YUGOSLAVIA'S REQUESTS FOR PROVISIONAL MEASURES
THE 1999 ICJ CASES ON *LEGALITY OF USE OF FORCE*

Jianming Shen*

INTRODUCTION

On 2 June 1999, the International Court of Justice rejected Yugoslavia's requests for the indication of provisional measures in separate but related cases against ten NATO respondents (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, and United States) in the *Legality of Use of Force cases.*[1] On 28 April 1999, Yugoslavia had commenced proceedings in the Court while NATO air strikes against it were intensifying. Due to the extreme urgency involved, Yugoslavia had requested the Court to indicate provisional measures and order the respondents to cease immediately their acts of use of force against it. Yugoslavia claimed that the NATO bombings had:

> 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 was deliberately imposed conditions of life calculated to bring about physical destruction of the group, in whole or in part.[2]

Yugoslavia maintained that if the proposed provisional measures were not adopted, there would be new losses of life, further physical and mental harm inflicted on the Yugoslav population, including their destruction, further destruction of civilian targets and heavy environmental pollution.[3]

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* Visiting Professor of Law, St John's University School of Law, New York.

[1] Legality of Use of Force (Yugoslavia v Belgium et al) ("Legality cases"). Since the case is not reported yet, information on the case (which includes the Applications, Requests for the Indication of Provisional Measures, verbatim record of hearings and the Court's Orders) is available at www.Court-cij.org/ (visited June 1999; revisted September 1999). For the sake of brevity, the detailed website reference for each document in the Legality cases shall be omitted.

[2] Ibid Applications.

[3] Ibid.

Generally speaking, to entertain any application on the merits of a case, the Court has to be satisfied that it has jurisdiction to hear the matter.[4] The Court's jurisdiction may be founded upon the consent of the relevant states by way of a special agreement *("compromis")* or by a declaration under Article 36(2) of the Statute of the Court ("the Optional Clause"). In addition, states may indicate their consent to the Court's compulsory jurisdiction in a provision in a treaty that also happens to be the subject of their dispute.

However, when the Court entertains a request for the indication of interim measures, it need not be finally satisfied that it has jurisdiction to deal with the merits of the case. This occurred in two recent cases involving United States as respondent. The first was *Vienna Convention on Consular Relations (Provisional Measures)*[5] where Paraguay was the applicant. The second was *LaGrand (Provisional Measures)*[6] where Germany was the applicant.

Indeed, with respect to the indication of provisional measures, neither the Statute nor the Rules of Court requires the Court's absolute satisfaction that it has jurisdiction to deal with the matter. In practice, the Court would indicate such measures as long as "the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded".[7]

Yugoslavia grounded the Court's jurisdiction in most of its applications in the *Legality cases* upon the Optional Clause, and in all cases upon Article IX of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). In the cases against Belgium and Netherlands, Yugoslavia invoked also certain bilateral treaty provisions that had provided for the jurisdiction of the Court's predecessor, the Permanent Court of International Justice.

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[4] See generally Article 36 Statute of the International Court of Justice; Article 79 Rules of the Court.

[5] Order of 4 April 1998 ("Paraguay v United States") at www.Court-cij.org (visited June 1999).

[6] Order of 3 March 1999 ("LaGrand case") at www.Court-cij.org (visited June 1999).

[7] Ibid; see also Libya v United Kingdom, Provisional Measures [1992] International Court of Justice Reports 3.

In the Orders handed down on 2 June 1999, the Court declined to indicate provisional measures and found that *prima facie* jurisdiction did not exist under any provision or rule, including the Optional Clause and Article IX of the Genocide Convention. In the cases against Spain and The United States, the Court held that it manifestly lacked jurisdiction and ordered the cases to be removed from the Court's docket.[8]

This article will discuss the Court's judgment from the perspective of the arguments presented by Yugoslavia in its ten Requests. However, it should be noted that the Court decided to remain seized of the remaining eight cases and reserved the subsequent procedure for further decision.[9]

JURISDICTION UNDER THE OPTIONAL CLAUSE

Optional Clause Declaration with a Waiting Period Condition

The most frequently used method for accepting the Court's compulsory jurisdiction is by declaration under the Optional Clause. By such a declaration on 25 April 1999, Yugoslavia initiated proceedings against the NATO states that had made similar declarations as well. However, reliance upon the Optional Clause was limited by the fact that four core NATO members (France, Germany, Italy and United States) had either not accepted the Court's compulsory jurisdiction *ipso facto* or had withdrawn such acceptance.[10]

The Court held that the declarations of Spain and The United Kingdom "manifestly [could] not constitute a basis of jurisdiction..., even *prima facie*".[11] The Court found that Yugoslavia's reliance was limited by a waiting period that was required by the Spanish and British declarations.

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[8] Legality cases (Yugoslavia v Spain) note 1 at para 40; Legality cases (Yugoslavia v United States) note 1 at para 34.

[9] Legality cases (Yugoslavia v Belgium) note 1 at para 51; Legality cases (Yugoslavia v Canada) note 1 at para 47; Legality cases (Yugoslavia v France) note 1 at para 39; Legality cases (Yugoslavia v Germany) note 1 at para 38; Legality cases (Yugoslavia v Italy) note 1 at para 39; Legality cases (Yugoslavia v Netherlands) note 1 at para 51; Legality cases (Yugoslavia v Portugal) note 1 at para 50; Legality cases (Yugoslavia v United Kingdom) note 1 at para 43.

[10] For example, the United States had withdrawn its acceptance after Nicaragua brought a claim against it in the Nicaragua case (Jurisdiction and Admissibility) [1984] International Court of Justice Reports 392 ("Nicaragua case").

[11] Legality cases (Yugoslavia v Spain, United Kingdom) note 1 at para 25.

