DISSENTING OPINION OF VICE-PRESIDENT WEERAMANTRY

Unlike the majority of the Court I take the view that the Court has prima facie jurisdiction in this case. As for the issue of provisional measures, it is a case where "circumstances so require" (Article 41 of the Statute).

I view this case as one of such seminal importance as to necessitate a somewhat extended statement of my views, despite the extreme constraints of time within which this opinion has had to be prepared.

The situation complained of is one where lives are being lost daily, vast numbers of people including women, children, the aged and the infirm are continuously exposed to physical danger and suffering, and property damage on a most extensive scale is a regular occurrence. Whatever the reason for the aerial bombing which is now in progress, and however well intentioned its origin, it involves certain fundamentals of the international legal order — the *peaceful* resolution of disputes, the overarching authority of the United Nations Charter and the concept of the international rule of law. It is upon these fundamental principles that the ensuing opinion is based.

The applicability of these principles, whether individually or in combination, produces a situation in which at least a prima facie case has been made out of the existence of circumstances justifying the issue of interim measures, pending a fuller consideration by the Court of the complex legal issues involved.

This Application highlights in classic form one of the most ancient and valued attributes of the judicial process — the power and obligation of a court to do what lies within its power to promote the peaceful settlement of disputes by such interim measures as may be necessary pending the final determination of the case before the Court. It is also a time-honoured attribute of the judicial mission that courts should, within the limits of the judicial function, do what they can to prevent the escalation of the conflict between the litigating parties.

In domestic law a court seeing violence between two litigating parties relating to the subject-matter of a pending action would, however righteous be the motive of one or other of the parties, have no hesitation in issuing an enjoining order restraining such violence. The rationale for such action is twofold: it is essential that the rights of parties be preserved intact pending their determination by the Court and it is essen-

tial that there be no escalation of the dispute pending litigation. The nature of the judicial function is no different when it is transposed into the international plane, especially when the Court concerned is the principal judicial organ of the United Nations, functioning under a Charter which ranks the peaceful resolution of disputes among its prime Purposes and Principles.

It is no argument to the contrary that the Court lacks the means to enforce its measures. The voice of the Court as the principal judicial organ of the United Nations may well be the one factor which, in certain situations, can tilt the balance in favour of a solution of disputes according to the law.

It is my view that the Court should have issued provisional measures on *both* Parties to desist from acts of violence of any sort whatsoever, subject to appropriate safeguards for keeping the peace as suggested later in this opinion.

Some General Observations

This case is one of ten simultaneously filed by Yugoslavia against ten different NATO Members.

The jurisdictional issues involved in all these cases are not the same and hence the Court's decisions on the various matters involved are not identical.

In two of the ten cases — those against Spain and the United States — I agree with the Court's decision that there is a manifest absence of jurisdiction to deal with them. These two cases should therefore be taken off the Court's register of pending cases, and I concur in the Court's decision to this effect.

In four of the remaining eight cases — the cases against France, Germany, Italy and the United Kingdom — while agreeing with the majority of the Court, I have some comments to offer, which I do in each case in a declaration.

In the remaining four cases — those against Belgium, Canada, the Netherlands and Portugal — I differ from the majority of my colleagues in that it is my view that provisional measures should be indicated. I have hence filed dissenting opinions in these cases. My position is set out in my dissenting opinion in *Yugoslavia* v. *Belgium*, and my opinions in the other three cases, which are identical *mutatis mutandis*, refer back to that opinion.

On the question whether these last eight cases should remain on the Court's General List I concur in the Court's decision that they should so remain, reserving the subsequent procedure for further decision.

PARTICULAR SIGNIFICANCE OF THIS CASE

This case raises human rights issues of the gravest nature on both sides.

On the one hand the Respondents allege against the Applicant the massacre of ethnic Albanians in Kosovo and the expulsion of ethnic Albanians from their homes and habitations on a scale that can be described as truly colossal. What is alleged is no less than the forcible expulsion of nearly a million persons, the murder of several thousands and the destruction of innumerable homes and villages in an ongoing process which is allegedly continuing to this day. All this is alleged to be part of a scheme which is said to be of such magnitude as to attract the repellent description of "ethnic cleansing".

If the allegations made are substantiated, this would constitute one of the severest violations of human rights and dignity that have occurred since the conclusion of World War II. Human rights violations on this scale are such as to throw upon the world community a grave responsibility to intervene for their prevention and it is well-established legal doctrine that such gross denials of human rights anywhere are everyone's concern everywhere. The concept of sovereignty is no protection against action by the world community to prevent such violations if they be of the scale and nature alleged.

On the other hand, however well intentioned the air strikes that have been launched by the NATO powers as a means of preventing this, there are assertions by the Applicant that this use of force lacks United Nations sanction and authority and overlooks express Charter provisions. There are also allegations of violations of the provisions of the Geneva Convention of 1949 and of the Additional Protocol No. 1 of 1977 on the protection of civilians and civilian objects in time of war.

These assertions raise substantial questions of law that need careful examination. Yugoslavia asserts that there have been over a thousand deaths of civilians including women and children, the aged and the infirm, 4,500 cases of serious bodily injuries to civilians, the destruction of thousands of civilian houses, the loss of several hundred thousand jobs and the destruction of industrial enterprises, schools, telecommunications, airports, hospitals, and cultural institutions, monuments, religious shrines and historical monuments. One million citizens are said to be short of water supply and the Applicant also alleges that serious environmental damage has been caused and is continuing to be caused by the bombing of oil refineries and chemical plants, and the use of bombs containing depleted uranium and that the prohibition against the use of weapons calculated to cause unnecessary suffering is violated by the use of cluster bombs.

