

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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AFFAIRE RELATIVE À LA LICÉITÉ
DE L'EMPLOI DE LA FORCE

(YUGOSLAVIE c. ALLEMAGNE)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 2 JUIN 1999

1999

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
LEGALITY OF USE OF FORCE

(YUGOSLAVIA v. GERMANY)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 2 JUNE 1999

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General List
No. 108CASE CONCERNING
LEGALITY OF USE OF FORCE(YUGOSLAVIA *v.* GERMANY)REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER

Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, BEDJAOU, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS; Judge ad hoc KRECA; Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the Federal Republic of Yugoslavia (hereinafter "Yugoslavia") filed in the Registry of the Court on 29 April 1999, instituting proceedings against the Federal Republic of Germany (hereinafter "Germany") "for violation of the obligation not to use force",

Makes the following Order:

1. Whereas in that Application Yugoslavia defines the subject of the dispute as follows:

“The subject-matter of the dispute are acts of the Federal Republic of Germany by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group”;

2. Whereas in the said Application Yugoslavia refers, as a basis for the jurisdiction of the Court, to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter the “Genocide Convention”), and to Article 38, paragraph 5, of the Rules of Court;

3. Whereas in its Application Yugoslavia states that the claims submitted by it to the Court are based upon the following facts:

“The Government of the Federal Republic of Germany, together with the Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia. In bombing the Federal Republic of Yugoslavia military and civilian targets were attacked. Great number of people were killed, including a great many civilians. Residential houses came under attack. Numerous dwellings were destroyed. Enormous damage was caused to schools, hospitals, radio and television stations, cultural and health institutions and to places of worship. A large number of bridges, roads and railway lines were destroyed. Attacks on oil refineries and chemical plants have had serious environmental effects on cities, towns and villages in the Federal Republic of Yugoslavia. The use of weapons containing depleted uranium is having far-reaching consequences for human life. The above-mentioned acts are deliberately creating conditions calculated at the physical destruction of an ethnic group, in whole or in part. The Government of the Federal Republic of Germany is taking part in the training, arming, financing, equipping and supplying the so-called ‘Kosovo Liberation Army’”;

and whereas it further states that the said claims are based on the following legal grounds:

“The above acts of the Government of the Federal Republic of Germany represent a gross violation of the obligation not to use force against another State. By financing, arming, training and equipping the so-called ‘Kosovo Liberation Army’, support is given to terrorist groups and the secessionist movement in the territory of the Federal Republic of Yugoslavia in breach of the obligation not to intervene in the internal affairs of another State. In addition, the provisions of the Geneva Convention of 1949 and of the Additional Protocol No. 1 of 1977 on the protection of civilians and civilian objects in time of war have been violated. The obligation to protect the environment has also been breached. The destruction of bridges on the Danube is in contravention of the provisions of Article 1 of the 1948 Convention on free navigation on the Danube. The provisions of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights of 1966 have also been breached. Furthermore, the obligation contained in the Convention on the Prevention and Punishment of the Crime of Genocide not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group has been breached. Furthermore, the activities in which the Federal Republic of Germany is taking part are contrary to Article 53, paragraph 1, of the Charter of the United Nations”;

4. Whereas the claims of Yugoslavia are formulated as follows in the Application:

“The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

- by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;
- by taking part in the training, arming, financing, equipping and supplying terrorist groups, i.e. the so-called ‘Kosovo Liberation Army’, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;
- by taking part in attacks on civilian targets, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;

- by taking part in destroying or damaging monasteries, monuments of culture, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
- by taking part in the use of cluster bombs, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
- by taking part in the bombing of oil refineries and chemical plants, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;
- by taking part in the use of weapons containing depleted uranium, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;
- by taking part in killing civilians, destroying enterprises, communications, health and cultural institutions, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;
- by taking part in destroying bridges on international rivers, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect freedom of navigation on international rivers;
- by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;
- the Federal Republic of Germany is responsible for the violation of the above international obligations;
- the Federal Republic of Germany is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;
- the Federal Republic of Germany is obliged to provide compen-

sation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons”;

and whereas, at the end of its Application, Yugoslavia reserves the right to amend and supplement it;

