Izetbegovic to cease immediately any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and to release and stop further mistreatment of all Orthodox priests being in prison;

[vi] to direct the authorities under the control of A. Izetbegovic to put an end to all acts of discrimination based on nationality or religion and the practice of 'ethnic cleansing', including the discrimination related to the delivery of humanitarian aid, against the Serb population in the 'Republic of Bosnia and Herzegovina'."

26. As can be seen, a number of the proposals in the paragraph relate to matters that cannot be described as "genocide", as genocidally related or as necessarily causally linked with genocide. This is true of items [i], [iii], [iv] and [v]. As for item [ii], the requirement of respect for the Geneva Conventions, though overlapping with a requirement that genocide should not be committed, goes wider than genocide; and the same is true of the reference to discrimination in item [vi].

27. The Court is bound to ask itself, what could be the jurisdictional basis for such proposals by the Respondent? The Respondent did not, in its letter of 1 April 1993, make any reference to the question of jurisdiction. Yet, if the proposals were seriously meant, they can only have been put forward on the basis of some supposed ground of jurisdiction. There are only two possibilities. One is the Genocide Convention itself, in which case the Respondent was putting a very broad construction on the definition of genocide and on the scope of Article IX of the Convention. The other is that the proposals may be seen as having been made in response to the presentation by the Applicant of certain requests which went beyond the scope of the Convention. Either way, though, the conduct of the Respondent seems to enlarge the jurisdiction of the Court beyond the range of matters strictly covered by an objective reading of Article IX of the Genocide Convention. The concordant conduct of the two Parties —

that of the Applicant in seeking by the nature of its requests to extend the jurisdiction of the Court beyond matters strictly covered by the Genocide Convention and that of the Respondent in doing something similar — amounts to an acceptance of the Court's jurisdiction by conduct to the extent that the scope of the subject-matter of the two requests coincide. That is to say, the scope of the jurisdiction is determined by the narrower of the two claims, in this case, that of the Respondent.

28. Because this aspect of the case had not been specifically addressed by either of the Parties, I considered it desirable to ascertain the views of the Parties and accordingly put to them the following questions:

> "(A) Do all the requests in the letter [of 1 April 1993] fall within the scope of the prevention of 'genocide' as is defined in Article II of the Genocide Convention?
>
> (B) If the answer to Question 1 is No, which requests are regarded as not falling within that definition?
>
> (C) If the answer No is given in relation to any of the requests, on what basis is the Court said to have jurisdiction in respect of them and, in particular, is the concept of *forum prorogatum* relevant here?"

29. The Applicant replied that "the Respondent actually broadens jurisdiction beyond the subject-matter covered by Articles II and IX of the Genocide Convention" and contended that:

> "the Respondent's acceptance of this jurisdictional setting for the first round of provisional measures . . . logically extends to any following provisional measures which are requested within the framework of the proceedings instituted by the 20 March 1993 Application".

The Applicant concluded:

> "In line with established jurisprudence of this Court, it is clear that this statement establishes jurisdiction with respect to all aspects of the situation in the Republic of Bosnia and Herzegovina connected with armed conflicts concerning the territory of the Republic of Bosnia and Herzegovina."

30. The Respondent replied as follows: "The reply is contained in the Observations of FR of Yugoslavia dated 23 August 1993 at pages 13 to 16 in paragraphs 20 to 24." Close study of the passages referred to reveals no reply to the first and second of the questions put to the Parties. The third question is answered only indirectly, in paragraphs 21 and 23. In paragraph 21 the Respondent stated:

> "It is obvious that, by requiring provisional measures on 1 April 1993, the intention of the FR of Yugoslavia was not to accept the

jurisdiction of the Court whatsoever, or to an extent beyond what is strictly stipulated in the Genocide Convention. The argument that the FR of Yugoslavia is estopped from raising any questions concerning the jurisdiction of the Court is obviously absolutely without foundation."

The Respondent then quoted, in paragraph 22, a passage from the case concerning the *Anglo-Iranian Oil Co., Preliminary Objection*, in which the Court had rejected a submission made by the United Kingdom Government to the effect:

> "17. That the Iranian Government, having in its conclusions submitted to the Court for decision several questions which are not objections to the jurisdiction of the Court and which could only be decided if the Court had jurisdiction, has by this action conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum*." (*I.C.J. Reports 1952*, p. 101.)

31. The passage quoted by the Respondent is part of a longer paragraph the continuation of which reads as follows:

> "Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it [the Government of Iran] has throughout the proceedings maintained that Objection. It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. *But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected.* No element of consent can be deduced from such conduct on the part of the Government of Iran. Consequently, the Submission of the United Kingdom on this point cannot be accepted." (*Ibid.*, p. 114; emphasis added.)

32. It is the content of the words emphasized above that distinguishes the *Anglo-Iranian Oil Co.* case so plainly from the present one. There, the "objections" on which the United Kingdom founded its claim of *forum prorogatum* were "clearly designed as measures of defence", the examination of which was seen as contingent upon the rejection of Iran's objection to the jurisdiction. By contrast, in the present case, the matters raised in the provisional measures which the Respondent proposed in its letter of 1 April 1993 were not contingent at all, but were assertive requests. They were not negative in their purpose, i.e., aimed at dissuading the Court from doing something. Rather, they were positive in their object, i.e., aimed at persuading the Court to take specific measures. And those measures, as just stated, were not ones that on their face fell within the scope of the Genocide Convention. Some basis must, therefore, be identified by reference to which their introduction into the proceedings can be justified.

33. The Respondent has reminded the Court of the statement made in the *Anglo-Iranian Oil Co.* case:

> "The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court." (*I.C.J. Reports 1952*, p. 114.)

The Respondent has then gone on to say:

> "The FR of Yugoslavia does not accept the jurisdiction of the Court in relation to customary and conventional international law of war and international humanitarian law, including the four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907 and Principles established by the Nuremberg Charter and Judgment."

34. The question is, therefore, whether the denial by the Respondent of the jurisdiction of the Court on any basis other than Article IX of the Genocide Convention is sufficient to override conduct of the Respondent which appears to be consistent only with the existence of some jurisdiction of the Court on a basis other than that of the Genocide Convention. In particular, does the above-quoted sentence amount to a sufficient denial of the jurisdiction of the Court to negative the effect of the Respondent's requests in its letter of 1 April 1993 which appear, in the words of the Court's Order of 22 July 1952, to involve "an element of consent regarding the jurisdiction of the Court"? In my view, the insistence by the Respondent that Article IX of the Genocide Convention is the sole source of the Court's jurisdiction is not persuasive. Were this insistence valid, it would be impossible for the Respondent to justify its clear requests for measures which fall outside the coverage of the Convention. Yet, these requests were neither brief nor accidental. They were deliberately presented to the Court as requests to which the Respondent wished the Court to accede. The Respondent cannot blow hot and cold. It cannot ask the Court to go beyond the limits of the Genocide Convention and simultaneously request the Court to limit its jurisdiction to that Convention.