Such is the background to the matter now before the Court, a situation which has no precedent in the annals of this Court or indeed of any other, for the Court is being asked to do no less than to prevent or mitigate the severities of a major military operation. This is thus a seminal moment in judicial history and I cannot permit it to pass without some suggestions which, though I am in a minority, may still, I hope, be of some utility.

THE POSITION OF THE APPLICANT

In this case the Applicant requests the Court to issue provisional measures requiring the Respondent to stop immediately the violation of various obligations towards Yugoslavia which Yugoslavia alleges are being violated.

The Respondent on the other hand claims that its actions are taken with purely humanitarian intent to prevent gross violations of human rights extending to genocide which have been perpetrated in Kosovo by the Applicant and still continue to be perpetrated. In this context it invokes the "clean hands" principle, a principle of equity and judicial procedure, well recognized in all legal systems, by which he who seeks the assistance of a court must come to the court with clean hands. He who seeks equity must do equity.

It is not for the Court to pronounce at this stage upon the merits of the allegations on either side. It is patently clear however that it is a precondition to the granting of any relief to the Applicant that if the Applicant is engaged on a course of violence relevant to the subject-matter of the Application, that violence should immediately cease.

It is clear that the Court in indicating provisional measures can indicate measures other than those proposed by the Applicant (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, 1997, Vol. III, p. 1457) and that the Court may also issue measures *proprio motu,* a practice which excludes the *non ultra petita* rule *(ibid.)*.

Moreover since both Parties are under an implied obligation until the Court has reached its decision to refrain from any steps which might have a prejudicial effect on the execution of the Court's decision (Rosenne, *op. cit.*, p. 1458) the applicant who comes to a court for interim relief is itself under a special obligation to desist immediately from all action which has any semblance of aggravating or extending the dispute.

The Court in this case is entitled to act on these principles with special stringency and my view is that it is a strict precondition to any interim provisions the Court may order against the Respondent that the Appli-

cant itself should desist immediately from any act of interference with the rights of the people of Kosovo. A violation of this precondition in any shape or form would immediately destroy the basis of any order the Court may make.

I stress in this context that there can be no affirmative finding of any sort on this matter at this stage and that all that has been said is without any attempt at prejudgment of any of the issues before the Court.

I set out at the end of this opinion some thoughts regarding the provisional measures which I think the Court could have issued, and which I consider appropriate, but I would lay down the requisite set out above as an essential precondition to the continuing applicability of any provisional measures that might be issued in circumstances such as these.

ADMISSIBILITY AND JURISDICTION

Turning next to the questions of admissibility and jurisdiction of Yugoslavia's Application, objection has been taken to Yugoslavia's status to make this Application. This objection is based on Yugoslavia's membership status in the United Nations.

The majority of the Court have held that the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in this case and I respectfully agree.

I come now to the question of the Court's prima facie jurisdiction.

The jurisdiction necessary for the issue of provisional measures is based by the Applicant on three grounds — Article 36, paragraph 2, of the Statute, Article IX of the Genocide Convention and Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration, 1930, between Belgium and the Kingdom of Yugoslavia.

Article 36, paragraph 2, of the Statute is, in my view, sufficient to confer prima facie jurisdiction for the purposes of provisional measures and for this reason I do not think it necessary to examine the other grounds further.

JURISDICTION *RATIONE TEMPORIS*

I do not share the view of the majority of the Court in regard to the lack of jurisdiction under Article 36, paragraph 2, and note that the main reason why the majority have concluded that prima facie jurisdiction is not available is that the Yugoslav declaration under Article 36, paragraph 2, is limited to disputes arising or which may arise after 25 April 1999.

(a) *Inappropriateness of Reference Back to Time of Planning*

The question for decision is whether the temporal restriction defeats the entire declaration, so far as concerns the subject-matter of the present Application, in view of the fact that the NATO air operations, the subject-matter of the Applicant's complaint, began on 24 March 1999, thus pre-dating 25 April, the date specified in Yugoslavia's declaration. Is the declaration thus inoperative in terms of the very restriction that Yugoslavia itself laid down?

I think not.

A vast enterprise may be planned and conceived at a particular time and date but it does not follow that every major operation conducted within that enterprise over the ensuing months, if it gives rise to a claim at law, dates back to the conception of the entire enterprise. The campaign may involve several breaches of vastly different State obligations such as environmental obligations, human rights obligations, obligations under the Convention against Torture, obligations under Conventions relating to civil aviation, the law of the sea or conduct in war. All of these operations may have been separately and individually planned on different dates. It seems to be difficult to maintain that all such breaches of obligation occurred when the initial plan was conceived.

(b) *Meaning of "Dispute"*

I wish to say a word here about the meaning of the term "dispute".

A dispute may remain at an abstract level, as where one party alleges that it has a particular right and the other party disputes it. A dispute may on the other hand, as in most instances, assume a practical form, as where one party causes damage to another by some wrongful act and that other party asserts a violation of its rights and makes a claim for compensation. There is then a dispute as to whether a wrongful act has been done and a claim to damages exists. Both types of dispute fall within the accepted definition in the Court's jurisprudence namely, "a disagreement on a point of law or fact, a conflict of legal views or interests between parties" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 99, para. 22).

Clearly the allegations of wrongful acts of the varied descriptions set out in the Application and the resulting claims based upon them are all "disputes" within the meaning of that term in the Court's jurisprudence.

