INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

LEGALITY OF USE OF FORCE

(YUGOSLAVIA *v.* ITALY)

PRELIMINARY OBJECTIONS OF THE ITALIAN REPUBLIC

TABLE OF CONTENTS

PRELIMINARY OBJECTIONS OF THE ITALIAN REPUBLIC

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INTRODUCTION

By an Application filed in the Registry of the Court on 29 April 2000, the Federal Republic of Yugoslavia (hereinafter "Yugoslavia") instituted proceedings against the Italian Republic (hereinafter "Italy") for "violation of the obligation not to use force".

The subject-matter of the proceedings was defined as follows:

> "The subject-matter of the dispute are acts of the Republic of Italy 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."

Yugoslavia cited as the basis of the Court's jurisdiction Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention"), and Article 38, paragraph 5, of the Rules of Court (hereinafter "the Rules").

Yugoslavia requested the Court to adjudge and declare that:

"— by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;

— by taking part in the training, arming, financing, equipping and supplying terrorist groups, i.e., the so-called 'Kosovo Liberation Army', the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;

— by taking part in attacks on civilian targets, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;

— by taking part in destroying or damaging monasteries, monuments of culture, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;

— by taking part in the use of cluster bombs, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e., weapons calculated to cause unnecessary suffering;

— by taking part in the bombing of oil refineries and chemical plants, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;

— by taking part in the use of weapons containing depleted uranium, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;

— by taking part in killing civilians, destroying enterprises, communications, health and cultural institutions, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;

— by taking part in destroying bridges on international rivers, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect freedom of navigation on international rivers;

— by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;

— the Republic of Italy is responsible for the violation of the above international obligations;

— the Republic of Italy is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;

— the Republic of Italy is obliged to provide compensation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons."

Yugoslavia reserved the right "to amend and supplement this Application".

On the same day, other Applications in identical terms (except with respect to the Court's jurisdiction) were filed by Yugoslavia against nine other States (Belgium, Canada, France, Germany, Netherlands, Portugal, Spain, United Kingdom and the United States of America), all members of the North Atlantic Treaty Organization (hereinafter "NATO").

Immediately after the filing of the Application against Italy, Yugoslavia further submitted to the Court a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court (hereinafter "the Statute").

Identical requests were lodged against the aforesaid nine States.

By Order of 2 June 1999, the Court rejected the request for the indication of provisional measures lodged against Italy, holding, on the one hand, that:

> "Article IX of the [Genocide] Convention, invoked by Yugoslavia, cannot . . . constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (para. 28);

and, on the other, that

> "it is quite clear that, in the absence of consent by Italy, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even prima facie" (para. 31).

By Orders made on the same date, the Court rejected the requests for the indication of provisional measures lodged by Yugoslavia against the other nine States.

With regard to the cases brought against Spain and the United States of America, the Court decided to remove them from its List, whereas, for the other cases, including that against Italy, it reserved the subsequent procedure for further decision (operative paragraph 2 of the Order in the case against Italy). By Order of 30 June 1999, after the Parties to the proceedings had been heard by the Vice-President of the Court, Acting President, the Court gave Yugoslavia until 5 January 2000 to submit its Memorial and Italy until 5 July 2000 to submit its Counter-Memorial.

Identical time-limits were set for the other seven outstanding cases.

Within the time-limit of 5 January 2000, Yugoslavia filed just one document for the eight cases, entitled "Memorial" in English.

In that document, Yugoslavia presents submissions reproducing almost word for word the heads of claim formulated, in identical terms, in the eight Applications. The only differences worthy of note are the following:

— the submissions in the Memorial are not addressed to a specific State, or to all the respondent States without distinction, but, in an entirely generic manner, to the "Respondent" *(in the singular)*;

— the "Respondent" is no longer accused of having *taken part* in the actions mentioned ("by taking part in the bombing . . ."), but of having carried out those actions directly and, it seems, individually (e.g., "by the bombing . . .");

— the "Respondent" is no longer accused of having trained, armed, financed and equipped terrorist groups (second head of claim), but of having used force against the Yugoslav army and police during their action against such groups;

— the action consisting in bombing bridges on international rivers (ninth head of claim) is described in the Memorial no longer as a breach of the obligation to respect freedom of navigation on international rivers, but as a breach of State sovereignty.

But, above all, an eleventh and entirely new submission makes its appearance in the Memorial, worded as follows:

> "— by failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligations to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in article III of the Genocide Convention".

SCHEME OF THE PRELIMINARY OBJECTIONS

As it had already announced on the occasion of the hearing before the Vice-President of the Court, Acting President, on 28 June 1999, Italy wishes, pursuant to Article 79, paragraph 1, of the Rules, to raise a number of preliminary objections against the Application of Yugoslavia, as supplemented by the Memorial.

Italy requests the Court to adjudicate upon these objections before the proceedings on the merits are continued.

The preliminary objections that Italy wishes to raise are the following:

I. Yugoslavia's Application, as supplemented by the Memorial, is inadmissible with respect to the eleventh submission, mentioned for the first time in the Memorial, inasmuch as Yugoslavia seeks thereby to introduce a dispute altogether different from the original dispute deriving from the terms of the Application.

II. The Court lacks jurisdiction *ratione personarum* to hear the present case, since Yugoslavia is not a party to the Statute.

III. The Court lacks jurisdiction *ratione materiae* to hear the present case, since the dispute deriving from the terms of Yugoslavia's Application, as supplemented by the Memorial, is not a dispute relating "to the interpretation, application or fulfilment" of the Genocide Convention as provided in Article IX of that Convention.

IV. Yugoslavia's Application, as supplemented by the Memorial, is inadmissible *in its entirety*, inasmuch as Yugoslavia seeks thereby to obtain from the Court a decision regarding the legality of action undertaken by subjects of international law not present at the proceedings, or not *all* so present.

On the other hand, Italy does not wish to raise formal objections regarding the manifest and surprising deficiencies in the Application and, above all, in the Memorial of Yugoslavia.

It has certainly not escaped Italy that, despite the provisions of Article 38, paragraph 2, of the Rules, the Application does not specify "the precise nature of the claim" or contain "a succinct statement of the facts and grounds".

Italy likewise has felt compelled to perceive, in the filing by Yugoslavia of a single Memorial for all eight outstanding cases, confined moreover to a very long account of the facts without the slightest legal analysis, a serious mark of disrespect by Yugoslavia for the Court, in that it seeks to use that forum as an opportunity for airing its anti-NATO propaganda.

Furthermore, Italy is of the opinion that it is essential not to play into the hands of Yugoslavia by delaying the proceedings on account of the flawed nature of its pleadings, but that the legal aspects of the case must be examined forthwith — which aspects Yugoslavia has throughout the proceedings sought by every means to confuse to the utmost.

Italy nevertheless considers that, when fixing the time-limit for the filing of observations on Italy's preliminary objections, the Court should remind Yugoslavia that it is entitled, pursuant to Article 79, paragraph 3, of the Rules, to present "a written statement of its observations and submissions" *solely* on the objections raised by Italy, but cannot file just one Memorial covering also such preliminary objections as other respondent States may raise in the other cases brought by Yugoslavia.

Italy will continue by dealing first with the first preliminary objection, with a view to removing forthwith from the debate the eleventh Yugoslav submission.

Italy will subsequently examine the second, third and fourth preliminary objections, in that order. Since, at the present stage of the proceedings, the Court is not required to consider the facts of the case, Italy will base its presentation on the facts set out in Yugoslavia's Application, as supplemented by the Memorial, and will refer to other facts only in so far as strictly necessary.

Italy nevertheless wishes to state from the outset that it in no way accepts the false and manifestly biased version presented by Yugoslavia of the historical context of NATO's Operation

Allied Force. Italy accordingly reserves the right to dispute the facts as related by Yugoslavia and to cite others, as necessary, when the merits of the case are considered.

FIRST PRELIMINARY OBJECTION
INADMISSIBILITY OF YUGOSLAVIA'S ELEVENTH SUBMISSION

The eleventh submission of Yugoslavia, mentioned for the first time in the Memorial, is not admissible.

The submission, which is entirely new and has never previously been referred to, concerns Italy's alleged failure to prevent the "killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija".

By this new submission, Yugoslavia is seeking to introduce a dispute altogether different from that deriving from the terms of the Application.

A. In temporal terms

The eleventh submission covers facts having occurred after 10 June 1999, the date of the cessation of NATO's Operation Allied Force, whereas it was precisely that operation which was the subject of the Application.

In its Application, the substance of Yugoslavia's claim against Italy lay in the latter's having taken part, together with the Governments of other NATO Member States, "in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia" (p. 10).

In its Order of 2 June 1999 on the request for the indication of provisional measures, the Court stated that it was indeed "the bombings which form the subject of the Yugoslav Application" (para. 27).

It is a matter of public record that the bombings in question began on 24 March 1999 and came to a definitive end on 10 June of the same year.