Spain had a 12-month waiting-period provision in its declaration of 29 October 1990. The Court held that under Paragraph 1 of the Spanish declaration, Spain had accepted the Court's compulsory jurisdiction without special agreement with regard to legal disputes, on the basis of the other state accepting the same obligation on a reciprocal basis. The Court held that the exceptions were disputes where the other party had accepted its compulsory jurisdiction less than 12 months prior to the filing of the application before it.[12] Since Yugoslavia had deposited its declaration with the United Nations Secretary-General only a few days prior to the start of formal proceedings against Spain, the Court held that the condition for the exclusion of the Court's jurisdiction found in Paragraph 1(c) of Spain's declaration was satisfied. The United Kingdom had a similar reservation in its declaration of 1 January 1969. As a result, the Court held that this reservation had the same effect as the Spanish reservation.[13]

The effect of these rulings meant that since the Spanish and British declarations required a waiting period of not less than 12 months after Yugoslavia's declaration, Yugoslavia had to wait until 26 April 2000 before it could bring a claim against these two states under the Optional Clause. By then, it would be too late for Yugoslavia to institute the proceedings.

Effects of Yugoslavia's Limitation ratione temporis

In the claims against Belgium, Canada, Netherlands and Portugal, Yugoslavia had in the first place founded the Court's jurisdiction upon the Optional Clause[14] because they had accepted the Court's general compulsory jurisdiction under this clause.

Under its declaration of 17 June 1958, Belgium had recognised as compulsory *ipso facto* and without special agreement the Court's jurisdiction in legal disputes arising after 13 July 1948 on the basis of reciprocity. An exception applied to disputes that the parties agreed should be the subject of "another method of pacific settlement".[15] Belgium's acceptance of the Court's compulsory jurisdiction was similarly reliant on the other state accepting the same obligation.

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[12] Ibid (Yugoslavia v Spain) at para 22.
[13] Ibid (Yugoslavia v United Kingdom) at paras 22 and 25.
[14] Ibid (Yugoslavia v Belgium, Canada, Netherlands, Portugal) at para 2.
[15] Ibid (Yugoslavia v Belgium) at para 23.

Portugal's declaration of 19 December 1955 appeared to be less restrictive. Not only did it omit the word "reciprocity", it even omitted the words, "in relation to any other State accepting the same obligation". The declaration provided:[16]

> Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without special agreement...under the following conditions:
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> (1) the present declaration covers disputes arising out of events both prior and subsequent to the declaration of acceptance of the "Optional Clause" which Portugal made on 16 December 1920 as a party to the Statute of the Permanent Court of International Justice...
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> (2) the Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.

In contrast, Canada's declaration clearly subjected the Court's jurisdiction to reciprocity and other conditions. Under its declaration of 10 May 1994, Canada accepted as compulsory, without special convention and on condition of reciprocity, the Court's compulsory jurisdiction over all disputes arising after the declaration. The exceptions were "(a) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement", and "(c) disputes with regard to questions which by international law fall exclusively within the jurisdiction of Canada".[17]

The declaration of Netherlands, which was dated 1 August 1956, had a similar provision on the Court's compulsory jurisdiction without special agreement, in relation to any other state accepting the same obligation, on the basis of reciprocity, in all disputes arising or which may arise after 5 August 1921. The exception concerned disputes where the parties had agreed to some other method of pacific settlement.[18]

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[16] Ibid (Yugoslavia v Portugal) at para 22.
[17] Ibid (Yugoslavia v Canada) at para 22.
[18] Ibid (Yugoslavia v Netherlands) at para 23.

Since the above declarations had excluded the 12-month waiting period that was included in the Spanish and British declarations, it may be concluded that Yugoslavia did not have to wait until 2000 to institute proceedings against Belgium, Canada, Netherlands and Portugal. However, this should not preclude the issue raised by another type of time condition that was found in Yugoslavia's declaration, namely, a limitation *ratione temporis*. Under its declaration of 25 April 1999, Yugoslavia had stated:[19]

> [T]he Government of the FRY recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the said Court in all disputes arising or *which may arise after the signature of the present Declaration*, with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement. The present Declaration does not apply to disputes relating to questions which, under international law, fall exclusively within the jurisdiction of the FRY, as well as to territorial disputes...[emphasis added]

Belgium made no counter jurisdictional argument in this regard.[20] Canada challenged Yugoslavia's reliance on the Optional Clause, stating that even if the Yugoslav declaration were valid, "it [was] inapplicable by the terms of its own temporal restriction".[21] Canada contended that the underlying dispute pre-dated the Yugoslav declaration which took it outside the terms of that instrument.[22] Similarly, Netherlands contended that its dispute with Yugoslavia had clearly arisen before the date of Yugoslavia's declaration. As a consequence, Yugoslavia's application should be considered to be "inadmissible".[23] Portugal argued in the same vein.[24]

The Court, finding for the respondents, held that Yugoslavia's applications were essentially directed against the bombings of its territory.[25] The Court

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[19] Ibid (Yugoslavia v Belgium, Canada, Netherlands, Portugal) at para 22.
[20] Ibid (Yugoslavia v Belgium) at para 24.
[21] CR 99/16 (Canada) at paras 4, 16-25.
[22] Ibid.
[23] CR 99/20 (Netherlands) at para 19.
[24] CR 99/21 (Portugal) at para 2.1.1.2.
[25] Refer note 1 (Yugoslavia v Belgium, Canada, Netherlands) at para 27; (Yugoslavia v

noted that the bombings had begun on 24 March 1999 and had been conducted continuously over a period extending beyond 25 April 1999. As such, the legal dispute that arose between Yugoslavia and each respondent was "well before 25 April 1999".[26] The Court found that although the bombings had continued after 25 April 1999 and the disputes had persisted since that date, the disputes were not such that they altered the date on which they arose. According to the Court, "each individual air attack could not have given rise to a separate subsequent dispute",[27] and Yugoslavia had failed to establish that "new disputes, distinct from the initial one", had arisen between Yugoslavia and each respondent since that date.[28]

Although Yugoslavia's declaration applied only to disputes "arising after the signature of [its] declaration", it may be argued that the Court could have regarded the disputes between the parties as ones that arose before 25 April 1999. NATO's actions, although initially commenced before that date, comprised a series of planning, preparation, as well as implementing acts and operations. Therefore, these acts and operations, when carried out, arguably gave rise to a series of inter-related yet separate or separable disputes.