(c) *Differences in Obligations Breached*

When in a bombing campaign a bridge over an international river is blown up, a chemicals factory destroyed, a prohibited weapon used or a hospital demolished, each of these acts, if wrongful, would be the subject of a different dispute and a distinct claim. These claims may involve the violation of different types of rights and different rules of law — navigation rights, environmental rights, human rights, humanitarian rules and rules under the Geneva Conventions.

In this case, as I understand it, the Court is faced with a number of such acts, separately executed and separated in time. In my view it strains the rules of legal interpretation to conclude that all of these constitute one dispute which was complete when the bombing campaign was decided upon. Disputes at law are not confined to disputes at such an abstract and theoretical level. It is of the nature of judicial proceedings and litigation at every level that disputes both abstract and practical are brought before courts for determination.

It is relevant to note in this connection that the claim as stated in the Application asserts the violation of different legal obligations in respect of the different categories of damage. Among these are violations of obligations not to use prohibited weapons, obligations not to cause far-reaching health and environmental damage, obligations respecting the right to information, obligations to respect freedom of navigation on international rivers and obligations not to commit any act of hostility towards historical monuments, works of art or places of worship.

To take some specific examples the disputes arising from the bombing of an embassy, from the bombing of a TV station, from the bombing of a passenger train, a school or a power station all arise when those acts in fact take place and not before the acts were done. To hold otherwise would be unrealistic and contrary to legal principle.

A major campaign may even take years and this does not mean that every act of wrongdoing that may be committed in the course of that campaign — even though those acts are years apart — dates back in law to the time when it was decided to commence hostilities.

(d) *Maturation of a Legal Claim*

A legal principle well recognized in all legal systems is that an act of wrongdoing is completed when the wrong is done, not when it was

planned. To take an analogy from domestic law, such an act of wrongdoing would be dated, for purposes of statutes of limitation or otherwise, as from the date when the wrongful act is committed. Until such commission the cause of action would not be complete. A plan or an intention to cause damage does not ripen into a justiciable claim until the physical act is done which causes the damage. In the well-known learning of the Roman law relating to *damnum injuria datum*, *damnum* needs to be *datum* before it grounds a claim at law.

In this view of the matter the fact that the bombing campaign as a whole was conceived before the material date, namely 25 April 1999, cannot carry the implication that acts of wrongdoing committed and perhaps even individually planned subsequent to that date must be taken as relating back in law to the date of conception of the entire scheme. They are committed in law when they are committed in fact and not when they are planned, just as any act in law attracts liability not as from the date when it is conceived but when it is executed.

(e) *International Law Commission's Draft Articles on State Responsibility*

The limitation *ratione temporis* thus does not seem to me to be a satisfactory basis on which to hold that the Court lacks even prima facie jurisdiction. The fact that the matter cannot be so simply dealt with as the Court has chosen to do is borne out also by the International Law Commission's Draft Articles on State Responsibility dealing with breaches of State responsibility which are part of a series. Article 25 which deals with the matter points out that the time of commission of a breach extends over the entire period during which the act continues and that in the case of a series of acts or omissions the breach of international obligation occurs at the moment when the particular act or omission is accomplished.

(f) *Intention of Author of Reservation*

Moreover, the construction adopted does not adequately consider the intention of the author of the reservation, which is an important factor to be taken into account in construing the overall meaning of a declaration (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49). Yugoslavia, in drafting its declaration, could not have intended to exclude from the Court's jurisdiction the very incidents of which it was complaining and which it had made the subject-matter of its Application. Such a self-defeating inten-

tion can scarcely be imputed to the author of such an important document.

(g) *The Question of Divisibility*

On the question of divisibility, I agree with the contention that a dispute is not infinitely divisible into a multitude of separate fragmentary events such as the firing of every individual bullet. Such analogies are however totally distinguishable. Fragmentary acts of this nature cannot be equated to events which are major incidents in themselves such as the accidental bombing of a train or a hospital or an embassy.

(h) *Inadequacy of Temporal Limitation to Defeat Prima Facie Jurisdiction*

In short, whichever way one looks at it, there is certainly a prima facie case that there is jurisdiction *ratione temporis*. At the very least the matter is debatable, and hence there is no adequate reason for refusing to consider this matter on the basis of a lack of prima facie jurisdiction.

In reaching this conclusion I apply the tests which are well recognized in the jurisprudence of the Court. The Court should be able to hold "should it be only provisionally, that it was competent to hear the case on the merits" (Rosenne, *op. cit.*, p. 1444).

Enough has been said to indicate that the prima facie jurisdiction which is sufficient to support an order for provisional measures does exist in this case. It is clearly not a case where it could be assumed *a priori* that the claims of Yugoslavia "fall completely outside the purview of the Court's jurisdiction" (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103, para. 23; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 140, para. 24; Rosenne, *op. cit.*, p. 1448).

Appropriateness

Granted then that the Application is admissible and that the Court has prima facie jurisdiction I move now to a consideration of the appropriateness of the issue of provisional measures in this case.

(a) *Urgency*

A prerequisite to the issue of provisional measures is urgency.

The circumstances of this case leave no doubt regarding the satisfaction of this condition. All over Yugoslavia lives are being lost every day, people are seriously injured and maimed and property loss of various descriptions is being sustained.

This Court acts urgently when the circumstances require it and this case is one such.