On the other hand, the events to which the eleventh submission refers (see pp. 201 to 282 of the Yugoslav Memorial) all took place after 10 June 1999, following the withdrawal from Kosovo of Yugoslav military and police personnel in compliance with the Military Technical Agreement of 9 June and resolution 1244 adopted on 10 June by the United Nations Security Council.

B. In geographical terms

The eleventh submission concerns acts that occurred solely in the territory of Kosovo, while the events related in the Application took place in the territory of Yugoslavia as a whole.

Thus Yugoslavia's Application refers to acts (bombings, attacks, murders, destruction, etc.) directed against "targets in the Federal Republic of Yugoslavia" or having effects on "cities, towns and villages in the Federal Republic of Yugoslavia" (p. 12 of the Application), without any distinction being drawn according to whether the targets of such actions were located in Kosovo or elsewhere in Yugoslav territory.

The Memorial likewise sets out a very long series of events classified by type and in chronological order, but not according to whether they took place in Kosovo or elsewhere. Events

concerning localities situated in Kosovo are thus mentioned in conjunction with others concerning localities in Serbia (e.g., the bombing of Pristina Airport on 11 April 1999 and of the Simic Residence in Krusevac on the same date: p. 30, Nos. 1.1.17.4 and 1.1.17.3).

On the other hand, the events to which the eleventh submission refers (see pp. 201 to 282 of the Yugoslav Memorial) all took place in Kosovo.

C. In material terms (that is, the type of alleged genocidal act)

By its eleventh submission Yugoslavia accuses Italy *in general* of having failed in its obligation to prevent genocide and other acts enumerated in Article III of the Genocide Convention, whereas the Application mentioned, albeit implicitly, violation of only Article II *(c)*, namely the obligation not to inflict deliberately on a national, ethnic, racial or religious group conditions of life calculated to bring about its physical destruction in whole or in part.

The tenth head of claim presented in the Application (repeated without major change in the Memorial) was indeed the only one to refer, albeit implicitly, to the Genocide Convention. It was worded thus:

> "by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Republic of Italy has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part".

Thus Italy was not accused of anything other than having deliberately inflicted on a "national group" (unspecified) conditions of life calculated to bring about its physical destruction, in whole or in part, through the fact of having taken part in NATO's Operation Allied Force and, in particular, in acts that caused serious environmental damage and in the use of weapons containing depleted uranium.

Although serious, such an accusation was of limited scope by comparison with the totality of the claims made by Yugoslavia against Italy and the other respondent States.

By contrast, the eleventh submission, added for the first time in the Memorial, concerns the breach by Italy of its obligation "to prevent genocide and other acts enumerated in article III of the Genocide Convention".

The genocide charge therefore looms much larger. Yugoslavia now holds Italy responsible not only for genocide corresponding to the conduct specified in Article II *(c)* of the Genocide Convention, but also for genocidal acts of potentially any type covered by that Article.

D. In terms of the responsibility imputed to Italy

The eleventh submission concerns the alleged failure to take measures to *prevent* acts of genocide committed *by third parties* in Kosovo, whereas the Application covers acts of genocide that Italy is accused of having committed itself, and more precisely by means of its armed forces.

Thus the Application concerns actual armed actions conducted by the airforces of certain NATO Member States in pursuance of Operation Allied Force, decided on by that organization in order to put an end to Yugoslav genocidal activities against the Albanian population in Kosovo.

Assuming that the actions of the NATO Member States can be characterized as genocide, as Yugoslavia claims, it would be a genocide for which those States would themselves be responsible and therefore bear *direct responsibility*, once it was established that the genocide had been perpetrated by the organs (armed forces) of those States (see International Court of Justice, case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32).

However, the events to which the eleventh submission refers (see pp. 201 to 282 of the Yugoslav Memorial) are acts committed, as the Memorial itself acknowledges (p. 249, No. 1.5.6), by Albanian separatists or by Albanian terrorists (see Memorial, pp. 240 *et seq.*, Nos. 1.5.5.3.1 and others).

Italy's responsibility for such events (assuming that it exists at all) would therefore not be direct as in the case of acts predating 10 June 1999, but would be *indirect responsibility* deriving from the fact of not having prevented or avoided them.

E. In terms of the target of the alleged acts of genocide

The eleventh submission relates to acts allegedly committed against just one part of the Yugoslav population (the Serbs and other non-Albanian groups in Kosovo), whereas the facts set out in the Application concerned the Yugoslav population as a whole, without distinction as to ethnic group or place of residence, including ethnic Albanians in Kosovo.

The Yugoslav Memorial itself twice mentions the attack suffered (by tragic error) on 14 April 1999 by a convoy of ethnic Albanian refugees (p. 35, No. 1.1.20.1, and p. 137, No. 1.2.1.2). On the other hand, the victims of the events relating to the eleventh submission (pp. 201 *et seq.* of the Memorial) were all inhabitants of Kosovo belonging to Serbian or other non-Albanian ethnic groups.

F. In terms of the perpetrators of the alleged acts of genocide

The eleventh submission concerns acts related to actions taken under United Nations auspices by a number of States which had not taken part in Operation Allied Force, whereas the Application was concerned only with acts carried out in pursuance of that operation.

In the Application, Italy is accused of having, "together with the Governments of other Member States of NATO, taken part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia" (p. 10).

It is a matter of public record that the bombings to which the Application refers were part of Operation Allied Force. It is also very well known that NATO felt itself compelled to launch that operation after the failure of the Rambouillet talks and Yugoslavia's refusal of a negotiated solution involving international protection for the ethnic Albanian population in Kosovo against the persecutions of the Yugoslav military and police forces.

Operation Allied Force ended on 10 June 1999.

The occurrences since that date are of an altogether different kind from the earlier bombings.

Yugoslavia having on 3 June 1999 accepted the peace plan submitted the previous day by the delegates of the European Union and the Russian Federation, Yugoslav military and police personnel withdrew from Kosovo as of 10 June 1999 and, in their place, an international security presence and an international civil presence were deployed under United Nations auspices pursuant

to resolution 1244 (1999) adopted on 10 June 1999 by the Security Council, acting under Chapter VII of the Charter.

The international security presence comprises substantial NATO participation and a unified command (para. 4 of Annex 2 to resolution 1244 (1999)). It has taken the name of KFOR and at present consists of troops from some thirty States, half of which, including the Russian Federation, do not belong to NATO.

The international civil presence was established by the Secretary-General of the United Nations pursuant to operative paragraphs 10 *et seq.* of resolution 1244 (1999). It has taken the name of UNMIK.

Clearly, the legal and factual context of the events referred to in Yugoslavia's eleventh submission is quite different from the context characterizing Operation Allied Force.

In view of the major differences between the heads of claim contained in the Application and the eleventh submission, the latter must be regarded as inadmissible.

In effect, it relates to what is, "both in form and in substance, a new claim"; so much so that, should the Court entertain it in the present proceedings, "the subject of the dispute originally submitted to the Court would be transformed" (case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 267, para. 70). If such a solution were to prevail, the effect of the provisions of the Statute (Art. 40) and of the Rules (Art. 38, para. 2) obliging the applicant State to specify in the Application "the subject of the dispute" and "the precise nature of the claim", previously described as "essential" by the Court "from the point of view of legal security and the good administration of justice" (case cited, p. 267, para. 69; see also *Fisheries Jurisdiction (Spain* v. *Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29), would be nullified.

SECOND PRELIMINARY OBJECTION
THE COURT'S LACK OF JURISDICTION *RATIONE PERSONARUM*

To be able to adjudicate upon a case brought before it, the Court must first have jurisdiction *ratione personarum*, meaning that both the Applicant and the Respondent must be among the States with access to the Court.

This is not so with respect to Yugoslavia. For:

— Yugoslavia is not a party to the Statute within the meaning of Article 35, paragraph 1, thereof;

— nor can Yugoslavia rely on Article 35, paragraph 2, of the Statute, which provides for the possibility of States not parties to the Statute being allowed to appear before the Court.

Yugoslavia is not a party to the Statute

Article 93, paragraph 1, of the Charter of the United Nations provides that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice".

Paragraph 2 of that Article nevertheless permits other States to become parties to the Statute on conditions to be determined *in each case* by the General Assembly upon the recommendation of the Security Council. It has never been claimed that Yugoslavia has asked to become a party to the Statute in accordance with Article 93, paragraph 2, of the Charter.

The question then arises whether Yugoslavia is or is not a Member of the United Nations.

This question is familiar to the Court, since it was the subject of debate between the parties during the proceedings for the indication of provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [(Serbia and Montenegro)]).*

Bosnia and Herzegovina invoked Security Council resolution 777 (1992) of 19 September 1992 and General Assembly resolution 47/1 of 22 September 1992. In those resolutions the two political organs of the Organization state that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations". The General Assembly, upon the corresponding recommendation of the Security Council, had further decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations".