Further, since the disputes had arisen before 25 April 1999, Yugoslavia could legitimately claim that the disputes that arose on 25 April 1999 and beyond, albeit connected with pre-declaration disputes, had constituted new and separate disputes in law and fact. As long as the respondents were engaging in pre-planned acts and operations against Yugoslavia beyond that date, it is arguable that the acts formed the basis of new and separate legal disputes. The participation of Belgium, Canada, Netherlands and Portugal in NATO's allegedly unauthorised military interventions did not cease until mid June 1999. If these amounted to breaches of obligations between 25 April and June 1999, they would be clearly outside the scope of the limitation *ratione temporis* found in Yugoslavia's declaration.

Yugoslavia could not have intended to limit itself to proceedings in the Court against the respondents *vis-à-vis* the very types of alleged ongoing violations listed in its applications and oral arguments. To determine

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Portugal) at para 26.

[26] Ibid (Yugoslavia v Belgium, Canada, Netherlands) at para 28; (Yugoslavia v Portugal) at para 27.

[27] Ibid at para 29.

[28] Ibid at para 28.

Spain's intention on the Court's compulsory jurisdiction, the Court referred to the dispute between Spain and Canada in the recent *Fisheries Jurisdiction case.*[29] But the Acting President of the Court, Weeramantry J, commented in his dissenting opinion that the Court's Orders had failed to "adequately consider the intention of the author of the reservation, which is an important factor to be taken into account in construing the overall meaning of a declaration".[30] He stated:[31]

> Yugoslavia, in drafting its declaration, could not have intended to exclude from the Court's jurisdiction the very incidents of which it was complaining and which it had made the subject-matter of its Application. Such a self-defeating intention can scarcely be imputed to the author of such an important document.

Vereshchetin J agreed and said:[32]

> In its Orders in the present cases, the Court, by refusing to take into account the clear intention of Yugoslavia, has taken an approach to the Yugoslav declaration which could lead to the absurd conclusion that Yugoslavia intended by its declaration...to exclude the jurisdiction of the Court over her Applications instituting proceedings against the Respondents.

In another dissenting opinion, Shi J observed the intention of Yugoslavia in terms of the "subject of the dispute" as follows:[33]

> [W]hether the date on which the dispute arose is before or after the signature by Yugoslavia of the declaration of acceptance, the Court has, in this connection, to consider what is the subject of the dispute, as it did in a similar situation in the *Right of Passage case* [(Preliminary Objections) [1957] ICJ Reports 125; (Merits) [1960] ICJ Reports 6]...

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[29] [1998] International Court of Justice Reports at para 49. See also the boundary dispute between Cambodia and Thailand in the Temple of Preah Vihear case [1961] International Court of Justice Reports 31.

[30] Refer note 1 (Yugoslavia v Belgium, Canada, Netherlands, Portugal) at para Jurisdiction *ratione temporis* (f) per Weeramantry J.

[31] Ibid.

[32] Ibid at para 13 per Vereshchetin J.

[33] Ibid at paras 4, 6-8.

> In the present case, the Application of Yugoslavia contains a section bearing the title "Subject of the Dispute", which indicates the subject as acts of the Respondent...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...
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> [T]he legal dispute before the Court consists of a number of constituent elements. Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise...
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> It is true that the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration. But aerial bombing and its effects are merely facts or situations and as such do not constitute a legal dispute. The constituent elements of the present dispute are not present before the critical date and only exist at and from the date of Yugoslavia's Application on 29 April 1999. It is true that, prior to the critical date, Yugoslavia had accused NATO...of illegal use of force against it. However, this complaint constitutes at the most one of the many constituent elements of the dispute...The legal dispute only arose at the date of the Application, which is subsequent to the signature of the declaration of acceptance. Therefore, the time condition in order for the present dispute to be within the scope of acceptance of compulsory jurisdiction *ratione temporis*, as contained in Yugoslavia's declaration, has been satisfied.

Since Yugoslavia's intention was clearly stated in the subject of its disputes, the Court was wrong when it over-simplified the matter by denoting the claim as the legality of "use of force" or the legality of the bombings. The breach of an obligation continues as long as the act complained of continues. This is well recognised, as reflected in Article 25 of the International Law Commission's 1996 Draft Articles on State

Responsibility. This provision appears as follows:[34]

> The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

According to Shi J, "[the] concept of the duration of a 'continuing' wrongful act is commonly accepted by international tribunals and legal scholars".[35] He said:[36]

> [T]he dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia...It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date of 25 April 1999. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of Respondent State cease or when the international obligations alleged to be breached by the acts of that State cease to exist or are no longer in force for it.

When referring to Draft Article 25, Weeramantry J said:[37]

> [T]he time of commission of a breach extends over the entire period during which the act continues and that in the case of a series of acts or omissions the breach of international obligation occurs at the moment when the particular act or omission is accomplished.

Even if one were to regard Yugoslavia's initial disputes with the respondents as having arisen before 25 April 1999, as long as they had continued beyond that date, they could and should be treated as a series of incidents that took place after that date. If so, the disputes with respect to

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[34] See International Law Commission, 1996 Report, GAOR, 51st Session, Supplement 10.
[35] Refer note 1 at para 12.
[36] Ibid at para 13.
[37] Ibid at para Jurisdiction *ratione temporis* (e).

every alleged violation by the respondents could be said to have arisen after Yugoslavia's declaration.

Alternatively, the whole series of alleged breaches could be divided into pre-declaration and post-declaration breaches. If the breaches had been completed before 25 April 1999, they should be excluded by Yugoslavia's own limitation *ratione temporis*. But if they were continuing, they should qualify as breaches that fell within the scope of the subject of the disputes in question.

