SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

The grounds of jurisdiction originally advanced by the Congo — The new title of jurisdiction invoked in the second round of oral argument — The objection made by Belgium — The precedents of the Court on the matter — The new position adopted by the Court — The reasons given cannot be upheld — Conclusion

1. Notwithstanding my vote for the operative part of the Order, I feel it necessary to make the following points.

2. In its Application, the Democratic Republic of the Congo relies, as basis for the Court's jurisdiction, on the fact that "Belgium has accepted the jurisdiction of the Court and, in so far as may be required, the present Application signifies acceptance of that jurisdiction by the Democratic Republic of the Congo" (Order, para. 2).

3. The Democratic Republic of the Congo did not indicate any additional basis of jurisdiction in its request for provisional measures.

4. At the hearing of 22 November 2000, in its second round of oral argument, the Democratic Republic of the Congo contended that

> "Prima facie, the Court's jurisdiction cannot be contested. It derives clearly from the optional declarations recognizing as compulsory the jurisdiction of the Court made by the Kingdom of Belgium and the Democratic Republic of the Congo on 3 April 1958 and 8 February 1989, respectively, which are appended to this statement and which appear to contain no reservation." (Order, para. 41).

5. On 23 November 2000, Belgium objected "to the invocation of a basis of jurisdiction . . . in the second round of oral arguments", and supported its contention citing jurisprudence of the Court (Order, paras. 45, 62).

6. As recalled by Belgium, the Court stated on 2 June 1999:

> "42. Whereas after it had filed its Application Yugoslavia further invoked, as a basis for the Court's jurisdiction in this case, Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration, between Belgium and the Kingdom of Yugoslavia, signed in Belgrade on 25 March 1930; whereas Yugoslavia's 'Supplement to the Application', in which it invoked this new basis of jurisdiction, was presented to the Court in the second round of oral argument (see paragraph 14 above); and whereas Yugoslavia gave no explanation

of its reasons for filing this document at this stage of the proceedings;

43. Whereas Belgium, referring to Article 38, paragraph 2, of the Rules of Court, argues as follows:

> 'It follows clearly that it is unacceptable, as in this case, to introduce a new ground *in extremis* supplementing an essential point in the arguments on the prima facie jurisdiction of the Court. Moreover, we may ask ourselves why the Federal Republic of Yugoslavia, which is deemed to be aware of the treaties to which it claims now to have succeeded, thought it unnecessary, contrary to the requirement of the principle of the sound administration of justice and of the provisions of Article 38 which I have just cited, to include this ground when filing its Application';

and whereas Belgium accordingly asks the Court, '*primarily*, to strike this ground from the proceedings'; whereas Belgium contends '*in the alternative*' 'that the Convention of 1930 confers jurisdiction not on [the] Court, but on the Permanent Court of International Justice', and whereas it contends that Article 37 of the Statute is without effect here; and whereas Belgium states '*in the further alternative* . . . that, under the terms of [the] Convention [of 1930], recourse to the Permanent Court of International Justice is a subsidiary remedy', and whereas it points out that Yugoslavia 'has failed to exhaust the preliminary procedures whose exhaustion is a necessary condition for seisin of the Permanent Court of International Justice';

44. Whereas the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never before occurred in the Court's practice; whereas such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice; and whereas in consequence the Court cannot, for the purpose of deciding whether it may or may not indicate provisional measures in the present case, take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999." (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, pp. 138-139, paras. 42-44.)

7. In a different Order, rendered on the same day, 2 June 1999, the Court confirmed that it could not take into consideration the new title of jurisdiction advanced in the second round of oral pleadings. There it was stated:

> "42. Whereas after it had filed its Application Yugoslavia further invoked, as basis for the Court's jurisdiction in this case, Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation

between the Netherlands and the Kingdom of Yugoslavia, signed in The Hague on 11 March 1931; whereas Yugoslavia's 'Supplement to the Application', in which it invoked this new basis of jurisdiction, was presented to the Court in the second round of oral argument (see paragraph 14 above); whereas Yugoslavia gave no explanation of its reasons for filing this document at this stage of the proceedings; and whereas Yugoslavia argues that, although the procedure provided for in Article 4 of the 1931 Treaty has not been strictly followed, 'the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the Applicant could easily remedy';