The Court nevertheless did not deem it necessary to settle the matter finally at the stage of the proceedings for the indication of provisional measures (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1992*, *I.C.J. Reports 1993*, p. 14, para. 18). The position of the Security Council and the General Assembly was confirmed by Security Council resolution 821 (1993) of 28 April 1993 and by General Assembly resolution 47/229 of 5 May 1993, debarring Yugoslavia from participation in the work of the Economic and Social Council.

In view of the clearly and consistently held position of the only United Nations organs with authority regarding the admission, suspension and even expulsion of a State (Arts. 4, 5 and 6 of the Charter), it is of little consequence that this position has been interpreted with caution — mainly for practical reasons — by the administration of the Organization.

The Security Council and the General Assembly established that Yugoslavia could not succeed to the membership that the former Socialist Federal Republic of Yugoslavia had enjoyed before its dissolution. That being so, the only way for Yugoslavia to acquire a status that it had never possessed since its birth as an independent State was to request its admission in accordance with Article 4, paragraph 2, of the Charter, that is by a decision of the General Assembly upon the recommendation of the Security Council.

Yugoslavia has never applied for admission, despite an invitation to do so extended to it not only by the Security Council and the General Assembly but also, albeit implicitly, by the Under-Secretary-General and Legal Counsel of the United Nations in his letter of 29 September 1992 to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and Croatia. In the concluding passage of that letter (cited in the Yugoslav Memorial, p. 330, No. 3.1.4, and, in French, in the Court's Order of 8 April 1993 on the request for the indication of provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993*, p. 13, para. 17) it was stated that "[t]he admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1".

The lack of membership status in the United Nations and the need to seek admission under Article 4 of the Charter were therefore facts of which Yugoslavia was fully aware. Moreover, the Yugoslav Memorial makes no mention of any stance on the part of Yugoslavia opposing the conclusions reached by the Security Council and the General Assembly. Yugoslavia has accordingly forfeited any right, in the context of the present case, to dispute the fact that it is not a Member of the United Nations.

Since it is not a Member of the United Nations, by the same token Yugoslavia is not a party to the Statute under Article 93, paragraph 1, of the Charter.

Yugoslavia cannot invoke Article 35, paragraph 2, of the Statute, which provides for the possibility of States not parties to the Statute being allowed to appear before the Court.

Under Article 35, paragraph 2, of the Statute, the conditions under which the Court "shall be open to other States shall, subject to the special conditions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court".

Those conditions were established by the Security Council in its resolution 9 (1946) of 15 October 1946. That resolution provides, in paragraph 1, that "such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter".

It is an established fact that Yugoslavia has never filed any such prior declaration. It is therefore not entitled to invoke Article 35, paragraph 2, of the Statute.

Nor can Yugoslavia derive a right to appear before the Court from the sole fact of being a party to the Genocide Convention.

True, Article IX of the Convention contains a compromissory clause by which the Contracting Parties have agreed that "[d]isputes 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".

It is nevertheless quite plain that Article IX only gives the Court jurisdiction *ratione materiae* under Article 36 of the Statute and does not concern jurisdiction *ratione personarum.*

Admittedly, in its Order of 8 April 1993 on provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993*, p. 14, para. 19), the Court appeared to be taking a different view. After recalling the terms of Article 35, paragraph 2, of the Statute, the Court held that:

— "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 6)";

— "a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention . . . could . . . be regarded prima facie as a special provision contained in a treaty in force"; and that

— "disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court".

In other words, the Court found that Article IX could serve as a title conferring upon it both jurisdiction *ratione materiae* and jurisdiction *ratione personarum*.

The Italian Government ventures respectfully to signify its disagreement with that finding and considers that in any event it cannot apply to the present case.

First, in the aforesaid Order, the Court was ruling in the context of proceedings for the indication of provisional measures under Article 41 of the Statute and was therefore not required to rule definitively on its jurisdiction. As is always the case when it rules on a request for the indication of provisional measures, consideration by the Court was intended to determine only prima facie jurisdiction and produced a conclusion which "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case" (Order cited, p. 23, para. 51). Furthermore, the Court has never had an opportunity of settling the point definitively, the objection not having been repeated at the preliminary objections phase (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595).

Furthermore, the solution adopted by the Court in the Order cited raises serious problems of interpretation.

There can be no disputing that, by adding to paragraph 2 of Article 35 of the Statute the phrase "subject to the special provisions contained in treaties in force", the authors of the Statute sought to establish an exception to the general rule which requires States not parties to the Statute to satisfy the conditions laid down by the Security Council. The scope of that exception must accordingly be defined.

Were the notion of "special provisions contained in treaties in force" in Article 35, paragraph 2, to be interpreted without limitation, that is, as covering any treaty between two or more States on the sole condition that it should provide for the jurisdiction of the Court with respect to one or more disputes and be in force between the parties to the dispute in question, it would follow that the conditions laid down by the Security Council in accordance with the purpose of paragraph 2 would never apply.

For, apart from disputes instituted under the optional clause system of acceptance of jurisdiction (Art. 36, para. 2, of the Statute) — a system not open to States not parties to the Statute — any other dispute can be brought before the Court only on the basis of a special provision contained in a treaty in force between the parties to the dispute, whether it be a special agreement or "compromis" (Art. 40, para. 1, of the Statute), a treaty containing a compromissory clause or a general treaty of judicial settlement.

Hence, short of claiming that the general rule laid down in Article 35, paragraph 2, is entirely devoid of practical effect, which would be contrary to all logic and to the interpretative criteria laid down in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, we are bound to conclude that, for the exception to the general rule to be applicable, other conditions must be met: and this of course means conditions not expressly set out in the text but which can be readily inferred from a historical interpretation of the paragraph in question.

There is no need here to go back over the history of that provision.

Italy ventures to refer you to the excellent study of Mr. Sienho Yee, "The Interpretation of 'Treaties in Force' in Article 35 (2) of the Statute of the ICJ" (*International and Comparative Law Review*, 1998, p. 884). It appears from that study that the phrase "subject to the special provisions contained in treaties in force" was added to paragraph 2 of Article 35 of the Statute of the Permanent Court of International Justice so as to enable that Court to hear disputes regarding the peace treaties concluded after the First World War. The point is that those treaties contained clauses giving the Permanent Court jurisdiction but were also binding on States (the Central Powers) which were neither Members of the League of Nations nor parties to the Statute.

The case-law of the Permanent Court offers no indication justifying an interpretation of the phrase in question that would permit the inclusion of treaties other than the aforesaid peace treaties.

The *S.S. "Wimbledon"* case (already cited, *P.C.I.J., Series A, No. 1*, 1923, p. 6) brought by France, Great Britain, Italy and Japan against Germany, a State not party to the Statute, concerned precisely a breach of the Treaty of Versailles of 28 June 1919.

By contrast, the case concerning *Certain German interests in Polish Upper Silesia*, brought by Germany against Poland, did have as its subject a breach of a convention subsequent to the Treaty of Versailles (the Convention concerning Upper Silesia, signed at Geneva on 15 May 1922). It was nonetheless a convention strictly linked to the consequences of the First World War and to the changes of sovereignty flowing from the Treaty of Versailles.

In its Judgment No. 6 of 25 August 1925 (*P.C.I.J., Series A, No. 6*, p. 11), the Court merely noted that Poland, which had moreover raised a number of objections to the Court's jurisdiction, "does not dispute the fact that the suit has been duly submitted to the Court in accordance with Articles 35 and 40 of the Statute".

There are two possible interpretations of this statement:

— the Court took the view that the lack of jurisdiction *ratione personarum* must be raised by the party concerned (which Poland had not done);

— the Court took the view that the exception to the general rule of Article 35, paragraph 2, covered not only the peace treaties as such but also subsequent treaties and conventions, provided that they were strictly related to the former, particularly if they supplemented or implemented their provisions (which was clearly the case for the 1922 Geneva Convention).

It would, on the other hand, be very difficult to read into the statement an intention to extend the scope of that exception to the point of no longer requiring any link with the peace treaties.

Article 35, paragraph 2, of the Statute of the Permanent Court was transposed without amendment into the Statute of the present Court. Even assuming that transposition also involved some sort of "updating" of the chronological reference implicit in the phrase in question, it would have to be concluded that it was now the peace treaties following the *Second* World War which were covered by the expression "treaties in force", together possibly with other associated treaties already in force before the date of entry into force of the United Nations Charter and of the Statute, namely 24 October 1945.

The Genocide Convention, which came into force on 12 January 1951, clearly does not, from the chronological point of view, fall into the category of "treaties in force" as referred to in Article 35, paragraph 2, of the Statute.

There is moreover, in Italy's view, no reason for the Court to adopt a broader interpretation of a provision which is in itself vague and ambiguous.

