International Court of Justice — Jurisdiction — Provisional measures — Prima facie basis for jurisdiction — Declarations under Article 36(2) of Statute of International Court of Justice — Condition of reciprocity — Temporal limitation — Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article IX — Whether threat or use of force against a State amounting to genocide — Whether necessary element of intent towards defined group — Whether Serbia and Montenegro party to the Genocide Convention at relevant date — Whether Genocide Convention a treaty in force under Article 35(2) of the Statute of the Court — Article 4 of Belgium–Yugoslavia Convention of Conciliation, Judicial Settlement and Arbitration, 1930 — Whether invoking new basis of jurisdiction at late stage acceptable

Treaties — Application — Convention on the Prevention and Punishment of the Crime of Genocide, 1948 — Definition of genocide contained in Article II of Genocide Convention — Whether intended destruction of a national, ethnical, racial or religious group — Whether threat or use of force against a State constituting an act of genocide

International organizations — United Nations — Membership — Yugoslavia — Status of Yugoslavia between 1992 and 2000 — Whether Member of the United Nations — Whether party to Statute of International Court of Justice — Whether Yugoslavia having access to Court under Article 35(1) of Statute — Whether Yugoslavia having access to Court under Article 35(2) of Statute

State succession — Succession and continuity of States — Socialist Federal Republic of Yugoslavia — Whether Serbia and Montenegro continuation of the former Socialist Federal Republic of Yugoslavia — Membership of the United Nations — Whether Yugoslavia party to Statute of International Court of Justice — Treaty obligations of the former Yugoslavia

War and armed conflict — NATO bombing of Yugoslavia — NATO Respondent States claiming humanitarian intervention — Loss of life and suffering in Kosovo — Whether NATO Respondent States violating obligation not to use force — Maintenance of peace and security — Role of Security Council — Responsibilities of Court under United Nations Charter and Statute of Court — Obligations of Parties under Charter and other rules of international law including humanitarian law

Legality of Use of Force

(Yugoslavia/Serbia and Montenegro *v.* Belgium)[1]

International Court of Justice

Request for the Indication of Provisional Measures. 2 *June* 1999

(*Vice-President* Weeramantry, *Acting President*; *President* Schwebel; Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren and Kooijmans, *Judges*; Kreća[2] and Duinslaeger,[3] *Judges ad hoc*)

Preliminary Objections. 15 *December* 2004

(Shi, *President*; Ranjeva, *Vice-President*; Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada and Tomka, *Judges*; Kreća,[4] *Judge ad hoc*)

Summary:[5] *The facts*:—On 29 April 1999 the Federal Republic of Yugoslavia ("Yugoslavia" or "the Applicant"), which was known as Serbia and Montenegro from 4 February 2003,[6] filed an Application against the Kingdom of Belgium ("Belgium") instituting proceedings for violation of the obligation not to use force, accusing Belgium, together with other NATO Member States, of bombing Yugoslav territory and of violating other

[1] At the provisional measures phase, Yugoslavia was represented by Mr Rodoljub Etinski, as Agent, Mr Ian Brownlie QC, Mr Paul J. I. M. de Waart, Mr Eric Suy, Mr Miodrag Mitić and Mr Olivier Corten. Belgium was represented by Mrs Raymonde Foucart, as Agent, and Mr Rusen Ergec.

At the preliminary objections phase, Serbia and Montenegro was represented by Mr Tibor Varady, as Agent, Counsel and Advocate; Mr Vladimir Djerić, as Co-Agent, Counsel and Advocate; Mr Ian Brownlie QC, as Counsel and Advocate; Mr Slavoljub Carić, Mr Saša Obradović, Mr Vladimir Cvetković, Ms Marijana Santrač and Ms Dina Dobrković, as Assistants, and Mr Vladimir Srećković, as Technical Assistant. Belgium was represented by Mr Jan Devadder, as Agent; Ms Valérie Delcroix, as Deputy Agent; Mr Daniel Bethlehem QC, as Counsel; and Ms Clare Da Silva, as Assistant.

[2] Chosen by Yugoslavia.

[3] Chosen by Belgium.

[4] Chosen by Yugoslavia. On 23 December 2003 the Court informed all of the Respondent States in the *Legality of Use of Force* cases that, because of the presence on the Bench of Judges of British, Dutch and French nationality, the judges ad hoc chosen by the other Respondents should not participate in the Preliminary Objections phase of the proceedings.

[5] Prepared by Ms Karen Lee, Co-Editor.