The Court is so sensitive to considerations of urgency especially where they concern the possible loss of human life that it has moved within a week *(Vienna Convention on Consular Relations (Paraguay* v. *United States of America))* or indeed within a day *(LaGrand (Germany* v. *United States of America))* to issue provisional measures where a single human life was involved. Without needing to elaborate upon the factual details of the deaths and damage alleged by the Applicant to have been caused by the bombing of Yugoslavia by NATO forces and without elaborating on the allegations of continuing human rights violations committed and continuing to be committed by the Applicant in Kosovo as alleged by the Respondent, it is clear that great urgencies exist in the present case. These urgently call for the issue of appropriate provisional measures preserving the rights of both Parties, preventing the escalation of the disputes and allaying the human suffering referred to in the allegations of both Parties. I do not think that the complexity of the issues takes away from the need to act with urgency in a matter of urgency — particularly where the urgencies are as telling as in the matter now before the Court.

(b) *Seminal Nature of the Issues Involved*

This case raises certain issues which reach through to the core of the United Nations Charter. They will of course come up for determination at the appropriate stage. At this provisional measures stage one needs to go no further than to determine whether an arguable issue exists. This criterion is more than satisfied in the present case.

One such issue is whether, assuming the entirely laudable nature of NATO's object of protecting the refugees from Kosovo, that intention could be given effect otherwise than in conformity with the provisions of the United Nations Charter.

There are Charter provisions which have a direct bearing on this subject namely Article 2 (3), Article 2 (4) and Article 53 (1). They contain a clear rule that international disputes should be settled by peaceful means, a clear prohibition of the use of force against the territorial integrity of any State and a clear prohibition of enforcement action without the authorization of the Security Council.

The Respondent has not been heard upon these matters and if the Court finds affirmatively that it has jurisdiction to hear this Application it will consider them. All that is necessary at the present stage of provisional measures is to determine whether there is a justiciable issue within the Court's prima facie jurisdiction that awaits determination. Indeed the Court indicates no less when in its Judgment it refers to the complex issues relating to legality that arise in connection with the military actions of NATO.

This issue is a serious one going to the roots of international order, for disregard of the Charter, if such indeed be the case, can have long-term effects on the stability of the international community itself and on the international rule of law. It is an arguable one and lies at the heart of the dispute before the Court. There are also issues relating to the alleged and continuing violation of the Geneva Convention of 1949, the Additional Protocol No. 1 of 1949 relating to the protection of civilians and civilian objects in time of war and of the rules against the use of prohibited weapons and of the laws of war. All these are principles so important to international order that their alleged violations involve a special degree of urgency. They are thus additional factors indicative of the appropriateness of provisional measures if the Court should have prima facie jurisdiction.

Issues have thus been raised which are so serious as, granted jurisdiction, would warrant the issue of provisional measures pending their determination.

(c) *Centrality of the Notion of Peaceful Resolution of Disputes*

The *peaceful* resolution of disputes is a cornerstone of the United Nations Charter. I do not need to elaborate on this point. It ranks high among the Purposes and Principles of the United Nations and finds its place at the very forefront of the United Nations Charter in Article 1 (1). War, its antithesis, is mentioned in the very first preambular paragraph of the Charter as the scourge from which the peoples of the United Nations are determined to save succeeding generations.

These matters of highest concern to the international community are the bedrock on which the Charter is built and the Court is *par excellence* the judicial institution which has been structured, in furtherance of these resolves, for the *peaceful* resolution of disputes. Fashioned as an embodiment of the rule of law which was to replace force as the arbiter of international disputes, the Court is charged with the highest responsibilities in upholding the peaceful resolution of disputes, and the judicial implementation of the principles of the Charter. Where there is an allegation of a violation of this basic principle there is an issue which awaits the serious and urgent consideration of the Court thus making out a further reason for the issue of provisional measures until this matter is resolved.

Article 2, paragraph 3, sets out as a fundamental principle that all Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Authoritative treatises on the Charter characterize the principle of the peaceful settlement of disputes as a cornerstone of the contemporary world order (Bruno Simma, *The Charter of the United Nations, A Commentary*, 1994, p. 99). Article 2, paragraph 3, has been described as by no means a mere recommendatory provision compliance with which would

be within the discretion of States, but rather as a principle which gives rise to a legal obligation (Simma, *op. cit.*, p. 101). Indeed "the peaceful settlement of disputes is the cornerstone of the edifice whose main pillar is constituted by the prohibition of the use of force" (*ibid.*, p. 100).

So well accepted was the principle embodied in Article 2 (3) that, as a writer on the topic has observed (Hans Blix, "The Principle of Peaceful Settlement of Disputes", in *Legal Principles Governing Friendly Relations and Co-operation among States*, 1966, p. 51), the principle laid down in Article 2, paragraph 3, "was echoed" in many other international documents of the time both multilateral and bilateral. Among the documents he mentions are the Treaty of Friendship, Co-operation and Mutual Assistance of 1955 (the Warsaw Treaty), the North Atlantic Treaty, 1949, and the Bandung Declaration, 1955. The first two embody this principle in their very first article[1].

Reference should also be made in this context to the primacy accorded to the prohibition of force and the peaceful settlement of disputes in the Declaration of Friendly Relations and Co-operation amongst States in Accordance with the Charter of the United Nations adopted by acclamation in the General Assembly on the 25th Anniversary of the Organization. Marking the culmination of ten years of deliberations on the basic principles of international law and the Charter, this declaration underscored the importance attached to these principles by the community of nations. An allegation of non-compliance with these principles and of resulting loss of life and damage on a continuing basis cannot but mark out such a case as appropriate for the issue of provisional measures, granted of course that the Court has prima facie jurisdiction[2].

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[1] Article 1 of the Warsaw Treaty reads as follows:

> "The Contracting Parties undertake, in accordance with the Charter of the United Nations . . . to settle their international disputes by peaceful means." (*UNTS*, Vol. 219, p. 26.)