A State which is not party to the Statute and has not deposited the prior declaration referred to in resolution 9 (1946) of the Security Council *is not bound by the obligation to comply with the decision or decisions of the Court*.

Since that obligation is provided for only in Article 94 of the Charter and in Article 59 of the Statute, it does not apply to a State which is not party to either instrument. It is precisely to make good that deficiency that the prior declaration prescribed by the Security Council must include an undertaking "to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter".

Hence, were the Court to give the exception provided for in Article 35, paragraph 2, of the Statute a broader interpretation, States would be encouraged to come before it, or indeed to bring other States before it, without ever having undertaken to comply with the Court's decision.

Prior acceptance of the binding force of a decision is one of the features, perhaps the most important feature, distinguishing judicial settlement and arbitration from diplomatic means of settlement of international disputes in the sense of Article 33 of the United Nations Charter (see, among others, J. G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge University Press, 1998, p. 88).

Faced with a provision such as the phrase contained in Article 35, paragraph 2, of the Statute, which would enable a party to evade that fundamental obligation, the Court cannot interpret it in such a way as to go beyond the scope intended by its drafters.

Italy is confident that the Court will wish to avoid any such result.

It follows that Yugoslavia cannot rely on Article 35, paragraph 2, of the Statute.

THIRD PRELIMINARY OBJECTION
THE COURT'S LACK OF JURISDICTION *RATIONE MATERIAE*

A. Introduction

In its Application, Yugoslavia invokes as "Legal grounds for the Jurisdiction of the Court" Article IX of the Genocide Convention and Article 38, paragraph 5, of the Rules.

It must first of all be made clear that Italy has never given, nor does it intend to give, its consent, pursuant to Article 38, paragraph 5, of the Rules, for the Court to deal with this case.

That being so, as the Court expressly recognized in its Order on the request for the indication of provisional measures of 2 June 1999, "it is quite clear that, in the absence of consent by Italy, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise its jurisdiction in the present case, even prima facie" (para. 31).

Moreover, in its Memorial Yugoslavia makes no further mention whatever of this provision (see pp. 346 *et seq.*, Nos. 3.4.1 *et seq.*). With respect to the question whether the Court's jurisdiction can be invoked on the basis of Article IX of the Genocide Convention, it has to be recalled that this question was already given a clearly negative response when Yugoslavia's request for the indication of provisional measures was considered.

Thus, in the Order of 2 June 1999, the Court stated the following:

> "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention";
>
> "in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above' *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26)";
>
> "the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention";

"Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (paras. 27 and 28).

Italy is of course aware that the Court's findings when considering a request for the indication of provisional measures are provisional and, as the Court made clear in the aforesaid Order, "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention" (para. 33).

Nevertheless, the fact that the Court found it necessary to reject the Yugoslav request for the indication of provisional measures *on the ground of lack of prima facie jurisdiction* is of great importance since *it is the first time this has happened in the history of the Court*. Thus on all previous occasions, even where its jurisdiction was strongly challenged by the parties, the Court either indicated provisional measures or rejected the request on grounds other than the lack of prima facie jurisdiction.

This demonstrates that, in the present case, the jurisdictional title relied upon by Yugoslavia seemed to the Court to be so remote from the case that it took the view that it should abandon the virtual "presumption" in favour of the recognition of prima facie jurisdiction that it had always followed in the past.

In Italy's opinion, the Court should uphold the provisional finding of its Order of 2 June 1999 and find, definitively, that it lacks jurisdiction *ratione materiae* to deal with the present case, since the dispute, as resulting from Yugoslavia's Application, supplemented by its Memorial, is not a dispute "relating to the interpretation, application or fulfilment" of the Genocide Convention as provided in Article IX thereof.

In reality, the facts alleged by Yugoslavia, even supposing them to be true (which Italy does not concede), in no way constitute, taken separately or as a whole, the crime of genocide as defined in Article III of the Genocide Convention.

When the applicant State seeks to found the jurisdiction of the Court upon a compromissory clause such as Article IX of the Genocide Convention and the respondent State makes a preliminary objection under Article 79 of the Rules challenging the existence of a dispute covered by such a clause, the Court has to establish *definitively*, when considering the preliminary objection, whether the dispute in question "does indeed fall within the provisions of Article IX of the Genocide Convention" (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Preliminary Objections, Judgment, I.C.J. Reports 1993*, p. 615, para. 30; see also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment I.C.J. Reports 1996*, p. 810, para. 16).

As Judge Shahabuddeen quite correctly observed in his separate opinion in that *Oil Platforms* case, the most recent jurisprudence has become stricter than hitherto with respect to the scope of the examination the Court has to undertake in such a case. According to Judge Shahabuddeen, recent judgments in the matter show that "the Court is required to make a definitive interpretation of the Treaty [in which the compromissory clause invoked is to be found] at this jurisdictional phase" (*I.C.J. Reports 1996*, p. 822), because "the Court must be clearly satisfied that it has jurisdiction" (*ibid*., p. 823).

Hence, in order to rule on the preliminary objection raised by Italy in the present case, the Court is required to make a definitive interpretation of the Genocide Convention in order to determine whether or not the facts, as related by Yugoslavia in its Application and supplemented by the Memorial, would, if proven in the course of consideration of the merits, constitute a breach of the Genocide Convention.

B. The notion of the crime of genocide

The Genocide Convention seeks to ensure punishment of the most atrocious of all the *crimina juris gentium*. Hence its authors set out to define the crime with the utmost precision in order to distinguish that extreme form of criminal activity from all of the other offences capable of falling within the more general category of *crimina juris gentium*. They accordingly took the view that, rather than providing an abstract definition of the crime of genocide, they should list the specific types of conduct to which that description could be applied.

This does not of course mean that the crime of genocide does not correspond to a unitary definition; quite the contrary. As we know, the idea of making the perpetration of acts of genocide punishable by the courts of any State, on the basis of the principle of universality, sprang from a reaction against the abhorrent events of the racial persecution of European Jews embarked upon by the Nazi régime before the Second World War: the clear intention of the authors of the Genocide Convention was to prevent any future repetition of such an extensive and atrocious series of criminal acts. It may accordingly be concluded that the notion of the crime of genocide is undoubtedly a unitary one and consists in conduct aimed at systematic persecution of a minority. However, going beyond this — functional — definition, which serves to draw a clear distinction between the crime of genocide and any other crime under international law, the drafters preferred to go into specifics, leaving no uncertainty as to either the type of persecution punishable or the type of group targeted by such persecution. The former category comprises activities of an extreme nature aimed at wholly or partly destroying a national, ethnic, racial or religious group as such. This is the definitional clause common to the five types of conduct constituting the crime of genocide, as identified in Article II of the Convention.

The offence consists in the types of conduct listed in the same provision in descending order of gravity, namely: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

In general, doctrine divides the five specific cases into three conceptual categories: physical destruction; biological destruction consisting in preventing births; and cultural destruction or, more properly, cultural genocide, when children belonging to a particular group are taken and forcibly incorporated in another group, with consequent prevention of the natural transmission to the children of a particular cultural heritage.

C. The notion of protected "group"

A detailed analysis of the provision of the Convention of interest to us here enables us readily to identify the fundamental elements for defining the crime in relation to which this Court will have to establish whether the acts cited by Yugoslavia can be brought within one of these specific cases examined. What we see first is the notion of national, ethnic, racial or religious group. From the very term "group", it can be inferred that the typical object of protection is minority groups within a State; thus we should bear in mind that it is not normally activities directed against the ethnic, religious or other majority existing within a State that it is sought to repress, since that majority is well placed to have recourse to the ruling class, the government, the administration of the State, and hence to draw for its protection upon all the resources offered by the apparatus of the State. It follows that the mention of national groups in the title clause of Article II of the Genocide Convention finds its logical place in the context of a multinational State, the aim of the Convention in such a case being typically to ensure special protection for each of the nationalities going to make up the State should other national elements seek to destroy the group.

All this does not preclude the possibility that members of the majority group, even of the only national, ethnic, religious or other element present in the State, may also be the object of genocidal activities. But in such a case what would have to be demonstrated with the utmost clarity and precision is the intention to strike at the majority or element in question as a "group". Otherwise, any activity aimed at seriously harming a State through the use of force or other means capable of achieving that purpose could be regarded as an act of genocide vis-à-vis the majority component or the only ethnic element present, which is contrary to the terms of Article II of the Genocide Convention read as a whole, in conjunction with the Protocol and Article I of the same Convention.

The considerations just set out bring us to the second element that needs to be taken into account, namely the phrase "as such", with which the title clause of Article II terminates. This qualifying phrase means that the acts of persecution in question must be directed not against persons individually or in relation to a particular aspect of their personality or social activity, but only on account of their membership of the group. In other words, the fact of belonging to the group must be the sole or main reason for their persecution.