[6] The name of the State of the Federal Republic of Yugoslavia changed to Serbia and Montenegro following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February 2003.

international obligations.[7] It requested that Belgium be held responsible for and immediately stop the violation of the obligations as well as provide compensation for the damage caused.[8]

On the same day Yugoslavia filed Applications, drafted in broadly similar terms, instituting proceedings in respect of other disputes arising out of the same facts, against Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America (together with Belgium "the Respondent States").[9]

Order on Request for the Indication of Provisional Measures (2 June 1999)

Immediately after filing its Application, Yugoslavia submitted a request for the indication of provisional measures, asking the Court to order Belgium to cease military operations and refrain from any threat or use of force against Yugoslavia. As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations made by both Parties under Article 36(2) of the Statute of the International Court of Justice ("the Statute")[10] and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention").[11] In a Supplement to its Application submitted during the oral proceedings, Yugoslavia also invoked Article 4 of the Belgium–Kingdom of Yugoslavia Convention of Conciliation, Judicial Settlement and Arbitration, 1930 ("the 1930 Convention").[12]

[7] In defining the subject of the dispute, Yugoslavia also listed in its Application 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 and the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group (see para. 1 of the Order on Provisional Measures).

[8] The formulation of the Applicant's claims in the Application can be found at para. 4 of the Order on Provisional Measures.

[9] See 157 ILR 296, 299, 306, 309, 312, 323, 326, 344, and 351 below. On 2 June 1999 the Court rejected the requests for the indication of provisional measures against all of the Respondent States and decided to remove from the General List the cases against Spain and the United States of America.

[10] The text of Yugoslavia's declaration of 26 April 1999 and of Belgium's declaration of 17 June 1958 can be found at para. 23 of the Order on Provisional Measures.

[11] Article IX of the Genocide Convention provided that: "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." Both Yugoslavia and Belgium were parties to the Genocide Convention without reservation.

[12] Article 4 of the 1930 Convention provided that: "All disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice unless the Parties agree in the manner hereinafter provided, to resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Belgium argued that there was no prima facie basis for jurisdiction. It contended that, in any event, there was no evidence to justify the indication of measures, which would have serious effects on the outcome of the humanitarian crisis in Kosovo and in neighbouring countries.

Held:—(1) (by twelve votes to four, Vice-President and Acting President Weeramantry, Judges Shi and Vereshchetin and Judge ad hoc Kreća dissenting) The request for the indication of provisional measures was rejected. There was no prima facie basis on which the jurisdiction of the Court could be founded.

(a) Since declarations under Article 36(2) of the Statute were made on condition of reciprocity, jurisdiction was conferred on the Court only to the extent to which the two declarations coincided. In its declaration Yugoslavia had limited that jurisdiction to disputes arising after 25 April 1999. The dispute between Yugoslavia and Belgium (and the other NATO Member States) arose on 24 March 1999 when NATO operations began. It was thus unnecessary to consider whether Yugoslavia was a party to the Statute (paras. 22-33).

(b) Article IX of the Genocide Convention did not constitute a prima facie basis for jurisdiction. The Court did not have jurisdiction *ratione materiae* over the dispute pursuant to that article because the acts imputed by Yugoslavia to Belgium were not, at this stage, capable of coming within the provisions of the Genocide Convention. The essential characteristic of genocide, which was defined in Article II of the Genocide Convention, was the intended destruction of a national, ethnical, racial or religious group. The threat or use of force against a State could not therefore in itself constitute an act of genocide. Neither did it appear, at this stage, that the bombings which formed the subject of the Yugoslav Application entailed the necessary element of intent towards such a group (paras. 34-41).

(c) Article 4 of the 1930 Convention had been invoked too late to be taken into consideration (paras. 42-4).

(2) (by fifteen votes to one, Judge Oda dissenting) The subsequent procedure was reserved for further decision.

(a) These findings in no way prejudged the question of the jurisdiction of the Court to deal with the merits or any questions relating to the admissibility of the Application, or relating to the merits themselves (paras. 45-6).

(b) The compatibility of particular acts with international law could only be considered at the merits stage and was distinct from the question of a State's acceptance of the Court's jurisdiction, which required consent. States remained responsible for acts attributable to them that violated international law, including humanitarian law. Any disputes relating to the legality of such acts had to be resolved by peaceful means of their own choice. Parties were to take care not to aggravate or extend the dispute (paras. 47-9).

(c) When a dispute gave rise to a threat to the peace, breach of the peace or act of aggression, the Security Council had special responsibilities under Chapter VII of the Charter (para. 50).

Declaration of Judge Koroma: The decision that the dispute did not, even prima facie, come within the scope of the Court's jurisdiction was incorrect and legally untenable. In accordance with the International Law Commission's Draft Article 25 on State Responsibility, the time of the commission of the breach was not limited to when the act began but extended over the whole period during which the act took place and continued (pp. 35-6).