43. Whereas the Netherlands objects to the late presentation by Yugoslavia of this basis of jurisdiction; whereas the Netherlands argues that the Treaty of Judicial Settlement, Arbitration and Conciliation of 11 March 1931 is no longer in force between the Netherlands and Yugoslavia; whereas the Netherlands observes that it is not a party to the 1978 Vienna Convention on the Succession of States in respect of Treaties and that, in contrast with a number of other bilateral treaties concluded with the former Socialist Federal Republic of Yugoslavia, no provisional mutual agreement has been reached on the continued validity of the 1931 Treaty; whereas the Netherlands further argues that Yugoslavia has not complied with the procedural requirements of Article 4 of the Treaty, in particular the period of notice of one month;

44. Whereas the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never occurred in the Court's practice; whereas such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice; and whereas in consequence the Court cannot, for the purpose of deciding whether it may or may not indicate provisional measures in the present case, take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999." *(Legality of Use of Force (Yugoslavia* v. *Netherlands), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, pp. 556-557, paras. 42-44.)

8. Notwithstanding the above-mentioned decisions, the Court adopts a different position in the present case and maintains that the invocation by Congo of the optional clause declarations in the second round of oral argument was not likely seriously to jeopardize the principle of procedural fairness and the sound administration of justice (Order, paras. 63-64).

9. As first argument in support of its new position, the Court recalls that Article 38, paragraph 2, of the Rules of Court requires that "[t]he

application shall specify, *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based" (emphasis added by the Court). However, in my opinion, this is not a good reason, because that paragraph was in force in June 1999 and it did not prevent the Court from reaching a different conclusion in the above-mentioned cases.

10. Secondly, paragraph 63 of the Order states that "it is in any event for the Court to ascertain in each case whether it has jurisdiction"; but, in my opinion, this task of the Court is different from making researches of its own to discover possible grounds of jurisdiction not indicated by the parties.

11. In the third place, the Court maintains that the optional clause declarations made by Belgium and the Democratic Republic of the Congo are "within the knowledge both of the Court and of the Parties", because they were duly deposited with the Secretary-General of the United Nations, who transmitted copies thereof to the Court and to all the States parties, and because they are reproduced in the *Yearbook* of the Court. However, in my opinion, neither possible knowledge of the optional clause declarations made by the Parties nor their reproduction in the *Yearbook* of the Court incorporate them as part of the Application filed by the Democratic Republic of the Congo against Belgium.

12. Finally, the Court states that,

> "having regard to the terms in which the Application was formulated and to the submissions presented by the Congo, Belgium could readily expect that the declarations made by the two Parties would be taken into consideration as basis for the jurisdiction of the Court in the present case" (Order, para. 63);

that Belgium was in a position to prepare and put forward any such argument as it thought fit in this regard; and that therefore Belgium was not prejudiced by the fact that the Democratic Republic of the Congo invoked its optional clause declarations in the second round of oral argument. In my opinion, these statements may only be considered wishful thinking not supported by the records.

13. Moreover, the Democratic Republic of the Congo indicated its optional clause declaration as a ground for the jurisdiction of the Court in three separate Applications filed by it in the Registry on 23 June 1999 (cases concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *(Democratic Republic of the Congo* v. *Burundi)* and *(Democratic Republic of the Congo* v. *Rwanda)*). The Democratic Republic of the Congo did not proceed in the same way in the present case and has given no explanation for indicating its optional clause declaration as a ground for the jurisdiction of the Court in the second round of oral argument. Therefore, in my opinion, it cannot be taken into account by the Court.

14. For all the above reasons, in my opinion the Court cannot take into consideration the invocation made by the Democratic Republic of the Congo of its own optional clause declaration in the second round of oral argument as a new title to support the jurisdiction of the Court.

(Signed) Gonzalo PARRA-ARANGUREN.