International Court of Justice

Case Concerning Legality of Use of Force

(Yugoslavia v. Belgium)

Preliminary Objections of the

Kingdom of Belgium

5 July 2000

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INTRODUCTION

1. By an Application dated 26 April 1999 filed with the Registry of the Court on 29 April 1999, the Federal Republic of Yugoslavia ("FRY") instituted proceedings against the Kingdom of Belgium ("Belgium") alleging the violation of various obligations arising from the use of force by the North Atlantic Treaty Organisation ("NATO") in the FRY. The Application charges that "Belgium, together with the Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia". It further charges that "Belgium is taking part in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army'". The legal grounds for the jurisdiction of the Court invoked by the FRY in its Application were Article 36(2) of the Court's *Statute* and Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("the Genocide Convention").[1] The Declaration filed by the FRY which forms the basis of its claim to jurisdiction under Article 36(2) of the *Statute* was dated 25 April 1999[2] and was deposited with the Secretary-General of the United Nations on 26 April 1999. The Belgian Declaration under Article 36(2) of the *Statute* is dated 17 June 1958.[3]

2. At the same time as the filing of its Application instituting proceedings against Belgium, the FRY filed separate Applications instituting proceedings on the basis of the same factual and legal allegations against the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Canada, Portugal and Spain.

3. Contemporaneously with its Application instituting proceedings against Belgium, the FRY also filed a *Request for the Indication of Provisional Measures* dated 28 April 1999 by which it requested the Court to order Belgium to "cease immediately its acts of use of force and [to] refrain from any act of threat or use of force against the Federal Republic of Yugoslavia".[4] Corresponding requests for the indication of provisional measures were submitted by the FRY in the parallel proceedings against the other nine Respondents.

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[1] 78 UNTS 277 **(Annex 1)**.
[2] **Annex 2.**
[3] **Annex 3.**
[4] *Request for the Indication of Provisional Measures*, 28 April 1999 ("Provisional Measures Request" or "Request"), at p.17.

4. The Court held hearings on the FRY's requests for the indication of provisional measures on 10-12 May 1999. In the course of those hearings, by a letter of 12 May 1999, the FRY sought to supplement its Application instituting proceedings against Belgium by invoking Article 4 of the *Convention of Conciliation, Judicial Settlement and Arbitration* of 1930 ("the 1930 Convention")[5] between Belgium and the Kingdom of Yugoslavia as an additional basis of the Court's jurisdiction.

5. By an Order of 2 June 1999, the Court rejected the FRY's request for the indication of provisional measures in respect of its proceedings against Belgium. The basis of the Order was the Court's determination that the relevant declarations of the Parties did not constitute a *prima facie* basis of jurisdiction under Article 36(2) of the *Statute*,[6] that Article IX of the *Genocide Convention* could not constitute a *prima facie* basis of jurisdiction[7] and that, in consequence of the late stage at which the *1930 Convention* was invoked as a basis of jurisdiction, the Court could not consider that Convention for the purpose of deciding whether it could indicate provisional measures.[8]

6. Similar Orders were made by the Court in respect of the requests for the indication of provisional measures by the FRY in its proceedings against Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom. In the proceedings against both Spain and the United States, the Court ordered that the cases be removed from the List on the grounds that the Court "manifestly lack[ed] jurisdiction to entertain Yugoslavia's Application" and that it "would most assuredly not contribute to the sound administration of justice" for the Court to maintain on the General List a case upon which it appears certain that it would not be able to adjudicate on the merits.[9]

7. By an Order of 30 June 1999, the Court fixed 5 January 2000 for the filing of the Memorial of the FRY and 5 July 2000 for the filing of the Counter-Memorial of Belgium. Pursuant to this Order, the FRY filed its Memorial, dated 5 January 2000, together with annexes, under cover of letters dated 4 January 2000.

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[5] 106 LNTS (1930-1931) 343, No.2455. **(Annex 4)**

[6] *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium): Request for the Indication of Provisional Measures*, Order of 2 June 1999, ("Provisional Measures Order"), at paragraph 30.

[7] *Provisional Measures Order*, at paragraph 41.

[8] *Provisional Measures Order*, at paragraph 44.

[9] Respectively *Case Concerning Legality of Use of Force (Yugoslavia v. Spain): Request for the Indication of Provisional Measures*, Order of 2 June 1999, at paragraph 35 and *Case Concerning Legality of Use of Force (Yugoslavia v. United States of America): Request for the Indication of Provisional Measures*, Order of 2 June 1999, at paragraph 29.

8. By Article 79 of the *Rules of Court* ("Rules"), any objection by the respondent *inter alia* to the jurisdiction of the Court or the admissibility of the application is to be made in writing within the time-limit for the delivery of the Counter-Memorial. In accordance with this requirement, Belgium submits these Preliminary Objections to the jurisdiction of the Court and the admissibility of the application in the present case.

9. The underlying issues of substance in this case involve allegations by the FRY against Belgium that, by "taking part in" action by NATO in the FRY, Belgium has violated various obligations of international law. Given the nature of the present phase of the case, and as Belgium objects to the jurisdiction of the Court and the admissibility of the application, Belgium makes no comment here on the substance of the FRY's allegations of fact and arguments of law or on the evidential propriety of and weight to be attributed to the material annexed to the FRY's Memorial in purported support of these allegations and arguments. For the avoidance of doubt, however, it may be noted that Belgium rejects the allegations raised against it by the FRY and that, were the Court to decide, contrary to Belgium's submissions herein, that it has jurisdiction to hear the case and that the application is admissible, Belgium would contest the allegations fully.

10. Neither this statement, nor any reference herein to the underlying factual context of this case or any other statement herein can be taken in any way as implying the submission by Belgium to the jurisdiction of the Court in this matter. Belgium does not here join argument with the FRY on the substance of its allegations.

11. Belgium's position on the jurisdiction of the Court and the admissibility of the application may be summarised as follows. As a preliminary matter, Belgium contends that the Court lacks jurisdiction in respect of claims advanced for the first time the FRY's Memorial but not in its Application instituting proceedings and/or that such claims are inadmissible.

12. On the issue of jurisdiction more generally, Belgium contends that the Court lacks jurisdiction to consider this case on the following grounds:

(a) the Court is not open to the FRY. The FRY is not a member of the United Nations. The FRY is not otherwise a party to the *Statute* of the Court

pursuant to Article 93(2) of the UN *Charter*. The Court is not otherwise open to the FRY pursuant to Article 35(2) of the *Statute*. Absent standing to appear, the FRY cannot found jurisdiction on its Declaration of 25 April 1999, on Article IX of the *Genocide Convention* or on Article 4 of the *1930 Convention*;

(b) in the alternative, Belgium contends that the Court lacks jurisdiction under the FRY's Declaration of 25 April 1999, Article IX of the *Genocide Convention* and Article 4 of the *1930 Convention* on the following grounds:

(i) as regards the FRY's Declaration of 25 April 1999 – that the dispute and/or the situations or facts alleged arose prior to the "crucial date" indicated in the temporal limitation of the FRY's Declaration;

(ii) as regards Article IX of the *Genocide Convention* – that the action alleged does not come within the scope *ratione materiae* of the *Genocide Convention*;

(iii) as regards Article 4 of the *1930 Convention* – in addition or in the alternative, that the FRY is not a party to the Court's *Statute* for the purposes of Article 37 of the *Statute*; that the *1930 Convention* is no longer in force; that the FRY has not succeeded to the *1930 Convention*; and that the conditions of Article 4 of the *1930 Convention* have not been observed.

13. In addition or in the alternative to these contentions going to the jurisdiction of the Court, Belgium contends that the FRY's application is inadmissible on the grounds:

(a) that the FRY does not identify any actions specifically alleged to have been committed by Belgium with which it takes issue;

(b) that the FRY has acted in bad faith; and

(c) of the absence of the United States and other "Respondents" from the parallel proceedings.

14. In paragraph 11 of its Memorial, the FRY notes that it "has prepared an identical text of the Memorial in all eight pending cases" and that the "substance of the dispute in all eight cases is identical". It goes on to note as follows:

> "Whereas all Respondents are in the same interest, according to Article 31, para.5, of the Statute of the Court, they should, for the purpose of the nomination of *ad hoc* judge, be reckoned as one party only. Alternatively, for said purpose, Belgium and the Netherlands are in the same interest; Canada, Portugal and the United Kingdom are in the same interest; and France, Germany and Italy are in the same interest."

15. Belgium rejects the contention that it is a party in the same interest as any of the Respondents in the parallel cases initiated by the FRY, whether for the purpose of Article 31(5) of the *Statute* or of any other provision of the Court's *Statute* or *Rules*.

16. By a letter to the Court dated 5 May 1999, Belgium notified the Court of its intention to choose a Judge *ad hoc* pursuant to the terms of Article 31 of the *Statute* and nominated Mr Patrick Duinslaeger for this purpose. The FRY, referring to Article 31(5) of the *Statute*, objected to this nomination. The Court, "after due deliberation, found that nomination of a judge *ad hoc* by Belgium was justified in the present phase of the case".[10]

17. In the light of this decision, and in accordance with Article 31 of the *Statute* and Article 35 of the *Rules*, Belgium, by a letter dated 13 April 2000 addressed to the Registrar of the Court, confirmed its appointment of and nominated Mr Patrick Duinslaeger as Judge *ad hoc* for purposes of this case.

18. In so doing, Belgium considers that the circumstances that warranted its nomination of a Judge *ad hoc* for the provisional measures phase of the case remain, and indeed are accentuated, in respect of the present phase of the case. Although the factual and legal allegations raised by the FRY against each of the Respondents in the parallel proceedings are the same, Belgium's interest in the matter is not the same as that of the other Respondents and should not be presumed to be so. As is also evident, the FRY has relied on jurisdictional bases in its proceedings against Belgium that are particular to Belgium alone – namely, in the context of Article 36(2) of the *Statute*, the Belgian Declaration of 17 June 1958 and, separately,

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[10] *Provisional Measures Order*, at paragraph 12.

Article 4 of the *1930 Convention*. Belgium contends, therefore, that it cannot be considered to be a party in the same interest as any of the Respondents in the parallel proceedings.

PART I: BACKGROUND AND PRELIMINARY ISSUES

CHAPTER ONE: THE FRY'S CASE

19. The FRY filed its Application instituting proceedings on 29 April 1999. At the same time, it filed a *Request for the Indication of Provisional Measures*. Oral argument on this *Request* was heard on 10-12 May 1999. The FRY's Memorial was filed on 5 January 2000. Although the *Provisional Measures Request* and the oral argument thereon were concerned with matters that are not now before Court, important elements of the FRY's case were addressed during this phase of the proceedings.

20. As will be described more fully below, it is Belgium's contention that the FRY's case has undergone a metamorphosis over the course of its submissions to the Court since its Application. The implicit purpose of this metamorphosis was to develop and adjust the FRY's case in an attempt to cure fundamental defects in the original formulation of the case, and in the jurisdictional bases relied upon by the FRY, that became apparent during the course of the provisional measures proceedings. As is addressed in Chapter Two below, Belgium also contends that, insofar as the FRY's case has evolved over time to include matters that were not specified in its Application, the Court lacks jurisdiction over these new elements and/or that these new elements are inadmissible. It is against this background, and for purposes of its argument on jurisdiction and admissibility only, that Belgium now turns to identify the essential elements of the FRY's case.

1. The FRY's Application instituting proceedings

21. Article 40(1) of the Court's *Statute* provides *inter alia* that cases brought before the Court by written application shall indicate the subject of the dispute. This is reiterated in Article 38(1) of the Court's *Rules* and is expanded upon in paragraph 2 of that Article in the following terms:

> "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

22. In respect of this provision, Belgium draws particular attention to the requirement that an application instituting proceedings shall specify "the precise nature of the claim".

23. Addressing the "Subject of the dispute", the FRY, in its Application, states as follows:

> "The subject-matter of the dispute are acts of The Kingdom of Belgium 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."

24. Under the heading "Claim", the FRY goes on to request the Court to adjudge and declare that, "by taking part in" various specified acts, Belgium is in breach of the aforementioned obligations. The acts in which Belgium is said to have participated are:

(1) the bombing of the territory of the FRY;
(2) the training, arming, financing, equipping and supplying the Kosovo Liberation Army ("KLA");
(3) attacks on civilian targets;
(4) destroying or damaging monasteries and monuments of culture;
(5) the use of cluster bombs;
(6) the bombing of oil refineries and chemical plants;
(7) the use of weapons containing depleted uranium;
(8) the killing of civilians, destroying enterprises, communications, health and cultural institutions; and
(9) the destruction of bridges on international rivers.

25. The allegation concerning the violation of "the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group" is based on the claim that Belgium took part in the "activities listed above,

and in particular by causing enormous environmental damage and by using depleted uranium".

26. Under the heading "Facts upon which the claim is based", the FRY alleges that

> "Belgium, together with the other Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia ... [and] is taking part in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army'."

27. The jurisdictional bases invoked by the FRY in its Application in respect of these allegations of substance are simply stated to be Article 36(2) of the Court's *Statute* and Article IX of the *Genocide Convention*.

28. Three observations are warranted in respect of these elements. First, the allegations levelled against Belgium are that, "by taking part in" various specified acts, Belgium is in breach of the various legal obligations. Beyond this, the allegations do not identify with any particularity the acts said to have been undertaken by Belgium which are alleged to constitute violations of law. It is not, for example, alleged that *Belgium* used weapons containing depleted uranium or that *Belgium* was engaged in the training, arming, financing equipping and supplying of the KLA.

29. Second, the Application contains no indication of the dates on which the alleged acts are said to have been committed. In other words, the Application does not identify any point at which the alleged dispute could be said to have crystallised or the period within which the acts constituting the dispute could be said to have taken place. The full extent of FRY specificity on this point is to be found in that part of the Application addressing the "facts upon which the claim is based" where it is alleged that Belgium, "together with the other Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia" and "is taking part in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army'".

30. By reference to this statement, insofar as it is possible to identify from the Application the period within which the allegations fall, this would seem to be the

period within which (a) NATO used force against the FRY (b) by bombing targets in the FRY. On this test, the relevant period is that of 24 March 1999, ie, the date on which the NATO bombing commenced, to 10 June 1999, ie, the date on which the NATO bombing ceased.

