SEPARATE OPINION OF JUDGE KOOIJMANS

1. I have voted in favour of the Court's decision that the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia must be rejected. I also agree with the Court's finding that Article IX of the Genocide Convention does not constitute a basis of jurisdiction, even prima facie.

Moreover, I share the Court's opinion that the additional ground for its jurisdiction based upon the bilateral Treaty between the Kingdom of Yugoslavia and the Kingdom of the Netherlands of 11 March 1931, which was invoked by Yugoslavia only during the second round of the oral argument, cannot be taken into consideration in the present stage of the proceedings. (Order, para. 44.)

2. I do not agree, however, with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the limitation *ratione temporis* contained in it.

It is my opinion that in this respect the Court's reasoning is flawed from a logical point of view and is, therefore, inconsistent. I therefore feel compelled to set out my arguments which are based on the following factual and legal considerations.

3. In its Application the Government of the Federal Republic of Yugoslavia invoked Article 36, paragraph 2, of the Statute as a legal ground for the Court's jurisdiction. It may be recalled that on 25 April 1999 Yugoslavia recognized the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. This declaration contains a limitation *ratione temporis*: the jurisdiction of the Court is only recognized with regard to disputes "arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature".

4. During the oral hearings the Respondent, which also has accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, contended that the Court lacks prima facie jurisdiction and that, consequently, the conditions for the indication of interim measures of protection are not met. With regard to the declaration of acceptance of 25 April 1999 the Respondent maintained that it is invalid since Yugoslavia is not a Member of the United Nations and therefore not a party to the Statute, whereas Article 36, paragraph 2, explicitly states that declarations under that provision can only be made by States which are party to the Statute. The Netherlands further argued that, even if the

declaration were to be considered valid, it would not cover the present dispute because of the temporal limitation contained in it.

5. In this respect it is relevant to recall that at the time of the proclamation of the Federal Republic of Yugoslavia a declaration was adopted by its parliamentary organs in which it is stated that the "Federal Republic of Yugoslavia, continuing the State, international, legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally".

6. After a note, containing a virtually identical statement, had been submitted by the Yugoslav Permanent Mission in New York to the Secretary-General of the United Nations and had been circulated to the member States, the Security Council decided that a presidential statement be issued in which it was noted that the Council members were of the opinion that the Yugoslav communication did not prejudge decisions that might be taken by appropriate United Nations bodies.

7. Such decisions were taken five months later. On 19 September 1992 the Security Council adopted resolution 777 (1992); the relevant parts read as follows:

> "*The Security Council,*
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> . . . . . .
>
> *Considering* that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,
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> . . . . . .
>
> 1. *Considers* 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; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;
>
> 2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

8. Three days later, on 22 September 1992, the General Assembly adopted resolution 47/1, which reads as follows:

> "*The General Assembly,*
>
> *Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.

1. *Considers* 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; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

It may be observed that the resolution of the General Assembly does not reiterate the Security Council's consideration that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist".

9. On 29 September 1992 the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and of Croatia in which he expressed "the considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1".

In this letter the Legal Counsel said that

> "General Assembly resolution 47/1 deals with a membership issue which is not foreseen in the Charter of the United Nations, namely, the consequences for purposes of membership in the United Nations of the disintegration of a Member State on which there is no agreement among the immediate successors of that State or among the membership of the Organization at large".

He gave as his view that "the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly".

He added that

> "the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia' . . . The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."

10. On 5 May 1993 the General Assembly in resolution 47/229 decided that the Federal Republic of Yugoslavia would not participate in the

work of the Economic and Social Council either. No follow-up was ever given to these resolutions of the appropriate organs.

11. The Court was already confronted with the question whether or not the Federal Republic of Yugoslavia is a Member of the United Nations and as such a party to the Statute when it dealt with the request for the indication of provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.

The Court, however, was of the opinion that at that stage of the proceedings there was no need to determine definitively Yugoslavia's status. In what certainly must be called an understatement the Court called "the solution adopted [by the General Assembly in resolution 47/1] . . . not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18).

12. In the *Genocide* case the Court's view that it was not necessary to deal with the issue of Yugoslavia's membership of the United Nations was understandable and even logical since the Court had in any event prima facie jurisdiction under Article IX of the Genocide Convention.

In the present case, however, the Court has found that the acts imputed by Yugoslavia to the Respondent are not capable of coming into the provisions of the Genocide Convention and that, consequently, Article IX of the Convention cannot constitute a basis on which the jurisdiction of the Court could prima facie be founded. (Order, para. 41.)

