the Oklahoma Court of Criminal Appeals had set an execution date of 18 May 2004 for Mr Torres Aguilera. It is therefore interesting to observe that as a consequence of the *Avena* case, that same Court granted an indefinite stay of execution in this case and remanded the case for evidentiary hearing on several issues.[38] Several hours later, Governor Brad Henry commuted the death sentence to life without parole, stating that 'he took into account the fact that the United States signed the 1963 Vienna Convention and [was] part of that treaty. In addition, the United States State Department contacted [his] office and urged [him] to give "careful consideration" to that fact'.[39]

In his comment on the Provisional Measures Order in this journal, the author commented that perhaps the *Avena* case would signal a new norm of compliance with such orders.[40] It is, perhaps, not too premature to suggest that in the light of the municipal outcome of the *Torres* case the Court has at last convinced both the United States federal and state authorities to observe its orders and judgments and abide by its international treaty commitments in such death penalty cases. This is certainly a welcome development.

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II. LEGALITY OF USE OF FORCE (*SERBIA AND MONTENEGRO v BELGIUM*) (*SERBIA AND MONTENEGRO v CANADA*) (*SERBIA AND MONTENEGRO v FRANCE*) (*SERBIA AND MONTENEGRO v GERMANY*) (*SERBIA AND MONTENEGRO v ITALY*) (*SERBIA AND MONTENEGRO v NETHERLANDS*) (*SERBIA AND MONTENEGRO v PORTUGAL*) (*SERBIA AND MONTENEGRO v UNITED KINGDOM*): PRELIMINARY OBJECTIONS. JUDGMENT OF 15 DECEMBER 2004[1]

A. Introduction

This is a surprising—and disquieting—judgment which raises serious questions about the role of the Court. *The Legality of Use of Force* cases began in 1999 when the Federal Republic of Yugoslavia (FRY)[2] first brought an action against ten NATO

[38] *Torres v The State of Oklahoma*, No PCD – 04-442, 13 May 2004.
[39] www.acluok.org/NewsEvents/OsbaldoTorresClemency.htm
[40] (2004) 53 ICLQ 738 at 746.

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[1] ICJ Reports 2004. For convenience references in this note will be made to the judgment in *Serbia and Montenegro v Belgium*; the eight judgments are in almost all particulars identical. This is reflected in the Court's rejection of the requests for ad hoc judges by those respondent States without judges of their nationality on the Bench, even though Serbia and Montenegro no longer maintained its opposition to their appointment. The Court's decision to reject the nomination of ad hoc judges was based on Article 31(5) of the Statute which provides: 'Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.' The Court said that it had taken into account the presence upon the Bench of judges of British, Dutch and French nationality (judgment paras 17–18).

[2] As the Court explained (at para 25), 'The official title of the Applicant in these proceedings has changed during the period of time relevant to the present proceedings.' On 27 Apr 1992 the Federal Republic of Yugoslavia (FRY) was established; it claimed to be the continuation of the Socialist Federal Republic of Yugoslavia (SFRY). On 1 Nov 2000 the applicant was admitted to

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States for their use of force in Kosovo.[3] In December 2004 the Court decided unanimously that it had no jurisdiction to decide the cases. However, this unanimity masked a fundamental disagreement between the judges: it is apparent from the Joint Declaration of Judges Ranjeva, Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby that the judges were strongly divided, by eight to seven, on the reasoning which led them to agree that there was no jurisdiction.

The Court's reasoning is extremely problematic; it is based on Article 35 of the Statute of the ICJ which specifies the States which are entitled to be parties before the Court (jurisdiction *ratione personae*). The Court's approach is inconsistent with the position it had taken at the Provisional Measures stage of this case.[4] It also has serious implications for an ongoing case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (the *Bosnia Genocide* case), and it appears to conflict with the approach taken earlier in the *Bosnia Genocide* case at the Provisional Measures (1993)[5] and Preliminary Objections (1996)[6] stages and in the *Application for Revision of the Judgment of 11 July 1996* (the *Application for Revision*).[7] A complex sequence of interrelated decisions are thus involved in any consideration of the significance of the current case.

During and after the 1991–5 conflict in the former Yugoslavia the FRY maintained that it was the continuation of the former Socialist Federal Republic of Yugoslavia (SFRY) and thus entitled to the SFRY's seat in the UN and to be a party to the Statute of the ICJ. According to the FRY, the other republics of the former SFRY—Slovenia, Croatia, Bosnia-Herzegovina and Macedonia—had seceded and the SFRY was a continuing entity.[8] The issue was controversial and the UN did not take a clear view on the matter.