Article 1 of the North Atlantic Treaty reads as follows:

> "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations." (*UNTS*, Vol. 34, p. 244; NATO basic documents, 1981, p. 10.)

[2] For an analysis of the discussions in the General Assembly on the importance of these principles see further V. S. Mani, *Basic Principles of Modern International Law*, 1993.

The principle of peaceful settlement thus enshrined in the Charter and widely accepted by the international community, acquires its binding character in international law not merely by virtue of its embodiment in the Charter but also because it is binding on every State as a rule of customary international law (Simma, *op. cit.*, p. 100; H. Blix, "The Principle of the Peaceful Settlement of Disputes", in *The Legal Principles Governing Friendly Relations and Co-operation among States*, 1966, p. 45; *The International Society as a Legal Community*, 1980, p. 227; H. Thierry *et al., Droit international public*, 1984, p. 570). This view has also the endorsement of this Court in the *Nicaragua* case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 145, para. 291).

So pivotal is the peaceful settlement of international disputes to the international legal order that a distinguished former judge of this Court has observed that:

> "The *settlement of disputes* is the key factor in deciding whether international society is functioning as a community governed by the rule of law." (H. Mosler, *The International Society as a Legal Community*, 1980, p. xvi.)

The settlement of disputes within the legal framework of international society is thus elevated to the level of a hall-mark of the existence of the international rule of law. The Applicant's assertions thus place us in the presence of an issue which is fundamental to the existence of an ordered international society. A corollary to this proposition is that in the absence of an ordered mode of settlement there is here a justiciable issue of cardinal importance and its violation for however brief a period can work lasting damage to the fabric of that society. This itself makes attention to this problem of staying the present violence on both sides a matter of great urgency.

It is not necessary to elaborate on the other Charter provisions referred to, except to stress their centrality to the matters which the Court will have to consider at the appropriate stage, and that they raise issues of considerable complexity as the Court itself has stressed. They are not issues which are easily decided but since they go to the heart of the Applicant's claims cannot at this stage be discounted when the Court is considering the appropriateness of provisional measures.

Against so strong a legal background relating to the peaceful settlement of disputes, when the Court is confronted with a case involving the use of force, where continuing events of a major nature involving loss of human life and other serious damage occur from day to day the need for provisional measures becomes ever more compelling until the legal issues are resolved.

Till such time the course dictated by the jurisprudence of the centuries, where human tragedy and loss of life are involved, is for the Court to issue provisional measures preserving the rights of the parties and preventing the escalation of the conflict. Such a course would also be in accordance with the primordial principles underlying the Charter and the Statute.

Whatever the genesis of the present matter, I think it would be inappropriate for the Court to respond negatively when its jurisdiction is invoked in such a situation.

It may be that for jurisdictional reasons the Court is totally unable to respond in the majority of the ten cases that have been brought before it. But in the cases where the Court can respond — be it in only one — I believe it should, because the issues involved are central to international order and the international rule of law, and when defined and applied by the Court will have their influence beyond the confines of the particular case.

(d) *Involvement of a Political Element*

I wish to deal here with the argument that the Court must not permit itself to be "politicized" or used as a political instrument — an argument which was addressed to the Court at some length. This is an argument which has been addressed to the Court in some other cases as well and I believe it is necessary to record some thoughts on the subject.

It should be clear that many, if not the vast majority, of the cases that are brought before the Court involve a political element. The fact that a political element is involved does not mean that there are no legal elements involved. Where legal elements are involved it is in my view inappropriate to suggest that merely because a political element is also involved, the pressure of that political element would in some manner deprive the Court of its right and indeed its duty to consider the legal element of a dispute which is rightly brought before it in its capacity as the principal judicial organ of the United Nations. If parties cannot bring such a dispute before the Court merely because a political element is involved they would be deprived of an essential right and relief which they enjoy under the United Nations system.

Making orders and delivering opinions in legal matters is the proper function and judicial responsibility of the Court and when the Court properly discharges its obligations in this regard the Court's determination will naturally have its repercussions in many spheres including the political.

Sir Hersch Lauterpacht, in referring to the distinction between legal and political disputes, has observed that it has become an obstacle in the way of legal progress and that "the doctrine is untenable in theory and

harmful in practice" (*The Function of Law in the International Community*, 1929, p. 435.)

I wish to place on record my rejection of the contention that the involvement of a political element in the dispute somehow causes the legal elements therein to vanish from the vision of the Court or in some way to become irrelevant. Involvement with a political element does not represent a vanishing point of the jurisdiction of the Court.

Once jurisdiction is established even prima facie, and the urgency and importance of the matter are apparent, it seems to me to follow inexorably that this is an appropriate case for the issue of provisional measures if ever there was one.

(f) *Lack of a Specific Allegation against the Respondent*

It is true that there is no single specific allegation of any act for which the respondent State is directly responsible. Yet it is on the basis of the joint and several responsibility of the member States of NATO for the actions of NATO that this Application has been filed.

The absence of any facts specifically imputed to the Respondent is thus no legal barrier to the present Application.

Scope of the Court's Powers in Relation to Provisional Measures

Having reached the conclusion that the Court should issue provisional measures in terms of the Rules of Court relating to interim protection (Arts. 73-78), I now proceed to consider the scope of those provisional measures, and what sort of orders it would be within the Court's jurisdiction to make.

It is my view that the Court should in this case go beyond the mere issue of provisional measures. Such a course is eminently within the function of a court faced with circumstances of this nature, where loss of life has become a daily feature of the ongoing dispute.