31. In this regard, it may be noted that 10 June 1999 was also the date on which the Security Council, acting under Chapter VII of the *Charter*, adopted Resolution 1244 (1999) laying down the principles that were to apply to a political solution of the "Kosovo crisis" and deciding upon "the deployment in Kosovo, *under United Nations auspices*, of international civil and security presences".[11]

32. Third, no indication is given in the Application of any linkage between the acts alleged and the bases of jurisdiction invoked. In other words, it is not clear from the Application whether the FRY relies on each alleged basis of jurisdiction in respect of every act alleged or whether one or other basis of jurisdiction is relevant only to certain of the acts alleged. It is however settled law that, while Declarations under Article 36(2) of the *Statute* may, subject to such limitations as may be contained therein, give the Court jurisdiction in disputes of a wide-ranging and general nature, Article IX of the *Genocide Convention* can only give the Court jurisdiction in "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention". Article IX of the *Genocide Convention* can therefore only establish jurisdiction in respect of acts falling within the scope of the Convention *ratione materiae*. It cannot provide a basis of jurisdiction in respect of acts more generally. Notwithstanding the lack of clarity on this matter in the Application, Article IX of the *Genocide Convention* can therefore only give the Court jurisdiction insofar as any of the acts alleged come within the scope of the Convention and in respect of those acts only. This matter is addressed further in Chapter Six below.

2. The provisional measures phase

(a) The FRY's Provisional Measures Request

33. Filed at the same time as its Application, the FRY's *Provisional Measures Request* did not address the substance of the FRY's case in detail or in a manner that was at variance with its Application. It did, however, list at some length various acts of destruction alleged to have been caused by NATO bombing.

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[11] S/RES/1244 (1999) of 10 June 1999, at paragraphs 1 and 5 (emphasis added). **(Annex 5)**

34. Two observations are warranted in respect of this *Request*. First, as in the case of the Application, the *Request* does not particularise any acts specifically alleged to have been committed by Belgium. The allegations in question are cast in general terms. Second, as in the case of the Application, the *Request* gives no indication of the dates on which the alleged acts are said to have been committed. In other words, as with the Application, the *Request* does not identify any point at which the alleged dispute could be said to have crystallised or the period within which the acts constituting the dispute could be said to have taken place.

35. This omission notwithstanding, some indication of the point at which the alleged dispute might be said to have crystallised is implicit from the terms of the *Request*. Three elements in particular are relevant in this regard. First, the *Request* is dated 28 April 1999. By necessary implication, any dispute must therefore have arisen prior to this point. Second, the FRY's allegations are placed in a broad temporal context, namely, "[f]rom the onset of the bombing of the Federal Republic of Yugoslavia ..."[12] Implicitly, therefore, the dispute with which the FRY is concerned crystallised on 24 March 1999, ie, the point at which the NATO bombing commenced. This is consistent with the FRY's Application. Third, the specific allegations of destruction made by the FRY are also consistent with an appreciation *on the part of the FRY* that the dispute with which the FRY was concerned crystallised with the commencement of bombing by NATO on 24 March 1999.

36. For example, under the heading "Bridges", the FRY alleged that the "Varadin Bridge on the Danube" was destroyed.[13] While no date is given in the *Request* for this alleged act of destruction, material subsequently filed by the FRY puts the date of the alleged destruction of this bridge as 1 April 1999.[14] By way of further example, under the heading "Industry and Trade", the FRY alleged an attack on the "'Lola Utva' agricultural aircraft factory in Pancevo".[15] While no date is given in the *Request* for the alleged act, material subsequently filed by the FRY states as follows:

> "The Lola Utva factory in Pancevo was exposed several times to NATO missile attacks: on 24 March 1999, at 9.00 p.m., by four

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[12] *Provisional Measures Request*, at pp.1-2, fourth paragraph.
[13] *Provisional Measures Request*, at p.4, "Bridges", at item (a)(1).
[14] See *NATO Crimes in Yugoslavia, Volume I: Documentary Evidence (24 March - 24 April 1999)* filed as an annex to the FRY's Memorial of 5 January 2000, at p.233.
[15] *Provisional Measures Request*, at p.8, "Industry and Trade", at item 6.

missiles; on 27 March 1999, at 8.05 p.m., by one missile and on 29 March 1999, at 8.30 p.m., by one missile."[16]

37. Although the FRY makes no express observations to this effect, it is clear that the alleged dispute with which the FRY is concerned arose, *in the view of the FRY*, at the point at which the NATO bombing commenced, ie, on 24 March 1999.

(b) The oral phase of the request for provisional measures

38. The oral phase of the provisional measures proceedings took place on 10-12 May 1999. In keeping with the nature and character of those proceedings, the FRY developed various aspects of its case – both in respect of jurisdiction and merits – at some length during the course of its submissions.[17] Without reopening or entering into debate on the detail of these submissions, a number of observations pertinent to the questions of jurisdiction and admissibility are warranted. First, as in the case of its previous submissions, the FRY's oral submissions during the provisional measures phase made no attempt to particularise any acts specifically alleged to have been committed by Belgium. Second, insofar as the FRY identified any NATO member in the context of its allegations, it pointed to the United States alleging that "the Kosovo crisis was a crisis selected and developed by the United States as a part of a long-term anti-Serb campaign. The objectives were political and strategic."[18]

39. Third, as in its Application and *Provisional Measures Request*, the FRY did not expressly place the alleged dispute with which it was concerned within a temporal framework. Once again, however, by reference to the detail of its submissions, it is possible to deduce the relevant period. Thus, for example, in the course of the FRY's opening round of oral argument, the Agent for the FRY referred variously, and generically, to "[t]he acts of bombing of the Yugoslav territory", "[t]he acts of bombing of the territory of Yugoslavia", "[b]y bombing the territory of Yugoslavia", "[c]ontinued bombing of the whole territory of the State".[19] Similarly, Counsel for the FRY, Mr Mitic, opened his statement by referring to "the consequences which NATO aggression against Yugoslavia caused so far and continues to cause". In the course of his statement, he went on to

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[16] See *NATO Crimes in Yugoslavia, Volume I: Documentary Evidence (24 March – 24 April 1999)* filed as an annex to the FRY's Memorial of 5 January 2000, at p.351.
[17] See CR 99/14, 10 May 1999 and CR 99/25, 12 May 1999.
[18] Statement by Mr Brownlie, CR 99/25, 12 May 1999, at p.16.
[19] Statement by Mr Etinski, CR 99/14, 10 May 1999, at pp.23 and 30.

develop various arguments by reference to "the beginning of the aggression on 24 March 1999".[20]

40. In the light of these statements, and given the generic nature of the references to the "acts of bombing", it is clear that the alleged dispute with which the FRY was concerned crystallised, *in the view of the FRY*, at the point at which the bombing commenced, ie, on 24 March 1999. This, indeed, is confirmed unambiguously by the statement by Mr Mitic just noted.

41. Fourth, while it is abundantly clear that the alleged dispute with which the FRY was concerned arose with the commencement of the bombing, it is also clear that the FRY itself saw this "dispute" as an intimate part of a wider series of events. Thus, while taking care to preface his remarks by the comment that they were "without prejudice to the jurisdiction of the Court defined by the Yugoslav declaration of the acceptance of the compulsory jurisdiction of the Court", the Agent for the FRY nevertheless went on to state that, "for a full comprehension of the case, it could be useful to shed light on facts surrounding the case".[21] He proceeded to place the "dispute" in the context of the wider events in the former Yugoslavia and, in particular, of the wider events concerning Kosovo. Thus, reference was made, amongst other things, to the deteriorating situation in Kosovo during 1998, the establishment of the Kosovo Verification Mission and the Rambouillet Conference of February-March 1999.[22] Counsel for the FRY, Professor de Waart, similarly placed the "dispute" which the FRY sought to bring before the Court within its wider context, noting that "[t]he threat or use of force against the Federal Republic of Yugoslavia in order to compel it to sign the Rambouillet draft Agreement was unjustified".[23]

42. Fifth, in the light of arguments advanced by Belgium and by the Respondents in the parallel proceedings before the Court, a number of statements of interest to the present phase of the proceedings were made by the representatives of the FRY during the second round of oral hearings on 12 May 1999. Particularly important amongst these was the statement by Counsel for the FRY, Mr Corten, who addressed at some length the temporal dimension of the "dispute" *raised by the FRY* in the context of the terms of the Declaration filed by the FRY purportedly under Article 36(2) of the Court's *Statute*. This provides *inter alia* that the Court

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[20] Statement by Mr Mitic, CR 99/14, 10 May 1999, at p.59.
[21] Statement by Mr Etinski, CR 99/14, 10 May 1999, at p.25.
[22] Statement by Mr Etinski, CR 99/14, 10 May 1999, at pp.25-29.
[23] Statement by Mr de Waart, CR 99/14, 10 May 1999, at p.41.

will have jurisdiction "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". The FRY Declaration was signed on 25 April 1999.

43. Addressing the argument that the dispute between the Parties predated the signature of the FRY's Declaration, and that in consequence, by the express terms of the Declaration, the Court could not have jurisdiction on the basis thereof, Mr Corten contended that the Declaration had to be interpreted on the basis of the intention of its author. He went on to argue that "Yugoslavia desired, from 25 April 1999 onwards, to recognise the Court's jurisdiction over a wide range of disputes".[24] Each act of bombing, on this contention, "led to 'a disagreement on a point of law or fact'".[25] In keeping with this analysis, the dispute with which the FRY was concerned was not, therefore – contrary to the language of the FRY's Application, *Provisional Measures Request* and first round oral statements – a dispute that had arisen with the commencement of the NATO bombing on 24 March 1999. Rather, there were "a large number of separate disputes arising between Yugoslavia and the NATO Member countries since 25 April concerning events occurring after that date".[26]

44. Expressly eschewing any notion of a "continuing situation" arising from "repeated separate military attacks", Counsel for the FRY described these acts as "instantaneous wrongful acts" which "can be precisely dated, including those after 25 April".[27] The Court, on this contention, had jurisdiction on the basis of the FRY's Declaration, over the "dispute" that arose after 25 April 1999 as a result of individual, separate, instantaneous wrongful acts.

45. The interpretation and application of the temporal limitation in the FRY's Declaration is addressed in Chapter Five below. For present purposes, Belgium simply notes these statements of Counsel for the FRY and the evident discordance between these statements and the clear thrust of the earlier submissions of the FRY on the matter. For completeness, it may be noted that, even within the attempt by Counsel for the FRY to circumvent the limitations of the FRY's Declaration, some ambiguity was evident. Thus, Counsel for the FRY, continuing the statement referred to above, noted that

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[24] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.13.
[25] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.10
[26] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.11.
[27] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.11.

> "[w]hat is in any event clear is that, initially, Yugoslavia wished to secure a judicial settlement of the disputes relating to the armed conflict then – and indeed still – in progress between Yugoslavia and the respondent States. It goes without saying – and the drafters of the declaration could personally testify to this – that Yugoslavia did indeed wish to include, and not to exclude, all the disagreements relating to the bombing to which it has been subjected."[28]

46. Notwithstanding the instantaneous wrongful acts argument previously advanced, this statement suggests that the "dispute" which constituted the subject-matter of the FRY's case was the dispute "relating to the armed conflict ... in progress between Yugoslavia and the respondent States", ie, the use of force by NATO that had commenced on 24 March 1999.

(c) The Court's Provisional Measures Order

47. The Court gave its Order on the *Provisional Measures Request* on 2 June 1999. Rejecting the FRY's request, the Court made a number of observations that are material to the present phase of the proceedings. First, the Court affirmed that it can "exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned".[29] As Belgium will contend in Chapter Four of these Preliminary Objections, this twofold test to the Court's jurisdiction – (a) access to the Court, and (b) acceptance of the jurisdiction of the Court – is fundamental to the scheme of the UN *Charter* and the Court's *Statute*.

48. Second, noting that "the Application is directed, in essence, against the 'bombing of the territory of the Federal Republic of Yugoslavia'",[30] the Court stated that it had "no doubt" that a legal dispute arose between the FRY and Belgium "well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole".[31] Having noted the FRY argument that "there exist 'a number of separate disputes which have arisen' between the parties 'since 25 April relating to events subsequent to that date'",[32] the Court went on to state:

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[28] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.13.
[29] *Provisional Measures Order*, at paragraph 20.
[30] *Provisional Measures Order*, at paragraph 27.
[31] *Provisional Measures Order*, at paragraph 28.
[32] *Provisional Measures Order*, at paragraph 25.

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium."[33]

49. On the basis of this analysis, the Court concluded that the Declarations of the Parties "do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case".[34]

50. Third, in the light of this finding, the Court concluded that it did not need to consider the question of the status of the FRY *vis-à-vis* membership of the United Nations and access to the Court.[35] It had been Belgium's contention in the oral phase of the provisional measures proceedings that the Court lacks jurisdiction in this matter as the FRY is not a member of the United Nations and that the Court is not otherwise open to the FRY on the basis of other arrangements contemplated by the *Charter* and the *Statute*. Belgium maintains this contention in these Preliminary Objections.

51. Fourth, as regards the FRY's claim to jurisdiction on the basis of Article IX of the *Genocide Convention*, the Court observed that, as it was "not disputed that both Yugoslavia and Belgium are parties to the Genocide Convention without reservation", Article IX of the Convention

> "accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded *to the extent that the subject-matter of the dispute relates to 'interpretation, application or fulfilment' of the Convention*, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III' of the said Convention".[36]

52. Addressing the allegations advanced by the FRY, the Court nevertheless went on to conclude that

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[33] *Provisional Measures Order*, at paragraph 29.
[34] *Provisional Measures Order*, at paragraph 30.
[35] *Provisional Measures Order*, at paragraph 33.
[36] *Provisional Measures Order*, at paragraph 37 (emphasis added).