35. It thus becomes necessary for the Court either to attempt a reconciliation of the two contradictory approaches or to choose between them. In my opinion, in deciding upon the relationship between the particular and the general, the general cannot be permitted entirely (if at all) to override the particular. The solution lies, therefore, in qualifying the insistence of the Respondent that the Court's jurisdiction is dependent solely upon Article IX of the Genocide Convention by acknowledging that the Respondent has expanded the jurisdiction of the Court to the extent that

its specific requests overlap in kind with those of the Applicant. In effect, the Applicant, in requesting measures that pass beyond the limits of the Genocide Convention, has made an offer to the Respondent to extend the jurisdiction of the Court to the category of subject-matter covered by that extension. The Respondent, by proposing counter-measures which in some respects resemble the proposals of the Applicant, has within those limits accepted the offer of the Applicant so to extend the jurisdiction of the Court.

36. The Court's conclusion in paragraph 34 of today's Order that the Yugoslav communication of 1 April 1993 "cannot, even prima facie, be interpreted as 'an unequivocal indication' of a 'voluntary and indisputable' acceptance of the Court's jurisdiction" is evidently influenced by the consideration there mentioned that "the provisional measure requested by Yugoslavia in a subsequent request, dated 9 August 1993 ..., was directed solely to protection of asserted rights under the Genocide Convention". The reference thus made to what may be seen as a withdrawal by the Respondent of its request for measures going beyond the scope of the Genocide Convention suggests that the difference between the Court and the opinion here expressed may lie principally in the effect to be attributed to the request of 9 August 1993. I regard that communication as insufficient to negative the effect of the Respondent's communication of 1 April 1993. To this limited extent, therefore, and to my regret, I find myself unable to agree with the Court.

37. The existence of jurisdiction on the basis of *forum prorogatum* has no impact on the conclusions that I reach in relation to the ten specific measures sought in the Applicant's second request. However, it does form the basis for the additional measures which, in the exercise of the power given in Article 75 (1) of the Rules of Court to indicate measures *proprio motu*, I set out in paragraph 124 below. These are expressed in terms which largely reflect, in the form of an indication to both Parties, the terms of the measures sought by Yugoslavia in its communication to the Court of 1 April 1993.

III. The Substance of the Request

1. The Nature of the Evidence to be Taken into Consideration in Relation to Requests for Provisional Measures of Protection

38. When the Court made its Order of 8 April 1993 it did so without committing itself to any specific findings of fact, limiting itself to the statement that "there is a grave risk of acts of genocide being committed" (para. 45). In the Order of today's date the Court has gone somewhat

further by "taking into account the development of the situation in Bosnia-Herzegovina" (para. 22), observing that "great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations" (para. 52), noting that "the grave risk" which the Court apprehended in its Order of 8 April 1993 of "action being taken which may aggravate or extend the existing dispute ... has been deepened by the persistence of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts" (para. 53) and stating that it "is not satisfied that all that might have been done has been done to prevent the commission of the crime of genocide in the territory of Bosnia-Herzegovina, and to ensure that no action is taken which may aggravate or extend the existing dispute or render it more difficult of solution" (para. 57).

39. In my view, if the Court considered that it had before it sufficient material on the basis of which it could make the generalized findings of fact set out above, it also had before it sufficient material to set out in greater detail the grim and gruesome realities of the situation which alone can explain why the Applicant has returned to the Court with this second request for interim measures. It will already be apparent that in my opinion the additional accumulation of evidence since the date of the first Order and the generally uniform content of the reports as well as their undeniable character, necessitates a fuller statement of the facts. As a necessary preliminary to this, attention must be given to the nature of the evidence which the Court may properly take into account at this stage of the proceedings.

40. In most of the previous requests for provisional measures there has been relatively little disagreement about the facts, the principal issue (the question of jurisdiction apart) being whether, on the facts as known, an indication of such measures was required. Questions of evidence were, therefore, not in the forefront of the discussion. In the present case, Bosnia-Herzegovina has produced much evidence of the events which it alleges, all of it in writing and most of it in secondary form. Yugoslavia has produced no evidence to rebut it.

41. The question is how much account should be taken of this evidence. There is no fundamental *legal* difference in the rules of evidence applicable to the consideration of the merits of a case and those applicable in proceedings relating to provisional measures. There is, however, a *practical* difference in that in the latter there may be less time for the applicant to prepare its evidence in the most cogent form, or for critical scrutiny of that evidence by the respondent and the Court, than there is in the extended merits stage of a case. But it does not follow that evidence produced at the

provisional measures stage is *a priori* to be treated as less adequate or less acceptable than evidence produced at the merits stage or that it is incapable of sustaining more than the most generalized findings of fact.

42. In the present case, the written evidence adduced by Bosnia-Herzegovina falls into the following categories: written primary evidence, such statements directly attributable to the Yugoslavia authorities, statements by United Nations, UNHCR or EC officials who have themselves been in the area, or newspaper reports by journalists who were eye-witnesses of events; and written secondary evidence, such as statements of fact adopted by organs of the United Nations, for example, in the form of preambular paragraphs to resolutions of the General Assembly or the Security Council. There is no reason why the Court should not take both such categories of evidence into account, giving more or less weight to particular items, according to the particular circumstances. The doctrine of judicial notice is known in many legal systems. Tribunals may not and do not close their eyes to facts that stare them in the face. In the *Military and Paramilitary Activities in and against Nicaragua* case the Court recalled its own reference in the case of the *United States Diplomatic and Consular Staff in Tehran* to facts which:

> "are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries (*I.C.J. Reports 1980*, p. 9, para. 12)" (*I.C.J. Reports 1986*, pp. 40-41, para. 63).

On an earlier occasion, though not speaking in terms of "judicial notice", the Court, in the *Fisheries* case, had had recourse to the concept of "notoriety of facts" (*I.C.J. Reports 1951*, pp. 138-139).

43. What matters for present purposes is the general *concordance* of evidence. This consideration also weighed with the Court in its decisions in 1980 and 1986:

> "On the basis of information, including press and broadcast material, which was 'wholly consistent and concordant as to the main facts and circumstances of the case', the Court was able to declare that it was satisfied that the allegations of fact were well-founded." (*I.C.J. Reports 1986*, p. 41, para. 63, citing *I.C.J. Reports 1980*, p. 10, para. 13.)

In this case, the evidence all points conclusively in one direction. Moreover, the Respondent has not sought in this Court to deny that atrocities of the character and on the scale described have occurred.

44. Two additional considerations are relevant here. The first is that the present proceedings do not relate to the indictment of named individuals

upon criminal charges in relation to which guilt has to be proved beyond reasonable doubt.

45. The second consideration has a particular bearing on the question of the complicity of the Respondent in rendering assistance to the Serbian forces in Bosnia-Herzegovina. As the bulk of the accessory conduct in question must necessarily have originated within the territory of the Respondent, it is obvious that it is beyond the power of the Applicant to obtain absolute proof of it. This being so, the situation resembles that in the *Corfu Channel* case (*Merits, I.C.J. Reports 1949*, p. 4) in which, at page 18, the Court discussed the consequences flowing from the inability of a party to secure evidence from areas outside its control:

> "[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. *By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.* This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." (Emphasis added.)

46. I will, therefore, in this opinion take into account those of the items presented in the Applicant's narrative that are supported by appropriate evidence. Assertions made by Yugoslavia will be approached in the same way. If supported by appropriate evidence they will be accepted. Where there is a conflict of evidence then, of course, it will be necessary to make a choice by reference to openly stated and objectively applied criteria.