B. The Court avoids deciding on the status of the FRY in earlier cases

In the *Bosnia Genocide* case the Court had avoided a decision on the status of the FRY. Under Article 35(1) of its Statute: 'The Court shall be open to the states parties to the present Statute.' Article 93(1) of the UN Charter provides that 'All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.' But the Court did not pronounce on the application of Article 35(1); it did not decide whether the FRY was at the relevant time a member of the UN and therefore a party to the Statute of the Court. Because the applicant State, Bosnia-Herzegovina, wanted to bring the case against the FRY, it did not press the argument that the FRY

membership of the UN under the name of the FRY. On 4 Feb 2003 it officially changed its name to Serbia and Montenegro.

[3] Two of these ten cases, those against Spain and the USA, were struck off the Court's List at the provisional measures stage because of manifest lack of jurisdiction: *Legality of the Use of Force* (Provisional Measures) ICJ Reports 1993, 761, 916.

[4] ICJ Reports 1999, 124; noted by C Gray at (2000) 49 ICLQ 730.

[5] Orders of 8 Apr and 13 Sept, ICJ Reports 1993, 3, 325; noted by C Gray at (1994) 43 ICLQ 704.

[6] ICJ Reports 1996, 596; noted by C Gray at (1997) 46 ICLQ 688.

[7] ICJ Reports 2003.

[8] M Craven 'The European Community Arbitration Commission of Yugoslavia' (1995) 66 BYIL 333; M Weller 'The International Response to the Dissolution of Yugoslavia' (1992) 86 AJIL 569.

was not a member of the UN. In its application to the Court it accepted—clearly for the sake of bringing the action — that the FRY was a party to the Statute, but said that its continuity with the former Yugoslavia 'had been vigorously contested by the entire international community'.[9] The Court did not commit itself on the issue. It said only that 'the question whether or not Yugoslavia (Serbia and Montenegro) is a member of the UN and as such a party to the Statute is one which the Court does not need to determine definitively at the present stage of proceedings'.[10] Rather than go into jurisdiction *ratione personae* under Article 35(1), the Court based its decision on jurisdiction on Article 35(2).[11] It accepted that the FRY was a party to the Genocide Convention and held that this gave jurisdiction to the Court.

Similarly, at the Provisional Measures stage of the *Legality of Use of Force* cases in which the FRY was the claimant State, the Court did not go into the question of its status under Article 35(1), but chose to refuse provisional measures on other grounds.[12] It held that there was no prima facie jurisdiction under the Optional Clause (Article 36(2) of the Statute) because the time limits in the FRY acceptance excluded claims based on the NATO campaign in Kosovo; there was thus no jurisdiction *ratione temporis*. Moreover, there was no prima facie jurisdiction under the Genocide Convention because the FRY claims did not support a case of genocide by the NATO States; there was thus no jurisdiction ratione materiae. Accordingly the Court could not award provisional measures. Although some respondent States had argued that the FRY was not a member of the UN or a party to the Statute, the Court did not find it necessary to consider this question as it had other grounds for finding no jurisdiction.[13] Three judges challenged this approach as illogical; they protested that the question whether the FRY was a member of the UN and a party to the Statute, and thus able to be sued before the Court, was logically prior to other jurisdictional issues.[14]

C. The FRY becomes a member of the UN in 2000

In 2000, after the overthrow of the government of Slobodan Milosevic, the FRY applied to become a new member of the UN and was admitted on 1 November. In March 2001 it deposited a notification of accession to the Genocide Convention.[15] The

[9] Order of 8 Apr 1993, ICJ Reports 1993, 3 at para 15.
[10] ibid para 18.
[11] See below at (F).
[12] Case note by C Gray at (2000) 49 ICLQ 730.
[13] *Case Concerning Legality of Use of Force (Provisional Measures)* 1999 ICJ Reports 124 at para 30–3.
[14] Judges Oda and Kooijmans argued that Serbia and Montenegro was not a member of the UN and therefore not able to accept the Optional Clause; in contrast Judge Kreca accepted Yugoslavia's view that it was a member of the UN and a party to the Statute. It is interesting that Judge Higgins in her Separate Opinion (at para 22) said that it was not necessary to decide complex issues at that stage. Such questions should be decided at the Jurisdictional Stage: 'Of course . . . it might be thought that the status of the FRY was a necessary "*préalable*" to everything else. But when dealing with provisional measures the Court is faced with unavoidable tensions between the demands of logic and the inability to determine with finality when operating under urgency in response to a request for provisional measures.' When the Court did decide to focus on the issue of jurisdiction *ratione personae* in the current case Judge Higgins held that it should have followed the same approach as it had at the Provisional Measures stage (Separate Opinion at para 19).
[15] *Application for Revision of the Judgment of 11 July 1996* case, ICJ Reports 2003 at para 52.

question thus arose as to the impact of these developments on the litigation before the International Court of Justice.