> "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and [that], in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by [Article II of the Convention]' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p.240, para.26)".[37]

53. On the basis of this analysis, the Court concluded that Article IX of the *Genocide Convention* could not constitute "a basis on which the jurisdiction of the Court could prima facie be founded in this case".[38]

54. Fifth, as regards the FRY's invocation of Article 4 of the *1930 Convention* as an additional basis of jurisdiction *vis-à-vis* Belgium, the Court concluded that, in consequence of the late stage at which the Convention had been invoked, it could not consider the Convention for the purpose of deciding whether it could indicate provisional measures.[39]

55. Finally, the Court noted that the findings reached at the provisional measure stage in no way prejudged the question of the jurisdiction of the Court to deal with the merits or any questions relating to the admissibility of the Application.[40] This observation notwithstanding, it is evident that certain aspects of the Court's findings amount to settled conclusions of law. While, for example, the issue of jurisdiction under the FRY's Declaration was left open, as a matter properly to be determined in the present phase of the case, the Court's conclusion that "the fact that the bombings have continued after 25 April 1999 ... is not such as to alter the date on which the dispute arose"[41] was cast in conclusive terms. Similarly, while the issue of jurisdiction under Article IX of the *Genocide Convention* was also left open, the Court's conclusion that "the threat or use of force against a State cannot itself constitute an act of genocide within the meaning of Article II of the Genocide Convention"[42] was also conclusive.

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[37] *Provisional Measures Order*, at paragraph 40.
[38] *Provisional Measures Order*, at paragraph 41.
[39] *Provisional Measures Order*, at paragraph 44.
[40] *Provisional Measures Order*, at paragraph 46.
[41] See paragraph 48 above.
[42] See paragraph 52 above.

56. The Court is not, of course, bound by its earlier decisions and Belgium does not here suggest that these findings cannot be reopened. These matters are accordingly addressed by Belgium fully elsewhere in these Preliminary Objections. Belgium nevertheless observes that the Court's findings on these points are cast in conclusive terms.

3. The FRY's Memorial

57. The FRY filed its Memorial and annexes on 5 January 2000. Of the four volumes of annexes, the first, marked "Annexes", contains 178 documents, Nos.1 - 160 of which are in Serbo-Croat. No translation of these documents is provided in this volume although translations are provided elsewhere in the annexed material filed by the FRY. The remaining 18 documents in this collection are filed in English or French with the exception of Annex No.165 which is filed in German only. No translation of this document is provided by the FRY.

58. The second and third volumes of annexed material are entitled *NATO Crimes in Yugoslavia: Documentary Evidence*. These are divided into Volumes I and II; the first relating to period 24 March - 24 April 1999; the second to the period 25 April - 10 June 1999. These dates are material. Volume I covers the period from the start of the NATO bombing to the point immediately prior to the signing of the FRY's Declaration purportedly under Article 36(2) of the Court's *Statute*. Volume II covers the period from the signature of the FRY's Declaration to the suspension of the NATO bombing. None of the material annexed by the FRY addresses acts alleged to have been committed after 10 June 1999. The material included in these volumes is filed in English and includes translations of Annexes No.1 - 160 filed by the FRY in Serbo-Croat in its first volume of annexes.

59. The final volume of annexes is entitled "*Documents Diplomatiques: Correspondance concernant les actes de violence et de brigandage des Albanais dans la Vieille-Serbie (Vilayet de Kossovo) 1898-1899*" and is filed in both Serbo-Croat and French.

60. As regards its Memorial, the FRY opens with a restatement of its case as formulated in its Application[43] and goes on to note that it has prepared an identical

[43] FRY Memorial, paragraph 5.

Memorial in respect of all eight pending cases arising out of the NATO action in the FRY as "[t]he substance of dispute in all eight cases is identical".[44]

61. Noting that the Court, in its *Provisional Measures Order*, had concluded that it was *prima facie* without jurisdiction,[45] the FRY then contends that

> "[s]ince the Orders of the Court, dated 2 June 1999, the dispute aggravated and extended. It got new elements concerning failures of the Respondents to fulfil their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Negating the alleged humanitarian motives of the Respondents, the new elements are of crucial importance for the substance of the dispute.
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> ...
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> Due to the fact that the dispute matured, through new elements, the Applicant considers that the circumstances related to the jurisdiction of the Court have thus changed so that the Court has the jurisdiction to resolve the dispute."[46]

62. As these paragraphs make plain, an important feature of the FRY's Memorial is that it seeks to develop the case originally stated in the FRY's Application both temporally and substantively. In Belgium's contention, insofar as the FRY case has evolved to include matters that were not specified in its Application, the Court lacks jurisdiction over these new elements and/or that these new elements are inadmissible. This matter is addressed fully in Chapter Two below.

63. Approximately three-quarters (some 300 pages) of the FRY's Memorial is given over to allegations of fact. About half of this material sets out a chronological, day-by-day series of allegations concerning "facts related to bombing of the territory of the FR of Yugoslavia".[47] This begins on 24 March 1999 and goes through to 9 June 1999. The allegations run seamlessly, day-by-day, throughout this period making no distinction between acts alleged to have occurred prior to 25 April 1999 (ie, the date of signature of the FRY's Declaration purportedly under Article 36(2) of the Court's *Statute*) and acts alleged to have occurred subsequently.

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[44] FRY Memorial, paragraph 11.
[45] FRY Memorial, paragraph 8.
[46] FRY Memorial, paragraphs 12 and 16. See also pp.339-340.
[47] FRY Memorial, Part 1.1, pp.11-137.

Of the annexed material referred to in this part, Annexes No.1 - 74 correspond to allegations in respect of the period 24 March - 24 April 1999.

64. Part 1.5 of the FRY's Memorial, under the title "Facts Related to Killings, Wounding and Ethnic Cleansing of Serbs and Other Non-Albanian Groups",[48] addresses acts alleged to have occurred in the period after 10 June 1999, ie, after the suspension of the NATO bombing and the adoption, by the Security Council acting under Chapter VII of the *Charter*, of Resolution 1244 (1999). This Part of the Memorial thus addresses those elements which, in the FRY's contention, caused the dispute to be "aggravated and extended" in the period following the Court's *Provisional Measures Order*. None of the allegations made in this Part are supported by any annexed documentary material. The allegations are thus entirely unsubstantiated.

65. The allegations in this Part constitute the only material cited by the FRY in support of its contention that "the dispute aggravated and extended" in the period after 10 June 1999.

66. Beyond its allegations of fact, the FRY Memorial includes short sections addressing issues of law[49] and the jurisdiction of the Court.[50]

67. As regards the jurisdiction of the Court, insofar as is material to the proceedings involving Belgium, the FRY case can be summarised as follows:

(a) the FRY is a Member of the United Nations;[51]

(b) the Court has jurisdiction under Article 36(2) of its *Statute* pursuant to the Belgian Declaration of 17 June 1958 and the FRY Declaration of 25 April 1999;[52]

(c) in this regard, a dispute arises when all its elements come into existence.[53] As the post-10 June 1999 "elements are part and parcel of the dispute related to the bombing of the territory of the Applicant",[54] the Court has

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[48] FRY Memorial, pp.201-282.
[49] FRY Memorial, Part Two, pp.301-328.
[50] FRY Memorial, Part Three, pp.329-349.
[51] FRY Memorial, pp.329-335.
[52] FRY Memorial, pp.335-343.
[53] FRY Memorial, p.339, paragraph 3.2.13.
[54] FRY Memorial, p.339, paragraph 3.2.11. See also p.340, paragraphs 3.2.14 and 3.2.16.

jurisdiction notwithstanding the temporal limitation in the FRY's Declaration as the dispute "has arisen in full after 10 June 1999";[55]

(d) the Court has jurisdiction *vis-à-vis* Belgium pursuant to Article 4 of the *1930 Convention*;[56]

(e) in this regard, the FRY contends that the *1930 Convention* is in force[57] and that the procedural obstacles that led to the Court declining to consider the Convention during the provisional measures phase have disappeared;[58]

(f) the Court has jurisdiction pursuant to Article IX of the *Genocide Convention*;[59]

(g) in this regard, the FRY contends that, by its Memorial, it has submitted evidence of intent to commit genocide – namely, acts of bombing and acts of killing and wounding of Serbs and other non-Albanian population after 10 June 1999 – such as to establish jurisdiction under Article IX of the *Genocide Convention*.[60]

68. Each of these elements of the FRY's case is addressed in detail below in the context of Belgium's substantive objections to jurisdiction and admissibility.

69. A number of observations on the FRY's Memorial more generally are warranted at this point. First, as regards the annexes to the FRY's Memorial, much of the material contained in the two volume collection entitled *NATO Crimes in Yugoslavia: Documentary Evidence* is not referred to in the FRY's Memorial. Similarly, no reference is made in the FRY's Memorial to the fourth volume of annexes containing *Documents Diplomatiques* from the period 1898-1899. In both cases, the FRY's purpose in attaching this material is unclear although it may be presumed to have been put before the Court with prejudicial intent *vis-à-vis* Belgium.

70. Second, as was the case in its earlier submissions, the FRY makes no attempt in its Memorial to particularise any acts specifically alleged to have been committed by Belgium. Indeed, with the sole exception of that part of the FRY's Memorial that addresses the *1930 Convention* as an additional basis of jurisdiction *vis-à-vis* Belgium, the Memorial makes no reference to Belgium at all in respect of any of the allegations therein.

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[55] FRY Memorial, p.340, paragraph 3.2.14.
[56] FRY Memorial, pp.343-346.
[57] FRY Memorial, p.346, paragraph 3.3.10.
[58] FRY Memorial, p.346, paragraph 3.3.9.
[59] FRY Memorial, pp.346-349.
[60] FRY Memorial, p.349, paragraph 3.4.3.

71. Third, the FRY's contention that "the dispute aggravated and extended" to include new elements in the period after 10 June 1999 is of central importance to the present phase of the case. Referring to "failures of the Respondents" to fulfil their obligations under Security Council Resolution 1244 (1999) and the *Genocide Convention*,[61] the FRY contends that

> "these new disputed elements are part and parcel of the dispute related to the bombing of the territory of the Applicant. The dispute arising from the bombing matured throughout the new disputed elements related to responsibility of the Respondents for the crime of genocide committed to Serbs and other non-Albanian groups in the area under control of KFOR. ...
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> ...
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> Whereas some of the constituent elements of the dispute appeared after 10 June 1999, the dispute, which started to arise before 25 April 1999, has arisen in full after 10 June 1999. So, it is within the compulsory jurisdiction of the Court, established by the Yugoslav declaration of 25 April 1999."[62]

72. As Belgium has already observed, the only material contained in the FRY's Memorial relating to the alleged aggravation and extension of the dispute after 10 June 1999 is to be found in Part 1.5. Belgium reiterates that this material consists of entirely unsubstantiated allegations, unsupported by any evidence whatever. In keeping with the strictly preliminary character of these proceedings, Belgium makes no comment on the substance of these allegations. As a purely formal matter, however, and one which is appropriate for determination by the Court in proceedings addressing jurisdiction and admissibility, Belgium contends that the material filed by the FRY in respect of its post-10 June 1999 allegations does not allow for any meaningful appraisal and response by Belgium and is likewise fundamentally incapable of any meaningful juridical appraisal by the Court.

4. Conclusions

73. A number of general conclusions emerge from the preceding review of the FRY's case:

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[61] See paragraph 61 above.

[62] FRY Memorial, pp.339-340, paragraphs 3.2.12 and 3.2.14.

(a) in none of the documents filed so far by the FRY is any attempt made to particularise allegations against Belgium in respect of specific acts alleged to have been committed by Belgium;

(b) insofar as the actions of any specific NATO Member are identified throughout its various submissions, the FRY alleged that the Kosovo crisis was "selected and developed by the United States";

(c) both in its Application and throughout the provisional measures phase of the case until the second round of oral argument, the FRY gave no indication of the temporal dimension of the dispute it sought to bring before the Court;

(d) in this regard, however, it is evident from the detailed allegations advanced by the FRY that the dispute with which the FRY is concerned is the dispute that crystallised with the commencement of the NATO action in the FRY on 24 March 1999;

(e) the FRY also, however, acknowledged that the NATO action was an integral part of a wider series of events concerning Kosovo;

(f) with the objective of avoiding the difficulties that became apparent as a result of the temporal limitation in the FRY's Declaration of 25 April 1999, Counsel for the FRY, in the second round of the oral hearings in the provisional measures phase, sought to characterise the "dispute" before the Court as a series of instantaneous wrongful acts subsequent to 25 April 1999 each of which gave rise to a separate disagreement on a point of fact or law;

(g) in a further attempt to avoid the pitfalls of the temporal restriction in the FRY's Declaration of 25 April 1999, the FRY, in its Memorial, alleged that the dispute was "aggravated and extended" in the period after 10 June 1999 so as to bring a dispute into existence only after 25 April 1999;

(h) this allegation notwithstanding, the factual allegations at the heart of the FRY's Memorial consistently treat the "dispute" as running from the commencement of the NATO bombing on 24 March 1999; and

(i) as regards the FRY's allegation that the dispute was "aggravated and extended" in the period after 10 June 1999, the only material cited by the FRY in support of this allegation is that set out in Part 1.5 of its Memorial. In not a single instance, however, are these allegations supported by evidence. Purely as a matter of form, these allegations could not therefore admit of any meaningful appraisal and response by Belgium and would be fundamentally incapable of any meaningful appraisal by the Court.

74. These elements will be addressed further below in the context of Belgium's substantive arguments on jurisdiction and admissibility.

CHAPTER TWO: THE COURT LACKS JURISDICTION IN RESPECT OF CLAIMS MADE FOR THE FIRST TIME IN THE FRY'S MEMORIAL AND/OR SUCH CLAIMS ARE INADMISSIBLE

75. In Chapter One, Belgium contended that the FRY's case has undergone a metamorphosis over the course of its various submissions to the Court. Belgium further contended that, insofar as the FRY's case has evolved over time to include matters that were not specified in its Application, the Court lacks jurisdiction over these new elements and/or that these new elements are inadmissible. As regards the first of these contentions, the metamorphosis of the FRY's case is plain. As the review in the preceding Chapter shows, the FRY's Application was focused on the allegations regarding NATO bombing of the FRY and the training, arming, etc of the KLA. This focus was maintained during the proceedings on the FRY's *Provisional Measures Request* leaving no doubt about the temporal dimension of the FRY's claim.