2. The Importance of Stating Essential Facts, Albeit in Summary Form

47. To refrain from confronting the facts simply because the proceedings are ones for provisional measures would suggest a degree of formalism inconsistent with one of the tasks of the international judicial process in circumstances so unusual as those involved here. In the present case, so public are the facts and so urgent is the need which they occasion that, to all intents and purposes, no clear line can be drawn between the grant of provisional measures and the grant of the remedy sought in the main action. A denial of sufficient provisional measures now may well, in practice, be tantamount to a negation of the rights claimed in the main action. If, as has been said, the *grant* of interim measures should not prejudice the

outcome of the consideration of the merits, so equally it must be recognized that the *denial* of interim measures also should not prejudice the outcome of the consideration of the merits. It is, therefore, a matter of necessity to examine the facts to which the measures ordered by the Court relate.

48. There is also a reason of policy for looking at the facts — a policy which the principal judicial organ of the United Nations can properly take into account. As is well known, the justification for the war crimes trials following the Second World War was seen to lie not solely in the requirement that the perpetrators of heinous crimes should be brought to justice. It lay also in the belief in the necessity of placing on historical record the character and extent of those crimes so that they should never be forgotten and that the recollection of the sacrifice of the victims should not be dimmed by time. The establishment and, it may be hoped, the activity of a United Nations War Crimes Tribunal for former Yugoslavia may in due course perform a similar function in relation to the events within the area previously comprised within that State. But this possibility does not, in my view, relieve this Court of the duty of explaining, even in the context of a request for provisional measures of protection, some of the basic features of the situation. It may, of course, be said that such a record will appear in the Court's treatment of the case at the merits stage. However, as has been pointed out on behalf of Bosnia-Herzegovina, there is a distinct possibility that the merits stage of these proceedings will not be reached. What will those in later years who are not well instructed in our contemporary history understand of the real thrust and significance of the Court's Order if they cannot read therein some narrative of the circumstances which have led to it?

49. At the same time, it must be realized that, important though the record is, limitations of time, space and immediate relevance preclude a comprehensive or even extended narrative of events. What follows is necessarily sharply focused on developments pertinent to the litigation instituted by the Applicant and is brief even at the risk of some oversimplification.

3. Some Pertinent Background

50. Before 1990 Yugoslavia, or the Socialist Federal Republic of Yugoslavia as it was then called (and as the Respondent still calls itself), consisted of six constituent republics — Serbia, Montenegro, Slovenia, Croatia, Bosnia-Herzegovina and Macedonia — together with two autonomous provinces. Within its population of some 23 million persons, the Serbs were the largest element numbering over 8 million persons, of whom three-quarters lived in Serbia. In Bosnia-Herzegovina there lived some 1.9 million Muslims, 1.3 million Serbs and 0.75 million Croats.

51. In the autumn of 1990 the power of the central authorities in Yugoslavia began to disintegrate in the face of separatist tendencies in Slovenia, Croatia, Bosnia-Herzegovina and Macedonia. On 25 June 1991 Slovenia and Croatia declared their independence. Soon afterwards the federal authorities began military action to suppress the Slovenian secession and fighting broke out in Croatia, especially in areas principally inhabited by Serbs.

52. The present Government of Yugoslavia is essentially a Serbian authority closely tied to the Government of Serbia; and the Yugoslav People's Army (JNA) today is a Serbian army controlled by the Serbian authorities of the present Government of Yugoslavia and fully supportive of Serbian aims.

53. The general identification of the position of the federal Yugoslavia authorities with that of the Serbs was demonstrated by a statement made in the Assembly of the Socialist Federal Republic of Yugoslavia on 19 March 1992 by Dr. B. Jovic, who had earlier been the Serbian member of the Yugoslav Presidency:

> "The Serbian people . . . demanded respect and protection of their legitimate national and civil rights. When Croatia decided to secede from Yugoslavia and form its own independent State, the Serbs inhabiting their ethnical territories in this republic decided to break away from Croatia and remain within Yugoslavia . . .
>
> Faced with the serious danger of a more widespread conflict, the Presidency of the Socialist Federal Republic of Yugoslavia instructed the Yugoslav People's Army to prevent such conflicts by standing as a neutral force between the parties in conflict. However, the Croatian authorities, instead of accepting such a mission of the Yugoslav People's Army openly attacked not only the Serbian people, which it branded as a band of outlaws, but also . . . the Yugoslav People's Army which it termed an army of occupation. This is how war was thrust upon Yugoslavia. In such a situation it was essential to protect the Serbian people from extermination."

What was there said about the connection between the Yugoslav Government and the Serbs in Croatia appears to be no less true in relation to Bosnia-Herzegovina.

54. International awareness of this relationship is reflected in the demand made by the Security Council in paragraphs 3 and 4 of resolution 752 (1992) on 15 May 1992 "that all forms of interference from outside Bosnia-Herzegovina, including by units of the Yugoslav People's Army (JNA), as well as elements of the Croatian Army, cease immediately . . ." and "that those units of the Yugoslav People's Army (JNA) and elements of the Croatian Army now in Bosnia-Herzegovina must . . . be withdrawn".

55. For virtually 18 months now, from February 1992 to the present

date, fighting has continued in Bosnia-Herzegovina between the Serbs there, supported by Serbs in Serbia, by the Government of the Socialist Federal Republic of Yugoslavia and by the Yugoslav National Army, on the one side, and the Bosnian Government and its supporters, mainly Muslims, on the other. During this period the Muslims in Bosnia-Herzegovina have been exposed to slaughter and injury, to rape, torture and starvation, to forced expulsion and to the destruction of their homes on an appalling scale — all directed against them because they are Muslims. Town after town and village after village with exclusively or dominantly Muslim populations have been attacked and the Muslim population either killed or expelled by the Serbs: Goradze, Srebrenica, Bihac, Olovo, Kladanj, Tuzla, Banja Luka, Zepa, Sandzak, Mostar, Sarajevo, Maglaj, Konijc, Shippergai, Brcko — to name only those that have figured most prominently in the reports.

56. The involvement of the Government of Yugoslavia (Serbia and Montenegro) or of the Socialist Federal Republic of Yugoslavia in all of this activity cannot be gainsaid and has been internationally noted. In the preamble to General Assembly resolution 47/121 of 18 December 1992 there appears an assessment of the Yugoslav Government's role that received the positive support of 102 Members of the United Nations and which, though 57 Members abstained in the vote, attracted no negative votes:

> "*Strongly condemning* Serbia and Montenegro and their surrogates in the Republic of Bosnia and Herzegovina for their continued non-compliance with all relevant United Nations resolutions,
>
> *Deeply regretting* that the sanctions imposed by the Security Council have not had the desired effect of halting the aggressive acts by Serbian and Montenegrin irregular forces *and the direct and indirect support of the Yugoslav People's Army for the aggressive acts in the Republic of Bosnia and Herzegovina* . . ." (emphasis added).

57. Similarly, in the material provided by Bosnia-Herzegovina in its current request for the indication of provisional measures there are some 16 indications of Yugoslav involvement in Serbian activity in Bosnia-Herzegovina of which the most important is a clear acknowledgment to this effect made by Yugoslavia itself. But, first, the earlier indications:

— On 16 April 1993 short-wave radio operators in Srebrenica reported that former Yugoslavian army troops crossed the Drina River separating Bosnia from Serbia and mounted their own attack on Srebrenica.