First, could this have any retroactive impact on the assertion of jurisdiction in the Bosnia Genocide case? In April 2001 the FRY made an Application for Revision under Article 61 of the Statute on the basis that its membership of the UN was a new fact justifying revision of the Court's earlier judgment asserting jurisdiction in the *Bosnia Genocide* case. Because the FRY had only now become a member of the UN, it could not earlier have been a member and so should not have been sued before the Court. The Court refused this application on the ground that the FRY's admission to the UN in 2000 was not a new fact. In its assessment of the significance of the new membership it said that the admission of the FRY to the UN

> cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the UN over the period 1992 and 2000, or its position in relation to the Statute of the Court and the Genocide Convention.[16]

Thus the *Bosnia Genocide* case seemed set to continue to the Merits stage.

D. A new approach in the Legality of Use of Force (Preliminary Objections) cases

However, in the current case the Court took a radically different line which seems to cast doubt on the future of the *Bosnia Genocide* case. After its admission to the UN, Serbia and Montenegro[17] changed its pleadings. It no longer asked the Court to decide that it had jurisdiction, as is normal for applicants. Rather, it asked the Court merely 'to decide on jurisdiction'.[18] It now claimed that at the time of the filing of its applications in 1999 it had *not* been a party to the Statute or to the Genocide Convention, thereby implying that the Court could not base its jurisdiction on the Optional Clause or on Article IX of the Genocide Convention. It did not offer any alternative basis of jurisdiction. Thus Serbia and Montenegro now seemed to accept the position of the respondent States who argued that the Court had no jurisdiction.

However, the Court rejected the claim by various respondent States that Serbia and Montenegro's position amounted to a discontinuance of the proceedings under Articles 88 and 89 of the Rules of the Court. The applicant had not informed the Court in writing that it was discontinuing the proceedings, nor had there been an agreement between the parties to this effect.[19] Nor did the Court use its own power to put an end to the proceedings. It said that, even though the parties may have arrived at a shared view on the question whether Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time of the institution of proceedings, the Court would not have to accept that view as necessarily the correct one.[20] Judges Higgins and Kooijmans in their Separate Opinions argued strongly that the Court should have used its inherent powers deriving from its judicial character to remove the case from its List. It could have relied on Article 38(2) of the Rules of the Court which requires the applicant to 'specify as far as possible the legal grounds upon which the jurisdiction of the Court is

[16] ibid at para 71.
[17] See n 2 above.
[18] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, ICJ Reports 2004 at para 29.
[19] ibid at paras 31–2.
[20] ibid at para 36.

said to be based'. These judges criticized Serbia and Montenegro for its failure to do so, for the 'disorderly nature of the course being followed by Serbia and Montenegro' and for its 'incoherent manner of proceeding'.[21] Serbia and Montenegro's failure to identify any ground for jurisdiction was 'incompatible with the respect due to the Court'.[22]

E. Article 35(1) of the Statute of the Court

The Court now turned to Article 35(1) of the Statute, and to the question it had avoided three times before:

> The question whether Serbia was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35(1) of the Statute.[23]

The Court seemed now implicitly to take the position rejected by it at the Provisional Measures stage—that in any decision on jurisdiction this question was logically prior to any other.[24] It deliberately chose not to rely on the same grounds for denying jurisdiction as it had at the Provisional Measures stage. It went out of its way to stress its freedom to select the ground upon which it would base its judgment.[25]

The Joint Declaration criticized the Court's choice to abandon the approach it had taken earlier in the case: 'In sum and contrary to its position in 1999, the Court has thus preferred to rule on its jurisdiction *ratione personae*, without even examining the questions of jurisdiction *ratione temporis* and *ratione materiae* on which it had previously pronounced *prima facie*.'[26] There had been strong reasons for denying jurisdiction at the Provisional Measures stage; it was odd to abandon these now in favour of a much more controversial ground.