(a) *Complementarity of the Court with Other Organs of the United Nations in Relation to Peaceful Settlement*

Apart from such specific provisions as may be contained in the Rules of Court relating to provisional measures, the Court also has an inherent jurisdiction arising from its judicial function, to lend such assistance as it can towards the process of peaceful settlement. The Court is the principal judicial organ of the United Nations whose purposes as set out in the very first article of its Charter include:

> "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

The Security Council has special responsibilities in this regard but so has the Court, within the parameters of the judicial function; and assisting parties to this end is an inherent part of that function. One recalls in this connection the words of Judge Lachs in his separate opinion in the *Aegean Sea Continental Shelf* case (*Judgment, I.C.J. Reports 1978*, p. 53) regarding the "compatibility and complementarity of all means of peaceful settlement as enumerated in Article 33 of the Charter of the United Nations".

(b) *Role of the Court in Facilitating Negotiation between the Parties*

As early as 1929 in the *Free Zones* case the Permanent Court under the presidency of Judge Anzilotti gave expression to this concept of the Court's judicial function when it observed

> "Whereas the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as *consequently it is for the Court to facilitate, so far as is compatible with the Statute, such direct and friendly settlement.*" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No.* 22, p. 13; emphasis added.)

This aspect of the Court's functions has been highlighted and used in the subsequent jurisprudence of the Court (see for example the reference to this passage in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 577, para. 46).

In *Passage through the Great Belt (Finland* v. *Denmark)* (*I.C.J. Reports 1991*, p. 20, para. 35), this passage was cited and used for the purpose of encouraging a settlement between the parties, although the Court declined to issue provisional measures. The Court there observed that "pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed".

The provisional measures were refused and just over a year later the Court made an Order incorporating a message from the Agent of one of the Parties, which referred to the Court's earlier Order and informed the Court that a settlement of the disputes between the Parties had been attained. This was a practical illustration of the value of such an approach.

Apart from practical applications such as those cited above, this approach to the Court's role in aiding the peaceful settlement of disputes

has eminent judicial support from a conceptual point of view. In his separate opinion in the *United States Diplomatic and Consular Staff in Tehran* case, Judge Lachs observed

> "I can only repeat the deep-rooted conviction I have expressed on other occasions, that, while the Court is not entitled to oblige parties to enter into negotiations, its Judgment should where appropriate encourage them to do so, in consonance with its role as an institution devoted to the cause of peaceful settlement." (*I.C.J. Reports 1980*, p. 49.)

I recite these circumstances in order to substantiate the principle that the Court can lend its good offices and encouragement towards the settlement of a dispute by the Parties themselves. Such procedure also has a proven value, as indicated above. This assumes great practical significance especially in the context of a dispute involving the daily loss of life where at the same time diplomatic initiatives are afoot for the settlement of the dispute.

(c) *Inherent Powers of the Court to Assist the Parties towards Peaceful Settlement and Peace*

When Article 41 of the Statute gave the Court power to indicate provisional measures it did not do so to the exclusion of universal principles relating to powers which are inherent in judicial proceedings. As a learned writer on provisional measures has observed, regarding the indication by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No. 79,* p. 199),

> "The last provision is thus presented by the Permanent Court as an aspect of a universal principle of which the Statute is an application, so it may be regarded either as a restatement of something which in the Permanent Court's view was inherent in judicial procedures, or as something which was implied in Article 41 of the Statute." (H. W. A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice", in R. Bernhard (ed.), *Interim Measures Indicated by International Courts*, 1993, p. 13.)

Possessed as it is of such inherent jurisdiction, the Court can indeed go further and indicate some guidelines relating to the applicable law, which may provide a framework within which the Parties can negotiate. This can be of assistance to both Parties, and was the mode resorted to in the *Gabčíkovo-Nagymaros* case. Disputes hitherto considered intractable can be considerably assisted towards settlement in this fashion.

A recent case in which, for humanitarian reasons, the Court went beyond the traditional framework of an advisory opinion was the Advi-

sory Opinion concerning the *Threat or Use of Nuclear Weapons* (*I.C.J. Reports 1986*, p. 226). In that Opinion the Court spoke of the obligation of States to pursue and to conclude negotiations in good faith in regard to nuclear disarmament (*ibid.*, p. 264, para. 99) — advice which went beyond the traditional scope of an advisory opinion regarding the legality of such weapons. This the Court was clearly entitled to do as an organization functioning within the framework of the United Nations and pursuing the common aim of peace. Here again was a clear illustration of the Court acting in its inherent jurisdiction in pursuit of the ideal of peace.

The case concerning the *Gabčíkovo-Nagymaros Project* (*I.C.J. Reports 1997*, p. 76) is indeed a recent example *par excellence* of this wider view of the Court's rule.

In that case the Court settled certain disputed questions of law that were involved in the case as for example by holding that a Treaty of 1977 was still in force and governed the relationship between the Parties. But within the legal guidelines laid down by the Court, it left it open to the Parties to negotiate between themselves and indeed encouraged them to do so. For example it encouraged the Parties to look afresh at the effects on the environment of the power plant in question and in particular encouraged them to find a satisfactory solution for the release of water into the old bed of the Danube and its side-arms (*ibid.*, para. 141). In view of the fact that bilateral negotiations were to be held after the delivery of the Judgment it left (*ibid.*, para. 143) it open to the Parties to agree otherwise, suggested the restoration of a certain régime for the works on the river (*ibid.*, para. 144). It suggested the establishment of co-operative administration of what remained of the Project as an indication of what the Parties might do, suggesting certain possibilities that were open to them (para. 150).