D. Intention to commit genocide

The third element of the genocide issue — and the one to which both doctrine and this august Court have devoted the most attention (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 345, para. 42; Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons, I.C.J Reports 1996*, p. 240, para. 26) — is that of specific intention to destroy the group.

A discussion of this question involves an examination of the mental element involved in the illegal act. In its treatment of the mental states which determine punishability, Article II of the Genocide Convention goes beyond the intention to kill or to commit one or other of the acts described in paragraphs *(a)* to *(e)*; over and above that intention, it requires, as a further essential condition for punishability, the intention to destroy the group as such. That specific intent is the fundamental factor differentiating the crime of genocide from situations which might be regarded as similar, but are in fact totally unrelated to genocide. Particular examples of this are individual or multiple killings and acts of persecution and injury which may fall within the scope of other offences under international law: for example, the unlawful use of armed force — subject to the very few exceptions recognized under current international law — where the intention to employ armed force and violence against another State is directed not at a group but at the State itself. This, in Italy's view, is the fundamental point for the Court to determine, for even if acts of destruction, acts designed to render the living conditions of the Yugoslav people harsher or even intolerable, and the fact of having killed Yugoslavs, were imputable to the member States of NATO, it is clear that in any event none of the respondent States had the intention of specifically persecuting a "group".

Their intention was to use armed force against Yugoslavia for reasons having nothing to do with the crime of genocide but arising out of circumstances of fact and law analysed not only by the organs of NATO but also by the United Nations, which found itself repeatedly having to deal with events for which Yugoslavia was responsible, to the point of calling on it to refrain from certain conduct.

In the present proceedings the Court is not being asked to determine whether the armed force hitherto used by the member States of NATO is lawful under the United Nations Charter and present customary international law. What it is, however, for the Court to determine is whether that force was used against a State or against a specific national group, persecuted as such.

The question then arises whether or not such a specific intent existed. The first place to look for evidence of this is in the official documents emanating from the authorities which ordered or permitted the use of force — in particular the official documents of NATO in which the purpose of the action is specifically mentioned; and we find not the slightest allusion, anywhere in these documents, to an intention to persecute the Serbian national group, as Yugoslavia claims was the case. A careful analysis of the official discussions which took place in each member State yields the same result. That is equally true, as regards Italy, of the official statements made on this subject by the Head of State, the President of the Council of Ministers and the Minister for Foreign Affairs in public interviews and parliamentary debates — at times stormy, but far from implying that Italy had joined with the other NATO countries in embarking on the persecution of the Serbian national group (see, annexed, the statement of 31 March 1999 by the Minister for Foreign Affairs, Mr. Lamberto Dini, to the joint meeting of the Foreign Affairs and Defence Committees of the Senate of the Republic and the Chamber of Deputies, concerning the status of military and diplomatic operations in the Balkans; the statement of 9 April 1999 by the Minister for Foreign Affairs, Mr. Lamberto Dini, to the joint meeting of the Foreign Affairs and Defence Committees of the Senate of the Republic and the Chamber of Deputies concerning the status of military and diplomatic relations in the Balkans and the position to be taken by the Italian Government at the Atlantic Council meeting of 12 April 1999; and the statement of 13 April 1999 by Mr. Massimo d'Alema, President of the Council of Ministers, to the Chamber of Deputies).

Were one to take an exceptionally scrupulous critical approach, one might even go so far as to question the complete reliability of evidence based exclusively on official statements. While Hitler made no secret of his genocidal intentions vis-à-vis the Jewish component of the population when the Government of the Third Reich exterminated the Jews — the prototype, as we have seen, of the crime of genocide — clearly, more astute rulers might refrain from making their intention to persecute a group explicit.

In these circumstances, one might question whether it is possible to infer from probative facts the existence of a genocidal intent. The great philosopher Jean-Paul Sartre answered this question in the affirmative, arguing that evidence of the existence of such a specific intention could be inferred from an objective analysis of the facts designed to reveal an implicit genocidal intent.

The Final Report of the Commission of Experts set up under Security Council resolution 780 (1992) came to a similar conclusion, stating that "[t]he necessary element of intent may be inferred from sufficient facts", and adding that in certain cases there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent.

Of course, the facts can be allowed to speak for themselves when their significance and the overall conduct of one or more States, as well as the ensuing consequences, can be determined beyond question simply by assuming the existence of a genocidal intent. However, acts constituting possible or suspected violations of humanitarian law in time of war cannot be regarded in themselves as the manifestation of a genocidal intent. Moreover, were one to remove the need to demonstrate, by means of a plausible and properly argued analysis, the significance of *facta concludentia* going to genocidal intent, the crime of genocide would no longer enjoy separate status vis-à-vis other possible *crimina juris gentium*. Indeed the Court itself, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*I.C.J. Reports 1996,* pp. 66 *et seq*.) already cited, expressly stated that the threat or use of force as such does not constitute genocide, thus excluding the possibility of inferring from the unlawful use of force or the violation of norms of international humanitarian law, without further specific evidence, the existence, additionally, of an intention to commit genocide.

In the present case, the argument that an intention of this kind existed is unsound, given that the facts cited merely constitute an instance of the use of armed force under circumstances of international tension entailing a threat to world peace.

In any case, it is for Yugoslavia to prove, if it can, that the action undertaken by the NATO member countries was motivated by a genocidal intent.

Thus, to establish the Court's jurisdiction in regard to Italy in this case, Yugoslavia should already have provided sufficient proof of the existence of genocidal intent. Furthermore, the existence of such intent should have been proved for each of the States summoned to defend themselves before the Court on the basis of a jurisdictional title under Article IX of the Genocide Convention. But it has not been proved for any of the States concerned, and in particular not for Italy.

It would moreover be absurd, given that Yugoslavia has failed to establish the soundness of the jurisdictional title it invokes, if the burden of establishing its lack of credibility lay with the respondent States. Such a reversal of the burden of proof would be tantamount to implicit recognition of a presumption of genocidal intent. But this is incompatible with the analysis that we have outlined, which seems, under the circumstances, to be the only one that is acceptable to and accepted by doctrine and by the Court itself.

The fact is that this problem arises at the stage of preliminary objections to jurisdiction, a stage at which it is impossible to make any properly substantiated finding as regards the hypothesis that the facts adduced in the proceedings, viewed as a whole for the purposes of an overall analysis of their significance, are capable of establishing genocidal intent on the part of the [Respondents]. We are, moreover, bound to note at this stage, and to bring to the attention of the Court, the total absence from Yugoslavia's Memorial of arguments designed to establish the existence of an intention to commit genocide. The Memorial presents a long series of facts constituting heads of damage in support of an application for damages. It complains of loss of human life and economic resources and of real or alleged acts of cruelty: but it fails not only to establish, but even to contemplate, any relationship whatsoever between those acts and Article II of the Genocide Convention. Yet — and we would state this again — properly substantiated evidence must be furnished in regard to the acts on which the complaint is based, and in respect of each State having carried them out.

In conclusion, it is quite clear that the facts as presented by Yugoslavia in its Application, and as supplemented by the Memorial, would not be sufficient, even if substantively proved, to establish, on an examination of the merits, the existence of a breach of the Genocide Convention. The Court therefore lacks jurisdiction *ratione materiae* to decide the present case on the basis of Article IX of that Convention.

FOURTH PRELIMINARY OBJECTION
INADMISSIBILITY OF YUGOSLAVIA'S SUBMISSIONS IN THEIR ENTIRETY

Yugoslavia's Application, as supplemented by the Memorial, is inadmissible in its entirety.

By the Application Yugoslavia seeks a decision from the Court concerning the legality of the action undertaken by subjects of international law who are not parties, or not all of whom are parties, to these proceedings. Yugoslavia complains of actions decided on by NATO and carried out by a much larger number of member States of those organizations than the eight States which are Respondents in the proceedings still pending before the Court. Accordingly, in deciding on Yugoslavia's claims:

— on the one hand, the Court is bound *first* to decide on the legality under international law of the decisions taken by those international organizations, even though they are not parties to the present proceedings, nor entitled to intervene pursuant to Article 62 of the Statute, the Court being a forum reserved for States (Article 34, paragraph 1, of the Statute);

— on the other hand, if it is considered that the decisions of NATO are purely political in scope and that only the decisions taken by States to implement them — implying a choice of the measures to be taken and defining the details of their execution — are capable of creating situations of responsibility, then, bearing in mind that Italy took part in the majority of those measures in a merely ancillary role, any finding of responsibility in its regard would presuppose a prior decision on the legality of acts of States which are not parties to these proceedings;

— furthermore, even if the acts of Italy, although merely ancillary, were held to be in themselves capable of creating situations of responsibility, Italy's rights of defence would be violated were it called upon to defend itself in respect of actions whose extent, circumstances of performance and consequences were beyond its knowledge.

