Le VICE-PRESIDENT, faisant fonction de président : La prochaine audience sera consacrée à l'affaire opposant la République fédérale de Yougoslavie et la République italienne. La composition du siège demeurera la même, M. Gaja, juge *ad hoc* pour l'Italie, venant se joindre à ses collègues. Quelques minutes seront nécessaires pour que le réagencement de la salle soit opéré. J'inviterai alors le juge *ad hoc* de l'Italie à nous rejoindre.

J'invite maintenant M. Gaja, juge *ad hoc* pour l'Italie, à venir prendre sa place sur le siège, afin d'entendre les conclusions de l'Italie dans l'affaire entre la République fédérale de Yougoslavie et la République italienne.

J'invite maintenant l'agent de l'Italie, M. Leanza, à prendre la parole.

Mr. LEANZA: Mr. President, Members of the Court, it is a great honour for me to submit to you, as Agent of the Italian Government and Head of the Diplomatic Legal Service of the Italian Ministry of Foreign Affairs, a few essential considerations relating to the case which is the subject of the present proceedings.

First of all, I would like to introduce Mr. Luigi Daniele, Professor at the University of Trieste, and Mrs. Ida Caracciolo, Researcher at the University of Rome II, both of whom are acting as counsel to the Italian Government.

By an instrument filed on 29 April last, the Federal Republic of Yugoslavia lodged against the Italian Republic an Application the subject of which is, as stated in its title, an alleged violation of the obligation not to use force.

In a separate instrument filed on the same date, the Federal Republic of Yugoslavia also asked the Court to indicate, pursuant to Article 41 of the Statute, certain provisional measures.

The Court is aware that similar Applications - each with a request for indication of provisional measures - have been introduced by the Federal Republic of Yugoslavia in respect of nine other NATO member States: Belgium, Canada, France, Germany, the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The present proceedings are concerned solely with an examination of the request for indication of provisional measures, which, under Article 74, paragraph 1, of the Rules of the Court, "shall have priority over all other cases". Thus, at the present stage, the Court is not required to adjudicate upon the merits of the case: consistent case-law has established that a decision handed down by the Court in response to a request for indication of provisional measures cannot in any way affect the merits; thus, the right of the respondent State to submit to the Court arguments in this connection remains intact (see Order of 17 August 1972 relating to *Fisheries Jurisdiction (United Kingdom* v. *Iceland, Provisional Measures, I.C.J. Reports 1972*, p. 16, para. 20).

Mr. President, Members of the Court,

The Italian Government has taken the view that it would be unnecessary and even an abuse of your patience to spend time at this stage on matters relating solely to the merits and it will therefore avoid as far as possible making any such reference. In particular, the Italian Government, unlike the Federal Republic of Yugoslavia, will not consider factual details, especially as they are now well known to the Court.

On the other hand, in my statement I do wish to concentrate on aspects which, in the opinion of the Italian Government, require a specific comment in relation to the request for indication of provisional measures which concerns us here. For the rest, the Italian Government relies on the lucid and well-consolidated case-law of the Court on the application of Article 41 of the Statute.

The points which the Italian Government wishes to consider are, in order, the following:

1. the absence of any prima facie jurisdiction of the Court as regards the merits of this dispute;

2. the manifest non-existence of the rights for which the provisional measures requested are intended to ensure provisional protection *(fumus boni iuris)*;

3. the absence of any imminent, serious and irreparable damage;

4. the non-provisional nature of the provisional measures requested.

1. Mr. President, Members of the Court,

Your case-law has clearly established that:

> "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case",

but that the Court itself

> "ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established;" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993, Provisional Measures, I.C.J. Reports 1993*, pp. 11-12, para. 14; see also Order of 9 April 1998, *Vienna Convention on Consular Relations (Paraguay* v. *United States of America); International Legal Materials 1998*, p. 812, para. 23).

For the purposes of these proceedings it is therefore enough for the Court to rule on the existence of an instrument binding both the Federal Republic of Yugoslavia and Italy upon which the Court's jurisdiction to entertain the merits could with any probability be based.

In its Application, the Federal Republic of Yugoslavia invokes as legal bases of the Court's jurisdiction the following texts:

> *(A)* Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in New York on 9 December 1948;
>
> *(B)* Article 38, paragraph 5, of the Rules of Court.

Perhaps I may mention at this point that Italy has never availed itself of the facility provided for in Article 36, paragraph 2, of the Statute.

In the opinion of the Italian Government, neither of the bases of jurisdiction indicated by the Federal Republic of Yugoslavia is such as to confer upon the Court - even on a prima facie examination - jurisdiction as regards the merits of the present case.

2. Mr. President, Members of the Court,

With permission, I should like to consider first and foremost Article 38, paragraph 5, of the Rules of Court.