— On 18 April 1993 the US Ambassador to the UN, Mrs. Madeleine Albright, was reported as having said that the sanctions imposed by

the UN on Yugoslavia were a means of bringing home to the Bosnian Serbs and *their allies in Serbia and Montenegro* the price they would have to pay for their genocidal practices.

— On 19 April 1993 Lord Owen, the Mediator appointed by the European Community, was reported as having confirmed that supplies to the Bosnian Serbs were coming through Belgrade and suggested selective bombing strikes to prevent Belgrade from giving the Bosnian Serbs logistical support.

— On 20 April 1993 Senator Biden, a US Senator, referred in the US Senate Foreign Relations Committee to intelligence reports indicating that the Yugoslav National Army in Serbia was "directly responsible for at least part of the shelling of Srebrenica".

— On 27 April Lord Owen was reported as saying that "If Yugoslavia applied the UN resolutions *and cut the Bosnian Serbs from the supply sources* such a step could lead to peace fairly quickly." (Emphasis added.)

58. On or about 8 May 1993 two communiqués were issued by, respectively, the Government of the Republic of Serbia and the Government of Yugoslavia (Serbia and Montenegro) which contained direct and concrete statements of the involvement of those two, well-nigh indistinguishable, authorities in the provision of arms and equipment to the Bosnian Serbs.

59. The communiqué of the Government of Serbia said, *inter alia*:

> "Firmly believing that a just battle for freedom and the equality of the Serbian people is being conducted in the Serb Republic [i.e., the so-called "Republic of Srpska" proclaimed by the Bosnian Serbs within Bosnia-Herzegovina], the Republic of Serbia has been unreservedly and generously helping the Serb Republic, in spite of the enormous problems it had to face due to the sanctions introduced against it by the UN Security Council.
>
> . . . . . .
>
> Since the conditions for space [*sic.* Query, peace] have been met, the Government also agreed that any further economic depletion of the Republic of Serbia is now unjustified and unsupportable, and that future aid to the Serb Republic should be limited to food and medicines in such quantities as the competent ministries will determine. The Government of the Republic of Serbia also believes that, as the conditions for establishing peace have been reached, any further aid in funds, fuel, raw materials etc., provided until now with great sacrifices by the Republic of Serbia itself, is not justified any more."

60. The communiqué of the Federal Government said, *inter alia*:

> "Bearing in mind the immediate adverse effects of UN Security Council resolution 820 on the economic power of the FRY and the social position of the majority of its citizens, the Federal Government is forced to adjust all future aid to the Republic of Srpska with its objective economic possibilities and to reduce it exclusively to contingents of food and medicaments."

61. The content of these two communiqués is evidence, falling into the category of "declarations against interest" which are of special cogency (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 42, para. 69), that, at any rate up to the date on which the communiqués were issued, the Federal Republic and the Republic of Serbia had been providing assistance to the Serbs in Bosnia in breach of the Security Council embargo.

62. Any claims that after that date such assistance must have ceased does not seem compatible with evidence of subsequent Serbian behaviour:

— On 13 May 1993 the *Washington Post* reported that over a period of five hours on 12 May at least a half-a-dozen large tankers and a score or more of other trucks were seen crossing Serbia to the Bosnian Serb enclosure of Bijeljina, used as a base and staging area for Serbian attacks against Bosnia. And this was said to be confirmed by "many observers".

— On 18 May 1993 CNN reported that "diplomats suggested that military supplies were still passing from the 'rump' Yugoslavia to the Bosnian Serbs".

— On 19 May 1993 *The Independent* reported that Serbian President Milosevic refused to allow UN observers on the Drina River because the move would highlight Belgrade's non-enforcement of a proclaimed blockade against the Bosnian Serbs. A week later the *New York Times* carried a similar report.

— On 23 May 1993 *The Sunday Times* reported that "along the narrow, winding roads of Bosanska Raca, large numbers of supplies from the rump Yugoslavia to the Bosnian Serbs was witnessed".

— Lastly, on 24 June 1993 *The Independent* reported that James Gow, a military specialist at King's College, University of London, considered that the Bosnian Serbs have about 60,000 troops, reinforced by up to 20,000 soldiers from the Yugoslav (Serbia and Montenegro) Army, that the Bosnian Serbs received crucial support from irregular militias

based in Serbia and that the Yugoslav (Serbia and Montenegro) Army assisted the Bosnian Serbs with helicopter missions.

63. Since May 1993 there has been evidence that the Croats in Bosnia-Herzegovina, who had previously been fighting alongside the Muslims against the Serbs, were themselves joining in the attack upon the Muslims — seemingly in fulfilment of some agreement between Serbs and Croats to divide Bosnia-Herzegovina between themselves at the expense of the Muslims. This, however, does not serve to reduce the responsibility of the Serbs, or of the Yugoslav authorities supporting them, for what they have done and are continuing to do. It merely creates a situation in which the liability of those who lend assistance to the Bosnian Croats may become involved.

64. As will readily be seen upon a comparison of the material set out in paragraphs 57-62 above with the content of the Bosnian second request for provisional measures, the content of those paragraphs has been taken from that request with little more than minor verbal changes. This is because it is the only material on this aspect of the dispute (as opposed to the accusations of genocide made by the Serbs against the Bosnians) that has been presented to the Court; and it has not been rebutted in any circumstantial detail by the Respondent. No doubt it can be said of several of the items here set out that they are only secondary reports derived from sources that are not sufficiently identified. However, some of the items, notably those attributed to Lord Owen, are not open to that criticism. And the communiqués of 8 May 1993 of the Serbian and Yugoslav Government also appear to be authentic.

65. It is the overall impact of the reports taken as a whole that matters. One must ask: are the secondary reports likely to be inaccurate or falsified? What interest would the reputable newspapers in which the reports appeared have in inventing news of this kind? And why should so many invent the same news, pointing the same accusatory fingers at the same parties?

66. But even if the reports are true, do they really establish the involvement of the Respondent in the activities of the Bosnian Serbs? And even if the reports do establish such involvement, was it an involvement in genocide or genocidal activities?

4. The Involvement of the Respondent

67. As to the first of these questions, it seems impossible to avoid the conclusion that the Respondent State was involved in the actions taken by the Serbs in Bosnia-Herzegovina. Apart from the positive nature of the evidence to that effect, one is bound to ask: how could the Serbs in Bosnia-

Herzegovina have mounted a campaign of such intensity and duration if they had not received external aid? And where could, or would, such aid have come from, if not from the Respondent State? At the very least, the effect of the evidence is to shift the burden of proof completely to the Respondent. It has made no attempt to meet this burden, even to the limited extent that would have been open to it within the framework of the proceedings for interim measures.

5. Has Genocide Been Committed?

68. In determining — even provisionally — whether genocide has been committed, the point of departure is, of course, the definition of genocide in Article II of the Genocide Convention:

> "In the present Convention, genocide means 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."

69. The Yugoslav conduct alleged by the Applicant in its first request of March 1993 consisted of

> "military and paramilitary activities, including the bombing and shelling of towns and villages, the destruction of houses and forced migration of civilians, and acts of violence, including execution, murder, torture and rape".