A. The absence of NATO and of the United Nations from the proceedings

The Court's jurisdiction is of course based on consent, and it is not therefore surprising that certain States which took part in the action decided on within NATO are not parties to the present proceedings. To be more precise, certain of them were brought before the Court as Respondents, but the Court removed their cases from the List on the ground that it did not have even prima facie jurisdiction in their regard.

It will be recalled in this connection that Yugoslavia, in its Application and subsequent Memorial, describes acts and complains of damage allegedly done or caused by certain NATO States, without specifying which of them it considers to have committed the wrongful acts. In other words Yugoslavia, rather than identifying the actionable conduct of each respondent State, presents its case in terms of the States as a whole, which are described as member States of NATO. However, inasmuch as the acts complained of by Yugoslavia are deemed to be the result of decisions taken by the Atlantic Council — no one can doubt that — the States as such are not concerned. It is generally recognized that NATO is a subject of international law whose legal personality is not to be confused in any way with that of its member States. Consequently, any responsibility of that Organization in no sense reflects upon its member countries. It is therefore to NATO that Yugoslavia should address its complaints and its demands for compensation, but not by doing so before this Court, since [Article 34,] paragraph 1, of the Statute confers *locus standi* in proceedings before the Court on States alone and not on other subjects of international law such as, in particular, international organizations.

In these circumstances, it is readily understandable why Yugoslavia addressed its Application to the member States of the Organization. In thus referring to States solely in their capacity as Members of NATO, Yugoslavia's aim is, on the one hand, to make it clear that the Application concerns acts committed by those States within the framework of the Organization, and, on the other, deliberately to circumvent the difficulty posed by NATO's lack of capacity to appear before the Court. But that obstacle cannot be overcome by clumsy verbal artifice: they, the States, are not responsible for events resulting from acts of the Organization of which they are Members, and no organization can be a party to proceedings before the Court.

B. The existence of close preconditional links, both logical and operational, between the acts of the States concerned

In Yugoslavia's Application and Memorial the relationship between NATO's decisions and the acts of member States are insufficiently clarified; in the opinion of Italy, however, careful consideration must be given to all the various arguments capable of imparting a clear and precise meaning to the vague and ambiguous passages in the two documents which deal with that relationship. Thus there is an apparent assumption on the part of Yugoslavia that the alleged

situations of responsibility derive not so much from the decisions of NATO, which are considered to be political and strategic rather than operational, as from the subsequent decisions which resulted in the implementation of the measures sought by NATO. If we accept this assumption as the starting-point of the Yugoslav claims, we must then weigh up very carefully the often highly complex relations between the decisions and acts of the various States which took part jointly in the conduct of the actions against Yugoslavia. Above all, it must be stressed that a precondition for the attribution of responsibility to a State alleged to have participated, solely by reason of providing logistical resources and other services, in the performance of many of those actions is the attribution of responsibility to those States which carried the actions into effect by physically performing them on Yugoslav territory.

Here there is no disagreement about the preponderant role played by the United States of America, in particular in the execution of the measures decided on within NATO: it is undisputed that the United States, either alone, or through the provision of its resources, carried out approximately 90 per cent of the actions undertaken. It is equally undisputed that the United States is no longer a party to the proceedings before the Court. It follows that, in order to make any finding of responsibility on the part of Italy on account of a violation of the Genocide Convention, it would be essential, in the majority of cases, first to adjudicate upon the conduct of the United States and of the other States which physically conducted the operations with the use of Italian logistics or services.

In light of these considerations, Italy is bound to request the Court to declare Yugoslavia's claims inadmissible in their entirety. There are specific precedents in this regard in which the Court has expressed its opinion with the utmost clarity. First and foremost, the *Monetary Gold* case, settled by the decision of 11 June 1954. In that decision (see *I.C.J. Reports 1954*, pp. 32 *et seq.*) the Court allowed Italy's plea of inadmissibility on the ground that in the case in question

> "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."

The same view was expressed in the Judgment of 30 June 1995 in the *East Timor* case. In that Judgment (see *I.C.J. Reports 1995*, p. 105), the Court found that "in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent". On the basis of that finding the Court held that it could not go on to consider the merits of the case.

It is true that in two other decisions the Court rejected a similar plea of inadmissibility, but in the two cases in question the factual circumstances were completely different; above all, the rights and interests of the State not a party to the dispute appeared merely to be concerned by the proceedings in progress and did not, according to the principle identified by the Court in the previous two judgments, form the very subject-matter of the decision.

Thus, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 392 *et seq.*) the Court found that, in the circumstances before it, there was a mere interrelationship, and nothing more, between the rights of the States parties to the proceedings and those of the non-party States, and it therefore went on to consider the merits of the dispute of which it was seised.

The Court was faced with a quite different situation, far removed from the case now under discussion, in connection with the case concerning *Certain Phosphate Lands in Nauru (Judgment, I.C.J. Reports 1992*, pp. 259 *et seq.*). Having stated more than once that a prerequisite for allowing a plea of inadmissibility was that the interests of third parties constituted the very subject-matter of the decision requested of it, the Court held that an examination of the manner in which New

Zealand and the United Kingdom, as Administering Powers, had exercised their respective functions was not an essential prerequisite for ascertaining and judging the conduct of Australia. It therefore found itself unable to conclude that a finding on the rights and responsibilities of non-party States either went to the actual subject-matter of the dispute or — which came to the same thing — was an indispensable prerequisite for its decision on the rights and responsibilities of the States which were parties to the proceedings then before the Court.

In the present case, however, it is clear that any finding of responsibility on Italy's part would necessarily be subject to such a presuppositional — or even preconditional — link in regard to at least some of the States which took part in the action but are not parties to the present proceedings. This applies particularly to the United States of America, bearing in mind the predominant part it played in the physical execution of the measures decided on by NATO's organs.

C. The violation of Italy's rights of defence

Given what Italy has just stated in regard to the complexity of the operational relationships between those member States of NATO which took part in the measures against Yugoslavia, and the freedom of action retained by each State in regard to its conduct, even within a general framework of operational co-ordination, it would appear that an examination of the alleged responsibility of Italy in isolation would be a manifest and serious violation of its right of defence. For, as we have just pointed out in relation to the majority of the acts cited by Yugoslavia, any illegality in Italy's actions would necessarily depend on the illegality of acts performed by other States in the exercise of a freedom of action limited solely by the aims laid down by the Atlantic Council. If Italy knew in only the most general terms what the action was to which it was to contribute its logistical support, and knew nothing of the extent of that action and the means which the State concerned would employ, how could it establish that the action was in conformity with international law?

That evidence could be furnished only by the State which undertook the action and carried it through.

Accordingly, where — as in the overwhelming majority of cases — the acts concerned were performed by States, such as the United States, which are not parties to these proceedings, Italy would be deprived of its power to defend itself. It is, however, convinced that the Court, aware of the need to avoid placing Italy in such a situation, which would violate the most elementary principles governing any judicial proceedings, will for this reason wish to declare that the Application of Yugoslavia is inadmissible in regard to any responsibility arising from acts accomplished directly and as principals by States other than Italy.

SUBMISSIONS

The Government of the Republic of Italy accordingly submits that it may please the Court to adjudge and declare that:

I. The Application filed in the Registry of the Court on 29 April 1999 by the Federal Republic of Yugoslavia against the Republic of Italy for "violation of the obligation not to use force", as supplemented by the Memorial filed on 5 January 2000, is inadmissible with respect to the eleventh submission, mentioned for the first time in the Memorial, inasmuch as Yugoslavia seeks thereby to introduce a dispute altogether different from the original dispute deriving from the terms of the Application;

II. The Court lacks jurisdiction *ratione personarum* to decide the present case, since Yugoslavia is not a party to the Statute;

III. The Court lacks jurisdiction *ratione materiae* to decide the present case, since the dispute deriving from the terms of Yugoslavia's Application, as supplemented by the Memorial, is not a dispute relating "to the interpretation, application or fulfilment" of the Genocide Convention as provided in Article IX of that Convention;

IV. Yugoslavia's Application, as supplemented by the Memorial, is inadmissible *in its entirety*, inasmuch as Yugoslavia seeks thereby to obtain from the Court a decision regarding the legality of action undertaken by subjects of international law not present at the proceedings, or not *all* so present.

Rome, 3 July 2000

(Signed) Professor Umberto LEANZA
Agent of the Italian Government.

LIST OF DOCUMENTS ANNEXED TO THE PRELIMINARY OBJECTIONS OF THE REPUBLIC OF ITALY

1. Statement by the Minister for Foreign Affairs, Mr. Lamberto Dini, to the joint session of the Foreign Affairs and Defence Committees of the Senate of the Republic and of the Chamber of Deputies, concerning the status of military and diplomatic operations in the Balkans. Rome, 31 March 1999.

2. Statement by the Minister for Foreign Affairs, Mr. Lamberto Dini, to the Committees for External Relations and Defence of the Senate of the Republic and of the Chamber of Deputies concerning the status of military and diplomatic relations in the Balkans and the position of the Italian Government at the meeting of the Atlantic Council on 12 April. Rome, 9 April 1999.