Separate Opinion of Judge Oda: (1) The cases against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom should have been removed from the General List as the cases against Spain and the United States had been. General Assembly resolution 47/1 (1992) stated that Yugoslavia could not continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations. Since Yugoslavia was not a Member of the United Nations and thus not a party to the Statute, it had no standing as an applicant State. Its Applications should be declared inadmissible and removed from the General List (paras. 1-4).

(2) Even if Yugoslavia had standing, the Court lacked jurisdiction under Article 36(2) of the Statute and Article 38(5) of the Rules of the Court, the 1930 Convention and the Genocide Convention. The Application was inadmissible under Article 36(2) of the Statute since no legal dispute existed between Yugoslavia and the Respondent State. The issue of bombing, which did exist on 29 April 1999, should have properly been dealt with by the Security Council under Chapters V, VI, VII and VIII of the Charter, or the General Assembly under Chapter IV. Had a legal dispute existed, the Court had no jurisdiction under Article 36(2) of the Statute. Yugoslavia had not acted in good faith in filing its Application only days after signing its declaration. If good faith was lacking, the system could not work in the manner intended (paras. 7-16).

(3) Yugoslavia could not rely on Article 4 of the 1930 Convention, which did not provide for the compulsory jurisdiction of the then Permanent International Court of Justice (paras. 17-18).

(4) The Applications citing the Genocide Convention as a basis for jurisdiction should have been rejected. No violation of the Genocide Convention had been established and no element of genocide as defined in Article II had been indicated. In any event, no dispute relating to the Genocide Convention existed between the parties. Neither was the Genocide Convention intended to protect the rights of Yugoslavia as a State (paras. 20-3).

(5) The granting of provisional measures was at the discretion of the Court. Since the ten cases were virtually identical, any decision had to apply to all ten cases. Since the requests for provisional measures were dismissed due to a lack of prima facie jurisdiction, the Court lacked jurisdiction to entertain the Applications. All ten cases should have been removed from the General List (paras. 24-9).

Separate Opinion of Judge Higgins: (1) Where one State had accepted the jurisdiction of the Court under Article 36(2) of the Statute with a limitation *ratione temporis* and the other State had accepted jurisdiction without such limitation, this limitation held good as between the Parties due to the condition of reciprocity (paras. 1-3).

(2) Yugoslavia's declaration failed to invest the Court with jurisdiction. While Yugoslavia clearly intended that no dispute between itself and Belgium prior to 25 April 1999 be subject to the Court's jurisdiction, it had hoped that a dispute that arose only after 25 April could be identified. While there were situations and facts occurring subsequent to 25 April 1999 which no doubt intensified the dispute, no new dispute arose after that critical date (paras. 4-8).

(3) While the Statute and Rules of Court provided minimal guidance as to legal requirements relating to the indication of provisional measures, legal elements had evolved through the Court's case law. A party had to show a prima facie basis on which jurisdiction could be founded. Weighty and complex jurisdictional arguments were usually only addressed at the preliminary objections phase (paras. 9-29).

(4) While the Court was not indifferent to the great suffering in Kosovo and Yugoslavia, it could only assume its responsibilities when it had jurisdiction. In this case the Court's jurisdiction had yet to be established even prima facie (para. 30).

Separate Opinion of Judge Parra-Aranguren: (1) The Court had prima facie jurisdiction to entertain the request for provisional measures on the basis of Article IX of the Genocide Convention. Since the Parties held clearly opposite views concerning the question of the performance or non-performance of obligations under the Genocide Convention, a legal dispute appeared to exist, prima facie, between them regarding its interpretation and application (paras. 1-7).

(2) The provisional measures should not, however, be indicated as they did not aim to guarantee the rights of Yugoslavia under the Genocide Convention. The threat or use of force against a State could not in itself constitute an act of genocide within the meaning of the Genocide Convention (para. 8).

Separate Opinion of Judge Kooijmans: (1) The Court should not have avoided the question of Yugoslavia's membership of the United Nations and the ensuing validity or invalidity of its declaration of acceptance but dealt with it as a preliminary issue. The question of the exclusion of jurisdiction by reservations in the declarations was only relevant if the Yugoslav declaration was capable of conferring prima facie jurisdiction (paras. 1-20).