The separability of such alleged breaches was well stated by Vereshchetin J who had "no doubt" that the *prima facie* jurisdiction under the Optional Clause existed in respect of Belgium, Canada, Netherlands and Portugal.[38] He held that the various disputes presented in Yugoslavia's applications should be viewed by the Court as a single dispute or as disputes that existed before 25 April 1999. He added:[39]

> The Court is dealing with the specific legal disputes of Yugoslavia with the individual Respondent States. Each of these separate disputes may have the same origin but they became distinct bilateral legal disputes between individual States only after they had been presented...
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> From a different perspective, even after "the critical date" Yugoslavia has, with good reason, complained of a number of new major breaches of international law by the NATO States. Each of these alleged new major breaches...may be seen as constituting specific disputes... which clearly occurred after 25 April 1999.
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> The possibility of distinguishing between a "dispute of a general nature" on the one hand, and "specific disputes" on the other was admitted by the Court in one of its recent cases *(Libya v United Kingdom, ICJ Reports 1998, para 29).* Nothing in the jurisprudence of the Court justifies the suggestion that a specific legal dispute...may not be considered by the Court solely on the ground that it is linked with, or part of, a dispute excluded from the Court's jurisdiction...

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[38] Ibid at para 5.
[39] Ibid at paras 8-11.

The Optional Clause was so "sufficient to confer *prima facie* jurisdiction for the purposes of provisional measures" that Weeramantry J did not "think it necessary to examine the other grounds further".[40] To him, a "vast enterprise may be planned and conceived at a particular time and date but it does not follow that every major operation conducted within that enterprise over the ensuing months, if it gives rise to a claim at law, dates back to the conception of the entire enterprise".[41]

He emphasised that the NATO campaign "may involve several breaches of vastly different State obligations", and that it was "difficult to maintain that all such breaches of obligation occurred when the initial plan was conceived".[42] He observed that "the [Yugoslav] claim...asserts the violation of different legal obligations in respect of the different categories of damage",[43] including the following obligations:

1. not to use prohibited weapons;
2. not to cause extensive health and environmental damage;
3. not to interfere with the right to information;
4. to respect freedom of navigation on international rivers; and
5. not to commit any act of hostility towards historical monuments, works of art or places of worship.

Weeramantry J specifically noted, by way of examples, that the disputes arising from the bombing of an embassy, television station, passenger train, school or power station all arose when those acts in fact took place, and not before the acts were committed.[44] As a result, in the cases against Belgium, Canada, Netherlands and Portugal, the Court had erred in holding that it lacked *prima facie* jurisdiction, on the basis that it misinterpreted the limitation *ratione temporis* embodied in Yugoslavia's declaration.

JURISDICTION UNDER ARTICLE IX OF THE GENOCIDE CONVENTION

In all ten Requests, Yugoslavia had invoked Article IX of the Genocide Convention as a basis for the Court's jurisdiction. Article IX provides that disputes between the Contracting Parties "relating to the interpretation,

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[40] Ibid at para Admissibility and Jurisdiction 5.
[41] Ibid at para Jurisdiction *ratione temporis* (a).
[42] Ibid.
[43] Ibid at para Jurisdiction *ratione temporis* (c).
[44] Ibid.

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". Yugoslavia and the ten respondents were all parties to the Genocide Convention, but Spain and the United States, when ratifying the Convention, had chosen to exclude the provisions of Article IX by express reservation. Consequently, Yugoslavia could establish the Court's jurisdiction under Article IX only *vis-à-vis* the other eight respondents.

Inapplicability of Article IX Subject to Reservation

In the case against Spain, the Court noted that Spain's instrument of accession to the Genocide Convention contained a reservation "in respect of the whole of Article IX".[45] Since Yugoslavia had not objected to this reservation, the Court found that Article IX was inapplicable to the mutual relations between Spain and Yugoslavia.[46] It held that the Spanish reservation had excluded Article IX from the provisions of the Convention in force between Spain and Yugoslavia.[47] Further, it held that Article IX manifestly did not constitute a basis of jurisdiction in that case, not "even *prima facie*".[48]

The same conclusion was reached in the case against the United States. Since the United States had withdrawn its acceptance of the Court's jurisdiction *ipso facto* in 1985, it was not possible for Yugoslavia to make any jurisdictional claim on the basis of the Optional Clause. Therefore, Yugoslavia focused on Article IX of the Genocide Convention. But it was equally difficult to establish the Court's jurisdiction in this way because the United States, when ratifying the Convention on 25 November 1988, had specifically opted out of the provisions of Article IX by making the following reservation:[49]

> [W]ith reference to Article IX of the Convention, before any dispute to which United States is a party may be submitted to the jurisdiction of

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[45] Refer note 1 (Yugoslavia v Spain) at para 29.
[46] Ibid at para 30.
[47] Ibid at para 32.
[48] Ibid at para 33.
[49] Ibid (Yugoslavia v United States) at para 21.

the International Court of Justice under this Article, the specific consent of United States is required in each case.

The Court therefore arrived at the following conclusions:

1. the Genocide Convention did not prohibit reservations;
2. Yugoslavia had not objected to the United States reservation to Article IX;
3. the United States' reservation had the effect of excluding Article IX from the provisions of the Convention in force between the United States and Yugoslavia, and
4. Article IX could not be used to found the Court's jurisdiction to entertain the dispute between Yugoslavia and the United States, not "even *prima facie*".[50]

On the whole, the cases against Spain and the United States were the least controversial. The United States, no longer bound by the Optional Clause declaration, and having made a reservation to Article IX, was clearly not subject to the Court's jurisdiction. Further, the Court's jurisdiction could not be founded in the case against Spain because of the waiting time condition in its Optional Clause declaration and its reservation to Article IX. Removal of these two cases from the Court's General List was therefore inevitable and a matter of time.

Nevertheless, the Court should not have removed these cases from the General List at this stage, nor should it have denied Yugoslavia's requests for *interim* protection. Owing to the extremely urgent nature of the requests, the decision of the Court could be viewed as rushed. If so, it would increase scepticism about the Court's fairness and justness. The magnitude and urgency of the suffering of Yugoslavia and its people were such that the Court should have indicated provisional measures against the respondents. This was what happened in *Paraguay v United States*[51] and the *LaGrand case,*[52] and these cases had been less urgent and less significant. The dismissal of the cases against Spain and the United States at this time by the Court could be viewed as premature and could deliver a

[50] Ibid at paras 24-25.
[51] Refer note 4.
[52] Refer note 5.

wrong message, especially to allies of Yugoslavia, that the respondents could continue in acts of aggression against Yugoslavia.