3. Statement by Mr. Massimo d'Alema, President of the Council of Ministers, to the Chamber of Deputies. Rome, 13 April 1999.

STATEMENT BY THE MINISTER FOR FOREIGN AFFAIRS, MR. LAMBERTO DINI, TO THE JOINT SESSION OF THE FOREIGN AFFAIRS AND DEFENCE COMMITTEES OF THE SENATE OF THE REPUBLIC AND OF THE CHAMBER OF DEPUTIES, CONCERNING THE STATUS OF MILITARY AND DIPLOMATIC OPERATIONS IN THE BALKANS

Rome, 31 March 1999

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We all hoped that yesterday would cast a ray of light upon the tragedy of Kosovo. However, the visit by the Russian Prime Minister, Yevgeny Primakov, also came to nothing. And the war is continuing. The Russian Prime Minister failed to obtain any concessions from President Milosevic which would enable negotiations to be resumed. On the contrary, Milosevic called — publicly — for the immediate suspension of the bombing as a prerequisite for a partial withdrawal of Serbian troops from Kosovo. He has taken a step backwards, not only in relation to the Rambouillet accords but also to the agreements reached on 25 October of last year with the US envoy Richard Holbrooke, agreements which, moreover, have been repeatedly violated.

As the President of the Council Mr. D'Alema has pointed out, not only is the NATO action continuing, but it will be further intensified during the next few hours. It is right and inevitable that this should be so.

This has become necessary primarily because of what is happening on the ground: reports of massacres bordering on genocide. We have the vivid and moving direct testimony of the Minister of the Interior, the Hon. Russo Jervolino. What is currently going on in the capital of Kosovo, Pristina, but also in more remote districts, is a spectacle of intolerable barbarity, incompatible with any form of civic conscience. In particular, the systematic destruction of the homes of the Albanians is intolerable; the savagery of the paramilitary militias, who go from door to door carrying out killings; the elimination of Kosovo's political leaders, in the first place of those moderate representatives on whose actions the fragile prospects of peace have long depended; and the murder of intellectuals, writers, all those who keep the culture and identity of the Kosovo Albanians alive.

2. Thus the war is continuing, and the prognosis for the immediate future is fraught with uncertainty. However, it is precisely at times like this that the greatest clear-sightedness is necessary. The Government proposes a threefold objective: no renunciation of the military action within the framework of the Atlantic Alliance aimed at reducing Belgrade's means of repression; action to help the refugees, who are pouring across the borders of Kosovo, particularly into Albania; and maintenance of a political perspective, which, while it may seem for the moment to have been virtually lost sight of, must continue to guide the use of force.

The Government must therefore confirm Italy's commitment alongside its allies. We must also fully assume our responsibilities. The NATO forces are currently engaged in bombing armoured vehicles and ground forces in Kosovo and the surrounding areas. But we are also launching selective strikes against human and material resources throughout Yugoslav territory.

The escalation of the violence, which will inevitably involve loss of life and destruction, including innocent victims, is certainly not being undertaken light-heartedly. This is a difficult time, an occasion for reflection and concern in the capitals of Europe. But the determination of the Alliance in the face of the terrible spectacle of the population in flight must not be weakened.

It must be remembered that it is those who have rejected a negotiated solution, above all President Milosevic, who are primarily to blame for the current situation. They have blocked any prospect of self-government for Kosovo. They have forced the population from their homes in the most dramatic exodus of this post-war period. An exodus reminiscent of the blackest periods in the history of the Balkans.

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The action being taken by NATO is guided, as I have said, by a political agenda: not only to put an end to the massacres but also to bring about a return to a situation where people can live together again, in mutual tolerance. Considerable thought has been given to the means of force deployed by the Atlantic Alliance. Their content is commensurate with the processes involved in restoring peace, starting with a clear indication that they were prepared to demonstrate to the parties concerned during the negotiations the extremely serious action which the Alliance would take in the event of failure to comply. Milosevic was warned in every possible way. Not only bilaterally but also by the joint action of international bodies: the United Nations, the Atlantic Alliance, the European Union and the Contact Group. How many times have we called upon Belgrade to stop on the edge of the abyss! Never leaving any doubts as to our determination or that of the allies, yet, even in the last mission of the US envoy Richard Holbrooke, always allowing Belgrade sufficient leeway in order to avoid the ultimate measure. At the present juncture, we can do no other than to allow the military action to continue until a clear indication is given by Milosevic of a change of heart: the ending of repressive measures; the withdrawal of troops from Kosovo; the resumption of negotiations. It is to be hoped that the Belgrade Government will want to spare its own people from having to pay the price of further destruction, further loss of life, further horrors.

On the other hand, it should again be made clear that, even though military action has so far failed to change Milosevic's attitude, NATO has, up until now, refused to contemplate the deployment of ground forces to protect the inhabitants of Kosovo from being massacred. This is an eventuality that extends beyond the allies' current plans and would radically alter the nature of the conflict.

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4. This brings me to the last point of our action: keeping alive the prospect of negotiations. The Italian Government did its utmost to try to bring the Rambouillet talks to a successful conclusion. We did so also as the country which is by far the most exposed and will bear the most dramatic consequences of this war, above all the exodus of refugees. We shall continue to do so because we are convinced that, even amid the clash of arms, it always remains necessary to pursue a political agenda.

Over the past few days, despite our participation in the military action, we have kept in constant contact with our partners and allies, with a view to an ongoing assessment of the military intervention, and to providing the Serbian Government with very clear messages concerning the solidarity of the Alliance, but also concerning our willingness to respond to credible signals of a change of heart, of an end to the savage repression and a return at least to the terms of the Rambouillet accords.

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STATEMENT BY THE MINISTER FOR FOREIGN AFFAIRS, MR. LAMBERTO DINI, TO THE COMMITTEES FOR EXTERNAL RELATIONS AND DEFENCE OF THE SENATE OF THE REPUBLIC AND OF THE CHAMBER OF DEPUTIES CONCERNING THE STATUS OF MILITARY AND DIPLOMATIC RELATIONS IN THE BALKANS AND THE POSITION OF THE ITALIAN GOVERNMENT AT THE MEETING OF THE ATLANTIC COUNCIL ON 12 APRIL

Rome, 9 April 1999

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The Kosovo conflict is fraught with historical complexities that are compounded by national legend and mythology and the legacy of this century's many wars. But the presence of the NATO forces shows that we believe in a new international law, that crimes against humanity must be punished wherever they are committed and that it is lawful to use force to restore the rule of law and to punish the perpetrators.

As Kofi Annan stated on 7 April in Geneva, "No Government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples"; and he condemned "the vicious and systematic campaign of 'ethnic cleansing' conducted by the Serbian authorities in Kosovo [which] appears to have one aim: to expel or kill as many ethnic Albanians in Kosovo as possible, thereby denying a people their most basic rights to life, liberty and security".

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3. . . . Military action, humanitarian emergencies and the strength of the Alliance do not imply that the search for peace has been abandoned and should not prevent us turning our minds even now to what may await us when the conflict is over. This does not mean challenging the grounds for the decision to go to war; on the contrary, it means not abandoning political vision or the wisdom of diplomacy, so as to prevent the Balkans from continuing to suffer the consequences of age-old hatreds, black memories and new myths and grievances. Hence our willingness to consider with an open mind all the initiatives taken during the past few days, regardless of their source: Russia, the Holy See, even the Government in Belgrade. Concurring with the arguments for war does not mean refusing to entertain the arguments for peace.

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4. . . . Over the next few days, we shall be working with the allies, starting on Monday in the Atlantic Council, to develop the political and strategic framework needed to provide solid backing for the use of force, thereby laying the foundations, however precarious to begin with, on which peace can be built. We must do so without fear of breaching the consensus within the Alliance or undermining the collegial character of its choices, supported by the resolve which has guided us in our present stance and which, with Parliament's endorsement, has never slackened and will never slacken. In the Atlantic Council, we shall scrutinize the Alliance's political course, also in terms of its contribution to humanitarian action and of plans, once the present conflict is over, to anchor the entire region firmly in European stability in accordance with the frequently extolled principle of "Europeanization" of the Balkans.

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6. In the course of the continual updating of allied strategy, we cannot afford to disregard circumstances that have been rendered still more difficult by the dramatic events of recent days.

There have been well-documented reports of serious and abhorrent crimes against the human person in Kosovo, incidents of a kind that we associated with a bygone era of European history and that we never expected to recur. Should we dialogue with interlocutors whose hands are steeped in blood? Yet what is the alternative unless we have recourse to other methods of warfare, particularly the massive deployment of ground forces?