We know that Article 38, paragraph 5, covers a situation where the applicant State is unable to indicate any basis of jurisdiction. Where this happens, the filing of the application must be considered as being an offer made to the respondent State with a view to the latter consenting *a posteriori* to the Court's jurisdiction, thus making good the original lack of jurisdiction: this is the principle known as *forum prorogatum*. Paragraph 5 states that in such cases the application shall be transmitted to the State against which it is made but that it shall not be entered in the General List of the Court.

The reference to Article 38, paragraph 5, of the Rules of Court shows that the Federal Republic of Yugoslavia was itself aware, when it submitted its Application, that there was no instrument in force between the Federal Republic of Yugoslavia and Italy giving the Court jurisdiction to entertain this case.

At all events, the Italian Government wishes to make it clear that it has no intention of consenting to the Court's jurisdiction to consider the merits, and that, whatever action it may take in the course of these or any other proceedings, such action must not and cannot be interpreted as tacit acceptance of that jurisdiction.

3. Mr. President, Members of the Court, the Italian Government acknowledges that the Genocide Convention, including Article IX, is in force both for the Federal Republic of Yugoslavia and for Italy.

At the outset, I would point out that, unlike the optional clause of acceptance of compulsory jurisdiction under Article 36, paragraph 2, of the Statute, a provision establishing the Court's jurisdiction which is included in an international treaty, such as Article IX of the Genocide Convention, confers on the Court only a specific jurisdiction confined to those disputes relating to the interpretation and application of that treaty. A provision of this type cannot empower the Court to adjudicate upon disputes not coming within the scope of the treaty containing it.

The Italian Government takes the view that Article IX does not constitute - even prima facie - a basis of jurisdiction such that the Court can consider the merits of the present case. My argument in support of this contention has two limbs.

3.A. Mr. President, Members of the Court, the first limb of my argument relates to the subject of the Application.

That instrument makes it very clear that the allegations made by the Federal Republic of Yugoslavia against Italy concern, in particular, a violation of international obligations obviously not caught - even indirectly - by the Genocide Convention; thus Italy and the other NATO Members are alleged to have violated the obligation banning the use of armed force, the obligation not to intervene in the internal affairs 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 freedom of navigation in international waters, the obligation regarding human rights and freedoms and the obligation not to use prohibited weapons.

Italy rejects these allegations. They are a deliberate distortion of the facts, manifestly designed to mislead. There is no point in spending time on them, especially as - as I shall now show - they do not fall within the Court's jurisdiction *ratione materiae*.

Article IX of the Genocide Convention confers jurisdiction on the Court only in respect of "disputes 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".

As the Court itself has stated in its Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia (Serbia and Montenegro), I.C.J. Reports 1993*, p. 3, para. 26), Article IX affords a basis on which the Court's jurisdiction might be founded only "to the extent that the subject-matter of the dispute relates to the interpretation . . . or fulfilment of the Convention".

But a dispute relating to an alleged violation of international obligations deriving from other sources, such as those referred to in the Application of the Federal Republic of Yugoslavia, lies manifestly outside the scope of Article IX. Hence, such a dispute can be entertained by the Court only if the applicant State can prove the existence of an additional basis of jurisdiction.

The attempt by the Federal Republic of Yugoslavia to use Article IX of the Genocide Convention to found the Court's jurisdiction in respect of disputes not relating to the interpretation or fulfilment of the Convention is moreover in flagrant contradiction with the attitude that the Federal Republic of Yugoslavia had itself adopted in the case referred to above with regard to the application of the Convention. During that dispute, in which, also, the only basis of jurisdiction was Article IX, the Federal Republic of Yugoslavia had always opposed

attempts by Bosnia-Herzegovina to "enlarge" the subject-matter by including the violation of international obligations not coming within the Genocide Convention (see, in particular, the Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Preliminary Objections, I.C.J. Reports 1996*, p. 618, para. 36).

It is only in the tenth of the claims formulated against Italy that the Federal Republic of Yugoslavia appears to invoke the violation of obligations under the Genocide Convention. All the other claims manifestly lie outside the scope of the Convention, both in their wording and as regards their subject-matter. Consequently, as Article IX of the Convention is the only instrument in force between the Federal Republic of Yugoslavia and Italy conferring jurisdiction on the Court, prima facie the Court has no jurisdiction to consider those claims in terms of their merits.

Consequently, as there is no prima facie jurisdiction, the Court cannot indicate provisional measures under Article 41 of the Statute.

3.B. Mr. President, Members of the Court, the second limb of my argument as regards prima facie jurisdiction relates to the scope of Article IX of the Genocide Convention and to the impossibility of bringing it within the tenth claim by the Federal Republic of Yugoslavia against Italy, that is to say the only claim in which the applicant State appears to invoke the violation of obligations under the Convention.