In its consideration of the application of Article 35(1) the Court went at length into the sequence of events relating to the legal position of Serbia and Montenegro vis-à-vis the UN.[27] The Security Council and the General Assembly had passed resolutions saying that they did not accept the right of the FRY automatically to continue the membership of the former SFRY in the UN. However, the UN Legal Counsel had maintained that the only practical consequence of the resolutions was that the FRY could not participate in the work of the General Assembly. The resolutions did not terminate or suspend the FRY's membership in the UN. Moreover the FRY had continued to pay contributions to the UN budget. Between 1992 and 2000 the situation had

[21] Judge Higgins, Separate Opinion at para 16.

[22] Judge Kooijmans, Separate Opinion at para 24.

[23] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at para 46.

[24] Judge Kooijmans had argued at the Provisional Measures stage that the Court should have examined this issue as a matter of logical priority (Separate Opinion, at paras 2, 19–22). He now took the position that the Court was wrong to have gone into this question at the Preliminary Objections stage (Separate Opinion, at paras 2–11).

[25] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at para 46.

[26] Joint Declaration, at para 8.

[27] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at paras 52–64; see also examination of this question in *Application for Revision* ICJ Reports 2003 at paras 24–53.

remained complex. The Court acknowledged that the position had been ambiguous and open to different assessments, owing to the absence of an authoritative determination by the competent organs of the UN.[28] It decided that because the FRY had become a UN member in 2000 it followed that the *sui generis* position identified in the Application for Revision had ended. The Court went further: the FRY's admission to the UN did not have the effect of dating back to the time when the SFRY broke up; the FRY could not before its admission have been a member of the UN and a party to the Statute and therefore it was not entitled to sue in April 1999.[29] This crucial passage is very brief and was criticized in the Joint Declaration; the seven judges said: 'We find this position far from self-evident and we cannot trace the steps of the reasoning.'[30]

In coming to its conclusion the Court did not pay any deference to the reasoning in the Application for Revision; there the Court had said that admission of the FRY to the UN in 2000 had *not* retroactively changed the sui generis position of the FRY vis-à-vis the UN over the period 1992–2000, or its position in relation to the Statute of the Court and the Genocide Convention.[31] The Court now dismissed this in rather formalistic terms: 'There is no question of that Judgment possessing any force of *res judicata* in relation to the present case.'[32] Its statement in Application for Revision could not be read as a finding on the status of Serbia and Montenegro in relation to the UN and the Genocide Convention. The specific characteristics of the Article 61 procedure meant that there was no reason to treat the judgment in the Application for Revision as having pronounced on the issue of the legal status of Serbia and Montenegro.[33] It is true that technically the Court's reasoning in the Application for Revision could not constitute *res judicata* and was not binding in the current case, but it was nevertheless a clear expression by the Court of its views.

The Court's decision to base its decision on Article 35(1) is inconsistent with its approach at the Provisional Measures stage of this case, and its reasoning on Serbia and Montenegro's status is incompatible with that in the *Bosnia Genocide* case. This has serious implications for the *Bosnia Genocide* case: it is difficult to see how the Court can now give judgment in that case.

F. Article 35(2) of the Statute of the Court

These problems were compounded by the Court's decision to look into Article 35(2) as a possible basis for jurisdiction in the *Legality of Use of Force* cases, even though this provision had not actually been invoked by Serbia and Montenegro.[34] Article 35(2) provides:

[28] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at para 64.

[29] ibid para 75.

[30] Joint Declaration at para 12. Judge Higgins (Separate Opinion, para 19) and Judge Kooijmans (Separate Opinion, paras 4–5) also expressed doubts about the Court's reasoning on this crucial point. Judge Elaraby in his Separate Opinion argued that the FRY had in fact been a member of the UN in 1999.

[31] *Application for Revision* case, at para 71.

[32] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at para 80.

[33] ibid para 90.

[34] ibid para 92.

> The conditions under which the Court shall be open to other states [non-parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in position of inequality before the Court.

In unusually strong language the Joint Declaration called this decision by the Court 'astonishing'.[35] Judge Higgins went into a little more detail; she said that the examination of Article 35(2) was unnecessary for the present case and added (rather coyly) that: 'Its relevance can lie, and only lie, in another pending case.'[36] It is clear that this is the *Bosnia Genocide* case, in which the Court's jurisdiction had been based on Article 35(2).

