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

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Spain), the Court rejected by fourteen votes to two 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 thirteen 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; Judges ad hoc Torres Bernárdez, Kreca; Registrar Valencia-Ospina.

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

40. For these reasons,

"THE COURT,

(1) By fourteen votes to two,

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; Judges ad hoc Torres Bernárdez, Kreca;

AGAINST: Judges Shi, Vereshchetin;

(2) By thirteen 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; Judge ad hoc Torres Bernárdez;

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, Higgins, Parra-Aranguren and Kooijmans, and Judge ad hoc Kreca appended separate opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Spain "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO" (see Press Communiqué 99/17). On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Spain to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

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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.

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 (at first sight).

Concerning the first basis of jurisdiction invoked, the Court observes that Spain contended that its declaration contains a reservation which is relevant to the case. Under the terms of that reservation, Spain does not recognize the jurisdiction of the Court in respect of "disputes to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court". The Court notes that Yugoslavia deposited its declaration of acceptance of the compulsory jurisdiction of the Court with the United Nations Secretary-General on 26 April 1999 and that it brought the dispute to the Court on 29 April 1999. It states that there can be no doubt that the conditions for the exclusion of the Court's jurisdiction provided for in Spain's declaration are satisfied. The Court concludes that the declarations made by the Parties manifestly cannot constitute a basis of jurisdiction in the case, even prima facie.

As for Spain's argument that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolution 777 (1992) and United Nations General Assembly resolution 47/1 (1992), nor a party to the Statute of the Court, and that it cannot appear before 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 Spain are parties to that Convention, but that Spain's instrument of accession, deposited with the United Nations Secretary-General on 13 September 1968, contains a reservation "in respect of the whole of Article IX". Since the Genocide Convention does not prohibit reservations and since Yugoslavia did not object to the Spanish reservation, the Court considers that Article IX manifestly does not constitute a basis of 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 amongst 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 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 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.

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.

Separate opinion of Judge Kreca

In his separate 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 points out that a reservation such as the one made by Spain in respect to Article IX on the Convention on the Prevention and Punishment of the Crime of Genocide does not contribute to the implementation of the concept of an organized de jure international community. States do not express verbally their belief in international law, by making declaratory vows, but by taking effective measures aimed at implementation of human rights and fundamental freedoms. This is especially true in regard to the Genocide Convention since:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention" (*Advisory Opinion of the International Court of Justice*)