76. The focus of the FRY's case was, however, expanded both temporally and substantively in the FRY's Memorial to include alleged failures by Belgium to fulfil its obligations under Security Council Resolution 1244 (1999) and the *Genocide Convention* in the period after the cessation of NATO bombing. These new allegations are significantly and qualitatively different from those raised in the FRY's Application as they address the interpretation and application of Security Council Resolution 1244 (1999) and raise issues of a broader nature that are likely to be of concern to many members of the United Nations, including, in particular, those which currently have forces in Kosovo pursuant to the mandate laid down in Security Council Resolution 1244 (1999). These new claims cannot in any way be said to have been implicit in the original Application or to otherwise arise directly out of the subject-matter of that Application.

77. The evidential shortcomings of the FRY's allegations in respect of these matters have already been touched upon in Chapter One. Other aspects of the metamorphosis in the FRY's case will be addressed in the context of Belgium's argument concerning the temporal limitation in the FRY's Declaration of 25 April 1999. Separately from these issues, Belgium also contends that the Court lacks jurisdiction in respect of the matters raised for the first time in the FRY's Memorial and/or that these new claims are inadmissible. As this question straddles various

otherwise discrete arguments which are addressed in Parts II and III of these Preliminary Objections below, it is convenient to address it at this point.

78. Article 40(1) of the Court's *Statute* provides that the "subject of the dispute" must be indicated in the Application. Article 38(2) of the Court's *Rules* goes on to require that "the precise nature of the claim" must be specified in the Application. The importance of these provisions within the scheme of the administration of justice by the Court cannot be overstated. As the Court observed in its Judgment in the *Nauru* case,[63]

> "[t]hese provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art.40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art.35, second paragraph), respectively."[64]

79. This assessment was echoed by the Court more recently in its Judgment in the *Fisheries Jurisdiction Case (Spain v. Canada)*.[65]

80. The central importance of a precise statement of an applicant's case in the document initiating legal proceedings is also attested to by the inclusion of provisions similar to those in the Court's *Statute* and *Rules* in the corresponding documents of other courts and tribunals.[66]

81. As is clear from the jurisprudence of both the Permanent Court and the International Court, the requirement that an applicant must specify the precise nature of its claim is not regarded as an unimportant matter of form. Thus, the Permanent Court, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, stated that

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[63] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p.240.

[64] *Nauru v. Australia*, ibid, at p.267, paragraph 69.

[65] *Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction, Judgment of 4 December 1998*, at paragraph 29.

[66] See, for example, Article 19 of the *Statute*, and the *Rules of Procedure*, of the European Court of Justice and Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

> "it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein ..."[67]

82. Similarly, in *Société commerciale de Belgique*, the Permanent Court stated:

> "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. The Court has not hitherto had occasion to determine the limits of this liberty, but it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction."[68]

83. The Judgment of the Court in the *Nauru* case is even more directly on point. In that case, Australia contended that Nauru's claim concerning the overseas assets of the British Phosphate Commissioners was inadmissible and that the Court had no jurisdiction in relation to that claim on the ground that the claim was new, having appeared for the first time in the Nauruan Memorial. Australia further argued that the claim would transform the dispute brought before the Court into a dispute of a different nature.[69]

84. Addressing this matter, the Court noted that there was no reference to the claim in question in Nauru's Application and that, from a formal point of view, the claim in question was thus a new claim.[70] On the question of whether this shortcoming of form was one to which the Court should attach importance, the Court noted that for the claim in question

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[67] *Prince von Pless Administration (Preliminary Objection), P.C.I.J., Series A/B, No.52*, at p.14.
[68] *Société commerciale de Belgique, P.C.I.J., Series A/B, No.78*, at p.173.
[69] *Nauru v. Australia,* note 63 supra, at pp.264-5, paragraphs 62-63.
[70] *Nauru v. Australia,* note 63 supra, at pp.265-6, paragraphs 64-65.

> "to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p.36) or must arise 'directly out of the question which is the subject-matter of that Application' (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974*, p.203, para.72)."[71]

85. The Court went on further to note that, if it had to entertain the dispute on the new claims on the merits, "the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application".[72] Given this to be the case, and referring to the requirement in the Court's *Statute* and *Rules* that the "subject of the dispute" and the "precise nature of the claim" had to be specified in the Application, the Court concluded that the Nauruan claim in question was, in both form and substance, a new claim. The Court, accordingly, upheld the preliminary objection advanced by Australia.

86. In Belgium's contention, this reasoning applies equally to the circumstances of the present case. The allegations in respect of the period after 10 June 1999 raise questions of a fundamentally different nature to those in respect of the pre-10 June period - quite apart from any issues concerning the veracity of the substantive allegations of fact. Issues which may be relevant include the interpretation and application of Security Council Resolution 1244 (1999), the responsibility of UN members acting pursuant to a mandate laid down in a binding resolution of the Council, the law applicable to forces acting pursuant to a UN mandate, the imputability of acts to individual troop-contributing states, the application of the *Genocide Convention* to situations involving UN peacekeeping or peace-enforcement operations, questions relating to the immunity of states and/or forces engaged in such operations, etc. Questions such as these could in no way be said to have been contemplated by the original Application or to be directly linked to the subject-matter of the dispute originally referred to the Court. To borrow the words of the Court in the *Nauru* case, if the Court had to entertain the dispute on these new claims on the merits, the subject of the dispute on which it would ultimately have to pass would, as regards these claims, be entirely distinct from the subject of the dispute originally submitted to it in the FRY's Application. In Belgium's view, to entertain such a case would be contrary to principles of legal certainty and the sound

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[71] *Nauru v. Australia*, note 63 supra, at p.266, paragraph 67.
[72] *Nauru v. Australia,* note 63 supra, at p.266, paragraph 68.

administration of justice and would prejudice the interests of third States having an interest in the matter.

87. One final point must be added. In its Application, the FRY stated that it "reserves the right to amend and supplement this Application". Whatever may be permitted by way of amendment by reference to this statement – and it is clear from the Court's jurisprudence that such a reservation cannot be relied upon simply to give an applicant the latitude to amend as it sees fit[73] – this cannot include the addition of new claims, identified for the first time in the applicant's Memorial, which have the effect of transforming the dispute before the Court into a dispute of a different character. The matter was addressed by the Court in its Judgment on jurisdiction and admissibility in the *Nicaragua* case in the following terms in the context of its decision on whether an additional ground of jurisdiction may be invoked during the course of proceedings:

> "An additional ground of jurisdiction may ... be brought to the Court's attention later, and the Court may take it into account provided that the Applicant makes it clear that it intends to proceed upon that basis ... 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)."[74]

88. To the extent that a clause reserving to an applicant the right to amend or supplement its application cannot be relied upon to invoke an additional ground of jurisdiction in circumstances in which this would transform the character of the dispute, it follows that such a clause cannot be relied upon as a basis for introducing new claims which would have the same effect.

89. In the light of the preceding analysis, Belgium contends that the Court lacks jurisdiction to consider the claims advanced for the first time in the FRY's Memorial and/or that these new claims are inadmissible. These claims relate to the allegations

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[73] See, for example, the Order of the Court in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p.325, at p.338, paragraph 28.

[74] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p.392, at p.427, paragraph 80. See also pp.397-8, paragraph 12.

> "concerning failures of the Respondents to fulfil their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. New elements related to killings, woundings and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija, after 10 June 1999".[75]

90. The allegations of facts which form the basis of these contentions are set out in particular in Part 1.5 of the FRY Memorial. Belgium contends that the Court lacks jurisdiction in respect of these allegations and/or that these allegations are inadmissible.

[75] FRY Memorial, p.339, paragraph 3.2.11.

CHAPTER THREE: THE CONTEXT OF THE CASE

91. Given the preliminary nature of the these proceedings, Belgium does not join argument with the FRY on the substance of its allegations. As already noted, were the Court to decide that it has jurisdiction to hear this case and that the application is admissible, Belgium would contest the allegations fully. While not taking issue with the FRY's allegations, it may nevertheless assist the Court's appreciation of the matter for Belgium to set out briefly some salient contextual elements relevant to the case.

92. As will be plain from the review of the FRY's case in Chapter One, the essence of the dispute raised by the FRY against Belgium concerns the use of force by NATO in the FRY. The context within which this action occurred was the situation in Kosovo. As was recognised by the FRY, "a full comprehension of the case",[76] however, requires an appreciation of the wider circumstances concerning events in the former Yugoslavia. Chief amongst these are the dissolution of the Socialist Federal Republic of Yugoslavia ("SFRY") and the establishment of the FRY, the situation in Kosovo prior to 24 March 1999, elements concerning the NATO action in the FRY, and developments subsequent to the cessation of the NATO action on 10 June 1999. With the exception of the dissolution of the SFRY and the establishment of the FRY, which are addressed in detail in Chapter Four, these matters are addressed briefly below.

1. The situation in Kosovo prior to 24 March 1999

93. Prior to the dissolution of the SFRY, under its 1974 Constitution, Kosovo was defined as an autonomous province within Serbia, one of the six republics comprising the SFRY. This status was in recognition of the fact that some 90 per cent of the population of Kosovo was ethnic Albanian in origin.

94. The situation in Kosovo became a matter of urgent international concern from at least 31 March 1998, the point at which the Security Council, acting under Chapter VII of the *Charter*, adopted Resolution 1160 (1998) condemning *inter alia* "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo".[77] By this resolution, the Council imposed an arms embargo against the FRY and took various other steps designed to facilitate "a

[76] See paragraph 41 above.
[77] S/RES/1160, 31 March 1998. **(Annex 6)**

solution of the Kosovo problem" in accordance with the proposals put forward by the Contact Group of countries.[78] The Council also requested the UN Secretary-General to keep it regularly informed and to report on the situation in Kosovo.

95. In adopting Resolution 1160 (1998), the Security Council was responding to growing concern in the wider international community at the rapidly deteriorating human rights situation in Kosovo, a matter addressed by, amongst others, the Organisation for Security and Cooperation in Europe ("OSCE").[79]

96. Pursuant to the terms of Resolution 1160 (1998), the UN Secretary-General reported regularly on the situation in Kosovo. These reports mark a steady decline in the human rights and humanitarian situation in Kosovo. Thus, in his initial Report on 30 April 1998, the Secretary-General expressed concern "about the deteriorating situation in Kosovo and the absence of progress in negotiations between the parties".[80]

97. Reporting a month later, on 4 June 1998, the Secretary-General observed that

> "the situation in Kosovo continues to be extremely volatile and shows marked signs of deterioration. The armed confrontation in Kosovo has led to loss of life and there is serious risk of a humanitarian and refugee crisis in the area. In this regard, the most recent Serbian police offensive in Kosovo is particular cause for alarm. I am gravely concerned that the mounting violence in Kosovo might overwhelm political efforts to prevent further escalation of the crisis. I deplore the excessive use of force by the Serbian police in Kosovo and call upon all parties concerned to demonstrate restraint and commit themselves to a peaceful solution."[81]

98. The downward spiral continued. Reporting on 2 July 1998, the Secretary-General noted that "the situation in Kosovo has deteriorated significantly since the submission of my last report" and that "[t]he international community is appalled by

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[78] The Contact Group was composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States.

[79] See, for example, *Decision 218 on the situation in Kosovo, adopted at the special session of the Permanent Council of the Organisation for Security and Cooperation in Europe, on 11 March 1998*; S/1998/246, 17 March 1998. **(Annex 7)**

[80] S/1998/361, 30 April 1998, at paragraph 9. **(Annex 8)**

[81] S/1998/470, 4 June 1998, at paragraph 46. **(Annex 9)**

the continued violence in Kosovo".[82] Further deterioration was recorded in August 1998.[83] Reporting in September 1998, the Secretary-General noted *inter alia* that

> "[a]n estimated 600 to 700 civilians have been killed in the fighting in Kosovo since March. The conflict has resulted in the estimated cumulative displacement of over 230,000 persons."[84]

99. In the face of these Reports, the President of the Security Council issued a Statement on 24 August 1998 in which the Council expressed its grave concern "about the recent intense fighting in Kosovo which has had a devastating impact on the civilian population and has greatly increased the numbers of refugees and displaced persons."[85] This was followed, on 23 September 1998, by the adoption of Resolution 1199 (1998) in which the Council again noted its grave concern

> "at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army which have resulted in numerous civilian casualties and, according to the estimate to the Secretary-General, the displacement of over 230,000 persons from their homes".[86]

100. Expressing its alarm at the "impending humanitarian catastrophe", the Council went on to affirm "that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region". Acting under Chapter VII of the *Charter*, the Council demanded *inter alia* that the FRY "cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression".[87]

101. The Secretary-General's Report of 3 October 1998 signalled a sharp decline in the situation in Kosovo:

> "The desperate situation of the civilian population remains the most disturbing aspect of the hostilities in Kosovo. I am particularly concerned that civilians increasingly have become the main target in the conflict. ...