The Court gave a ruling on the interpretation of Article 35(2) that was fundamentally at odds with its position in the *Bosnia Genocide* case. In the latter case the Court had taken a wide view of Article 35(2). With relatively little discussion it had accepted that access to the Court would be open to States not parties to the Statute of the Court if they were parties to a treaty providing for resort to the Court; it therefore found prima facie jurisdiction under the Genocide Convention as it accepted that both Bosnia-Herzegovina and Yugoslavia were parties.[37] The Court now threw its own earlier decisions open to doubt again. It said that the Order in the *Bosnia Genocide* case had been addressed to the situation in which the proceedings were instituted against a State whose membership of the UN was unclear. It was made in the context of incidental proceedings at the Provisional Measures stage and it would therefore now be appropriate for the Court to make a definitive finding on Article 35(2).[38] It went on to adopt an interpretation totally contradictory to that adopted earlier.

The key question under Article 35(2) was whether a compromissory clause such as that in the Genocide Convention gave non-parties to the Statute access to the Court. The Court held that a narrow interpretation of Article 35(2) was correct.[39] Relying on the *travaux préparatoires* of the Statute of the PCIJ and on earlier decisions of the Court, it held that the phrase 'the special provisions contained in treaties in force' should be interpreted as referring only to treaties *already in force* at the time the Statute came into force after the Second World War. It did not include *later* treaties such as the Genocide Convention:

> The court thus concludes that, even if Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35(2) of the Statute does not provide it with a basis to have access to the Court under Article IX of that Convention, since the Convention only entered into force . . . after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.[40]

[35] Joint Declaration at para 11.

[36] Judge Higgins, Separate Opinion at para 18.

[37] *Bosnia Genocide* case (Provisional Measures) ICJ Reports 1993, 3 at para 26. At the subsequent Preliminary Objections stage the Court said it had not been contested that Yugoslavia was party to the Convention and thus bound by its provisions at the date of the filing of the application in 1993 (*Bosnia Genocide* case Preliminary Objections ICJ Reports 1996, 595 at para 17).

[38] *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) Preliminary Objections, at para 98–9.

[39] The question has been raised whether, if a wide interpretation was adopted, an entity such as Taiwan, although not a member of the UN or a party to the Statute, might be able to become a party before the Court through the simple means of concluding a treaty with a compromissory clause such as that in the Genocide Convention.

[40] Judge Elaraby in his Separate Opinion (Section III) differed on this interpretation of Art 35(2).

The problematic feature is not that the Court was necessarily wrong in its interpretation of Article 35(2), but that there was no need for it to have involved itself in this issue at all. It could easily have avoided any discussion of Article 35(2) and thus obviated the need for conflict with its own earlier decisions. The language of this ruling by the Court also opens up the question: was Serbia and Montenegro a party to the Genocide Convention? This issue will be vital to the ongoing *Bosnia Genocide* case in which it had already been accepted that Serbia and Montenegro was a party.

G. Conclusion

In the current *Legality of Use of Force* cases the Court stressed its freedom to choose the grounds on which it would base its refusal of jurisdiction. But it did not adequately address the need for consistency in the Court's reasoning. In paragraph 40 it said that it 'cannot decline to entertain a case simply because its judgment may have implications in another case'. The Joint Declaration and Separate Opinions were rightly critical of this as inadequate. The Joint Declaration said that there should be three criteria governing the proper exercise of the judicial function which must guide the Court in selecting between possible options. First, the Court must ensure consistency with its own past case law in order to provide predictability; second, the principle of certitude should lead the Court to choose the ground which is most secure in law; third, as the principal judicial organ of the UN the Court should be mindful of the possible implications and consequences for other pending cases. But the Court was not constrained by these considerations; it contradicted earlier decisions and created serious problems for ongoing cases. The objection is not that the Court's views on Articles 35(1) and (2) were untenable but rather that it chose to abandon its own earlier reasoning which could have produced the same result without the difficulties. If a standing court does not offer consistency where this is easily achievable, then its role at a time when there is a proliferation of tribunals must be uncertain. This is in many ways an unsettling judgment and one which threatens to undermine the authority of the International Court of Justice.

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III. CASES BEFORE THE COURT

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*).

The Republic of Bosnia and Herzegovina instituted proceedings against Yugoslavia on 20 March 1993 alleging violations of the 1949 Genocide Convention and requesting an indication of provisional measures which was made in an order of 8 April 1993.[1] This was reaffirmed in an order of 13 September 1993,[2] following a second request for provisional measures made by Bosnia and Herzegovina on 27 July 1993 and a request

[1] ICJ Rep 1993, 3.
[2] ibid 325.

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