13. Thus, the only remaining title for the Court's jurisdiction, invoked by Yugoslavia, is that of the mutual acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. One would expect, therefore, that the Court would no longer be able to avoid the rather thorny question of Yugoslavia's membership of the United Nations and, therefore, of that of the legal validity of its declaration of acceptance.

14. In its present Order, however, the Court again — like in 1993 — takes the position that it need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in view of its finding that the dispute between the Parties arose well before 25 April 1999, the date on which Yugoslavia accepted the compulsory jurisdiction of the Court with the explicit proviso that it accepted that jurisdiction in respect only of disputes arising or which may arise after the signature of its declaration, with regard to situations or facts subsequent to that signature. (Paras. 28 and 29.)

15. In this respect the Court relies upon what it said in its Judgment of 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> "[a]s early as 1952, it held in the case concerning *Anglo-Iranian Oil Co.* that, when declarations are made on condition of reciprocity, 'jurisdiction is conferred on the Court only to the extent to which *the two Declarations* coincide in conferring it' (*I.C.J. Reports 1952*, p. 103)" (*I.C.J. Reports 1998*, p. 298, para. 43; emphasis added).

And the Court concludes by saying that the declarations made by the Parties under Article 36, paragraph 2, of the Statute do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case. (Order, para. 30.)

16. With all due respect, I find this reasoning puzzling if not illogical and inconsistent. How can the Court say that there is no need to consider the question of the validity of Yugoslavia's declaration whereas at the same time it concludes that this declaration, taken together with that of the Respondent, cannot constitute a basis of jurisdiction? This conclusion surely is based on the presumption of the validity of Yugoslavia's declaration, at least for the present stage of the proceedings. If such a presumption does not exist, the Court should at least have said that it accepts that validity purely *arguendo* since, even if it had been valid, it would not have had the capability to confer jurisdiction on the Court in view of the limitation *ratione temporis* in the Applicant's declaration.

17. In this respect I must confess that the reference to the *Cameroon* v. *Nigeria* case (although correctly made in the context as framed by the Court) does not seem to be particularly well chosen, for in that case — as in most other cases which have come before the Court under Article 36, paragraph 2, of the Statute — it was not the validity of the Applicant's declaration which was in issue but the question whether it could be invoked against the Respondent. It is for that reason that the Court two years earlier in its Order indicating provisional measures could find "that the declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute constitute a prima facie basis upon which its jurisdiction in the present case might be founded" (*Land and Maritime Boundary between Cameroon and Nigeria, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 21, para. 31), in spite of the fact that Nigeria had contended that Cameroon could not rely upon its own declaration (the validity of which was not contested) vis-à-vis Nigeria.

18. In his separate opinion joined to the Court's Order on interim measures of protection in the *Interhandel* case, Judge Hersch Lauterpacht said the following:

> "The Court may properly act under the terms of Article 41 provided that there is *in existence* an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which prima facie confers jurisdiction upon the Court

and which incorporates no reservations obviously excluding its jurisdiction." (*I.C.J. Reports 1957*, pp. 118-119; emphasis added.)

19. This quotation indicates the correct order in which decisions must be taken. The Court first has to establish the existence of an instrument which prima facie is capable of conferring jurisdiction upon the Court; it is only after this has been established that the question becomes relevant whether such instruments, emanating from the parties to the dispute, contain reservations which manifestly exclude the Court's jurisdiction.

20. I am, therefore, of the opinion that the Court should not have avoided the question of Yugoslavia's membership of the United Nations and the ensuing validity or invalidity of its declaration of acceptance, but should have dealt with it as a preliminary issue. Only after having established that this declaration is capable of providing the Court with a prima facie basis for its jurisdiction could the Court have considered in a meaningful way whether reservations made in either of the declarations obviously exclude its jurisdiction. For if the Court would have concluded that the Yugoslav declaration is not capable of conferring this prima facie jurisdiction, the latter question becomes irrelevant.

21. Not for a moment do I contend that the Court already at the present stage of the proceedings should have taken a definitive stand on what I called earlier a thorny question. The dossier on the controversy with regard to the Federal Republic of Yugoslavia's continuation of the international personality of the Socialist Federal Republic of Yugoslavia is full of legal snags. The decisions taken by the appropriate United Nations bodies are without precedent and raise a number of as yet unsolved questions. Neither should it be forgotten, however, that these decisions have been taken by the organs which according to the Charter have the exclusive authority in questions of membership. Their decisions therefore, cannot easily be overlooked or ignored, even if the interpretations given to them by the member States which have participated in the decision-making process are widely divergent.