In the light of the material available to the Court in April 1993 and which has accumulated further since then, it is impossible to deny either the occurrence or the massive scale of these crimes. The evidence also indicates plainly that, in particular, the forced migration of civilians, more commonly known as "ethnic cleansing", is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide in that they clearly fall within categories *(a)*, *(b)* and *(c)* of the definition of genocide quoted above, they are clearly directed against an ethnical or religious group as such, and they are intended to destroy that group, if not in whole

certainly in part, to the extent necessary to ensure that that group no longer occupies the parts of Bosnia-Herzegovina coveted by the Serbs. The Respondent stands behind the Bosnian Serbs and it must, therefore, be seen as an accomplice to, if not an actual participant in, this genocidal behaviour.

70. Should there be any disposition to regard "ethnic cleansing" as no more than an aspect of a particularly vicious territorial conflict between Serbs and Muslims and, therefore, as not being carried out "with intent to destroy, in whole or in part, a[n] ... ethnical ... or religious group, as such", it must be recalled that the Respondent has itself also characterized "ethnic cleansing or comparable conduct" as genocide. In its request of 1 April 1993 (discussed in paragraphs 24-37 above in connection with *forum prorogatum*) the Respondent adopted a broad view of genocide by speaking (in its second proposal) of "the genocide of the Serbs" as a consequence of "the commission of very serious war crimes". Further, and more specifically, in its sixth proposal, the Respondent requested, within the framework of its assertion that the jurisdiction of the Court was limited to disputes arising under the Genocide Convention, that the Court should direct the Applicant "to put an end to ... the practice of 'ethnic cleansing'". Most recently, in the formal submissions made at the close of the hearings on 26 August 1993, the Respondent asked the Court to require the Applicant Government

> "in pursuance of its obligation under the [Genocide] Convention ... [to] take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group".

Since the evidence presently before the Court of such "genocide against the Serb ethnic group" is of a limited kind, and in terms of expulsion by Bosnian Muslims of Bosnian Serbs from the areas in which they were living does not approach the same order of magnitude as the expulsion of Bosnian Muslims by the Serbs, it would appear *a fortiori* that the Respondent also regards the "ethnic cleansing" as carried out in this conflict as a breach of Article II of the Genocide Convention.

IV. Consideration of the Measures Sought in the Current Request

71. I now turn to consider the provisional measures sought in the current request.

1. The First Request

72. The first request is:

> "That Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support . . . to any nation, group [etc.] in Bosnia and Herzegovina for any reason or purpose whatsoever."

73. This request is too broad to be granted *in toto*. The jurisdiction of the Court has been invoked under Article IX of the Genocide Convention, the scope of which is limited to disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, namely, conspiracy, incitement, attempt and complicity — all directly related to genocide. In so far as no other, more general ground of the Court's jurisdiction can be validly established, conduct unrelated to genocide does not properly fall within the scope of the Application. Since this request calls for an indication of measures prohibiting certain conduct not in itself of a genocidal character, i.e., "for any reason or purpose whatsoever", it self-evidently goes beyond the limits of conduct directed towards the commission of genocide and related matters. In view of this, I would restrict the grant of the first request to genocide-related activity. The identification of such activity is dealt with in connection with the requests that follow and my conclusions appear in paragraph 122 below.

2. The Second Request

74. The second request is:

> "That Yugoslavia (Serbia and Montenegro) and all of its public officials . . . must immediately cease and desist from any and all efforts . . . to partition, dismember, annex or incorporate the sovereign territory of Bosnia and Herzegovina."

75. In order to fall within the terms of the Genocide Convention, the Applicant must show that the conduct which it asks the Court to bring to an end and prohibit (i) is aimed at the destruction, in whole or in part, of a national, ethnical, racial or religious group; (ii) with the intent to destroy it as such in whole or in part; (iii) by killing members of the group, causing them serious bodily or mental harm, etc., as set out in Article II of the Convention.

76. It is to be noted that the actions which the second request seeks to prevent are all limited by the words that describe their objective, i.e., "to partition, dismember, annex or incorporate the sovereign territory of Bosnia and Herzegovina".

77. Of the four kinds of groups expressly protected by Article II of the Convention — national, ethnical, racial or religious — evidently the only one that could be threatened by measures which are requested in terms of protecting the integrity of "the sovereign territory" of Bosnia and Herzegovina is a "national" group. The question is, therefore, what national group is threatened by the conduct described and whether this conduct is being carried out with intent to destroy that group.

78. Once one speaks of a "national" group defined by reference to the people resident within the territory of Bosnia-Herzegovina, one immediately excludes any "national" group that may be described by reference exclusively to a single ethnical, racial or religious qualification. The population of Bosnia-Herzegovina includes not only Muslim elements, but also Serbs, Croats and other minority religious or ethnical groups. Since the conduct which is the subject of the evidence produced by the Applicant is aimed not at all the people of Bosnia-Herzegovina, but principally at the Muslim population, it cannot be said to be aimed at the "nation", i.e., the totality of the people, that lives in the territory of that country.

79. While it would be undesirable to adopt a restrictive view of the concept of genocide as covered by the Convention, care must be taken that a treaty aimed at preventing and punishing a relatively specific evil is not converted into a device for challenging territorial change even though brought about by conflict. International law, to the extent that it can be effective in this most difficult of areas, already has available to it the necessary legal rules, in the shape principally of those that deny legal effect to territorial change brought about by aggression. It is not necessary for this purpose to invoke and overstretch the Genocide Convention. I would, therefore, deny the second request.

3. The Third Request

80. The third request is:

> "That the annexation or incorporation of any sovereign territory of the Republic of Bosnia and Herzegovina by Yugoslavia (Serbia and Montenegro) by any means or for any reason shall be deemed illegal, null, and void *ab initio*."

81. It is beyond question that territory cannot lawfully be acquired by the aggressive use of force and that such acquisition is in theory null and void unless and until ratified by consent on the part of the State whose

territory is thereby attenuated. This has been repeatedly stated by the General Assembly and the Security Council of the United Nations, including on occasion specific reference to the conflict in Bosnia and Herzegovina, and there is no reason why the Court should not, albeit *obiter*, restate and confirm this fundamental rule of international law.

82. But that opinion does not necessarily extend to cover "annexation or incorporation of ... territory ... *by any means or for any reason*". If "annexation" is defined as "forcible seizure followed by unilateral assertion of title" then, of course, the request falls within the prohibition of the use of force for the acquisition of territory. On the other hand, if "annexation" is used in a more colloquial sense as meaning the assumption of title over territory as a result of a negotiated settlement, even one following aggression and hostilities, then it is not possible to say that the original illegal conduct of the State acquiring the territory taints permanently the transfer subsequently approved by the original sovereign. *A fortiori*, the same is true of the expression "incorporation" which, in normal usage, is a neutral expression not necessarily implying prior forcible action on the part of the acquiring State.

83. I have said "albeit *obiter*" in paragraph 81 above because the request is really a hypothetical one and, therefore, does not call for a response. Although the area of Bosnia-Herzegovina originally occupied by its Muslim population has now been significantly reduced by Serbian attacks and occupation, the Applicant has produced no evidence that "Yugoslavia (Serbia and Montenegro)", the entity named in the request, is — or will be — an annexing or incorporating power. Indeed, such evidence as falls within the sphere of public knowledge or judicial notice indicates at the present time that the Republic of Bosnia-Herzegovina is likely to remain as a State within its original territory and that the resolution of the present conflict will take the form of a redistribution of territory between the Muslim, Serb and Croat populations within that territory.