Given the specific nature of the jurisdiction conferred on the Court by Article IX of the Convention, the Italian Government takes the view that under this Article the Court has jurisdiction only in respect of facts and circumstances meeting the definition of the crime of genocide set out in Article II of the Convention and corresponding to the acts described in subparagraphs *(a)* to *(e)* of that Article.

Where facts and circumstances alleged by the applicant State cannot be considered as genocide and, in particular, as one or more of the acts specified in Article II of the Convention, jurisdiction *ratione materiae* is lacking. Where, as in the present case, the Court's lack of jurisdiction is obvious and undeniable, the Court may already, at the stage of proceedings for the indication of provisional measures, so declare.

The Italian Government points out, in the first place, that, under Article II of the Convention, the crime of genocide must consist in acts against a national, ethnic, racial or religious *group*.

But the facts and circumstances alleged by the Federal Republic of Yugoslavia relate to acts affecting the territory of a State, and hence to its population taken as a whole: the Federal Republic of Yugoslavia has never argued that NATO has targeted any specific groups within the Yugoslav population.

The use of the term "group", both in the initial clause of Article II and in each of the following subparagraphs, indicates clearly that the concept of "genocide" does not cover action relating to the whole of the population of a State, not only because the word "group" and not "people" is used but, even more importantly, because the very logic of the provision rules out this interpretation. If the two words were to be considered as equivalent for the purposes of the concept of genocide, any use of force in an international conflict would automatically rank as genocide. The prohibition of genocide would thus have the same scope as the prohibition of the use of international armed force. It is immediately clear that a definition of genocide as wide as this in no sense reflects the ordinary meaning of the term (see Art. 31 of the Vienna Convention on the Law of Treaties).

The facts and circumstances alleged by the Federal Republic of Yugoslavia are not covered by the Genocide Convention.

This finding is so obvious that the Court cannot but conclude - already at this stage of the procedure - that it must refuse to indicate provisional measures.

3.C. Mr. President, Members of the Court,

There is a further consideration supporting the view that the facts and circumstances alleged by the Federal Republic of Yugoslavia manifestly cannot be characterized as genocide: this is the absence of the psychological component of the crime - the deliberate and intentional desire to achieve its inherent objective, namely the

destruction of all or part of a national, ethnic, racial or religious group as such.

The requirement that such a desire exist and be shown to exist is repeated in tautological fashion - and hence all the more significantly - ("deliberately inflicting") in the description of the criminal act set out in Article II *(c)*, which is the only provision implicitly invoked by the Federal Republic of Yugoslavia in its request for provisional measures (p. 16).

In this connection I would draw the Court's attention to the fact that even a superficial reading of the documents relating to the fundamental stages of the decision process followed by NATO and its member States prior to and during their action over the territory of the Federal Republic of Yugoslavia shows that there could not possibly be any such intention. As everyone knows, NATO's military action has the sole objective of safeguarding the Kosovar Albanian population. The Kosovar Albanians have been the victims of acts of genocide committed by Yugoslav security forces and special police units, whose operations have been condemned by all international bodies, and in particular by the United Nations Security Council in resolutions 1160, 1199 and 1203 of 1998.

I need only mention in this connection statements to the press made by NATO Secretary-General Mr. Solana on 23 and 25 March and 1 and 6 April of this year, the statement released following the ministerial meeting of the North Atlantic Council on 12 April, the statement on Kosovo made by the Heads of State or Government following the North Atlantic Council meeting held in Washington on 23 and 24 April, statements made by the President of the Italian Council of Ministers, Mr. D'Alema, to the Italian Chamber of Deputies on 26 and 30 March, Mr. D'Alema's report of 13 April on developments in the Balkan crisis, hearings attended by the Italian Minister for Foreign Affairs, Mr. Dini, before the Italian Senate and Chamber of Deputies Foreign Affairs Committees on military and diplomatic action in the Balkans (on 31 March and 9 and 20 April last).

It is accordingly clear that the Atlantic Alliance was compelled to intervene to prevent an ongoing genocide and has never had the least intention of embarking upon a genocide of its own.

3.D. Mr. President, Members of the Court,

I have just pointed out that, of the five types of act referred to in Article II of the Convention, the only one to have been implicitly invoked by the Federal Republic of Yugoslavia in its request for the indication of provisional measures is that specified in subparagraph *(c)*, namely "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

In this connection it must not be forgotten that the material situation which was in the mind of the drafters of this provision was that of the concentration camps of the Second World War. That situation is a very long way from the facts presented to the Court in these proceedings.