Applicability of Article IX not Subject to Reservation

Since France, Germany and Italy did not accept the compulsory jurisdiction of the Court under the Optional Clause, Yugoslavia had to rely on Article IX of the Genocide Convention as the primary basis for the Court's jurisdiction in the applications against these states. In addition, none of them had entered a reservation to Article IX. This is a bit dissimilar to the applications against Belgium, Canada, Netherlands, Portugal and the United Kingdom because in those cases Yugoslavia had invoked Article IX as the secondary basis for the Court's jurisdiction.

The Court acknowledged this argument stating that Article IX appeared "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, application or fulfilment' of the Convention".[53]

However, the Court added that it was "not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia" against the eight respondent states were "capable of coming within the provisions of the Genocide Convention".[54] Further, Article IX could not "constitute a basis on which the jurisdiction of the Court could *prima facie* be founded".[55] As a result, the Court concluded the following:

1. the Court lacked "*prima facie* jurisdiction" and could not "indicate any provisional measure whatsoever in order to protect the rights invoked" in Yugoslavia's Applications;[56]
2. the Court's findings in no way prejudged the question of the Court's jurisdiction to deal with the merits of the cases under Article IX of the Genocide Convention, or any questions relating to the admissibility of the Applications, or relating to the merits themselves;[57] and

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[53] Refer note 1 (Yugoslavia v France, Germany, Italy) at para 24.
[54] Ibid at para 28.
[55] Ibid.
[56] Ibid at para 32.
[57] Ibid at para 33.

3. such findings left "unaffected the right of the Governments of Yugoslavia" and each respondent state "to submit arguments in respect of those questions".[58]

The above conclusions of the Court may, once again, appear premature to some. Since the Court was not in a position to determine if the acts of the respondents came within the Genocide Convention "at this stage of the proceedings", this question should be resolved in a later phase. Whether the acts of the respondents were within the scope of the Genocide Convention was itself in dispute, as a question of interpretation of the Convention. As such, the question should have been left for later determination by the Court and should not have been dealt with during the urgent proceedings for the indication of provisional protective measures.

The Court had stated that there were two questions: (1) did the alleged breaches fall within the provisions of the Genocide Convention? and (2) was the dispute one that the Court had jurisdiction *ratione materiae* to entertain pursuant to Article IX of the Convention?[59] Referring to Article II of the Convention the Court held:[60]

1. the essential characteristic of genocide was the intended destruction of "a national, ethnical, racial or religious group";
2. the threat or use of force against a State could not in itself constitute an act of genocide within the meaning of Article II; and
3. it did not appear at the present stage of the proceedings that the bombings which formed the subject matter of the Yugoslav Application entailed "the element of intent" that was required by Article II towards a group as such.

Although it is true that "the threat or use of force against a State cannot in itself constitute an act of genocide", to make this statement at this stage and

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[58] Ibid.

[59] Ibid (Yugoslavia v Belgium) at para 41; (Yugoslavia v Canada) at para 37; (Yugoslavia v France, Germany, Italy) at para 25; (Yugoslavia v Netherlands) at para 38; (Yugoslavia v Portugal) at para 37; (Yugoslavia v United Kingdom) at para 33. The Court cited Oil Platforms (Islamic Republic of Iran v United States) Preliminary Objection [1996] II International Court of Justice Reports 810 at para 16.

[60] Refer note 1 (Yugoslavia v Belgium) at para 43; (Yugoslavia v Canada) at para 39; (Yugoslavia v France, Germany, Italy) at para 27; (Yugoslavia v Netherlands) at para 40; (Yugoslavia v Portugal) at para 39; (Yugoslavia v United Kingdom) at para 35.

within the context of ongoing excessive NATO bombing could be viewed as not only unnecessary but potentially misleading also. It could even be construed by some as approval of NATO's military operations and encouragement to engage in the use or threat of force.

The Court may have been right, albeit not unquestionably so, in holding that the crucial element of intent had been absent in the acts of the respondents complained of. This is in spite of the effects of the bombings, which had inflicted on a group of Yugoslavs conditions that could be seen as calculated to bring about the physical destruction in whole or in part of Yugoslavia. However, as stated above, this should have been a question for a later stage of the proceedings when the merits of the case were dealt with, rather than in proceedings involving urgent requests for provisional protection. Consequently, the Court should have acknowledged the existence of *prima facie* jurisdiction at this stage given the nature of the actual disputes in question.

According to Yugoslavia, a dispute had arisen over the interpretation of the Genocide Convention. It alleged that its disputes with the respondents concerned their individual acts which amounted to violations of their international obligations as follows:[61]

1. not to use force against another state;
2. not to intervene in the internal affairs of another state;
3. not to violate the sovereignty of another state;
4. to protect the civilian population and civilian objects in wartime;
5. to protect the environment;
6. to respect the freedom of navigation on international rivers;
7. to respect fundamental human rights and freedoms;
8. not to use prohibited weapons; and
9. not to inflict deliberately conditions of life calculated to cause the physical destruction of a national group in whole or in part.

Yugoslavia had specifically claimed that each respondent had participated in activities that breached the above obligations, including the use of depleted uranium, causing enormous environmental damage. As such, they had acted against Yugoslavia in breach of their obligation (1) not to deliberately inflict on a national group conditions of life calculated to bring

[61] Refer note 2.

about its physical destruction;[62] and (2) not to breach Article II of the Genocide Convention.[63] Yugoslavia had averred in the following words:

> The Government of [each respondent], together with the Governments of other Member States of NATO, took part in the acts of use of force against...Yugoslavia by taking part in bombing targets in...Yugoslavia. In bombing...Yugoslavia military and civilian targets were attacked. Great numbers 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 ...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.[64]

In addition, during the public hearings Yugoslavia claimed the following as violations of Article II:[65]

> 4.1 Continued bombing of the whole territory of the State, 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.
>
> 4.2. The Respondents have used weapons containing depleted uranium...It is well known that the radiation hazard materialized in the case of a large number of US soldiers participating in actions against Iraq....Far-reaching health and environmental damage is a matter of certain pre-knowledge of the Respondents, and that *implies the intent* to destroy a national group as such in whole or in part.