5. Whereas on 29 April 1999, immediately after filing its Application, Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court; and whereas that request was accompanied by a volume of photographic annexes produced as “evidence”;

6. Whereas, in support of its request for the indication of provisional measures, Yugoslavia contends *inter alia* that, since the onset of the bombing of its territory, and as a result thereof, about 1,000 civilians, including 19 children, have been killed and more than 4,500 have sustained serious injuries; that the lives of three million children are endangered; that hundreds of thousands of citizens have been exposed to poisonous gases; that about one million citizens are short of water supply; that about 500,000 workers have become jobless; that two million citizens have no means of livelihood and are unable to ensure minimum means of sustenance; and that the road and railway network has suffered extensive destruction; whereas, in its request for the indication of provisional measures, Yugoslavia also lists the targets alleged to have come under attack in the air strikes and describes in detail the damage alleged to have been inflicted upon them (bridges, railway lines and stations, roads and means of transport, airports, industry and trade, refineries and warehouses storing liquid raw materials and chemicals, agriculture, hospitals and health care centres, schools, public buildings and housing facilities, infrastructure, telecommunications, cultural-historical monuments and religious shrines); and whereas Yugoslavia concludes from this that:

“The acts described above caused death, physical and mental harm to the population of the Federal Republic of Yugoslavia; huge devastation; heavy pollution of the environment, so that the Yugoslav population is deliberately imposed conditions of life calculated to bring about physical destruction of the group, in whole or in part”;

7. Whereas, at the end of its request for the indication of provisional measures, Yugoslavia states that

“If the proposed measure were not to be adopted, there will be new losses of human life, further physical and mental harm inflicted on the population of the FR of Yugoslavia, further destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia”;

and whereas, while reserving the right to amend and supplement its request, Yugoslavia requests the Court to indicate the following measure:

“The Federal Republic of Germany shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia”;

8. Whereas the request for the indication of provisional measures was accompanied by a letter from the Agent of Yugoslavia, addressed to the President and Members of the Court, which read as follows:

“I have the honour to bring to the attention of the Court the latest bombing of the central area of the town of Surdulica on 27 April 1999 at noon resulting in losses of lives of civilians, most of whom were children and women, and to remind of killings of peoples in Kursumlija, Aleksinac and Cuprija, as well as bombing of a refugee convoy and the Radio and Television of Serbia, just to mention some of the well-known atrocities. Therefore, I would like to caution the Court that there is a highest probability of further civilian and military casualties.

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”;

9. Whereas on 29 April 1999, the day on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar sent to the German Government signed copies of the Application and of the request, in accordance with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas he also sent to that Government copies of the documents accompanying the Application and the request for the indication of provisional measures;

10. Whereas on 29 April 1999 the Registrar informed the Parties that the Court had decided, pursuant to Article 74, paragraph 3, of the Rules of Court, to hold hearings on 10 and 11 May 1999, where they would be able to present their observations on the request for the indication of provisional measures;

11. Whereas, pending the notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual text of the Application to the Members of the United Nations and other States entitled to appear before the Court, the Registrar on 29 April 1999 informed those States of the filing of the Application and of its subject-matter, and of the filing of the request for the indication of provisional measures;

12. Whereas, since the Court includes upon the bench no judge of Yugoslav nationality, the Yugoslav Government has availed itself of the provisions of Article 31 of the Statute of the Court to choose Mr. Milenko Kreća to sit as judge *ad hoc* in the case; and whereas no objection to that choice was raised within the time-limit fixed for the purpose pursuant to Article 35, paragraph 3, of the Rules of Court;

13. Whereas, at the public hearings held between 10 and 12 May 1999, oral observations on the request for the indication of provisional measures were presented by the following:

On behalf of Yugoslavia:

Mr. Rodoljub Etinski, *Agent*,
Mr. Ian Brownlie,
Mr. Paul J. I. M. de Waart,
Mr. Eric Suy,
Mr. Miodrag Mitić,
Mr. Olivier Corten;

On behalf of Germany:

Mr. Gerhard Westdickenberg, *Agent*,
Mr. Reinhard Hilger, *Co-Agent*;

14. Whereas, in this phase of the proceedings, the Parties presented the following submissions:

On behalf of Yugoslavia:

“[T]he Court [is asked] to indicate the following provisional measure:

