

DECLARATION OF JUDGE SHI

I am in agreement with the majority of the Court that, in the present case, no basis of *prima facie* jurisdiction can be found for the indication of provisional measures requested by the Applicant.

Nevertheless I am of the opinion that, being confronted with the urgent situation of a human tragedy involving loss of life and suffering which arises from the use of force in and against Yugoslavia, the Court ought to have contributed to the maintenance of international peace and security in so far as its judicial functions permit.

The Court would have been fully justified in point of law if, immediately upon receipt of the request by the Applicant for the indication of provisional measures, and regardless of what might be its conclusion on *prima facie* jurisdiction pending the final decision, it had issued a general statement appealing to the Parties to act in compliance with their obligations under the Charter of the United Nations and all other rules of international law relevant to the situation, including international humanitarian law, and at least not to aggravate or extend their dispute. In my view, nothing in the Statute or the Rules of Court prohibits the Court from so acting. According to the Charter, the Court is after all the principal judicial organ of the United Nations, with its Statute as an integral part of the Charter; and by virtue of the purposes and principles of the Charter, including Chapter VI (Pacific Settlement of Disputes), the Court has been assigned a role within the general framework of the United Nations for the maintenance of international peace and security. There is no doubt that to issue such a general statement of appeal is within the implied powers of the Court in the exercise of its judicial functions. Now that the Court has made its final decision on the request by the Applicant, it has failed to take an opportunity to make its due contribution to the maintenance of international peace and security when that is most needed.

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

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

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

It is for these reasons that I felt compelled to vote against the operative paragraph 39 (1) of the present Order.

(Signed) SHI Jiuyong.