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[82] S/1998/608, 2 July 1998, at paragraphs 10 and 13 respectively. **(Annex 10)**
[83] S/1998/712, 5 August 1998. **(Annex 11)**
[84] S/1998/834, 4 September 1998, at paragraph 7. **(Annex 12)**
[85] S/PRST/1998/25, 24 August 1998. **(Annex 13)**
[86] S/RES/1199, 23 September 1998. **(Annex 14)**
[87] S/RES/1199, 23 September 1998, at paragraph 4(a). **(Annex 14)**

> I am outraged by reports of mass killings of civilians in Kosovo, which recall the atrocities committed in Bosnia and Herzegovina. ..."[88]

102. In the face of some progress towards a peaceful settlement of the situation in Kosovo, the Security Council adopted Resolution 1203 (1998) on 24 October 1998 endorsing and supporting agreements signed between the FRY and the OSCE and the FRY and NATO concerning the verification of compliance by the FRY and others in Kosovo with the requirements of Resolution 1199 (1998). By this Resolution, the Council, acting under Chapter VII of the *Charter*, demanded "the full and prompt implementation of these agreements by the Federal Republic of Yugoslavia".[89]

103. By late December 1998, these initiatives towards a peaceful settlement had all but broken down. Reporting on Christmas eve, the Secretary-General noted that "the situation in Kosovo has not significantly improved and there are alarming signs of potential deterioration".[90] By mid-January 1999, this "potential deterioration" had become a reality. Reporting on 30 January 1999, the Secretary-General noted *inter alia* that "[s]ince late December, more than 20,000 people have fled from some 23 villages in the four municipalities of Decane, Podujevo, Stimlje and Suva Reka".[91] Addressing the broader picture, the Secretary-General went on to note that "[a]t the start of 1999, UNHCR estimated that some 180,000 civilians remained displaced within Kosovo, the vast majority of whom are Kosovo Albanians".[92]

104. More troubling was the Secretary-General's assessment of the transformation of the nature of the violence in Kosovo during the last weeks of 1998 and the first weeks of 1999:

> "The most disturbing new element is the spread of violence in Kosovo and the transformation of the nature of that violence. Prior to the ceasefire hostilities were limited to certain geographic locations, with fluid lines of engagement, although sniper fire did occur sporadically outside the discrete areas of encounter. In many cases, the civilian population fled from threatened locations to areas of perceived relative safety, some to urban areas within Kosovo but many others to exposed conditions with poor access to shelter and food. Following the ceasefire, many internally

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[88] S/1998/912, 3 October 1998, at paragraphs 7-9. **(Annex 15)**
[89] S/RES/1203, 24 October 1998, at paragraph 1. **(Annex 16)**
[90] S/1998/1221, 24 December 1998, at paragraph 4. **(Annex 17)**
[91] S/1999/99, 30 January 1999, at paragraph 25. **(Annex 18)**
[92] S/1999/99, 30 January 1999, at paragraph 29. **(Annex 18)**

> displaced persons began returning to their homes, but many continue to express fear of government forces and paramilitary units in and around villages. Calculated acts of violence followed by retaliatory measures now occur frequently in cities that, until winter, had been notably exempt from violence, even during the influx of internally displaced persons into urban areas whose social resources were already overtaxed. With the exception of some isolated incidents, the resident communities of Kosovo's large multi-ethnic cities, where most of its population resides, have not turned violently upon each other. However, targeted acts of violence and growing expressions of public rage during the past month might seriously threaten peace in urban areas."[93]

105. One of the worst examples of the atrocities committed within this period was the massacre of 45 Kosovo Albanian civilians in the village of Racak on 15 January 1999.

106. In response to the events in Racak, the President of the Security Council issued a Statement on 19 January 1999 *inter alia* in the following terms:

> "The Security Council strongly condemns the massacre of Kosovo Albanians in the village of Racak in Southern Kosovo, Federal Republic of Yugoslavia, on 15 January 1999, as reported by the Organisation for Security and Cooperation in Europe (OSCE) Kosovo Verification Mission (KVM). It notes with deep concern that the report of the KVM states that the victims were civilians, including women and at least one child. The Council also takes note of the statement by the Head of the KVM that the responsibility for the massacre lay with the Federal Republic of Yugoslavia security forces, and that uniformed members of both the Federal Republic of Yugoslavia armed forces and Serbian special police had been involved."[94]

107. In the face of this deteriorating situation, and in a further attempt to achieve a peaceful resolution to the situation in Kosovo, the Contact Group of countries summoned representatives of the FRY and the Kosovo Albanian community to a conference at Rambouillet, France in early February 1999. Following intensive negotiations both in Rambouillet on 6-23 February 1999 and subsequently in Paris in mid-March 1999 this peace initiative collapsed, the negotiations being suspended on 19 March 1999.

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[93] S/1999/99, 30 January 1999, at paragraph 4. **(Annex 18)**
[94] S/PRST/1999/2, 19 January 1999. **(Annex 19)**

108. Reporting on the situation in Kosovo on 17 March 1999, the UN Secretary-General noted *inter alia* that

> "[t]he humanitarian and human rights situation in Kosovo remains grave. The general insecurity, combined with continuing and unpredictable outbreaks of violence, has resulted in a cycle of displacement and return throughout Kosovo. During the reporting period, targeted killings of civilians, summary executions, mistreatment of detainees and new abduction cases were reported almost daily."[95]

109. Throughout the period under consideration, NATO worked closely with the UN Security Council and Secretary-General and the OSCE in respect of the situation in Kosovo. This involvement was contemplated by the Security Council from the outset, albeit in general terms, in Resolution 1160 (1998) insofar as it requested "the Secretary-General, in consultation with appropriate regional organisations" to include in his first report on the situation in Kosovo "recommendations for the establishment of a comprehensive regime to monitor the implementation of the prohibitions imposed by this resolution".[96]

110. In response to this request, the Secretary-General noted:

> "I believe that OSCE, with contributions and assistance from other regional organisations, as necessary, would be in a position to carry out the requested monitoring functions effectively. Those regional organisations might include the European Union, the North Atlantic Treaty Organisation, and the Western European Union."[97]

111. On the basis of further instructions from the Security Council, the UN Secretary-General undertook a detailed consultative exercise with the OSCE, NATO and other groups and organisations designed to establish a comprehensive regime to monitor compliance with Resolution 1160 (1998). NATO played an integral role in the mechanism that emerged from these consultations and in the wider process aimed at achieving a peaceful resolution of the situation in Kosovo.[98]

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[95] S/1999/293, 17 March 1999, at paragraph 4. **(Annex 20)**

[96] S/RES/1160 (1998), 31 March 1998, at paragraph 15. **(Annex 6)**

[97] S/1998/361, 30 April 1998, at paragraph 7. **(Annex 8)**

[98] See, for example, the *Kosovo Verification Mission Agreement* between NATO and the FRY of 15 October 1998; S/1998/991, 23 October 1998 **(Annex 21)** and Annex II to the Report of the UN Secretary-General of 30 January 1999; S/1999/99, 30 January 1999 **(Annex 18)**.

112. In the light of the sharply deteriorating situation in Kosovo and continued non-compliance by the FRY with the requirements of Security Council Resolution 1199 (1998) and other relevant resolutions, NATO notified the FRY on a number of occasions of its resolve to take military action to address the situation in the event of a continued failure by the FRY to fulfil its international commitments. Thus, for example, in a letter dated 30 January 1999 from the NATO Secretary-General to the President of the FRY, NATO identified various steps required of the FRY to address the situation in Kosovo and continued:

> "If these steps are not taken, NATO is ready to take whatever measures are necessary in the light of both parties' compliance with international commitments and requirements, including in particular assessment by the Contact Group of the response to its demands, to avert a humanitarian catastrophe, by compelling compliance with the demands of the international community and the achievement of a political settlement. The Council has therefore agreed today that the NATO Secretary-General may authorise air strikes against targets on territory of the Federal Republic of Yugoslavia."[99]

113. In the light of the continued failure by the FRY to take steps to address the situation in Kosovo, NATO commenced military action in the FRY on 24 March 1999. Following an agreement of 9 June 1999 on *inter alia* the phased withdrawal of FRY forces from Kosovo,[100] NATO suspended its military action on 10 June 1999. On the same day, the UN Security Council adopted Resolution 1244 (1999) laying down the principles that were to apply to a political solution of the Kosovo crisis.

2. Elements concerning the NATO action in the FRY

114. NATO, a political and military alliance established in accordance with the principles of the UN Charter, was created by the North Atlantic Treaty of April 1949. It is currently composed of 19 members - Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States.

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[99] S/1999/107*, 3 February 1999, at p.4, paragraph 5. **(Annex 22)**
[100] S/1999/682, 15 June 1999. **(Annex 23)**

115. NATO operates within a wider framework known as the Partnership for Peace ("PfP") which comprises a further 27 countries.[101] The PfP meets within the framework of the Euro-Atlantic Partnership Council on a regular basis as well as under the auspices of the North Atlantic Council, the principal decision-making organ of NATO.

116. Of the 19 members of NATO, 14 participated in some active manner in the NATO military action in the FRY. These included the United States, France, Italy, the United Kingdom, Germany, the Netherlands, Turkey, Canada, Belgium, Denmark, Spain, Norway, Hungary and Portugal. The Belgian contribution to the NATO force amounted to approximately 1.3% of total aircraft committed. By comparison to the Belgian contribution, the United States, by a significant margin the largest contributor to the NATO force, committed some 65% of total aircraft.

3. Developments subsequent to the cessation of the NATO action on 10 June 1999

117. On 10 June 1999, contemporaneously with the cessation of the NATO military action, the UN Security Council, acting under Chapter VII of the *Charter*, adopted Resolution 1244 (1999). By this Resolution, the Council decided that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2".[102] The Security Council further decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required".[103] The Council went on *inter alia* to:

(a) request the UN Secretary-General to appoint a Special Representative to control the implementation of the international civil presence and to coordinate closely with the international security presence;[104]

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[101] These include Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Croatia, Estonia, Finland, Georgia, Ireland, Kazakstan, the Kyrgyz Republic, Latvia, Lithuania, Moldova, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine and Uzbekistan.

[102] S/RES/1244, 10 June 1999, at paragraph 1. **(Annex 5)**

[103] S/RES/1244, 10 June 1999, at paragraph 5. **(Annex 5)**

[104] S/RES/1244, 10 June 1999, at paragraph 6. **(Annex 5)**

(b) authorise Member States and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2;[105] and

(c) authorise the Secretary-General to establish an international civil presence to promote substantial autonomy and self-government in Kosovo.[106]

118. Pursuant to Annex 2, point 3 of Resolution 1244 (1999), agreement was to be reached on the "[d]eployment in Kosovo under United Nations auspices of effective civil and security presences". By Annex 2, point 4:

> "[t]he international security presence with substantial North American Treaty Organisation participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."

119. In accordance with the terms of this Resolution, the international civil presence in Kosovo was established by the UN Secretary-General as the *United Nations Interim Administration Mission in Kosovo* ("UNMIK"). The structure, role and responsibilities of UNMIK were laid out initially by the Secretary-General in a Report of 12 June 1999[107] and subsequently elaborated upon in two further Reports of 12 July 1999[108] and 16 September 1999.[109] On 2 July 1999, the Secretary-General indicated his intention to appoint Bernard Kouchner of France as his Special Representative and head of UNMIK.[110] UNMIK's operational presence in Kosovo is extensive.

120. In accordance with Resolution 1244 (1999), the international security presence in Kosovo was established pursuant to a Military-technical agreement concluded between the NATO military authorities and the FRY.[111] The force, known as KFOR, is to "operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission".[112] KFOR's 50,000

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[105] S/RES/1244, 10 June 1999, at paragraph 7. **(Annex 5)**
[106] S/RES/1244, 10 June 1999, at paragraphs 10-11. **(Annex 5)**
[107] S/1999/672, 12 June 1999.
[108] S/1999/779, 12 July 1999.
[109] S/1999/987, 16 September 1999.
[110] See S/1999/748, 6 July 1999 and S/1999/749, 6 July 1999.
[111] S/1999/682, 15 June 1999. **(Annex 23)**
[112] S/1999/682, 15 June 1999, at p.3, paragraph 2. **(Annex 23)**

or so personnel are drawn from 39 states as follows: Argentina, Austria, Azerbaijan, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lithuania, Luxembourg, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates, United Kingdom and United States. The Belgian contingent in KFOR amounts to around 800 personnel.

PART II: OBJECTIONS TO JURISDICTION

CHAPTER FOUR: THE COURT IS NOT OPEN TO THE FRY

121. In its *Provisional Measures Order*, the Court observed that it can exercise jurisdiction "only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned".[113] As this recognises, access to the Court, or an entitlement to appear, is a condition precedent to any question arising as to the Court's jurisdiction in a particular case.

122. Access to the Court is controlled by the UN *Charter* and the *Statute* of the Court. Pursuant to Article 93(1) of the *Charter*, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute" of the Court. Pursuant to Article 93(2) of the *Charter*,

> "[a] State which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

123. In the light of these provisions, the *Statute* lays down the circumstances in which the Court "shall be open" to states. Pursuant to Article 35(1) of the *Statute*, the Court is open to "the States parties to the present Statute". Pursuant to Article 35(2), "[t]he conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council".

124. Acting pursuant to the powers conferred upon it by Article 35(2) of the *Statute*, the Security Council adopted Resolution 9 on 15 October 1946. This requires the deposit of a declaration accepting the jurisdiction of the Court as well as compliance with other specified conditions.

125. The institution of proceedings by a state which is not party to the *Statute* but which has accepted the jurisdiction of the Court by a declaration made "in accordance with any resolution adopted by the Security Council" under Article 35(2) of the *Statute* is addressed by Article 41 of the Court's *Rules*. This provides

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[113] *Provisional Measures Order*, at paragraph 20.

that the institution of proceedings "shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar".

126. As these provisions make plain, access to the Court by a state is dependent upon (a) membership of the United Nations, or (b) the state in question being otherwise a party to the *Statute* on conditions determined by the General Assembly upon the recommendation of the Security Council, or (c) in the case of a state not party to the Statute, compliance with the terms of Article 35(2) of the *Statute*.

127. Of these bases of access to the Court, the FRY contends simply that it is a member of the United Nations.

128. In Belgium's contention, the Court is not open to the FRY on any of the bases just enumerated. The FRY is not a member of the United Nations. The FRY is not otherwise a party to the *Statute* of the Court pursuant to Article 93(2) of the *Charter*. The FRY has not deposited a declaration accepting the jurisdiction of the Court pursuant to the terms of Article 35(2) of the *Statute*, Security Council Resolution 9 (1946) and Article 41 of the Court's *Rules*. Nor does the reference to "treaties in force" in Article 35(2) of the *Statute* provide a basis of access to the Court by the FRY in this case. Each of these elements is addressed further below.

129. Absent an entitlement to appear, the Court lacks jurisdiction *ratione personae*. As this is a condition precedent to any question arising as to the Court's jurisdiction in a particular case, the question of whether the Court has jurisdiction *ratione materiae* or *ratione temporis* does not arise.