To what extent is self-rule still a viable option in Kosovo, given the chasm that has been opened up by the scale of the bereavement and violence suffered by the population? Are there any alternatives? At all events, there can be no casual redrawing of frontiers in the Balkans, whose still fragile contours must be managed with care. The dismantling of Yugoslavia cannot continue indefinitely. Eighteen of the region's 23 frontiers are still under discussion or even subject to dispute, just as they were on the eve of the First World War. We must avoid improvisation, since errors of judgment could have irreparable consequences.

Europe seems, yet again, to be reliving its own history in the Balkans, an ineluctable sequence of conflict and fragmentation. Looking beyond the war, can we not try to work out a way to reverse this trend so that the Balkans begin to resemble the rest of the continent (where models of integration are spreading apace)? It is never too soon to start a process of reflection, like that begun yesterday among the Ministers for Foreign Affairs of the European Union.

To what extent should recent events encourage us to seek remedies for the Union's shortcomings: its continuing lack of cohesion in foreign and security policy and the weakness of its voice in sensitive situations that nonetheless deeply concern us?

The Atlantic Alliance is preparing to update its methods, procedures and strategies this month in Washington, gearing them to a world that differs sharply from that in which it was founded. What useful lessons can we draw, here again, from the Kosovo tragedy?

Viewing war as a policy tool and trying to look beyond the armed conflict does not, as I have said, imply any impairment of the solidity of the Alliance. It simply means safeguarding the primacy of reason by drawing on our conscience and intelligence. To ensure that the unspeakable sufferings of recent days — for which, I repeat, we have no doubt where responsibility lies — were not endured in vain. To prevent the path of this century "ending in a dark forest". And to prevent an uninterrupted sequence of wars in the Balkans "like the beads of a rosary or the leaves of a calendar".

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STATEMENT BY MR. MASSIMO D'ALEMA, PRESIDENT OF THE COUNCIL OF MINISTERS, TO THE CHAMBER OF DEPUTIES

Rome, 13 April 1999

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I should like to say at the outset that the crucial project in which we are currently engaged consists in the search for a political and negotiated solution to the present conflict in Kosovo.

We have done our utmost to further that project by acting in concert with our allies, as is right and proper for a responsible country, and by refusing to abandon the precondition for any move towards peace, namely the directive to the Belgrade Government to terminate its military action against the Albanian civilian population of Kosovo.

Unfortunately, the war is continuing, because the Belgrade authorities have persisted in their abhorrent ethnic cleansing operation, which, according to United Nations estimates, has already had a more serious impact than the operations in Bosnia.

Despite the absence to date of explicit and verifiable signals of a change of heart on the part of Slobodan Milosevic, we have insisted on stepping up diplomatic initiatives and on resisting a military escalation that might run dangerously out of control. The conclusions of the summit of NATO Ministers for Foreign Affairs convened yesterday in Brussels (a summit that Italy ardently desired — and I recall informing Parliament that we had filed a request to that end) endorse the line that we have been following hitherto and may help to bring about a positive outcome to the crisis. It is in this spirit that we welcome Kofi Annan's statement a few days ago in which he reactivated the role of the United Nations in managing and seeking a settlement to the conflict. In taking that step, the United Nations Secretary-General, exercising his generally recognized moral authority, sought to reaffirm the political role of the United Nations. For our part, we had strongly advocated an initiative that would restore the United Nations to its central position. We gave the statement our full support and backing because of our conviction that United Nations involvement in these tragic events is a sure guarantee of speedier progress towards a negotiated and jointly espoused settlement encompassing all countries interested in securing peace in the region.

The final declaration of the Atlantic Council, which acknowledges the value of Kofi Annan's efforts to attain the political goals set by the international community confirms that we are on the right track.

The conditions that have to be met for the suspension of military operations are at present crystal clear.

They are precisely those reaffirmed by the United Nations Secretary-General in his statement of 9 April, which I propose to review point by point: first, an end to Serb military activities in Kosovo; second, a guarantee of the withdrawal of military, paramilitary and police forces from the region; third, acceptance of an international military force; fourth, repatriation, with appropriate assistance and safeguards, of all refugees; lastly, the concomitant reopening of negotiations among the parties concerned.

These are conditions which reproduce in substance those proposed by NATO, as confirmed by the conclusions of yesterday's meeting of the Atlantic Council. They represent the prerequisite for any move to broach a discussion of the foundations for a just peace, based on principles of

democratic and multi-ethnic coexistence that offer an enduring guarantee of effective security and respect for the human and civil rights of the populations concerned.

Yesterday's summit in Brussels reinforced the Alliance's united stance in support of legitimate military action in the face of an unprecedented humanitarian catastrophe in Europe, for which the Belgrade authorities bear full responsibility.

I wish to emphasize in this forum the fact that our considered support for NATO's action is the outcome of a process of deep reflection, which has preceded and accompanied our involvement, and, in particular, of a rigorous examination, including from the moral perspective, of the legitimacy of the use of force; it is a particularly sensitive process of reflection in a country such as ours, with its deep-rooted aversion to violence and its warm and firm ties of friendship with other peoples, especially our neighbours across the Adriatic, which rendered support for a military operation neither an easy option nor one that could be taken for granted.

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I propose that we look back together at the events of recent years. In Bosnia, NATO waited for four years before taking action, four years during which the violence claimed 200,000 lives and created 2 million refugees. We stood by and did nothing, launching appeals when the Yugoslav army shelled Vukovar and when paramilitary militias entered the ruins of the city to butcher the survivors. However, our inaction did not check the violence. I have recalled this, frankly, because I understand the gravity of the choices to be made, and I believe you all understand their gravity for those directly responsible for making them. I do not believe, on the other hand, that we can accept the argument that the repressive action against the peoples of Kosovo is linked to or stems from the NATO bombardment. This repression had, in fact, been planned and prepared, with troops massing on the borders of Kosovo even as the Rambouillet negotiations continued, and has very significant precedents, which demonstrate that the practice of ethnic cleansing is not one improvised over recent weeks but a policy that has been methodically pursued over recent years.

As President of the Council of Ministers, I believe that the majority of the Italian people have understood our decisions and our assumption of responsibility. They have understood that the use of force represented the ultimate but unavoidable option in the face of a tragedy that could not be prevented by other means.

In this connection, the United Nations Secretary-General himself made a significant statement on the issue a few days ago in Geneva. On that occasion, Kofi Annan had this to say, and I quote: "Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty".

Clearly, this principle, given its implications, requires the utmost caution in political terms, a sound basis in law and a solid endorsement by international law.

It is also clear, however, that this statement implicitly confirms that the use of force has to be regarded as a legitimate ultimate option in cases where all available means of negotiation and diplomatic action have failed.

The dramatic events of recent weeks, as well as the initiative and positions taken by the United Nations, have thus validated the motives for a fitting and effective response to the humanitarian tragedy that has erupted in the heart of Europe.

I wish to reiterate that the present military operation is not a war against Serbia or against its people, whom we regard as our friends, and who have been isolated from Europe for far too long because of the policy of their Government.

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On the military front, the NATO operation — now in its twentieth day — has achieved three important results. It has significantly reduced Milosevic's military potential: strategic command centres, air defence facilities and specific industrial and logistic infrastructures have been hit.

Kosovo has been partially isolated by the severing of lines of communication, a blockade of supply routes and strikes against armoured units heading towards the region.

This has led to a corresponding reduction in the operational capacity of the Serbian army and police, who are still engaged in a campaign of systematic repression of the civilian population of Kosovo.

Unfortunately, as we know, NATO's operation has claimed civilian victims. We wish to express our regret at that fact and to reiterate that NATO's operations are carried out — as we know from direct testimony and the efforts of our military and civilian authorities — with the aim of avoiding or limiting, as far as possible, any involvement of local populations. But we know that there have been victims, and the Italian Government offers its condolences to all victims of the present conflict, obviously without discrimination as to race, background or ethnicity. Wars are by nature painful and tragic.

It should be borne in mind that this war was launched in the first place by the Belgrade regime and that NATO intervened only after they had killed more than 300,000 people.

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As I have already stressed on many occasions in recent weeks, participation in the NATO operation and efforts on the humanitarian front have been combined with the Government's steps to explore every avenue that might lead to a diplomatic settlement to the crisis.

We are still convinced that no military solution to the crisis can be achieved separately from action to secure a political settlement.

Minister Dini has already made a statement on the subject to Parliament. I wish to add that, in close consultation with him, I have had daily contacts with the top leaders of the allied countries and with the Russians leaders, President Yeltsin and Prime Minister Primakov, as well as with Mr. Solana, the Secretary-General of NATO.

Every initiative we have taken has been motivated by the search for a settlement under which all the inhabitants of Kosovo are guaranteed the possibility of living in an atmosphere of security and trust. It was thus necessary, and it is still necessary, to work towards ensuring that the Albanians and Serbs of Kosovo can return to their homes and live together in peace. This requires the immediate withdrawal of Serbian forces from the region and, once the guarantees specified by NATO have been fulfilled, the cessation of military action against Belgrade.

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