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[62] Ibid.
[63] Genocide Convention Article II(c).
[64] Refer note 2.
[65] CR 99/14 (Yugoslavia) at para 4.1-4.4.

4.3. On the night of 2 May 1999 and later, the Respondents bombed power plants, transformer stations and transmission lines, destroying the largest part of the country's power supply system and leaving almost all users without electricity. By this act the Respondents have targeted the Yugoslav nation as a whole and as such. In the present-day world electricity is an element of survival of society. The Respondents had to be aware that the destruction of the power supply system of a country can produce enormous consequences, including loss of human life. This is also a matter of certain pre-knowledge on the part of the Respondents and *implies the intent* to destroy the Yugoslav national group.

4.4. The above facts substantiate the qualification of the crime of genocide.

Thus, at the stage dealing with the urgent requests for the indication of *interim* measures a legal dispute existed, raising two questions. The first was whether what was being done to Yugoslavia was being done deliberately. The second was whether the obligation under Article II(c) of the Genocide Convention was being breached by the respondents.

At this stage, the dispute appeared to satisfy the requirement of Article IX of the Genocide Convention regarding "the interpretation, application or fulfilment" of that obligation. If the Court's jurisdiction to deal with the merits under Article IX were to remain open, it is arguable that there was nothing to preclude the Court from entertaining the most urgent requests of Yugoslavia under the circumstances. The Court could have indicated provisional measures without prejudging the issue of jurisdiction on the merits at this stage when *interim* protection was dealt with. This meant that the Court could have granted Yugoslavia's requests for provisional measures by leaving the issue of jurisdiction for subsequent proceedings.

JURISDICTION UNDER BILATERAL TREATIES

In the applications against Belgium and Netherlands, Yugoslavia invoked a provision contained in two bilateral treaties that would have established the Court's jurisdiction. Although this additional jurisdictional basis was not contained in the initial applications, nothing in the practice of the Court and its Statute and Rules disallowed the introduction of new arguments at a

later stage. During the second round of hearings on 12 May 1999, Yugoslavia therefore presented this argument *vis-à-vis* Belgium by stating:

> Yugoslavia and Belgium have concluded the Convention of Conciliation, Judicial Settlement and Arbitration. The Convention was signed at Belgrade on 25 March 1930. And it is in force. Pursuant to Article 4 of the Convention, the two Parties agreed as follows:
>
> 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...[66]

In the case against Netherlands, Yugoslavia invoked the Treaty of Judicial Settlement, Arbitration and Conciliation signed between the two states at The Hague on 11 March 1931. Article 4 of this treaty provides:[67]

> If, in the case of one of the disputes referred to in Article 2, the two Parties have not had recourse to the Permanent Conciliation Commission, or if that Commission has not succeeded in bringing about a settlement between them, the dispute shall be submitted jointly under a special agreement, either to the Permanent Court of International Justice, which shall deal with the dispute subject to the conditions and in accordance with the procedure laid down in its Statute, or to an arbitral tribunal which shall deal with it subject to the conditions and in accordance with the procedure laid down by the Hague Convention of October 18, 1907 for the Pacific Settlement of International Disputes.
>
> If the Parties fail to agree as to the choice of a Court, the terms of the special agreement, or in the case of arbitrator procedure, the appointment of arbitrators, either Party shall be at liberty, after giving one month's notice, to bring the dispute, by an application, direct before the Permanent Court of International Justice.

The 1930 Convention and the 1931 Treaty would provide an alternative basis upon which the Court could establish its jurisdiction over Belgium

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[66] CR 99/25 (Yugoslavia).
[67] Ibid.

and Netherlands. But the Court rejected these jurisdictional arguments once again and instead stated that at this stage of the proceedings, Yugoslavia had given no explanation for filing its "Supplement to the Application invoking the 1930 Convention with Belgium and the 1931 Treaty with the Netherlands."[68] However, by so doing, it ignored the extraordinary and urgent circumstances put by Yugoslavia.

The Court held:[69]

> [T]he invocation by a party of a new basis of jurisdiction in the second round of oral argument on a Request for the Indication of Provisional Measures has never before occurred in the Court's practice; ... such action at this late stage, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice...[I]n consequence the Court cannot, for the purpose of deciding whether it may or may not indicate provisional measures in the present case, take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999.

It appears that the Court had made a mistake by stating that the introduction of a new jurisdictional basis subsequently "has never before occurred in the Court's practice".[70] In the *Nicaragua case,* for example, the Court had convincingly stated the following:[71]

> The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself institute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified 'as far as possible' in the application. *An additional ground of jurisdiction may however be brought to the Court's attention later*, and the Court may take it into account provided the Applicant makes it clear that it

[68] Refer note 1 (Yugoslavia v Belgium, Netherlands) at para 42.
[69] Ibid at para 44.
[70] Ibid.
[71] Nicaragua case at 426-427 para 80.

> intends to proceed upon that basis *(Certain Norwegian Loans*, ICJ Reports 1957, p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de Belgique*, P.C.I.J. Series A/B, No. 78, p. 173). [emphasis added]

Further, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia),*[72] the Court had similarly recognised the above rationale by holding that, for the purposes of a request for the indication of provisional measures, the Court should not:[73]

> exclude *a priori* such additional bases of jurisdiction from consideration, but that it should consider whether the texts relied on may, in all the circumstances, including the considerations stated in the decision quoted above, afford a basis on which the jurisdiction of the Court to entertain the Application might *prima facie* be established.

