CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* NETHERLANDS) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Netherlands), the Court rejected by eleven votes to four the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fourteen votes to one.

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:

"51. For these reasons,

THE COURT,

(1) By eleven votes to four,

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

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

AGAINST: Vice-President Weeramantry, Acting President; Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda."

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Judge Koroma appended a declaration to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions. Vice-President Weeramantry, Acting President, Judges Shi and Vereshchetin, and Judge ad hoc Kreca appended dissenting opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against the Netherlands "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 Netherlands 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 the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and 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.

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. In a supplement to its Application submitted to the Court on 12 May 1999, Yugoslavia invoked, as an additional ground of jurisdiction, Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia, signed at The Hague on 11 March 1931.

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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 the first basis of jurisdiction invoked, the Court observes that under the terms of its declaration, Yugoslavia limits its acceptance of the Court's compulsory jurisdiction 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". It states that in order to assess whether it has jurisdiction in the case, it is sufficient to decide whether the dispute brought to the Court "arose" before or after 25 April 1999, the date on which the declaration was signed. It finds that the bombings began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999. The Court has thus no doubt that a "legal dispute ... 'arose' between Yugoslavia and [the Netherlands], as it did also with the other NATO member States, well before 25 April 1999". The Court concludes that the declarations made by the Parties do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to the arguments of the Netherlands that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolutions 757 and 777 (1992) and United Nations General Assembly resolutions 47/1 (1992) and 48/88 (1993), nor a party to the Statute of the Court, so that Yugoslavia could not validly make the declaration accepting the compulsory jurisdiction of the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the Netherlands are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Kingdom of the Netherlands by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. According to the Netherlands, Yugoslavia's Application "fails to refer to the conditions that form the core of the crime of genocide under the Convention, namely 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'" and the Court accordingly lacks jurisdiction *ratione materiae* on the basis of Article IX. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Netherlands are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia, the Court observes that "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", that "such action at this late stage, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice" and that in consequence the Court cannot take into consideration this new title of jurisdiction.

The Court having found that it has "no prima facie jurisdiction to entertain Yugoslavia's Application, either on the basis of Article 36, paragraph 2, of the Statute or of Article IX of the Genocide Convention" and having "taken

the view that it cannot, at this stage of the proceedings, take account of the additional basis of jurisdiction invoked by Yugoslavia", it follows that the Court "cannot indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and the Netherlands to submit arguments in respect of those questions".

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 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.

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 Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree 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 reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended, that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of

membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Vice-President Weeramantry

Judge Weeramantry has filed a dissenting opinion in this case on the same grounds as in *Yugoslavia* v. *Belgium.*

Dissenting opinion of Judge Shi

In the four cases of Yugoslavia against Belgium, Canada, the Netherlands and Portugal, Judge Shi disagrees with the Court's findings that, given the limitation *ratione temporis* contained in Yugoslavia's declaration of acceptance of compulsory jurisdiction, the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute for the indication of provisional measures requested by Yugoslavia.

By that declaration, signed on 25 April 1999, Yugoslavia recognized compulsory jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature ...". In cases where the Court is confronted with such a "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

As to the first aspect of the time condition, the Court has to determine what is the subject matter of the dispute, which in the present cases consists of a number of constituent elements. The section "Subject of the Dispute" in each of Yugoslavia's Applications indicates that subject matter to be acts of the Respondent by which it has violated its international obligations not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State, to protect the civilian population and civilian objects in wartime, to protect the environment, etc.

Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. Though the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration, aerial bombing and its effects as such do not constitute a dispute. It is true that prior to the critical date, Yugoslavia had accused NATO of illegal use of force against it. This complaint constitutes at the most one of the many constituent elements of the dispute. Besides, NATO cannot be identified with, nor be the Respondent in the present cases *ratione personae*. The dispute only arose at the date subsequent to the signature of the declaration.

Regarding the second aspect of the time condition, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease.