22. The factual and legal background of this question necessitates a thorough analysis and a careful evaluation by the Court when it deals with its jurisdiction on the merits at a later stage. What the Court should have done, however, in the present stage of the proceedings, is to determine whether the doubts, raised by the decisions of the competent United Nations bodies with regard to the continued membership of the Federal Republic of Yugoslavia, are serious enough to bar the Court from assuming that it has prima facie jurisdiction to entertain the case brought by Yugoslavia on the basis of its declaration of acceptance.

23. In this respect it is, in my opinion, of primordial importance that both the Security Council and the General Assembly expressed the view that the Federal Republic of Yugoslavia cannot continue automatically

the membership of the former Socialist Federal Republic of Yugoslavia and *therefore* (emphasis added) that the Federal Republic of Yugoslavia should apply for membership.

Security Council resolution 777 (1992) and General Assembly resolution 47/1 seem to establish a causal link between the requirement of an application of membership and the issue of the continuation of the membership of the former Socialist Federal Republic of Yugoslavia. This "causal link" seems to be a breeding-ground of inconsistencies, both legally and otherwise. Nevertheless it cannot be fully ignored.

24. In this respect it is worthwhile to quote once more from the letter of 29 September 1992 of the United Nations Legal Counsel, referred to in paragraph 9 above. The Legal Counsel wrote that "the admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1".

During the debate in the General Assembly on the draft resolution which was finally adopted as resolution 47/1 (22 September 1992) the then Prime Minister of the Federal Republic of Yugoslavia said: "I herewith formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent." The United Nations, however, never received any written document as a follow-up to that statement.

25. Against this background I come to the conclusion that there are strong reasons for doubt as to whether the Federal Republic of Yugoslavia is a full-fledged, fully qualified Member of the United Nations and as such capable of accepting the compulsory jurisdiction of the Court as a party to the Statute.

That means that there is a probability, which is far from negligible, that the Court after a thorough analysis of the legal issues involved will find that is without jurisdiction because of the invalidity of Yugoslavia's declaration of acceptance.

26. The disputed validity of that declaration touches the very basis of the Court's jurisdiction and, therefore, takes precedence over other issues, like, for example, limitations *ratione temporis, ratione materiae* and *ratione personae*. In view of the doubts and the controversies with regard to this question the Court would have found itself on safe ground if it had concluded that the uncertainties about the validity of Yugoslavia's declaration prevent it from assuming that it has jurisdiction, even prima facie.

27. In their dissenting opinion in the *Anglo-Iranian Oil Co.* case (interim measures of protection) Judges Winiarski and Badawi Pasha stressed the importance of the consent of the Parties in the context of Article 41 of the Statute. They went on to say:

> "the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court nevertheless *reasonably probable*" (emphasis added).

And they concluded:

> "if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated" (*I.C.J. Reports 1951*, p. 97).

It is my considered view that because of the thick clouds which have packed around Yugoslavia's membership of the United Nations, the ensuing uncertainty of the validity of its declaration does not pass the test of "reasonable probability".

28. There have been earlier occasions when the Court shied away from thorny questions and chose to decide a case on other grounds which were judicially preferable albeit not logically defensible. The most famous example is the *Interhandel* case where the Court first rejected three of four preliminary objections regarding the Court's jurisdiction, then upheld a preliminary objection on admissibility and ultimately decided that there was no need to consider the fourth objection on jurisdiction. This order of dealing with preliminary objections has been criticized and for good reasons but it is at least comprehensible as the various objections were completely different in character.

29. The present case, however, is different. The issue of the declaration's validity is preconditional for that of the applicability of the reservations and time limitations. The latter issue is completely dependent upon the former. In particular with regard to the limitation *ratione temporis* in Yugoslavia's own declaration this becomes relevant. If the majority of the Court would have found that this limitation did not act as a bar to the Court's prima facie jurisdiction, the Court could no longer have avoided to take up the question of the declaration's validity. This shows that that finding would have been wholly conditioned by this threshold question.

30. Finally, let me state that I find the Court's view that the temporal limitation contained in Yugoslavia's declaration prevents the Court from assuming that it has prima facie jurisdiction persuasive, although it does not fully satisfy me. In my view, however, that finding would have been superfluous if the Court had based its negative conclusion on the question of the validity of Yugoslavia's declaration.

(Signed) Pieter H. KOOIJMANS.