Even if it were true that a new ground of jurisdiction had never been invoked in the second round of oral argument in the practice of the Court, this would not necessarily mean that such invocation is prohibited altogether. The excuse that there was lack of precedent in this regard should not constitute a bar to Yugoslavia invoking the 1930 Convention in relation to Belgium and the 1931 Treaty in relation to Netherlands. While the invocation of a new jurisdictional ground after the filing of the application should be discouraged, it is not prohibited by the Statute of the Court or by its Rules. The Optional Clause provides that "the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based".[74]

This provision makes it clear that an application must list *as far as possible*, rather than *all*, the legal grounds upon which the Court's jurisdiction is to be based. There is no legal provision that precludes an applicant from referring to additional grounds for jurisdiction after the application is filed or in the second round of oral arguments. In his dissent, Vereshchetin J was therefore correct when he held:[75]

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[72] [1993] International Court of Justice Reports 3 ("Genocide case") at 338 para 28.
[73] Ibid.
[74] Rules of Court Article 38(2).
[75] Refer note 1 (Yugoslavia v Belgium, Netherlands).

> In my view, the conditions set out by Article 38 of the Rules of Court and in its jurisprudence are fully satisfied in the present cases. The jurisprudence of the Court clearly shows that for the purposes of a Request for the Indication of Provisional Measures additional grounds of jurisdiction may be brought to the Court's attention after filing of the Application...

The Court had concluded that Yugoslavia had failed to explain why it invoked a new basis of jurisdiction in the second round of oral arguments. However, the official record of the proceedings appears to suggest that Yugoslavia did not have, or was not given, the chance to explain its position after Belgium and Netherlands had raised objections to the new jurisdictional ground. If one were looking for excuses, it is possible that the omission of the two treaties from Yugoslavia's pleadings were due to the urgency surrounding the preparation of its applications and the extreme hardship faced by Yugoslavia at the time.

In all its applications, Yugoslavia had expressly reserved "the right to amend and supplement" them at a later stage.[76] Vereshchetin J found that such a reservation was "standard, and in relation to grounds of jurisdiction had for a long time been interpreted by the Court as permitting the addition of a basis of jurisdiction".[77] Accordingly, in relation to the applications against Belgium and Netherlands, the Court should have considered the above express reservation and the urgent circumstances surrounding Yugoslavia's applications.

The Court had relied on "the principle of procedural fairness and the sound administration of justice" when it refused to consider Yugoslavia's newly invoked jurisdictional ground *vis-à-vis* Belgium and Netherlands. But this argument is a two-edged sword because conversely, it may be argued that "the principle of procedural fairness and the sound administration of justice" would have required the Court to allow Yugoslavia to introduce new pleadings, or amend its pleadings. Moreover, it is arguable that the urgent circumstances of the case would make Yugoslavia's resort to new grounds of jurisdiction appear reasonable and justifiable, without affecting procedural fairness. As Vereshchetin J had stated:[78]

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[76] Refer note 2 last para.
[77] Refer note 1 (Yugoslavia v Belgium, Netherlands).
[78] Ibid.

> [Yugoslavia] may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

EXTREME URGENCY AND *PROPRIO MOTU* EXAMINATION

In the public hearings relating to all ten Requests, Yugoslavia had urged the Court to consider its requests for the indication of provisional measures *proprio motu* due to the greatest urgency of the matter.[79] The Court's power to indicate provisional measures *proprio motu* is inherent in the Court because it is the principal judicial organ of the United Nations, with a special role in the peaceful settlement of international disputes and the maintenance of international peace and security. This is expressly provided for in Article 75(1) of the Rules of Court.

Under this provision, the Court "may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties".[80] According to its own interpretation of this provision in the *LaGrand case*, "the Court may make use of this power, irrespective of whether or not it has been seised by the parties of a Request for the Indication of Provisional Measures". Further, in cases of extreme urgency, the Court may "proceed without holding oral hearings".[81]

The extraordinary and urgent circumstances that led Yugoslavia to seek the Court's timely and urgent action had a precedent in the two recent cases on provisional measures mentioned above, *Paraguay v United States* and the *LaGrand case*. In the present case, Yugoslavia had asked the Court to stop further humanitarian disasters and to prevent the disputes from becoming more aggravated. In *Paraguay v United States*, the Court had ordered provisional measures within a week of receiving Paraguay's request.[82] In the *LaGrand case,* the Court had reiterated that the "importance and sanctity of an individual human life are well established in international

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[79] CR 99/14 (Yugoslavia) by Agent Suy, section 3, "Urgency" (translation).
[80] Rules of Court Article 75(1).
[81] Refer note 5 at para 21.
[82] Refer note 4.

law" and indicated provisional measures within 24 hours of Germany's request.[83]

In *Paraguay v United States* and the *LaGrand case,* the life of only one individual was at stake. On the other hand, in the *Legality cases,* the lives of hundreds of thousands were in immediate and extreme jeopardy as their entire country was being bombed and the extraordinariness and urgency of the Yugoslav applications were on a larger scale. Yet the Court took more than a month before it rendered its Orders on 2 June 1999. Further, the Court refused to indicate interim measures in all ten cases, although it manifestly had jurisdiction in some of them. As stated by Shi J in his dissenting opinion:[84]

> [C]onfronted with that urgent situation, the Court ought to have contributed to the maintenance of international peace and security in so far as its judicial functions permit. The Court would have been fully justified in point of law if, immediately upon receipt of the request by the Applicant for the indication of provisional measures, and regardless of what might be its conclusion on *prima facie* jurisdiction pending its final decision, it had issued a general statement appealing to the Parties to act in compliance with their obligations under the Charter of the UN and all other rules of international law relevant to the situation, including international humanitarian law, and at least not to aggravate or extend their dispute...
>
> [B]y virtue of the purposes and principles of the Charter, including Chapter VI (Pacific Settlement of Disputes), the Court has been assigned a role within the general framework of the United Nations for the maintenance of international peace and security. There is no doubt that to issue such a general statement of appeal is within the implied powers of the Court in the exercise of its judicial functions. It is deplorable that the Court has failed to take an opportunity to make its due contribution to the maintenance of international peace and security when that is most needed...

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[83] Refer note 5 at para 8. In its request for the indication of provisional measures, Germany referred to the 1966 International Covenant on Civil and Political Rights. Article 6 states that "every human being has the inherent right to life and this right shall be protected by law".

[84] Refer note 1 at para 16.