I may add that the fact that a particular method of assistance towards peaceful settlement is not referred to or provided for in the Rules of Court is no argument against resort to such a method, for this is part of the inherent jurisdiction of the Court, following from the terms of the United Nations Charter and the Court's Statute, and the purposes of the United Nations as stated in this composite of documents. Nowhere in the Charter or Statute or indeed in the Rules of Court is such a procedure prohibited or indicated to be inappropriate and indeed such helpfulness towards the parties in achieving their own settlement is, as indicated above, part of the inherent attributes of the judicial process as well as a part of the jurisprudence of the Court.

I reinforce this further by observing that the International Court of Justice, constituted as it is to embody the representation of the main forms of civilization and of the principal legal systems of the world[3], is

[3] Statute of the Court, Art. 9.

heir to the judicial traditions of many civilizations, and that the concept of judicial assistance towards the peaceful resolution of disputes is heavily embedded in these traditions. I note in particular that in the philosophies of the East, as in the Buddhistic tradition, the peaceful resolution of disputes lies at the heart of the judicial function as understood in those cultures[4]. This is based *inter alia* on the rationale that peaceful resolution averts the rancour and the lasting bitterness of victory and defeat, which breed animosities against the winner and frustrations for the loser, and lead eventually to violence, further disputes, escalating violence and wars[5]. This teaching, which has particular relevance to the world of international relations, comes from one of the world's major cultural traditions relating to peace, which can significantly enrich the jurisprudence of this Court[6].

For all these reasons I am of the view that the Court, drawing upon the richness and variety of the powers available to it and in consequence of its complementarity, in the cause of peaceful settlement, to all the organs of the United Nations, should have issued provisional measures and that such measures should have been so worded as to encourage negotiations between the Parties and to provide some legal guidelines towards this end.

CENTRALITY OF NOTIONS OF PEACE AND CONFLICT PREVENTION

In my dissenting opinions in the provisional measures requests in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America),* I made the following observation:

> "A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are

[4] See J. Wigmore, *A Panorama of the World's Legal Systems*, 1928, Vol. 2, pp. 489 *et seq.*; K. N. Jayetilleke, "The Principles of International Law in Buddhist Doctrine", *Recueil des cours* (1967), Vol. 120, p. 447; L. P. N. Perera, *Buddhism and Human Rights*, 1991, pp. 40-41.

[5] See *Dhammapada*, verse 201; *Kunāla Jātaka, The Jātaka*, Vol. V, pp. 412-414. The conceptual basis of this Buddhist stress on peaceful settlement is encapsulated in verse 201 of the *Dhammapada*:

> "One who defeats others creates enemies for himself
> One who is defeated by others feels sad and frustrated
> One who defeats the inner need to defeat others remains happy and satisfied at all times."

[6] See generally C. G. Weeramantry, "Some Buddhist Perspectives on International Law", in *Boutros Boutros-Ghali; Amicorum Discipulorumque Liber*, 1999, pp. 775, 804-805.

> not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict. The Court, in an appropriate case, where possible conflict threatens rights that are being litigated before it, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force. That would be entirely within its mandate and in total conformity with the Purposes and Principles of the United Nations and international law. Particularly when situations are tense, with danger signals flashing all around, it seems that this Court should make a positive response with such measures as are within its jurisdiction. If the conservation of rights which are *sub judice* comes within the jurisdiction of the Court, as I have no doubt it does, an order restraining damage to those rights through conflict must also lie within that province. If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case." (*I.C.J. Reports 1992*, pp. 70 and 180-181.)

I repeat those observations here with the added emphasis that in the present case there is not merely a possible resort to force but an actual and continuing use of force. In a world legal order based upon the pursuit of peace and peaceful settlement, the message that law can and should be used for avoiding the use of force is one which reverberates with special strength.

In situations where force is already being used there is always a particular danger of escalation, with resulting damage to the rights of both parties.

I believe the responsibility lies very heavily upon the Court in such a situation to take such steps as it can within its legal powers to halt the continuance of violence and the escalation of the conflict. This case offers the occasion *par excellence* for the Court so to act, in accordance with the principles I have outlined earlier in this opinion.

PROVISIONAL MEASURES REQUIRED BY THE PRESENT SITUATION

While there are some elements of the Court's Order with which I readily agree, such as that the Parties should take care not to aggravate or extend the dispute, I believe it does not go far enough to complete the mission of the Court as an international court and more particularly as the principal judicial organ of the United Nations and upper guardian of the legal norms underpinning the structure of the international community.

I believe the correct resolution of the legal problems presented to the Court in this case would have required the use of a balanced formula

designed to terminate as speedily as possible the use of force on either side and the return of refugees to Kosovo. The Court's power to act *proprio motu* gives it the authority to take into consideration the situation alleged to be occurring in Kosovo.

Without any finding whatsoever at this stage on any of the substantive matters awaiting determination at the merits phase of the case, I believe the Court would be entitled to draw the attention of the Applicant to the need for the immediate cessation of all action by the security forces affecting the civilian population in Kosovo as contemplated by resolution 1199 of 1998 of the Security Council. Likewise the Court would be entitled to draw the attention of the Respondent to the requirements of the United Nations Charter and the need, pending the fuller consideration of the issues involved, for the cessation of the use of force within the territory of the Federal Republic of Yugoslavia.

The attention of both Parties should also have been drawn to the relevant provisions of the Universal Declaration of Human Rights and related human rights instruments and to the importance of compliance with them in all actions related to the present crisis.