While regretting the loss of life and material damage involved in the operation undertaken by the ten NATO States, the Italian Government would point out that this operation, whose sole aim is the protection of the right to life and existence of the Kosovar Albanian population, is being conducted in as limited a way as possible and cannot - because of its clearly limited character and the nature and scope of the means employed - constitute a threat to the very existence of the Yugoslav people.

In conclusion, it follows from the foregoing considerations that there can be no question of the Court having prima facie jurisdiction to consider this case on the basis of Article IX of the Genocide Convention. The Court should accordingly refuse to indicate provisional measures in the case.

4. Mr. President, Members of the Court, the arguments set out above with regard to prima facie jurisdiction may also serve as a basis to reject Yugoslavia's request for the indication of provisional measures on a further ground, namely the lack of a *fumus boni iuris.*

These arguments establish, in the view of the Italian Government, that the right on which the Federal Republic of Yugoslavia relies in its Application quite clearly does not exist and that its claims are thus totally without legal foundation.

In these circumstances, if the Court were to accede to the Yugoslav request it would find itself in the

paradoxical situation of proceeding to indicate provisional measures designed to preserve *pendente lite* rights which the Federal Republic of Yugoslavia does not in fact possess and which the Court could never recognize in any decision on the merits.

It is helpful in this connection to recall the *Lockerbie* case, where the Court decided not to indicate provisional measures, because the applicant State was not entitled to rely on rights affected by Security Council resolutions (see Order of 14 April 1992 in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, I.C.J. Reports 1992,* p. 15, para. 39).

5. Mr. President, Members of the Court, as to the *periculum in mora*, that is to say the risk of grave and irreparable prejudice to the Applicant if the provisional measures requested were not indicated, the Italian Government is confident that the Court will take due account of the fact that the threat to the population of Kosovo is manifestly more serious and imminent than the risks referred to by the Federal Republic of Yugoslavia.

There can be no doubt that any interruption of the action by the ten NATO member States would cause immediate and irreparable harm to the Kosovar Albanian population. The Yugoslav special forces would pursue their actions with still greater intensity, with the result that, very shortly, the genocide of that population would be complete.

6. Finally, Mr. President, Members of the Court, the Italian Government would draw the Court's attention to the fact that the object of the measure requested on a provisional basis, namely the immediate cessation of military action by NATO, is the same as that stated in the twelfth, penultimate, claim in the Yugoslav Application.

It follows that, in asking the Court to indicate on a provisional basis a measure which, in reality, coincides with one of the most important claims put forward by the Federal Republic of Yugoslavia on the merits, the latter is seeking to obtain from the Court what is in truth *an interim judgment*. This Court has never acceded to such a request in proceedings under Article 41 of the Statute.

The Italian Government would refer the Court here to the precedent of the *Factory at Chorzów* case, where the Permanent Court of International Justice refused to grant such a request (see the Order of 21 November 1927 in the case concerning the *Factory at Chorzów, (Germany* v. *Poland), reparation, request for interim measures*).

Since the cessation of an allegedly illegal act is one of the consequences flowing from the finding that such an act has been committed by a particular party, the Court cannot order such cessation until it has first established that the act in question is illegal. And this the Court cannot do in proceedings for the indication of provisional measures.

7. Mr. President, Members of the Court, in conclusion, in the opinion of the Italian Government, the conditions of law and fact capable of justifying the indication of provisional measures requested by the Federal Republic of Yugoslavia are not satisfied.

In particular, the absence of prima facie jurisdiction is grounds for removing the case from the Court's General List in accordance with Article 38, paragraph 5, of the Rules of Court.

The Italian Government stresses its hope that the Court, in exercising its power under Article 41 of the Statute, will take account of the paradoxical nature of the situation which we have been discussing today.

A group of States, who - much against their will - have felt compelled to intervene against a State to halt genocide being carried out against a minority living on the territory of that State, are being called upon to defend themselves before this Court against the accusation, as defamatory as it is absurd, that they are themselves committing genocide. The Court will not be deceived by a diversionary tactic of this kind.

Mr. President, Members of the Court, the Italian Government makes the following submissions: may it please the Court:

1. to order that the case be removed from the General List pursuant to Article 38, paragraph 5, of

the Rules of Court;

2. in the alternative, to refuse the request for the indication of provisional measures filed by the Federal Republic of Yugoslavia on 29 April 1999;

3. in any event, to refrain from indicating in respect of the Italian Republic the provisional measures specified in the Yugoslav request, or any other provisional measure.

Mr. President, Members of the Court, I thank you for your kind attention.

Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, Monsieur Leanza. Le premier tour des audiences dans l'affaire relative à la *Licéité de l'emploi de la force (Yougoslavie c. Italie)* est ainsi conclu. L'audience est suspendue pendant 15 minutes.

L'audience est levée à 11.20.