> In the recent *LaGrand* case, the Court, at the request of the Applicant State and despite the objection of Respondent State, decided to make use of its above-mentioned power under Article 75, paragraph 1, of the Rules of Court without hearing Respondent State in either written or oral form (*Order of 3 March 1999,* paras. 12 and 21). By contrast, in the present case the Court failed to take any positive action in response to the similar request made by Yugoslavia in a situation far more urgent than that in the former case.

Similarly, Weeramantry J referred to the extreme urgency of Yugoslavia's applications in the following manner:[85]

> All over Yugoslavia, lives are being lost every day, people are seriously injured and maimed and property loss of various descriptions is being sustained...
>
> The Court is so sensitive to considerations of urgency especially where they concern the possible loss of human life that it has moved within a week...or indeed within a day...to issue provisional measures where a single human life was involved. Without needing to elaborate upon the factual details of the deaths and damage alleged...to have been caused by the bombing of Yugoslavia by NATO forces and without elaborating on the allegations of continuing human rights violations ...by the Applicant in Kosovo as alleged by the Respondent, it is clear that great urgencies exist in the present case. These urgently call for the issue of appropriate provisional measures preserving the rights of both Parties, preventing the escalation of the disputes and allaying the human suffering referred to in the allegations of both Parties. I do not think that the complexity of the issues takes away from the need to act with urgency in a matter of urgency - particularly where the urgencies are as telling as in the matter now before the Court.

Further, Kreca J *ad hoc* in dissent had observed the following after discussing *Paraguay v United States* and the *LaGrand case*:[86]

> [H]umanitarian concern represented an aspect which brought about unanimity in the Court's deliberations. This is clearly shown not only

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[85] Ibid at para 19.
[86] Ibid (Yugoslavia v Belgium et al) at para 5(a).

> by the letter and spirit of both Orders in the above-mentioned cases, but also by the respective declarations and the separate opinion appended to those Orders. In the process, humanitarian considerations seem to have been sufficiently forceful to put aside obstacles standing in the way of the indication of provisional measures.

Moreover, he observed that humanitarian concern in the *Legality cases* had "as its object the fate of an entire nation, in the literal sense".[87] He stated:[88]

> Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world...
>
> [T]he arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time...
>
> [T]he Court is, *in concreto*, confronted with an uncontestable case of 'extreme urgency' and 'irreparable harm', which perfectly coincides, and significantly transcends the substance of humanitarian standards which the Court has accepted in previous cases.

Vereshchetin J arrived at a similar conclusion, pointing out that the extraordinary nature and urgency of the *Legality cases* required the Court to act with equal urgency. For instance, he stated:[89]

> 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 UN, 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

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[87] Ibid at para 6(2).
[88] Ibid at para 6(3), (8) and (20).
[89] Ibid at para 1.

> Statute in relation to one or another of 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 UN. 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.

Vereshchetin J noted that Yugoslavia had urged the Court "to uphold the rule of law in the context of large-scale gross violations of international law".[90] He added that "[i]nstead of acting expeditiously and, if necessary, *proprio motu*", the Court had rejected the requests after taking more than one month to consider the urgent requests. This delay had also been extended to the question of the *prima facie* jurisdiction of the Court, even though the circumstances of the case involved the bombardment of heavily populated areas in various parts of Yugoslavia.[91]

CONCLUSION

Some may find it difficult to reconcile the judgment of the Court in the *LaGrand case* and the *Legality cases.* If LaGrand, a convicted killer, was entitled to "the inherent right to life" and immediate protection of the Court, it is arguable that innocent people in Yugoslavia, from different ethnic groups, should have been given similar protection, especially when they were being exposed to danger on a larger scale. From this perspective, the applications of Yugoslavia should have been granted on the basis of protection under international humanitarian law.

Overall, the Court's rejection of Yugoslavia's applications in all ten Requests has negative implications. First of all, it does not appear to accord with precedent. The Court's failure to do what it could have done, at least in the short term, may have a negative impact on the confidence of non-Western states in the Court's impartiality. If so, this would be a regressive

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[90] Ibid at para 2.
[91] Ibid.

step, especially after the forward steps taken pursuant to its decision in the *Nicaragua case*. Now, such states may be discouraged from submitting their disputes to the Court, especially those that involve Western states as the respondent.

In addition, some states may view the Court's rejection of Yugoslavia's applications as delivering a wrong message to the international community in relation to the use of force in violation of the United Nations Charter and general international law. They may consider the rejection as support for the alleged war of aggression against Yugoslavia. It is likely they would be disappointed with the Court's reluctance to accord more weight to humanitarian considerations such as those presented by Yugoslavia in its pleadings.

By failing to seize the opportunity to uphold fundamental principles of international law, the Court in the *Legality cases* has given a blow to the international legal system and some commentators have been quick to point out the inadequacies of the decision. For example, Olivier Ribbelink observed that the Court had opted for a "safe way" by refusing Yugoslavia's request to order a halt to the NATO bombings.[92] Others have stated that "there is no international legal justification for the bombing", noting in particular that no resolution of the United Nations Security Council ever authorised such use of force.[93]

The decisions have been criticised as "politicized".[94] Some states have openly expressed their regret and disappointment with the Court's rulings. For example, China "deeply" regretted the decisions, stating that they should have been "just" rulings in accordance with law and the facts of the case.[95] It indicated "deep concern" that "relevant international judicial organs have tended to become politicized recently", adding that "they should make efforts to safeguard the prestige of the law and the people's

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[92] Janet McBride, "World Court Rejects Yugoslav Bid to Stop NATO", Lycos News at http//:news.lycos.com/stories/World/19990602RTINTERNATIONAL-YUGOSLAVIA-COURT.asp (visited on 2 June 1999 but no longer accessible).
[93] Ibid.
[94] Ibid.
[95] See comments of the Chinese Foreign Ministry Spokesperson on the Court's denial of Yugoslavia's request in "Jiu Guoji Fayuan bohui Nan Qisu, Wo Waijiao Bu Fayanren Fabiao Pinglun" 4 June 1999, People's Daily 1.

expectation that there is a judiciary they can trust".[96] As the judicial arm of the United Nations, the Court cannot afford to allow itself to be perceived as an organ of NATO or any state or group of states for that matter.

[96] Ibid.