[T]he Federal Republic of Germany . . . 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”;

On behalf of Germany:

“That the Court decline to indicate the provisional measures requested by the Federal Republic of Yugoslavia”;

* * *

15. Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;

16. Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;

17. Whereas the Court is 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 the Statute of the Court;

18. Whereas the Court deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law;

* * *

19. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted; whereas the Court has repeatedly stated “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” (*East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 101, para. 26); and whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

20. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established;

* *

21. Whereas in its Application Yugoslavia claims in the first place to found the jurisdiction of the Court on Article IX of the Genocide Convention, which provides:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”;

and whereas in its Application Yugoslavia states that the subject of the dispute concerns *inter alia* “acts of the Federal Republic of Germany 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”; whereas, in describing the facts on which the Application is based, Yugoslavia states: “The above-mentioned acts are deliberately creating conditions calculated at the physical destruction of an ethnic group, in whole or in part”; whereas, in its statement of the legal grounds on which the Application is based, Yugoslavia contends that “the obligation . . . not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group has been breached”; and whereas one of the claims on the merits set out in the Application is formulated as follows:

“by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Federal Republic of Germany has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part”;

22. Whereas Yugoslavia contends moreover 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”; whereas it argues that “the pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium, inflicts conditions of life on the Yugoslav nation calculated to bring about its physical destruction”; whereas it asserts that it is the Yugoslav nation as a whole and as such that is targeted; and whereas it stresses 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;

23. Whereas for its part Germany contends that Article IX of the Genocide Convention does not constitute a basis of jurisdiction in this case, because the subject-matter of the claims brought by Yugoslavia does not relate to “the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention”; and whereas Germany also maintains that even if true, the breaches of international obligations alleged by Yugoslavia in its Application do not enter the definition of Article II of the Genocide Convention;

24. Whereas it is not disputed that both Yugoslavia and Germany are parties to the Genocide Convention without reservation; and whereas Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to “the interpretation, applica-

tion or fulfilment” of the Convention, including disputes “relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III” of the said Convention;

25. Whereas, in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court 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 which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16);

26. Whereas the definition of genocide set out in Article II of the Genocide Convention reads as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”;

27. Whereas it appears to the Court, from this definition, “that [the] essential characteristic [of genocide] is the intended destruction of ‘a national, ethnical, racial or religious group’” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 345, para. 42); whereas 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; and whereas, in the opinion of the Court, 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 quoted above” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26);

28. Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by

Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could *prima facie* be founded in this case;

* *

29. Whereas in its Application Yugoslavia claims, in the second place, to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court, which reads as follows:

“5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court’s jurisdiction for the purposes of the case”;

30. Whereas Germany contends that Article 38, paragraph 5, of the Rules of Court is without effect in this case, because Germany does not accept Yugoslavia’s proposal to found the jurisdiction of the Court upon a consent to be given in accordance with that Article;

31. Whereas it is quite clear that, in the absence of consent by Germany, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even *prima facie*;

* *

32. Whereas it follows from what has been said above that the Court lacks *prima facie* jurisdiction to entertain Yugoslavia’s Application; and whereas it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein;

33. Whereas, however, the findings reached by the Court in the present proceedings in no way prejudice the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention, or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas they leave unaffected the right of the Governments of Yugoslavia and Germany to submit arguments in respect of those questions;

* * *

34. Whereas 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;

35. Whereas, 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; whereas 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;

36. Whereas in this context the parties should take care not to aggravate or extend the dispute;

37. Whereas, 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;

* * *

38. 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* Kreća;

(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* Kreća;

AGAINST: *Judge* Oda.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this second day of June, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Yugoslavia and the Government of the Federal Republic of Germany, respectively.

(*Signed*) Christopher G. WEERAMANTRY,
Vice-President.

(*Signed*) Eduardo VALENCIA-OSPINA,
Registrar.

Vice-President WEERAMANTRY, Acting President, and Judges SHI, KOROMA and VERESHCHETIN append declarations to the Order of the Court.

Judges ODA and PARRA-ARANGUREN append separate opinions to the Order of the Court.

Judge *ad hoc* KREČA appends a dissenting opinion to the Order of the Court.

(Initialed) C.G.W.

(Initialed) E.V.O.
