DISSENTING OPINION OF JUDGE SHI

To my regret, I am unable to concur with the findings of the Court that, given the limitation *ratione temporis* contained in the declaration of acceptance of compulsory jurisdiction made by the Federal Republic of Yugoslavia (hereinafter Yugoslavia), the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute, to which both the Applicant and the Respondent are parties. This conclusion prevented the Court from exercising its power under Article 41, paragraph 1, of the Statute to indicate provisional measures to the Parties.

Yugoslavia signed the declaration of acceptance of the compulsory jurisdiction of the Court on 25 April 1999. By that declaration, Yugoslavia recognized compulsory jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature . . .".

This limitation *ratione temporis* of recognition of the Court's jurisdiction belongs to the category of the so-called "double exclusion formula". In cases where the Court is confronted with this "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

Regarding the first aspect of the limitation *ratione temporis* in the present case, that is to say, whether the date on which the dispute arose is before or after the signature by Yugoslavia of the declaration of acceptance, the Court has, in this connection, to consider what is the subject of the dispute, as it did in a similar situation in the *Right of Passage* case, where the Court stated:

> "In order to form a judgment as to the Court's jurisdiction it is necessary to consider what is the subject of the dispute." (*Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960,* p. 33).

In the present case, the Application of Yugoslavia contains a section bearing the title "Subject of the Dispute", which indicates the subject as acts of the Respondent

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian

> population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

As in the *Right of Passage* case, the legal dispute before the Court, as shown above, consists of a number of constituent elements. Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. None of the above elements existed before the critical date of 25 April 1999. It is true that the aerial bombing of the territory of Yugoslavia began some weeks before this critical date of signature of the declaration. But aerial bombing and its effects are merely facts or situations and as such do not constitute a legal dispute. The constituent elements of the present dispute are not present before the critical date and only exist at and from the date of Yugoslavia's Application on 29 April 1999. It is true that, prior to the critical date, Yugoslavia had accused NATO (Security Council Meetings of 24 and 26 March 1999, S/PV.3988 and 3989) of illegal use of force against it. However, this complaint constitutes at the most one of the many constituent elements of the dispute. Besides, in no way could NATO be identified with the Respondent, and NATO cannot be the Respondent in the present case *ratione personae*. The legal dispute only arose at the date of the Application, which is subsequent to the signature of the declaration of acceptance. Therefore, the time condition in order for the present dispute to be within the scope of acceptance of compulsory jurisdiction *ratione temporis*, as contained in Yugoslavia's declaration, has been satisfied.

With respect to the second aspect of Yugoslavia's double exclusion formula, the situations or facts which the Court has to consider are those with regard to which the dispute has arisen, i.e., those situations or facts which are the source of the present legal dispute.

Article 25, paragraph 1, of the Draft Articles on State Responsibility, adopted at first reading by the International Law Commission, provides:

> "1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation." (*ILC Yearbook*, 1978, Vol. II, Part Two, p. 89.)

This concept of the duration of a "continuing" wrongful act is commonly accepted by international tribunals and legal scholars.

In the present case, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date of 25 April 1999. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease or when the international obligations alleged to be breached by the acts of that State cease to exist or are no longer in force for it.

The conclusion may be drawn from the above analysis that the limitation *ratione temporis* in the double exclusion formula contained in Yugoslavia's declaration of acceptance of the compulsory jurisdiction in no way constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indication of provisional measures in the present case.

It is regrettable that, as a result of its mistaken findings on this point, the Court was not in a position to indicate provisional measures to the Parties in the urgent situation of human tragedy with loss of life and human suffering in the territories of Yugoslavia arising from the use of force in and against that country.

Moreover, I am of the opinion that, confronted with that urgent situation, the Court ought to have contributed to the maintenance of international peace and security in so far as its judicial functions permit. The Court would have been fully justified in point of law if, immediately upon receipt of the request by the Applicant for the indication of provisional measures, and regardless of what might be its conclusion on prima facie jurisdiction pending its final decision, it had issued a general statement appealing to the Parties to act in compliance with their obligations under the Charter of the United Nations and all other rules of international law relevant to the situation, including international humanitarian law, and at least not to aggravate or extend their dispute. In my view, nothing in the Statute or Rules of Court prohibits the Court from so acting. According to the Charter of the United Nations, the Court is after all the principal judicial organ of the United Nations, with its Statute as an integral part of the Charter; and by virtue of the purposes and principles of the Charter, including Chapter VI (Pacific Settlement of Disputes), the Court has been assigned a role within the general framework of the United

Nations for the maintenance of international peace and security. There is no doubt that to issue such a general statement of appeal is within the implied powers of the Court in the exercise of its judicial functions. It is deplorable that the Court has failed to take an opportunity to make its due contribution to the maintenance of international peace and security when that is most needed.

Furthermore, in his letter addressed to the President and the Members of the Court, the Agent of Yugoslavia stated:

> "Considering the power conferred upon the Court by Article 75, paragraph 1, of the Rules of Court and having in mind the greatest urgency caused by the circumstances described in the Requests for provisional measure of protection I kindly ask the Court to decide on the submitted Requests *proprio motu* or to fix a date for a hearing at earliest possible time."

In the recent *LaGrand* case, the Court, at the request of the applicant State and despite the objection of the respondent State, decided to make use of its above-mentioned power under Article 75, paragraph 1, of the Rules of Court without hearing the respondent State in either written or oral form (*LaGrand (Germany* v. *United States of America), Order of 3 March 1999, I.C.J. Reports 1999*, pp. 13 and 14, paras. 12 and 21). By contrast, in the present case the Court failed to take any positive action in response to the similar request made by the Agent of Yugoslavia in a situation far more urgent even than that in the former case.

It is for these reasons that I felt compelled to vote against the operative paragraph 47 (1) of the present Order.

(Signed) SHI Jiuyong.