(2) The Court should have concluded that the uncertainties about the validity of Yugoslavia's declaration prevented it from assuming that it had

jurisdiction, even prima facie. While no definitive stand was required at this stage, there was sufficient doubt as to whether Yugoslavia was a fully qualified Member of the United Nations capable of accepting the compulsory jurisdiction of the Court as a party to the Statute. Both the Security Council and the General Assembly had expressed the view that Yugoslavia could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that Yugoslavia should apply for membership. The declaration validity question took precedence over other issues such as limitation *ratione temporis* (paras. 21-30).

Dissenting Opinion of Vice-President Weeramantry: (1) A prima facie case had been made that circumstances justified the issue of provisional measures on both Parties. The case was of seminal importance, involving fundamental principles of the international legal order and raising grave human rights issues on both sides. Loss of life and suffering was great. The Court was obliged to promote the peaceful settlement of disputes and prevent the escalation of the conflict (pp. 71-4).

(2) While it was not for the Court to pronounce at this stage upon the merits of the allegations of either side, Yugoslavia had to cease immediately any violence relevant to the subject-matter of its Application as a precondition to the grant of any relief. Yugoslavia was also under a special obligation to desist immediately from any action appearing to aggravate or extend the dispute. The Court could indicate measures other than those proposed and *proprio motu* (pp. 74-5).

(3) Article 36(2) of the Statute was sufficient to confer prima facie jurisdiction for the purposes of provisional measures. The temporal restriction in Yugoslavia's declaration did not defeat the entire declaration. The Application was thus admissible. Although the NATO air operations began on 24 March 1999, pre-dating 25 April 1999 specified in the declaration, not every subsequent operation dated back to when the enterprise was conceived. The campaign comprised different operations which might have been planned on different dates. Acts of wrongdoing were committed in law when they were committed in fact and not when they were planned. The International Law Commission's Draft Article 25 on State Responsibility also stipulated that the time of commission of a breach extended over the entire period during which the act continued; in the case of a series of acts or omissions the breach of the international obligation occurred at the moment when the particular act or omission was accomplished (pp. 76-95).

Dissenting Opinion of Judge Shi: (1) The limitation *ratione temporis* in the double exclusion formula contained in Yugoslavia's declaration was no bar to founding prima facie jurisdiction upon Article 36(2) of the Statute for the purpose of indicating provisional measures. The legal dispute before the Court consisted of a number of constituent elements. For the dispute to have arisen, all of those elements had to come into existence. Since none of those elements

existed before the critical date of 25 April 1999, the dispute arose subsequent to that date. Although the bombing of Yugoslav territory began some weeks before that date, the bombing and its effects were facts or situations; they did not constitute a legal dispute. Yugoslavia's complaint of NATO's illegal use of force prior to the critical date was, at most, one of many constituent elements. Neither could NATO be the Respondent in this case *ratione personae*. In accordance with the International Law Commission's Draft Article 25(1) on State Responsibility, a breach by a "continuing" act occurred when the act began and extended over the entire period of non-conformity. Although the bombing began before the critical date, it continued beyond that date (pp. 95-8).

(2) Given its role, the Court should have furthered international peace and security by issuing a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all of the relevant rules of international law, including international humanitarian law, and at least not to aggravate or extend their dispute. It should also have complied with Yugoslavia's request to decide the requests *proprio motu* under Article 75(1) of the Rules of Court (pp. 98-9).

Dissenting Opinion of Judge Vereshchetin: (1) As the principal guardian of international law, the Court should have acted expeditiously and, if necessary, *proprio moto* in the context of gross violations of international law, which included the Charter. Provisional measures should have been indicated in the cases against Belgium, Canada, the Netherlands and Portugal. Prima facie jurisdiction under Article 36(2) of the Statute existed in respect of Belgium, Canada, the Netherlands and Portugal. The Court had no competence over the general political dispute which began with the NATO bombing of Yugoslavia. A specific legal dispute could not be excluded from the Court's consideration solely because it was linked with, or part of, a dispute so excluded While the separate disputes had the same origin, they became individualized as distinct bilateral legal disputes upon Yugoslavia's filing of Applications against ten individual States, which occurred after 25 April 1999 (pp. 99-102).

(2) Prima facie jurisdiction also existed under the 1930 Convention in respect of the case against Belgium and the 1931 Treaty in respect of the case against the Netherlands. Although invoked by Yugoslavia as additional grounds of jurisdiction at a late stage, Yugoslavia had reserved its right to amend and supplement its Applications. The conditions set out by Article 38 of the Rules of Court and in jurisprudence had been satisfied: the Applicant clearly intended to proceed upon the new basis and the character of the dispute remained unchanged (pp. 102-5).