It is essential to the balance of this formula that the rights of the Kosovo Albanians and all who live in Kosovo to remain without let or hindrance in their homes and habitations should be strictly respected and the rights of refugees from Kosovo and all displaced persons to return unhindered and resettle in their homes and habitations should likewise be strictly respected and should be facilitated in terms of Security Council resolution 1199 of 1998.

Such an indication would be incomplete without a recognition also of the rights of the people of Kosovo and all returning refugees and displaced persons to international safeguards, under the auspices of the United Nations, for their continuing protection, and an indication of the need for arrangements to be set in train immediately for the provision of such safeguards.

In the *Anglo-Iranian Oil Co.* case (*Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89), the Court in issuing provisional measures went further than merely indicating that parties should not take action prejudicing the rights of either party or extending or aggravating the dispute but laid down arrangements for a provisional régime for the oil industry in Iran. It specified how a board of supervision should be established and what its duties should be. In the present case, in my view, it would have been within the competence of the Court, if it had issued provisional measures, to make some specific provisions relating to the return of the refugees and their continuing protection after their return. It is not for the Court to set out these details but for the Parties to work out an acceptable arrangement to this end, and the Parties should, in my view, have been encouraged to negotiate the necessary working arrange-

ments towards achieving this objective. As Sir Hersch Lauterpacht has observed (*The Development of International Law by the International Court*, 1982, p. 256) it is within the province of the Court, while issuing provisional measures, to indicate the substance of those measures. Attention could in this regard have been drawn to the relevant provisions of Security Council resolutions relating to this matter.

The Court would have jurisdiction to direct both Parties to take all measures necessary to prevent an aggravation of the situation and for the restoration and maintenance of international peace and security in the region.

The Court would also have significantly advanced the complementarity of its judicial role to that of all the other organs of the United Nations in seeking the peaceful settlement of disputes if it had in the concluding part of such an order also indicated that the measures prescribed are guidelines laid down within the law applicable and that the Parties are urged to negotiate towards the immediate cessation of all uses of force in all parts of Yugoslavia and that the guidelines are interlinked and to be of simultaneous application.

The concluding part of such an order could also indicate that the measures prescribed are interlinked and to be given simultaneous application.

The Court was entitled further to encourage the Parties to pursue all efforts through diplomatic channels and otherwise to achieve a speedy settlement of the dispute within the legal guidelines indicated above. Furnishing such an indication would be well within the jurisprudence of this Court and the traditional attributes of the judicial process. The good offices of the Court would continue to be available to facilitate this process.

Having outlined these areas of dissent I associate myself completely with the reference in the Court's Order to the deep concern felt by the Court with the human tragedy, the heavy loss of life and the suffering in Kosovo which form the background to this dispute and with the continuing loss of life and human suffering in all parts of Yugoslavia. I also respectfully endorse the Court's observation that the use of force in Yugoslavia raises under the present circumstances very serious issues of international law.

I express my concern, in common with the Court that all parties appearing before the Court should act in conformity with their obligations under international law including humanitarian law.

In common with the Court I am mindful of the Court's own responsibilities for the maintenance of peace and security. I venture to observe here that there is an intimate conceptual linkage between the notions of peace and international law. Peace is not merely a moral idea but a legal

one. In Lauterpacht's felicitous words (Lauterpacht, *The Function of Law in the International Community, op. cit.*, p. 438), "Peace is pre-eminently a legal postulate. Juridically it is a metaphor for the unity of the legal system." The Court's responsibilities in relation to peace are thus of a particularly onerous nature.

It is in regard to this last aspect that I feel the Court should have gone further than it has done and issued provisional measures on the lines indicated above.

It is my view that even if the Court did not order provisional measures it was within its power to have issued an appropriate communication to both Parties on the lines indicated above — a procedure envisaged by Judge Lachs in his separate opinion in the *Aegean Sea Continental Shelf* case. Judge Lachs there observed

> "The Court does not, to my way of thinking, arrogate any powers excluded by its Statute when, otherwise than by adjudication, it assists, facilitates or contributes to the peaceful settlement of disputes between States, if offered the occasion at any stage of the proceedings.
>
> . . . . . .
>
> While it would not be proper specifically to advise Greece and Turkey 'as to the various courses' they should follow (*I.C.J. Reports 1951*, p. 83), the Court, acting *proprio motu*, should, even while not indicating interim measures, have laid greater stress on, in particular, the need for restraint on the part of both States and the possible consequences of any deterioration or extension of the conflict. In going further than it has, the Court, with all the weight of its judicial office, could have made its own constructive, albeit indirect, contribution, helping to pave the way to the friendly resolution of a dangerous dispute. This would have been consonant with a basic role of the Court within the international community." (*Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 20.)

My views as stated above are based on a conception of the judicial function which has been recognized in the jurisprudence of the Court and indeed in the time-honoured conception of the judicial function in the world's main forms of civilization and principal legal systems as more fully explained earlier in this opinion.

This role requires the Court to do all within its power in accordance with the law for the peaceful settlement of disputes and for assistance to and guidance of that process. This dovetails into the principle of peaceful resolution of disputes already referred to as a cornerstone of the United Nations Charter and the Statute of the International Court of Justice.

Needless to say, all that has been said in this opinion in no way involves any views whatsoever upon the merits (see *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, paras. 43, 44) and

> "the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93).

* * *

Within these limitations the Court would then have played a positive role in strengthening and stabilizing the international rule of law through the exercise of the judicial function — a role for which, of all the organs of the United Nations, the Court alone was pre-eminently designed.

(Signed) Christopher G. WEERAMANTRY.