The conclusion may be drawn that the limitation *ratione temporis* contained in Yugoslavia's declaration in no way constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indicating provisional measures in the present case.

Moreover, for reasons similar to those expressed in the declarations relating to the other six cases, Judge Shi regrets that the Court, being confronted with a situation of great urgency, failed to make a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all the rules of international law relevant to the situation, and at least not to aggravate or extend their disputes immediately upon receipt of Yugoslavia's request and regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision. The Court also failed to make use of Article 75, paragraph 1, of the Rules of Court to decide the requests *proprio motu*, despite Yugoslavia having so asked.

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

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin begins his dissenting opinion with a general statement, attached to all the Orders of the Court, in which he holds that the extraordinary and unprecedented circumstances of the cases before the Court imposed on it a need to act promptly and, if necessary, *proprio motu*. After that, he proceeds to explain why he has no doubt that prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court exists with regard to the Applications instituted against Belgium, Canada, the Netherlands and Portugal. As far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

Judge Vereshchetin disagrees with two cornerstone propositions on which, in his opinion, rest the arguments to the contrary upheld in the Orders of the Court. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the

wording of the reservation contained therein, does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands.

As concerns the first proposition, Judge Vereshchetin takes the view that the Court, by refusing to take into account the clear intention of Yugoslavia, reads its declaration in a way that could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

As to the second proposition connected with the invocation of additional grounds of jurisdiction in relation to Belgium and the Netherlands, in the opinion of Judge Vereshchetin, the legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude a priori the additional basis of jurisdiction from its consideration, solely because the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

The refusal of the majority to take into consideration the new bases of jurisdiction is clearly contrary to Article 38 of the Rules of Court and .to the Court's jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the Court's case-law and with the customary rules for interpreting legal instruments. In the view of Judge Vereshchetin, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

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 finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case. But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of

Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

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.

Judge Kreca finds that the stance of the Court as regards jurisdiction of the Court *ratione temporis* is highly questionable for two basic reasons. Firstly, for reasons of a general nature to do with the jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other and, secondly, for reasons of a specific nature deriving from circumstances of the case in hand. As far as jurisdiction of the Court is concerned, it seems incontestable that a liberal approach towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. It is understandable that the proceeding for the indication of provisional measures is surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. The determinant "prima facie" itself implies that what is involved is not definitely established jurisdiction, but the jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined as the "title of jurisdiction". It could be said that the "title of jurisdiction" is sufficient *per se* to constitute prima facie jurisdiction except in the case of the absence of jurisdiction on the merits is manifest (*Fisheries Jurisdiction* cases).

Judge Kreca disagrees with the stance of the Court regarding the additional ground of jurisdiction (Article 4 of the 1931 Treaty), since he finds that three essential conditions necessary to qualify the additional ground as admissible are met in this particular case:

(*a*) that the Applicant makes it clear that it intends to proceed upon that basis;

(*b*) that the result of invoking additional grounds is not to transform the dispute brought before the Court by the Application into another dispute which is different in character; and

(*c*) that additional grounds afford a basis on which the jurisdiction of the Court to entertain the Application might be prima facie established.

It should be stressed, in the opinion of Judge Kreca, that the 1931 Treaty was concluded and designed for the purpose of dealing with disputes which may arise between the Contracting Parties through "conciliation, judicial settlement and arbitration" *per definitionem* affords a basis on which the jurisdiction of the Court to entertain the Application may be established. Article 4 (1) stipulated that "the dispute shall be submitted jointly under a special agreement" and, as that obviously is not the case, only paragraph 2 of the said Article may be the appropriate basis of jurisdiction of the Court *pro futuro*.

At the same time he points out that even if the document in which the Applicant pointed to the Treaty of 1931 as additional grounds of jurisdiction were declared "inadmissible", the Court could not have ignored the fact that the Treaty exists. In that case, the Court could have differentiated between the document as such and the Treaty of 1931, per se, as a basis of jurisdiction.