Dissenting Opinion of Judge Kreća: (1) The functions of the judge ad hoc had not been fulfilled in this case; this affected substance as well as procedure. The Respondent States shared the same interest. To equalize the position of the Parties, Yugoslavia had the right to choose five judges ad hoc

since five out of the ten Respondent States had their national judges sitting on the Bench. None of the Respondent States was entitled to appoint a judge ad hoc (paras. 1-4).

(2) Humanitarian concern, which had assumed a primary importance, had lost its acquired autonomous legal significance with the fate of an entire nation at stake. The weapons used had limitless effects on health and the environment. This was a case of extreme urgency and irreparable harm (paras. 5-7).

(3) The Court should have decided whether Yugoslavia could have been considered a Member of the United Nations and party to the Statute of the Court in the light of the content of General Assembly resolution 47/1 and of the practice of the Organization. That resolution did not affect the status of Yugoslavia as a party to the Statute since it did not mention it. The Court's position had remained that no definite determination was required at this stage of proceedings[13] (paras. 8-10).

(4) While the use of force per se did not constitute an act of genocide, it could be conducive to genocide. At this stage it was sufficient to establish that there was an objective risk that the survival of the group was threatened due to the intensive bombing conditions. The conflicting views of the Parties in relation to intent led to a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 11-13).

(5) The Court's stance on its lack of jurisdiction *ratione temporis* was questionable. The Court did not have to satisfy itself that it had jurisdiction on the merits of the case. No final and definitive establishment of the Court's jurisdiction was necessary. In the case of a temporal defect, jurisdiction was not excluded if the defect could be easily remedied. The difference between the Parties concerning the qualification of the nature of the armed attack on Yugoslavia was a dispute over a point of law; it was not a matter of jurisdiction. The Court had made an interim judgment, without a formal judgment (para. 14).

(6) The additional basis for jurisdiction under Article 4 of the 1930 Convention was admissible since the three necessary conditions laid down in the Court's jurisprudence had been met. That Yugoslavia intended to proceed on that basis was clear from its invocation relying on its amendment reserve. The character of the dispute was untransformed. The 1930 Convention was designed to deal with such disputes, thus affording a basis on which the Court's jurisdiction might be established. Belgium knew, or was obliged to know, that the 1930 Convention was in force and was binding on it. According to Article 38(2) of the Rules an Application need not specify all

[13] See paragraph 18 of Provisional Measures Order of 8 April 1993 in *Application of the Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, 95 ILR 1 at 29.

grounds. While a late stage of proceedings was not defined in the Statute or Rules, from the perspective of the Rules it coincided with formal closure. In each case the Court had to find a practical solution which enabled the other party to state its position, not one for the sake of convenience (paras. 15-17).

Judgment on Preliminary Objections (15 December 2004)

Following the submission of preliminary objections by Belgium on 5 July 2000, the proceedings on the merits were suspended. Belgium argued that the Court was not open to Yugoslavia in accordance with Article 35(1) of the Statute. Since Yugoslavia was not, and never had been, a Member of the United Nations, it could not claim to be a party to the Statute pursuant to Article 93(1) of the Charter. Belgium requested that the Court remove the case from the General List and, in the alternative, rule that it lacked jurisdiction in the case and/or that the case was inadmissible.

Serbia and Montenegro initially requested that the Court adjudge and declare on its jurisdiction *ratione personae*, dismiss the remaining preliminary objections, and order proceedings on the merits if it found that it had jurisdiction *ratione personae*. Having asserted that it was a Member of the United Nations as the continuator State of the Socialist Federal Republic of Yugoslavia, and thus a party to the Statute, the Applicant changed its approach. Following the change of government in Belgrade and the admission of the Applicant to membership of the United Nations on 1 November 2000, it conceded that it had not been a Member, and thus not party to the Statute, when the proceedings were instituted. It therefore requested that the Court decide on its jurisdiction on the basis of the Applicant's legal status vis-à-vis the United Nations.[14]

Held (unanimously):—The Court had no jurisdiction to entertain the claims made in the Application.

(1) The Court could not remove the cases from the General List, or take any decision putting an end to the cases *in limine litis*. It had to proceed to examine the titles of jurisdiction asserted by the Applicant and the objections thereto advanced by the Respondent States, and give its decision with respect to jurisdiction. The Observations of Serbia and Montenegro could not be treated as having the legal effect of a discontinuance of the proceedings instituted by that State. Serbia and Montenegro had emphasized that it wanted the Court

[14] For the relevant sequence of events relating to the legal status of the Applicant vis-à-vis the United Nations, see paras. 55-63 of the Judgment on Preliminary Objections. The text of United Nations General Assembly resolution 47/1 of 22 September 1992 can be found at para. 60 of that Judgment.