4. The Fourth Request

84. The fourth request is:

> "That the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own People as required by Article I of the Genocide Convention."

85. It is convenient to approach this request with some analysis of the duties and rights created by Article I of the Genocide Convention wherein the Contracting Parties:

"confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

86. The duty to "prevent" genocide is a duty that rests upon all parties and is a duty owed by each party to every other. This network of duties is matched by a network of correlative rights which it is not necessary now to analyse in full detail. But in considering the present case, three separate elements may be distinguished.

87. First, there is the duty of the Respondent both to prevent genocide and to refrain from conduct that inhibits the ability of the Applicant itself to prevent genocide or to resist it. There can be no doubt that the Court may require the Respondent in general terms not to commit genocide and to take measures to prevent the commission of genocide, whether directly by itself or indirectly by others who may be directed, controlled or supported by it. This is what the Court has done in its Orders of 8 April 1993 and of today's date. It is the least that the Court can do. There is a case, however, for saying that, in the light of facts of which it is aware, the Court should be more specific in directing the Respondent to refrain also from particular kinds of acts, especially further murder of civilians and the continuance of the process of ethnic cleansing and the forced displacement of the Muslim population.

88. Second, there is the duty of the Applicant conceived and expressed in the same terms as those just used in regard to the duty of the Respondent. In principle, the duties of the two Parties are identical. But when the evidence indicates (as it does) that the extent of the atrocities committed against the Muslim population of Bosnia is of an order which so far exceeds the extent of any wrongs done to the Serb ethnic group in Bosnia-Herzegovina as to exclude any conclusion that the latter are suffering genocide, there is no need for a more specific indication of interim measures in favour of Yugoslavia than appeared in the Court's Order of 8 April 1993; and that is the view that the Court has taken in its Order of today's date.

89. Third, there is the question of access by the Applicant to the *means* to prevent the commission of acts of genocide. The Applicant obviously has here in mind some consideration by the Court of the effect and future of the embargo placed by Security Council resolution 713 (1991) of 25 September 1991 upon the provision of arms and military equipment to both sides in the conflict.

90. In the resolution in question the Security Council decided, acting under Chapter VII of the Charter, *inter alia*:

> "that all States shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia" (resolution 713 (1991), para. 6).

Four aspects of this resolution call for comment.

91. The first is that the embargo was requested by Yugoslavia itself and three members of the Security Council, China, India and Zimbabwe, stated that they regarded Yugoslavia's express agreement to the embargo as essential. This, however, cannot be seen as reflecting a legal requirement to this effect. Rather, the likely explanation is that some political hesitation on the part of those States mentioning this consideration was overcome by the fact of Yugoslavia's agreement.

92. The second comment is that the resolution was adopted at a time when the international status and capacity of the original federal State of Yugoslavia had not been brought into question. Within one month, however, the authority of the government in Belgrade to represent the whole of the territory formerly comprised within the borders of Yugoslavia had become a matter of doubt. On 25 October 1991 Mr. Cyrus Vance, acting as representative of the United Nations Secretary-General, reported that the subsequent declarations of full independence made by Slovenia and Croatia had seriously impaired the *de facto* authority of the central government in Yugoslavia. On 7 December 1991 the Arbitration Commission established by the European Community found *(inter alia)* that the Socialist Federal Republic of Yugoslavia was in the process of dissolution. By 19 September 1992 the Security Council recorded in the preamble to resolution 777 (1992) that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist". On 6 March 1992 Bosnia-Herzegovina declared its independence; on 6 April 1992 it was recognized by the European Community and on 22 May 1992 it was admitted to membership of the United Nations. The implications of this consideration are closely connected with the one that follows.

93. The third point is that the area to which the resolution prohibited the delivery of weapons was described as "Yugoslavia". As a description of an identifiable territory this name ceased to be valid upon the dissolution of the former Socialist Federal Republic of Yugoslavia and its replacement in a large part of that territory by a number of independent republics, the boundaries of which with each other were found by the Arbitral Commission on 11 January 1992 to have acquired "the character of borders protected by international law".

94. On the basis of these two considerations the Applicant has argued

that the resolution is not applicable to the territory of the new Republic of Bosnia and Herzegovina. Though this argument is by no means devoid of logical force, the difficulty with it lies in the fact that the Security Council has on a number of occasions reaffirmed the embargo, notwithstanding the fact that the Security Council clearly must have known of the emergence of the new Republic and evidently intended the embargo to apply to it. The idea of "interpreting" the resolution so as not to apply to the Applicant does not seem consistent with what the Security Council has apparently had in mind. The most compelling evidence of the Council's view in this regard is the record of the debate held on 29 June 1993 when six members sought, without success, to persuade the Council expressly to raise the embargo in relation to Bosnia-Herzegovina. The vote was 6 in favour, none against, with 9 abstentions.

95. The fourth and legally most relevant comment to be made on the resolution is that the embargo operates unequally between the two sides principally engaged in the conflict. The Serbians in Bosnia had (and have) the support of the Serbians in Serbia and the latter have the benefit of access to the stocks of arms of the Yugoslav National Army, the production of arms factories in Serbia and the import, in breach of the embargo, of arms and military equipment via the Danube and other routes. The Bosnian Muslims did not (and do not) have these advantages.

96. This inequality has been widely recognized and, in particular, was pointed out by the former Prime Minister of Poland, Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, in his report circulated in the United Nations on 17 November 1992 (A/47/666 - S/24809). He said, in paragraph 14:

> "Another factor which has contributed to the intensity of ethnic cleansing in areas under Serbian control is the marked imbalance between the weaponry in the hands of the Serbian and the Muslim population of Bosnia and Herzegovina."

In an earlier paragraph 6, the Special Rapporteur had indicated that

> "the content of the report is based mainly on information received by the Special Rapporteur and his delegation directly from credible witnesses or from reliable and impartial sources".

Subsequently, the General Assembly took note of the above-quoted statement of the Special Rapporteur and incorporated it verbatim in the preamble of General Assembly resolution 47/121 of 18 December 1992. This statement is the more important because of the direct link which it demonstrates between the continuance of the arms embargo and the exposure of the Muslim population of Bosnia to genocidal activity at the hands of the Serbs.

97. The Applicant's request gives rise to two questions: one is whether any challenge to the Security Council resolution is possible in the present context; the other is how, as a matter of form, the Court could give operative effect to its views on this matter within the procedural framework of bilateral litigation between the present two Parties. Although the Court has taken the position that it can make a suitable order without entering into these questions, I believe that some consideration should be given to them.

A. The effect of the Security Council resolution

98. On the face of it, Security Council resolution 713 (1991) is a valid prohibition of the supply of arms and military equipment to those involved in the Yugoslav conflict and is binding on all Members of the United Nations. Although the resolution is open to the comments expressed above in paragraphs 91-96, it cannot be said with certainty that in themselves these comments affect the continuing validity of the resolution. The fact that some of the members of the Security Council indicated that they would not have supported the resolution in the absence of the consent of Yugoslavia, in relation to whose territory the embargo was adopted, could only be relevant in the absence of a determination by the Security Council that the situation fell within Chapter VII of the Charter. Once the Security Council indicated that it was acting "under Chapter VII", it was no longer constrained by the necessity of obtaining the consent of any State to the measures that it considered the circumstances to require.

