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

(YUGOSLAVIE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 2 JUIN 1999

1999

INTERNATIONAL COURT OF JUSTICE

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ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
LEGALITY OF USE OF FORCE

(YUGOSLAVIA v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 2 JUNE 1999

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General List
No. 114CASE CONCERNING
LEGALITY OF USE OF FORCE(YUGOSLAVIA *v.* UNITED STATES OF AMERICA)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, KOOLJMANS; Judge ad hoc KREČA; 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 United States of America (hereinafter "the United States") "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 United States of America 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 United States of America, 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America 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 United States of America is responsible for the violation of the above international obligations;
- the United States of America is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;
- the United States of America is obliged to provide compensation 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 United States of America 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 Kursumljia, 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 United States 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 the United States:

Mr. David Andrews, *Agent*;
Mr. John Crook,
Mr. Michael Matheson;

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 United States of America . . . 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 the United States of America:

“That the Court reject the request of the Federal Republic of Yugoslavia for the indication of provisional measures”;

* * *

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 upon 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”;

whereas it is not disputed that both Yugoslavia and the United States are parties to the Genocide Convention; but whereas, when the United States ratified the Convention on 25 November 1988, it made the following reservation:

“That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the United States is required in each case”;

22. Whereas the United States contends that “[its] reservation [to Article IX] is clear and unambiguous”; that “[t]he United States has not given the specific consent [that reservation] requires [and] . . . will not do so”; and that Article IX of the Convention cannot in consequence found the jurisdiction of the Court in this case, even prima facie; whereas the United States also observed that reservations to the Genocide Convention are generally permitted; that its reservation to Article IX is not contrary to the Convention’s object and purpose; and that, “[s]ince . . . Yugoslavia did not object to the . . . reservation, [it] is bound by it”; and whereas the United States further contends that there is no “legally sufficient . . . connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention”; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific intent required by the Convention to “destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, which intent could not be inferred from the conduct of conventional military operations against another State.

23. Whereas Yugoslavia disputed the United States interpretation of the Genocide Convention, but submitted no argument concerning the United States reservation to Article IX of the Convention;

24. Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties;

25. Whereas in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and the United States alleged to fall within its provisions; and whereas that Article manifestly does not constitute a basis of jurisdiction in the present case, even prima facie;

* *

26. 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”;

27. Whereas the United States observes that it “has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so”;

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

* * *

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

* * *

30. 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;

31. 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;

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

33. 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;

* * *

34. For these reasons,

THE COURT,

(1) By twelve votes to three,

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

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

AGAINST: *Judges* Shi, Vereshchetin; *Judge ad hoc* Kreća:

(2) By twelve votes to three,

Orders that the case be removed from the List.

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

AGAINST: *Judges* Vereshchetin, Parra-Aranguren; *Judge ad hoc* Kreća.

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 United States of America, respectively.

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

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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* KREĆA appends a dissenting opinion to the Order of the Court.

(Initialed) C.G.W.

(Initialed) E.V.O.