1. The FRY is not a member of the United Nations

130. The FRY asserts that it is a party to the *Statute* of the Court.[114] The basis for this assertion is the contention that the FRY is a member of the United Nations.[115] Although this is not expressly stated in the FRY's pleadings, this contention rests on the proposition that the FRY is the continuation of the former Socialist Federal Republic of Yugoslavia ("SFRY") and that, as such, it continued

[114] FRY Memorial, at paragraph 3.1.18.
[115] FRY Memorial, Part 3.1.

the UN membership of the SFRY.[116] The FRY advances no other ground in support of its claim of access to the Court.

131. Belgium rejects the FRY's claim to membership of the UN. The FRY is a new state. It is one amongst five successor states of the former SFRY. It is neither the continuation nor the "sole successor" of the SFRY. In accordance with the terms of the *Charter*, the established practice of the Organisation and authoritative commentary, new states must apply for membership. They cannot succeed to membership on the basis of the membership of the state from which they emerged or with which they were once connected. The long-standing practice of the Organisation in this regard has been confirmed repeatedly in resolutions of the Security Council and General Assembly with respect to the position of the FRY. Whatever the practical complications to which this position has given rise, whether for reasons of pragmatism or oversight, the status of the FRY *vis-à-vis* the UN is clear. The FRY is not a member of the United Nations. It cannot therefore, on this basis, be a party to the *Statute* of the Court.

132. Membership of the United Nations is governed by Articles 3 and 4 of the UN *Charter*. Article 3 addresses the "original" membership of those states which signed and ratified the Charter following the San Francisco negotiations in 1945. Article 4 addresses the admission to membership of all other states.

133. Pursuant to Article 4(2), the admission to membership of any state satisfying the requirements of Article 4(1) "will be effected by a decision of the General Assembly upon the recommendation of the Security Council". As this makes clear, membership of the UN is a matter of combined action by two of the principal organs of the UN, the Security Council and the General Assembly. As the Court observed in its *Conditions of Admission* Advisory Opinion, the "judgment of the Organisation" which is at the core of the procedure admitting states to membership "means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members".[117] It is a solemn responsibility. It is a responsibility that requires two distinct affirmative acts, both of which "are indispensable to form the judgment of the Organisation to which the previous paragraph of Article 4 refers."[118]

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[116] See, for example, S/24073, 6 June 1992, at p.2 **(Annex 24)** and S/24577, 21 September 1992, at p.2 **(Annex 25)**.

[117] *Admission of State to the United Nations (Charter, Article 4), Advisory Opinion: I.C.J. Reports 1948*, p.57, at p.62.

[118] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p.4, at pp.7-8.

134. The issue before the Court is whether the FRY is a member of the UN pursuant to these provisions. It is not, as has sometimes been suggested, a question of the suspension of the rights and privileges of membership under Article 5 of the *Charter*. Nor is it a question of expulsion from the Organisation under Article 6 of the *Charter*. The FRY is not now, and has never been, a member of the UN.

135. The issues relevant to a consideration of this matter are addressed below under the following headings:

(a) the dissolution of the SFRY and the establishment of the FRY as a new state;
(b) the practice of the United Nations in respect of the admission to membership of new states;
(c) the practice of the Security Council and General Assembly in respect of claims of succession to UN membership by the FRY;
(d) the practice of the UN Secretariat;
(e) the practice of other international organisations in respect of claims of succession to membership by the FRY;
(f) conclusions.

(a) The dissolution of the SFRY and the establishment of the FRY as a new state

136. "Yugoslavia", as the Kingdom of Serbs, Croats and Slovenes became known in 1929, was an original member of the United Nations. By its Constitution of 31 January 1946, "Yugoslavia" was declared to be composed of six republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro. Its name was changed in 1963 to the Socialist Federal Republic of Yugoslavia. The status of the six republics of the SFRY was confirmed in Constitutions adopted in 1963 and 1974.

137. Following the outbreak of hostilities in the SFRY and declarations of independence by four of its constituent republics in 1991,[119] the European Community and its Member States convened a peace conference to bring together the Federal Presidency and Federal Government of Yugoslavia, the Presidents of the

[119] During 1991, declarations of independence of one form or another were made by Slovenia, Croatia, Macedonia and Bosnia-Herzegovina.

six Yugoslav Republics and representatives of the European Community and its Member States. As part of this *Conference on Yugoslavia*, the participants established an Arbitration Commission, composed of five eminent jurists, the competence of which was to decide on disputes submitted to it by the parties and to give advice on any legal question submitted to it by the Chairman of the Conference.[120] The arrangements establishing the Arbitration Commission were accepted by the six Yugoslav Republics at the opening of the *Conference on Yugoslavia* on 7 September 1991.[121]

138. In response to a request from the Chairman of the Conference on 20 November 1991 to consider *inter alia* whether the SFRY had disintegrated as a result of the declarations of independence of four of its constituent republics, the Arbitration Commission issued *Opinion No.1* on 29 November 1991 *inter alia* in the following terms:

> "1. The Commission considers:
> (a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State; ...
>
> 2. The Arbitration Commission notes that:
> (a) - although the SFRY has until now retained its international personality, notably inside international organisations, the Republics have expressed their desire for independence;
> ...
> (c) The recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organisation.
>
> 3. Consequently, the Arbitration Commission is of the opinion:
> - that the Socialist Federal Republic of Yugoslavia is in the process of dissolution; ..."[122]

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[120] See 96 *ILR* 737, at p.738 and generally *ILR* at Vol.92, pp.162 *et seq* and Vol.96, pp.713 *et seq.*

[121] *Interlocutory Decision (Opinions No.8, 9 and 10),* 4 July 1992, 92 *ILR* 194, at p.197, paragraph 2.

[122] *Opinion No.1,* 29 November 1991, 92 *ILR* 162-166.

139. Contributing to this process of dissolution, the Republics of Serbia and Montenegro, by a Declaration of 27 April 1992, established the "Federal Republic of Yugoslavia". The Declaration provided *inter alia* as follows:

> "... the representatives of the people of the Republic of Serbia and the Republic of Montenegro declare:
> 1. The Federal Republic of Yugoslavia, continuing the state, international, legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
> ...
> Remaining bound by all obligations to international organisations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly formed states to join these organisations and institutions, particularly the United Nations and its specialised agencies. ..."[123]

140. As will be evident from its terms, the FRY, by this Declaration, purported to be the continuation of the SFRY, including, implicitly, in respect of its membership of international organisations, particularly the United Nations and its Specialised Agencies. This claim to continuity between the SFRY and the FRY was, however, unequivocally rejected by the Arbitration Commission, by the Security Council and General Assembly and by other international organisations. These elements are addressed further below.

141. In the light of *Opinion No.1* and subsequent Opinions of the Arbitration Commission concerning the status of the four constituent Republics that had declared independence, the Chairman of the *Conference on Yugoslavia*, on 18 May 1992, asked the Arbitration Commission whether the process of dissolution of the SFRY could be regarded as complete. In response, the Commission issued *Opinion No.8* on 4 July 1992 *inter alia* in the following terms:

> "1. In its *Opinion No.1* of 29 November, the Arbitration Commission found that:
> - a State's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a State;
> - the SFRY was at that time a legal international entity but the desire for independence had been expressed through referendums in the Republics of Slovenia, Croatia and

[123] S/23877, 5 May 1992. **(Annex 26)**

Macedonia, and through a resolution on sovereignty in Bosnia-Hercegovina;
- the composition and functioning of essential bodies of the Federation no longer satisfied the intrinsic requirements of a federal State regarding participation and representativeness;
- recourse to force in different parts of the Federation had demonstrated the Federation's impotence;
- the SFRY was in the process of dissolution but it was nevertheless up to the Republics which so wished to constitute, if appropriate, a new association with democratic institutions of their choice;
- the existence or disappearance of a State is, in any case, a matter of fact.

2. The dissolution of a State means that it no longer has legal personality, something which has major repercussions in international law. It therefore calls for the greatest caution.

The Commission finds that the existence of a federal State, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign States with the result that federal authority may no longer be effectively exercised.

By the same token, while recognition of a State by other States has only declarative value, such recognition, along with membership of international organisations, bears witness to these States' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law.

3. The Arbitration Commission notes that since adopting *Opinion No.1*:
- the referendum proposed in *Opinion No.4* was held in Bosnia-Hercegovina on 29 February and 1 March: a large majority voted in favour of the Republic's independence;
- Serbia and Montenegro, as Republics with equal standing in law have constituted a new State, the 'Federal Republic of Yugoslavia', and on 27 April adopted a new constitution;
- most of the new States formed from the former Yugoslav Republics have recognised each other's independence, thus demonstrating that the authority of the federal State no longer held sway on the territory of the newly constituted States;
- the common federal bodies on which all the Yugoslav Republics were represented no longer exist: no body of that type has functioned since;
- the former national territory and population of the SFRY are now entirely under the sovereign authority of the new States;
- Bosnia-Hercegovina, Croatia and Slovenia have been recognised by all the Member States of the European

> Community and by numerous other States, and were admitted to membership of the United Nations on 22 May 1992;
> – UN Security Council Resolutions Nos.752 and 757 (1992) contain a number of references to 'the former SFRY';
> – what is more, Resolution No.757 (1992) notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically (the membership) of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted';
> – the declaration adopted by the Lisbon European Council on 27 June makes express reference to 'the former Yugoslavia'.
> 4. The Arbitration Commission is therefore of the opinion:
> – that the process of dissolution of the SFRY referred to in *Opinion No.1* of 29 November 1991 is now complete and that the SFRY no longer exists."[124]

142. As this *Opinion* makes clear, the dissolution of the SFRY did not result in a legal vacuum in the territory previously comprising the SFRY – viz., "the former national territory and population of the SFRY are now entirely under the sovereign authority of the new States".

143. The emergence of, and relationship between, the "new" states was addressed by the Arbitration Commission in *Opinion No.9* of 4 July 1992 in the context of its response to the question of how issues of succession should be settled between the various successor states.

> "New States have been created on the territory of the former SFRY and replaced it. All are successor States of the former SFRY.
> ...
> The Arbitration Commission is therefore of the opinion that:
> – the successor States to the SFRY must together settle all aspects of the succession by agreement;
> ...
> – the SFRY's membership of international organisations must be terminated according to their statutes and that *none of the successor States may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY*; ..."[125]

144. Belgium draws particular attention to the italicised part of *Opinion No.9* just cited to the effect that, in the view of the Arbitration Commission, none of the

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[124] *Opinion No.8,* 4 July 1992, 92 *ILR* 199-202.
[125] *Opinion No.9,* 4 July 1992, 92 *ILR* 203-205, at paragraphs 1 and 4 (emphasis added).

new states emerging from the former SFRY could claim to be the successor to the SFRY in respect of membership in international organisations.

145. Addressing the specific question of whether the FRY was to be considered a new state, the Arbitration Commission, in *Opinion No.10* of 4 July 1992, concluded *inter alia* that "the FRY (Serbia and Montenegro) is a new State which cannot be considered the sole successor to the SFRY".[126]

146. The principal conclusions, for present purposes, which emerge for the *Opinions* of the Arbitration Commission may be summarised as follows:

(a) the SFRY – ie, the state that was an original member of the United Nations – ceased to exist;

(b) the critical element leading to the dissolution of the SFRY was the constitution of the majority of the republics comprising the SFRY as independent sovereign states, the republics in question "embracing a greater part of the territory and population" of the SFRY;

(c) the SFRY was replaced by new states, all of which are successors to the former SFRY;

(d) as with the other successor states, the FRY is a new state and cannot be considered the sole successor of the SFRY; and

(e) none of the successor states may claim for itself alone the membership rights of the SFRY in any international organisations.

147. The conclusions of the Arbitration Commission are not, of course, binding upon the Court. They are, however, in Belgium's contention, of very particular importance in the present context as they constitute the essential legal framework within which on-going attempts have been taking place to address the difficult questions raised by the dissolution of the SFRY. They form, for example, an essential legal basis of the negotiations between the successor states on such questions as their succession to the property, archives, assets and liabilities of the SFRY. The conclusions of the Arbitration Commission, as with other principles to emerge from the negotiations within the framework of the *Conference on Yugoslavia*, are thus part of a delicate balance of relations between the various successor states.

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[126] *Opinion No.10,* 4 July 1992, in 92 *ILR* 206-208, at paragraph 5.

(b) The practice of the United Nations in respect of the admission to membership of new states

148. The admission to membership of the United Nations of new states is in principle governed by Article 4 of the *Charter*. As previously described, this establishes both the conditions that must be fulfilled before a state can be admitted to membership and a two-stage procedure for admission involving a recommendation by the Security Council and a decision by the General Assembly.

149. Virtually from the outset, questions have arisen concerning succession to UN membership in cases of secession from, or the partition or dissolution of, existing members. Although the circumstances of such cases have varied considerably, the basic principle underpinning the practice of the UN is that, while a state which constitutes the continuation of the pre-existing legal person will retain its UN membership, *new* states emerging in such circumstances must apply for and be admitted to membership in accordance with the procedure set out in Article 4 of the *Charter*. A new state cannot, in other words, succeed to membership of the United Nations.

150. This principle first emerged from the circumstances surrounding the establishment of Pakistan as a new state on its separation from India in 1947. Addressing this situation, the UN Assistant Secretary-General for Legal Affairs noted *inter alia*:

> "Pakistan will be a new non-member State. In order for it to become a Member of the United Nations, it would have to apply for admission pursuant to Article 4 of the Charter, and its application would be handled under the pertinent rules of procedure of the General Assembly and the Security Council."[127]

151. In the light of further discussion on this matter, the Sixth Committee of the General Assembly was asked to consider "the legal rules to which ... a State or States entering into international life through the division of a Member State of the United Nations should be subject".[128] In response, the Sixth Committee agreed on the following principles:

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[127] Legal Opinion of 8 August 1947 by the Assistant Secretary-General for Legal Affairs; set out in Document A/CN.4/149 and Add.1, *The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat*, YILC (1962) Vol.II, p.101, at p.102.

[128] *The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat*, ibid, at p.103, paragraph 14.

> "1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organisation of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognised in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
>
> 2. *That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they form part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.*
>
> 3. Beyond that, each case must be judged according to its merits."[129]

152. With due regard to the appreciation that each case must be judged on its own merits, the principle that new states cannot succeed to UN membership but must apply for and be admitted to membership in accordance with the terms of Article 4 of the *Charter* has been the guiding principle since 1947.