99. This is not to say that the Security Council can act free of all legal controls but only that the Court's power of judicial review is limited. That the Court has some power of this kind can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation. The Court has already, in the Lockerbie case, given an extensive interpretation of the powers of the Security Council when acting under Chapter VII, in holding that a decision of the Council is, by virtue of Articles 25 and 103 of the Charter, able to prevail over the obligations of the parties under any other international agreement (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, para. 39).

100. The present case, however, cannot fall within the scope of the doctrine just enunciated. This is because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*. Even in 1951, in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court affirmed that genocide was "contrary to moral law and to the spirit and aims of the United Nations" (a view repeated by the Court in paragraph 51 of today's Order) and that

> "the principles underlying the Convention are provisions which are recognized by civilized nations as binding on States even without any conventional obligation" (*I.C.J. Reports 1951*, p. 22).

An express reference to the special quality of the prohibition of genocide may also be seen in the work of the International Law Commission in the preparation of Article 50 of the draft articles on the Law of Treaties (*Yearbook of the International Law Commission*, 1966, Vol. II, pp. 248-249) which eventually materialized in Article 53 of the Vienna Convention on the Law of Treaties and in the same Commission's commentary on Article 19 (international crimes and delicts) of the draft articles on State Responsibility (*Yearbook of the International Law Commission*, 1976, Vol. II, Pt. 2, p. 103). The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus — that a Security Council resolution may even require participation in genocide — for its unacceptability to be apparent.

101. Nor should one overlook the significance of the provision in Article 24 (2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. Amongst the Purposes set out in Article 1 (3) of the Charter is that of achieving international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

102. Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule

of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.

103. What legal consequences may flow from this analysis? One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it. Even so, it would be difficult to say that they then became positively obliged to provide the Applicant with weapons and military equipment.

104. There is, however, another possibility that is, perhaps, more in accord with the realities of the situation. It must be recognized that the chain of hypotheses in the analysis just made involves some debatable links — elements of fact, such as that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and elements of law, such as that genocide is *jus cogens* and that a resolution which becomes violative of *jus cogens* must then become void and legally ineffective. It is not necessary for the Court to take a position in this regard at this time. Instead, it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's Order, so that the Security Council may give due weight to it in future reconsideration of the embargo.

B. The procedural question

105. The second question now presents itself. In formal procedural terms, how can the Court, within the framework of proceedings between the Applicant and the Respondent to which no other State is a party,

reflect the views set out above? The position would, of course, have been somewhat different if, invoking the obligation resting upon *all* parties to the Genocide Convention to prevent genocide, the Applicant had started proceedings against one or more of other parties to the Convention challenging their failure to meet this commitment. Then, if the Court had shared the view here expressed of the scope of Article I, it could have made a declaration *inter partes* along the lines indicated above. But, for whatever reason, that course was not chosen by the Applicant and, in consequence, the question must be asked whether the Court, either at the request of a party or *proprio motu*, can properly find room within the framework of the present case for this kind of approach.

106. While, of course, the principal thrust of a finding that paragraph 6 of Security Council resolution 713 (1991) may conflict with *jus cogens* must lie in the direction of third States which may be willing to supply arms to Bosnia-Herzegovina, that does not mean that such a conclusion could have no place in an order operative between Bosnia-Herzegovina and Yugoslavia in the present proceedings. There may well be advantage for Bosnia-Herzegovina (it is not for the Court to determine) in being able to say that the Court has identified a source of doubt regarding the validity of the embargo resolution which, though not directly operative by itself, requires that the Security Council give the matter further consideration.

107. So far, then, as this fourth request is related to the elimination of the arms embargo vis-à-vis Bosnia-Herzegovina, I would be prepared to say that the Applicant may have an indication of a provisional measure in the following terms: that as between the Applicant and the Respondent the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council.

5. The Fifth Request

108. The fifth request is:

> "That all Contracting Parties to the Genocide Convention are obliged by Article I thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina."

109. As is apparent on the face of the Convention, most of its provisions are taken up with aspects of the prevention and punishment of genocide within the national legal sphere, that is to say, with breaches of the Convention by individuals. Thus Article III describes genocide and related acts as being "punishable" — a process more obviously applicable to individuals than to States. Article IV prescribes that "persons committing genocide ... shall be punished". Article V requires the Contracting

Parties "to enact legislation to give effect to the provisions of the Convention" — again reflecting the concern of the Convention with the individual violator. This is reinforced by Article VI which provides that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed or by an appropriate international penal tribunal. Yet again, Article VII provides that, for the purpose of extradition, genocide shall not be considered as a political crime. All this, therefore, strongly suggests that the Convention does no more than establish for the Contracting States duties that are to be implemented by legislative action within their domestic legal spheres.

110. Any such narrow view must, however, be rejected. The statement in Article I that the Contracting Parties undertake "to prevent and to punish" genocide is comprehensive and unqualified. The undertaking establishes two distinct duties: the duty "to prevent" and the duty "to punish". Thus, a breach of duty can arise solely from failure to prevent or solely from failure to punish, and does not depend on there being a failure both to prevent and to punish. The confirmation in the same Article that genocide "is a crime under international law" does not change the position or restrict the application of the concept of genocide exclusively to individual criminal liability. The purpose of this latter provision is to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide — that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals.

111. Thus the effect of the Convention is also to place upon States duties to prevent and to punish genocide on the inter-State level. This is the plain meaning of the words of Article I and it is confirmed to some extent by Article VIII and most clearly by Article IX. The latter Article contains the disputes settlement provision of the Convention:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, *including those relating to the responsibility of a State for genocide* or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." (Emphasis added.)

It is the italicized words, "including those relating to the responsibility of a State for genocide", and especially the words "for genocide", that make it clear that the Convention contemplates the possibility that a State may commit genocide and, therefore, that the obligation "to prevent" genocide

extends also to the obligation to prevent a State from committing genocide. If the Convention were limited to the creation of a duty upon States to prevent and to punish genocide within their national legal systems and, by definition, committed by persons not possessing the quality of statehood, how could there be any possibility of the State itself being responsible for genocide, a possibility evidently anticipated in Article IX?

112. The above interpretation, it should be said, is based exclusively upon the plain meaning of the words actually used in the Convention. There is no doubt or ambiguity on the face of the text and preliminary scrutiny of the *travaux préparatoires* does not suggest anything that requires departure from this plain meaning.

113. There is, thus, no difficulty in declaring that all the parties to the Genocide Convention are under a duty to prevent genocide. This is merely a matter of reading the words of Article I of the Convention. Nor is it out of place for the Court to make such a declaration in the present case as part of the indication of provisional measures of protection directed towards the Respondent. What is more controversial is whether this duty extends beyond the duty of each party to prevent genocide within its own territory to that of preventing genocide wherever it may occur.

114. Obviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense. So there is an obligation, at any rate for a State involved in a conflict, to concern itself with the prevention of genocide outside its territory.

