CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* UNITED STATES OF AMERICA) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia *v.* United States of America), the Court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY).

In its Order, the Court, having found that it manifestly lacked jurisdiction to entertain the case, decided to dismiss it. It ordered by twelve votes to three that the case be removed from the List.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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The full text of the operative paragraph of the Order reads as follows:

"34. For these reasons,

THE COURT,

(1) By twelve votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By twelve votes to three,

Orders that the case be removed from the List.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Kooijmans;

AGAINST: Judges Vereshchetin, Parra-Aranguren; Judge ad hoc Kreca."

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Judges Shi, Koroma and Vereshchetin appended declarations to the Court's Order. Judges Oda and Parra-Aranguren appended separate opinions. Judge ad hoc Kreca appended a dissenting opinion.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against the United States of America "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order the United States of America to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. As to Article 38, paragraph 5, of the Rules of Court, it provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, the application is transmitted to that other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the

consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the United States of America are parties to that Convention, but that when the United States ratified the Convention on 25 November 1988, it made a reservation. That reservation provides that with reference to Article IX, before any dispute to which the United States is a party may be submitted to the jurisdiction of the Court, "the specific consent of the United States is required in each case". However, in this case, the United States has indicated that it had not given specific consent and that it would not do so. Since the Genocide Convention does not prohibit reservations and since Yugoslavia did not object to the reservation made by the United States, the Court considers that Article IX manifestly does not constitute a basis of jurisdiction in the case, even prima facie.

As to Article 38, paragraph 5, of the Rules of Court, the Court stresses that, in the absence of consent by the United States, it cannot exercise jurisdiction in the case, even prima facie.

The Court concludes that it "manifestly lacks jurisdiction to entertain Yugoslavia's Application" and that "it cannot therefore indicate any provisional measure whatsoever". It adds that "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany v. the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of

life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life among non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Article 79 of the Rules of Court prescribes that any objection by the Respondent to the jurisdiction of the Court shall be made in writing within the time limit fixed for the delivery of the Counter-Memorial. Such preliminary objection shall be decided as provided by paragraph 7 of the said Article 79. The Court has no discretionary powers to depart from the

rules established by Article 79; and the present proceedings have not yet reached the stage when the Respondent may submit preliminary objections. Therefore, in his opinion, when deciding upon a request for provisional measures the Court can neither make its final decision on jurisdiction nor order the removal of the case from the Court's List.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder*; *Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca points out that the first and the second of "understandings" lodged by the United States to Article II are actually reservations incompatible with the object and purpose of the Genocide Convention. Namely, at least Articles II, III and IV of the Genocide Convention represent *ius cogens*. The norms of *ius cogens* are of an overriding character; thus, they make null and void any act, be it unilateral, bilateral or multilateral, which is not in accordance with them. Such a logical conclusion based on the peremptory or absolutely binding nature of *ius cogens* norms, expressing in the normative sphere the fundamental values of the international community as a whole, have been confirmed in the *North Sea Continental Shelf* cases. The only possible way of excluding nullity effects in regard to the United States' reservation to Article IX of the Genocide Convention, may lie in the interpretation that nullity affects only "understandings" and that it has no legal consequences for the reservation itself. But such an interpretation would run counter to the fundamental rule of inseparability of the acts conflicting with the norm belonging to *corpus iuris cogentis* expressed in Article 44, paragraph 5, of the Vienna Convention on the Law of Treaties.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.