153. An example of the application of this principle in circumstances which most closely approximates that involving the SFRY is that of Czechoslovakia, also an original member of the United Nations. On the dissolution of Czechoslovakia on 31 December 1992, both successor states, the Czech Republic and the Slovak Republic, applied for and were admitted to membership as new states on 19 January 1993 in accordance with Article 4 of the *Charter*.

154. The principle that new states cannot succeed to membership of international organisations by reason of the fact of the membership of the state of which they were once a part or from which they emerged is also reflected in the work of the International Law Commission in the context of its Draft Articles on the *Succession of States in Respect of Treaties*. Although the Draft Articles - which formed the basis of the *1978 Vienna Convention on Succession of States in Respect of Treaties* - did not address the subject of succession to membership of international

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[129] A/C.1/212; GAOR, Second Session, First Committee, pp.582-583, annex 14g; reproduced in *The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat*, op.cit. note 127, at pp.103-4, paragraph 16 (emphasis added).

organisations, the issue was addressed in the Commission's commentary to draft Article 4 in the following terms:

> "(2) International organisations take various forms and differ considerably in their treatment of membership. In many organisations, membership other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and member of the organisation as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organisation. The leading precedent in the development of this principle was the case of Pakistan's admission to the United Nations in 1947. The Secretariat then advised the Security Council that Pakistan should be considered as a new State formed by separation from India. Acting upon this advice, the Security Council treated India as a continuing member, but recommended Pakistan for *admission* as a new member; and after some debate the General Assembly adopted this solution of the case. Subsequently, the general question was referred to the Sixth Committee which, *inter alia*, reported:
>
> > 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they form part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has formally been admitted as such in conformity with the provisions of the Charter.
>
> New States have, therefore been regarded as entitled to become members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialised agencies and of numerous other organisations.
>
> (3) The practice excluding succession is clearest in cases where membership of the organisation is dependent on a *formal process of admission*, but it is not confined to them."[130]

155. As the preceding section in this part describes, claims by the FRY to be the continuation or sole successor of the SFRY – and, as such, to have succeeded to its membership of the UN – were unambiguously rejected by the Arbitration Commission of the *Conference on Yugoslavia*. It has been a cornerstone of the

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[130] *Succession of States: Succession in Respect of Treaties*, Report of the Commission to the General Assembly, YILC, 1972, Vol.II, p.223, at p.233.

response of the international community to events in the former SFRY that the republics, once part of the SFRY, that emerged to independence in the period 1991-92 were all new states and were all equal successors of the former SFRY. This characterisation was explicitly affirmed by the Arbitration Commission in respect of the FRY in its *Opinion No.10*.

156. As has also been noted, one of the fundamental consequences of this appreciation was the assessment by the Arbitration Commission that none of the new states could claim for itself the membership rights in international organisations, including the United Nations, previously enjoyed by the former SFRY. As has been described in this section, this conclusion corresponds to the practice of the United Nations in relation to the admission of new states to membership.

157. The Arbitration Commission's assessment that the FRY was a new state, and that, as such, it could not succeed to the UN membership of the SFRY, mirrors the approach adopted by the Security Council and General Assembly, the relevant UN organs concerned with questions of membership. This element is addressed in the following section.

(c) The practice of the Security Council and General Assembly in respect of claims of succession to UN membership by the FRY

158. Pursuant to applications for membership in accordance with Article 4(1) of the *Charter*, Bosnia-Herzegovina, Croatia and Slovenia were admitted to membership of the United Nations on 22 May 1992 following recommendations by the Security Council and decisions of the General Assembly in accordance with Article 4(2). Macedonia was admitted to membership of the UN pursuant to the same procedure on 8 April 1993 under the provisional designation of "the former Yugoslav Republic of Macedonia".

159. As regards FRY membership of the United Nations, the Security Council, on 30 May 1992, in the course of Resolution 757 (1992) imposing economic sanctions against the "Federal Republic of Yugoslavia (Serbia and Montenegro)", noted *inter alia*

> "that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the

> former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".[131]

160. This rejection by the Security Council of FRY succession to the UN membership of the SFRY was a reaction to the Declaration establishing the FRY of 27 April 1992 and its purported continuation of the SFRY's UN membership. As the quoted paragraph indicates, the Security Council was also acting in the face of opposition amongst UN members to the FRY's claim to continue the SFRY's UN membership. By way of example of such opposition, Austria, in a communication to the UN Secretary-General of 5 May 1992, commented: "There is no legal basis for an automatic continuation of the legal existence of the former Socialist Federal Republic of Yugoslavia by the Federal Republic of Yugoslavia, which therefore cannot be considered to continue the Yugoslav membership in the United Nations."[132]

161. By way of further example, and of particular significance given its status as one of the successor states of the former SFRY, Slovenia, in a communication of 27 May 1992, addressed the matter *inter alia* in the following terms:

> "Serbia and Montenegro - two of the Republics of the former Socialist Federal Republic of Yugoslavia - opted for the creation of a common State, currently called the 'Federal Republic of Yugoslavia'. It is beyond doubt that they have the right to create a new common State. However, that right does not provide Serbia and Montenegro with any title of right either to continuity of the international personality of the former Socialist Federal Republic of Yugoslavia or to the membership of the former Socialist Federal Republic of Yugoslavia in international organisations. ...
>
> Since the dissolution of the former Socialist Federal Republic of Yugoslavia, some of its successor States have already become members of certain international organisations, including the United Nations. This process will continue. It would be only correct to terminate the membership of the former Socialist Federal Republic of Yugoslavia in all international organisations, on grounds of its dissolution and non-existence. Moreover, all the Republics of the former Socialist Federal Republic of Yugoslavia that so wish should, as equal successor States of the former Socialist Federal Republic of Yugoslavia, become candidates for

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[131] S/RES/757, 30 May 1992. **(Annex 27)**
[132] S/23876, 5 May 1992, at p.2. **(Annex 28)**

> membership in these organisations, in accordance with their pertinent rules on membership."[133]

162. Resolution 757 (1992) was followed, on 25 August 1992, by the adoption of Resolution 46/242 by the General Assembly in which the Assembly noted *inter alia* "that a large number of States have reserved their position regarding the succession of the Socialist Federal Republic of Yugoslavia by the Federal Republic of Yugoslavia (Serbia and Montenegro)".[134]

163. In the light of continued opposition to automatic succession by the FRY to the UN membership of the SFRY, the Security Council returned to the question on 19 September 1992, addressing the matter expressly in Resolution 777 (1992) in the following terms:

> "*The Security Council,*
> *Reaffirming* its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,
> *Considering* that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,
> *Recalling* in particular its resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',
>
> 1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;
>
> 2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."[135]

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[133] S/24028, 28 May 1992, at p.3. **(Annex 29)**
[134] GA Resolution 46/242, 25 August 1992. **(Annex 30)**
[135] S/RES/777, 19 September 1992. **(Annex 31)**

164. In the light of the recommendation of the Security Council, the General Assembly, on 22 September 1992, adopted Resolution 47/1 in the following terms:

> "*The General Assembly*
> *Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,
>
> 1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;
>
> 2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."[136]

165. In acting in this manner, the Security Council and General Assembly adopted the procedure laid down in Article 4(2) of the Charter concerning membership.

166. Speaking in the debate in the General Assembly that preceded the adoption of this Resolution, Mr Milan Panic, the then Prime Minister of the FRY, appearing to accept that the FRY could not be considered to have succeeded to the UN membership of the former SFRY, stated:

> "I herewith formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent. I am certain that my country and my Government satisfy the conditions for membership at least as well as the countries and Governments many here today represent."[137]

167. This statement was not, however, followed up by a formal application for admission to membership by the FRY.

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[136] GA Resolution 47/1, 22 September 1992. **(Annex 32)**
[137] A/47/PV.7, 22 September 1992, at p.149. **(Annex 33)**

168. The Security Council returned to the matter of the status of the FRY within the UN in Resolution 821 (1993) of 28 April 1993. Recalling its Resolution 777 (1992) and General Assembly Resolution 47/1, the Council *inter alia*

> "*[r]eaffirm[ed]* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommend[ed]* to the General Assembly that, further to the decisions taken in resolution 47/1, it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".[138]

169. In the light of this recommendation, the General Assembly adopted Resolution 47/229 on 29 April 1993 in the following terms:

> "*The General Assembly,*
> *Recalling* its resolution 47/1 of 22 September 1992,
> *Having received* the recommendation made by the Security Council in its resolution 821 (1993) of 28 April 1993 that, further to the decisions taken in resolution 47/1, the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council,
>
> 1. *Decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council;
>
> 2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the forty-seventh session of the General Assembly."[139]

170. In view of some continuing ambiguity in the *de facto* working status of the FRY within the UN (addressed further below), the General Assembly, in Resolution 48/88 of 20 December 1993

> "*[r]eaffirm[ed]* its resolution 47/1 of 22 September 1992, and urge[d] Member States and the Secretariat in fulfilling the spirit of that resolution to end the de facto working status of the Federal Republic of Yugoslavia (Serbia and Montenegro)."[140]

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[138] S/RES/821, 28 April 1993, at paragraph 1. **(Annex 34)**
[139] GA Resolution 47/229, 29 April 1993. **(Annex 35)**
[140] GA Resolution 48/88, 20 December 1993, at paragraph 19. **(Annex 36)**

171. In Belgium's contention, the resolutions of the Security Council and General Assembly noted above leave no room for doubt that, in the appreciation of the Organisation, as expressed by its principal organs charged with responsibility in this area, the FRY could not - and did not - succeed to the UN membership of the former SFRY. The language of the resolutions is unambiguous - "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations ... the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations."

172. As the FRY has not been admitted to membership in accordance with the procedure set out in Article 4 of the *Charter*, there is no basis for the claim that the FRY is a member of the UN.

173. Before leaving this section, a concluding observation is necessary. The resolutions set out above address the claim by the FRY to have succeeded to the UN membership of the former SFRY. Their focus was thus the status *of the FRY* in the UN. While the underlying premise was that the SFRY had ceased to exist, the resolutions did not address the status of the SFRY, or "Yugoslavia" as it was invariably referred to, in the UN. They did not, for example, purport to terminate the membership of "Yugoslavia". SFRY membership of the UN was thus formally left unaffected by the resolutions in question.

174. In the normal course of events, the termination of the UN membership of a state that has dissolved will occur by operation of law, lapse of time and, where relevant, the admission to membership of the new states that comprised the constituent parts of the former member (as in the case of Czechoslovakia). In the case of the SFRY, however, the matter was more complex. The failure by the successor states to resolve fundamental issues of succession arising from the SFRY's dissolution suggested that, for formal purposes, some conception of the SFRY remained extant. This, in the perception of some, combined with the silence on the matter of the SFRY's status within the UN by the Security Council and the General Assembly, has resulted in the anomalous position of the apparent continued UN membership of the SFRY.

175. It is undeniable that a certain amount of confusion has been caused by this situation. The anomalous position of the SFRY within the UN is clearly a matter that will have to be addressed by the Organisation in due course. It is equally clear,

however, that the two issues – the figment of continued membership of the SFRY and the status of the FRY within the UN – are distinct. The anomalous position of the SFRY within the UN cannot provide a foundation for the claim by the FRY to have succeeded to the membership of the SFRY.

(d) The practice of the UN Secretariat

176. In its Memorial, the FRY refers to various aspects of the practice of the UN Secretariat in respect of the FRY – opinions from the Office of the UN Legal Counsel, certain aspects relating to the practice of the Secretary-General in his capacity as depositary of multilateral treaties and the Secretariat's assessment of the FRY for contributions. This practice is cited in support of the proposition that the FRY is a member of the UN.

177. A number of observations on this material and on the conclusion advanced on the basis thereof are warranted. First, as has already been noted, there is no doubt that a certain amount of confusion has arisen as a result of the anomalous position of the SFRY within the UN. As has also been noted, however, the issue of the status of the SFRY within the UN is distinct from that concerning the status of the FRY. The anomalous position of the SFRY cannot therefore provide a foundation for the claim by the FRY to have continued to the SFRY's UN membership.

178. Second, far from supporting the FRY's claim to have succeeded to the UN membership of the SFRY – and contrary to the interpretation advanced by the FRY in its Memorial – the observations of the UN Legal Counsel of 29 September 1992 on certain questions arising from the adoption of General Assembly Resolution 47/1 affirm that a distinction is to be drawn between the UN membership of the SFRY, under the name "Yugoslavia", and the position of the FRY. Thus, having noted that "the General Assembly has stated unequivocally that the *Federal Republic of Yugoslavia (Serbia and Montenegro)* cannot automatically continue the membership of the Socialist Federal Republic of Yugoslavia in the United Nations and that the *Federal Republic of Yugoslavia (Serbia and Montenegro)* should apply for membership of the United Nations",[141] the Legal Counsel went on to state:

> "On the other hand, the resolution neither terminates nor suspends *Yugoslavia's* membership in the Organisation. Consequently, the

[141] A/47/485, 30 September 1992, at p.2, third paragraph (emphasis added). **(Annex 37)**

> seat and nameplate remain as before, but in Assembly bodies representatives of the *Federal Republic of Yugoslavia (Serbia and Montenegro)* cannot sit behind the sign *'Yugoslavia'*. ... The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."[142]

179. As these extracts indicate, a clear distinction was made by the Legal Counsel between "Yugoslavia" - ie, the SFRY, being an original member of the UN whose membership remained unaffected by Resolution 47/1 - and the "Federal Republic of Yugoslavia (Serbia and Montenegro)". Significantly, the Legal Counsel also expressly contemplated the admission to the UN "of a new Yugoslavia under Article 4 of the Charter", a reference to possible FRY admission to the UN. By necessary implication, the FRY was not then a member of the UN.

180. The same distinction between "Yugoslavia" and the FRY was preserved in the letter by the Acting Director of the Office of the Legal Counsel reproduced as Annex No.167 to the FRY's Memorial.