115. But does the duty of prevention that rests upon a party in respect of its *own* conduct, or that of persons subject to its authority or control, outside its territory also mean that every party is under an obligation individually and actively to intervene to prevent genocide outside its territory when committed by or under the authority of some other party? As already stated, the undertaking in Article I of the Convention "to prevent" genocide is not limited by reference to person or place so that, on its face, it could be said to require every party positively to prevent genocide wherever it occurs. At this point, however, it becomes necessary to look at State practice. Since the Second World War, there have regrettably been a number of cases of genocide. As Mr. B. Whitaker, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, has stated in the *Revised and Updated Report on the Question of the Prevention and Punishment of Genocide* (E/CN.4/Sub.2/1985/6, 2 July 1985) requested by the Economic and Social Council, the examples which may be cited are

> "the Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Aché Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978 and the contemporary Iranian killings of Bahai's" (pp. 9-10, para. 24).

The limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting the permissibility of inactivity. In contrast with the position that I have taken on other debatable aspects of this case that have not been fully argued by the Parties, I do not feel able, in the absence of a full treatment of this subject by both sides to express a view on it at this stage — sympathetic though I am in principle to the idea of an individual and collective responsibility of States for the prevention of genocide wherever it may occur. I, therefore, find myself unable to accede to the fifth request.

6. The Sixth Request

116. The sixth request is:

> "That the Government of Bosnia and Herzegovina must have the means to defend the People and State of Bosnia and Herzegovina from acts of genocide and partition and dismemberment by means of genocide."

117. The first part of this request essentially duplicates the fourth request, already considered, but the second part introduces an additional element, namely, that the Applicant should have the means to defend its people and itself from "partition and dismemberment by means of genocide".

118. As the view has already been expressed in the answer to the fourth request that the Applicant must have the means to prevent the commission of genocide against itself, the elaboration of the consequences of genocide against which it is entitled to protect itself is unnecessary. The problem is largely one of causation. Is the "partition and dismemberment" of Bosnia and Herzegovina being achieved "by means of genocide"? To answer No — as must be the answer — is not to deny that genocide has taken place in Bosnia and Herzegovina and that at the present time it appears to be continuing. Rather it is to say that the object of the genocide is the Muslim population of Bosnia not "the People and State of Bosnia-Herzegovina" as a whole. The latter concept must comprise all the elements of the population of Bosnia and Herzegovina, of which the Muslim population forms no more than 40 per cent. So, though the Government of Bosnia and Herzegovina is entitled to the means to protect its population, or part of its population, from genocide, that entitlement does not extend to the protection of the State from dismemberment where the population of the State is evidently divided within itself and cannot be said to compose a "national

group" within the meaning of that expression as used in Article I of the Convention. The Court is as much bound to take judicial notice of current political developments in Bosnia and Herzegovina as it is of the earlier events affecting its Muslim population and clearly constituting genocide. These current developments exclude any notion that the division by agreement of the territory of Bosnia and Herzegovina between the Muslims, Serbs and Croats of the country can be regarded as genocide.

7. The Seventh, Eighth and Ninth Requests

119. The content of these requests is so similar to that of the sixth, fourth and fifth requests respectively as not to require separate answers. They are covered, to the extent that it is possible to do so, by the measures indicated below.

8. The Tenth Request

120. The tenth request is

> "That United Nations Peace-keeping Forces in Bosnia and Herzegovina (i.e., UNPROFOR) must do all in their power to ensure the flow of humanitarian relief supplies to the Bosnian People through the Bosnian city of Tuzla."

121. As no evidence has been produced to the Court that the United Nations Peace-keeping Forces in Bosnia are doing anything other than all in their power to perform their humanitarian duties, there is no basis for dealing with this request.

V. CONCLUSIONS

122. In expressing my conclusions on the Applicant's second request for an indication of interim measures, I begin by repeating my concurrence with the operative paragraphs of the Court's Order. As already stated, however, I would have preferred the Court to have dealt with certain aspects of the case in greater detail and to have gone beyond the reaffirmation of the measures indicated in its Order of 8 April 1993. I shall, therefore, elaborate in paragraph 123 a number of interim measures which I believe fall within the scope of the Genocide Convention and of the operative part of the Court's Order and which I would have wished to have seen expressly included in it. In paragraph 124 I shall set out some additional measures which, though outside the scope of the Genocide

Convention, lie, in my view, within the scope of the Court's jurisdiction based on *forum prorogatum.*

123. In the exercise of the jurisdiction conferred upon it by Article IX of the Genocide Convention:

A. The Court should have ordered Yugoslavia (Serbia and Montenegro) and any authorities or persons, whether military or civil, subject to its control, direction or influence, immediately to cease, and subsequently to refrain from, any act amounting to, contributing to, or supportive of genocide in Bosnia-Herzegovina.

The acts of, or associated with, genocide which should have been covered by the Order are those acts listed in Article II of the Genocide Convention.

The prohibition should have extended, but not been limited, to:

(i) providing or permitting the provision of weapons, ammunition, military supplies and financial, commercial or any other aid, except of a strictly humanitarian character, to any forces, authorities or individuals engaged or engaging in Bosnia-Herzegovina in hostilities or armed actions against the Government of the Republic of Bosnia-Herzegovina or against any persons within the territorial limits of that Republic as established at 6 March 1992 who acknowledge its authority or claim its protection, and

(ii) "ethnic cleansing" or conduct contributing thereto such as attacks and firing upon, sniping at and killing of non-combatants, and bombardment and blockade of areas of civilian occupation and other conduct having as its effect the terrorization of civilians in such a manner as to lead them to abandon their homes.

B. The Court should further have declared that, as between the Applicant and the Respondent, the imbalance in the supply of weaponry as a result of the embargo established by Security Council resolution 713 (1991) and the grave disadvantage under which the Applicant has thus been placed has a sufficient causal connection with the continuance of genocide in Bosnia-Herzegovina to raise the question of its compatibility with *jus cogens* and thus place in doubt its continuing validity in a manner calling for further consideration by the Security Council.

124. In addition, in the exercise of the jurisdiction conferred upon the Court by the request of the Applicant for interim measures contained in the act of *forum prorogatum* constituted by the letter of 1 April 1993 from the Respondent to the Registrar of the Court, the Court should have ordered both Parties and those subject to their authority or control:

(i) to comply strictly with any agreement or agreements for a cease-fire to which they may be, or may become, parties;
(ii) to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof;

(iii) to release immediately from all prisons and detention camps all Muslims, Serbs or other persons who are being detained because of their ethnic origin, and to terminate forthwith the torture and maltreatment of such persons;
(iv) to allow, without delay, the free movement of all those who, by reason of the conflict and insecurity in Bosnia-Herzegovina wish voluntarily to leave their homes and move elsewhere;
(v) to refrain from any further destruction of mosques, churches, other places of worship, schools, libraries, museums and any other establishments or institutions associated with the ethnical or religious identity of any group in Bosnia-Herzegovina; and
(vi) to end immediately all acts of discrimination in any territory under their control based on nationality, religion or ethnic identity, including any discrimination relating to the delivery of humanitarian aid and, to that end, to co-operate with and render all aid and assistance within their power to UNPROFOR, UNHCR and other agencies, whether intergovernmental or non-governmental, in providing and protecting safe havens and other localities of sheltered civilian abode and in carrying necessary non-military supplies to such places.

(Signed) Elihu LAUTERPACHT.