181. Third, whether for reasons of pragmatism in the face of the delicate situation in the Balkans or of oversight, the confusion caused by the figment of the continued UN membership of the SFRY, combined with the absence of SFRY representation, allowed the FRY to assume the guise of the SFRY for various purposes. So, for example, UN documents circulated to "Yugoslavia" and sent to the last known address of the "Yugoslav" mission to the UN, were received by the FRY as the occupant of that premises. Similarly, assessed contributions in respect of "Yugoslavia" were received, and on occasion acted upon, by the FRY.

182. The confusion that has arisen as a result of this situation is regrettable and, as has already been observed, will have to be addressed by the Organisation in due course. This practice cannot, however, provide a foundation for the FRY's claim to UN membership. It is, in the first instance, practice which, within the ambit of operation of the UN, is relatively limited in scope. More fundamentally, membership of the UN is not a *de facto* affair. It is governed by the *Charter*. It involves a formal, twofold procedure requiring affirmative acts of both the Security Council and the General Assembly, acts which are predicated on compliance with procedural and substantive conditions by an applicant. It involves the exercise of "the judgment of the Organisation". It also has legal consequences entailing

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[142] A/47/485, 30 September 1992, at pp.2-3, fourth paragraph (emphasis added). **(Annex 37)**

obligations as well as rights, both *vis-à-vis* the Organisation and its members. UN membership is not therefore something that can arise *en passant* as a result of some passing contact between a state and the Organisation. It is certainly not something that can arise by reference to the practice of the Secretariat in the face of unambiguous resolutions to the contrary by the two principal organs charged under the *Charter* with action in respect of membership.

(e) The practice of other international organisations in respect of claims of succession to membership by the FRY

183. The approach adopted by the Security Council and General Assembly to the succession of the FRY to UN membership is mirrored by that taken by other international organisations and bodies of which the SFRY was a member in the face of claims by the FRY to have succeeded to SFRY membership. The following examples illustrate the general practice.

(i) World Health Organisation

184. In the face of claims by the FRY to have succeeded to membership of the World Health Organisation ("WHO"), the World Health Assembly adopted Resolution WHA46.1 on 3 May 1993 in the following terms:

> "The Forty-sixth World Health Assembly,
>
> Recalling resolution 47/1 of the United Nations General Assembly – upon the recommendation of the Security Council of 19 September 1992 (S/RES/777) – of 22 September 1992, in which the General Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,
>
> 1. CONSIDERS that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in WHO;
>
> 2. DECIDES that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in WHO pursuant

> to the relevant provisions of the Constitution of the World Health Organisation and that it shall not participate in the work of the principal and subsidiary organs of WHO, including the Forty-sixth World Health Assembly."[143]

185. Pursuant to the terms of this Resolution, the FRY is not a member and does not participate in the work of the WHO. Slovenia, Croatia, Bosnia-Herzegovina and Macedonia each applied for and were admitted as members of the WHO in accordance with the relevant provisions of the WHO Constitution. As in the case of the UN, "Yugoslavia" continues to be referred to in WHO documentation and to feature in certain formal elements of WHO practice, eg, the flying of members' flags and the use of members' nameplates. The FRY does not participate as "Yugoslavia" in respect of such matters.

(ii) International Labour Organisation

186. In the face of claims by the FRY to have succeeded to membership of the International Labour Organisation ("ILO"), the Governing Body of the ILO addressed the participation of the FRY in the 80th Session of the International Labour Conference in the following terms:

> "The Governing Body [instructs] the Director-General to take no action as regards the invitation to the 80th Session (1993) of the International Labour Conference of the Federal Republic of Yugoslavia (Serbia and Montenegro) or with regard to any credentials submitted on behalf of that State at the 80th Session of the Conference notwithstanding the absence of such an invitation, as long as that State had not been recognised by the United Nations as the continuation of the former Socialist Federal Republic of Yugoslavia or admitted to the International Labour Organisation as a new Member."[144]

187. The decision to preclude FRY participation in the International Labour Conference was renewed indefinitely the following year.[145] Subsequent attempts by the FRY to participate in the work of the International Labour Conference were

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[143] WHA46.1, 3 May 1993. **(Annex 38)**

[144] *Second Report of the Officers of the Governing Body: Participation of the Federal Republic of Yugoslavia (Serbia and Montenegro) at the 80th Session (1993) of the International Labour Conference*, ILO Official Bulletin, Vol.LXXVI, Series A, 1993, at pp.129-130. **(Annex 39)**

[145] ILO Official Bulletin, Vol.LXXVII, Series A, 1994, at pp.166-7. **(Annex 40)**

rejected on the basis of this decision.[146] As with the International Labour Conference, the FRY is precluded from participating in the work of ILO committees. Slovenia, Croatia, Bosnia-Herzegovina and Macedonia each applied for and were admitted as members of the ILO. As in the case of the UN, "Yugoslavia" continues to be referred to in ILO documentation. The use of this name is, however, explained in the ILO circular listing ILO member countries as follows:

> **"Special cases**
> ...
> Yugoslavia
>
> 7. *The Federal Republic of Yugoslavia* (i.e. the territory of Serbia and Montenegro) is still not recognised as continuing automatically the membership of the former Socialist Federal Republic (SFRY) in the ILO.
>
> Information from or about the Federal Republic of Yugoslavia should therefore use that name rather than Yugoslavia, which is used to refer to the former SFRY."[147]

188. Of general significance is the explanatory note introducing this circular which states *inter alia* as follows:

> "This circular gives the standard office nomenclature relating to country and area designations which must be used in <u>all</u> ILO publications and documents. *The nomenclature ... is in line with current United Nations practice ...*"[148]

(iii) International Maritime Organisation

189. At its 69th Session in November 1992, the Council of the International Maritime Organisation ("IMO") noted General Assembly Resolution 47/1 of 22 September 1992.[149] In the light of a draft resolution on the matter proposed by the Islamic Republic of Iran, the Council, at its 70th Session in June 1993, adopted by consensus Resolution C.72(70) in the following terms:

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[146] See, for example, the First Report of the Credentials Committee of the 85th Session of the International Labour Conference, *Record of Proceedings of the 85th Session of the International Labour Conference, 1997*, at p.7/4, paragraph 4.

[147] See <u>http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm</u> **(Annex 41)**

[148] See <u>http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm</u> at paragraph 1. **(Annex 41)**

[149] *Note by the Secretary*-General, C 70/3/1, 17 March 1993.

"THE COUNCIL,

RECALLING resolutions 47/1 of 22 September 1992 of the United Nations General Assembly, adopted upon the recommendation of the Security Council of 19 September 1992 (S/RES/777), and 47/229 of 29 April 1993, adopted on the recommendation of the Security Council of 28 April 1993 (S/RES/821), which decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly and in the work of the Economic and Social Council,

CONSIDERS that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in IMO; and

DECIDES that the Federal Republic of Yugoslavia (Serbia and Montenegro) must comply with Articles 5 or 7, as applicable of the IMO Convention concerning the procedures for acquiring membership in the Organisation and that until then it shall not participate in the work of the principal and subsidiary organs of IMO."[150]

190. Pursuant to the terms of this Resolution, the FRY is not a member and does not participate in the work of the IMO.

(iv) International Civil Aviation Organisation

191. On 25 September 1992, the Assembly of the International Civil Aviation Organisation ("ICAO") adopted Resolution A29-2 on the question of the membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the following terms:

"*The Assembly:*

Having noted United Nations Security Council Resolution 777 (1992) of 19 September 1992, and United Nations General Assembly Resolution A/47/1 of 22 September 1992;

Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in ICAO; and therefore

[150] Resolution C.72(70), 18 June 1993. **(Annex 42)**

> *Decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in ICAO pursuant to Chapter XXI of the Chicago Convention on International Civil Aviation and that it shall not participate in the work of ICAO."[151]

192. In accordance with the terms of this Resolution, the FRY is not a member and does not participate in the work of ICAO.

(v) International Monetary Fund, International Bank for Reconstruction and Development, International Development Association and International Finance Corporation

193. In accordance with Article II, Section 1 of the Articles of Agreement of the International Bank for Reconstruction and Development ("IBRD" or "the Bank"), membership of the IBRD is open to members of the International Monetary Fund ("IMF"). Pursuant to Article II, Section 1 of the Articles of Agreement of both the International Development Association ("IDA") and the International Finance Corporation ("IFC"), membership in these organisations is open to members of the IBRD. In the light of these provisions, membership in each of these organisations will in the first instance be determined by reference to membership of the IMF.

194. At a meeting on 14 December 1992, the Executive Board of the IMF considered the status of SFRY membership in the IMF. In the light of its consideration of this matter, the IMF "found that the SFRY has ceased to exist and has therefore ceased to be a member of the IMF."[152] At the same time, the IMF

> "decided that the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia (Serbia/Montenegro) are the successors to the assets and liabilities of the SFRY in the IMF ..."[153]

195. Having determined the share of assets and liabilities of the SFRY to be apportioned to each of the successor states, the IMF went on to decide:

> "Each successor may formally succeed to the membership of the SFRY in the IMF when the following conditions have been met: it

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[151] Resolution A29-2, 25 September 1992. **(Annex 43)**
[152] IMF Press Release No.92/92, 15 December 1992. **(Annex 44)**
[153] IMF Press Release No.92/92, 15 December 1992. **(Annex 44)**

> has notified the IMF, within one month, that it agrees to its share in the assets and liabilities of the SFRY in the IMF; it has notified the IMF that it agrees, in accordance with its law, to succeed to the membership in accordance with the terms and conditions specified by the IMF and has taken all the necessary steps to enable it to succeed to such membership and carry out all of its obligations under the Articles of Agreement; it has been found by the IMF to be able to meet its obligations under the Articles; and it has no overdue financial obligations to the IMF or in the SDR Department."[154]

196. Subsequent to this decision, and in accordance with the conditions laid down, Slovenia, Croatia, Macedonia and Bosnia-Herzegovina became members of the IMF. The FRY has yet to become a member of the IMF.

197. Following the decision of the Executive Board of the IMF, the Board of Executive Directors of the IBRD and the IDA and the Board of Directors of the IFC met to consider the matter in February 1993. Pursuant to these deliberations, the membership of the SFRY in the IBRD, IDA and IFC was terminated and, as in the case of the IMF, detailed requirements laid down under which the five successor states could succeed to the SFRY's membership.[155]

198. Subsequent to this decision, Slovenia, Croatia, Macedonia and Bosnia-Herzegovina became members of the IBRD and IFC. Macedonia and Bosnia-Herzegovina are eligible as IDA borrowers. The FRY has yet to become a member of these organisations.

(vi) General Agreement on Tariffs and Trade and the World Trade Organisation

199. The SFRY became a contracting party to the General Agreement on Tariffs and Trade ("GATT") in 1966. In the light of the Declaration establishing the FRY of 27 April 1992, and a communication drawing this, and purported FRY continuation of SFRY membership in international organisations, to the attention of the GATT,[156] the question of the FRY's status within the GATT was first considered by the GATT Council on 30 April 1992 at which point it was agreed that the matter should be placed on the agenda of a future Council meeting for consideration.[157]

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[154] IMF Press Release No.92/92, 15 December 1992. **(Annex 44)**
[155] World Bank Press Release No. 93/S43, 26 February 1992. **(Annex 45)**
[156] GATT Document L/7000, 29 April 1992.
[157] GATT Document C/M/256, 29 May 1992.

200. The status of the FRY within the GATT was addressed further by the Council at its 19 June 1992 meeting at which point the Council agreed with a proposal of its Chairman that,

> "without prejudice to the question of who should succeed the former SFRY in the GATT, and until the Council returned to this issue, ... the representative of the FRY should refrain from participating in the business of the Council."[158]

201. The Council returned to the question of the FRY's status within the GATT at its 16-17 June 1993 meeting. In the light of the adoption of General Assembly Resolution 47/1 on 22 September 1992, and on the proposal of the Chairman of the Council after consultations with its members, the Council, by consensus, adopted the following decision:

> "The Council considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the contracting party status of the former Socialist Federal Republic of Yugoslavia in the GATT, and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for accession to the GATT and that it shall not participate in the work of the Council and its subsidiary bodies. The Council further invites other committees and subsidiary bodies of the GATT, including Committees of the Tokyo Round Agreements and the Committee on Trade and Development, to take necessary decisions in accordance with the above."[159]

202. In the light of this decision, and the decision of other GATT committees in accordance with the Council's invitation, the FRY did not become a contracting party to and did not participate in the work of the GATT.

203. Following the entry into force of the *Agreement Establishing the World Trade Organisation* on 1 January 1995, the FRY, on 30 September 1996, "[expressed] the request to regulate its membership in the World Trade Organisation ... by the adoption of a clause of retroactive effect, which could be the subject of an agreement between the Federal Republic of Yugoslavia and the World Trade Organisation".[160] In response to this communication, the Republic of Slovenia, which had become a member of the WTO, stated *inter alia* as follows:

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[158] GATT Documents C/M/257, 10 July 1992, at p.3 and C/M/257/Corr.1, 6 August 1992.
[159] GATT Document C/M/264, 14 July 1993, at p.3. **(Annex 46)**
[160] WTO Document WT/L/176, 30 September 1996. **(Annex 47)**

> "1. An accession on the basis of Article XII of the Agreement Establishing the World Trade Organisation is the only acceptable basis for the Federal Republic of Yugoslavia to become a member country;
>
> 2. There is no legal basis for exceptional or privileged treatment of the Federal Republic of Yugoslavia compared to other acceding countries, especially those that have emerged from the former Socialist Federal Republic of Yugoslavia, which was a contracting party of GATT 1947".[161]

204. The FRY has not become a member of the WTO.

(f) Conclusions

205. The principal conclusions that emerge from the preceding review may be summarised as follows:

(a) with the dissolution of the SFRY, the national territory and population of the SFRY came under the sovereign authority of five new states: Bosnia-Herzegovina, Croatia, the FRY, Macedonia and Slovenia;

(b) each of these states is a successor of the former SFRY;

(c) none of these states can be considered to be the sole successor of the SFRY;

(d) this assessment was explicitly affirmed with regard to the FRY by the Arbitration Commission established by the *Conference of Yugoslavia*;

(e) in keeping with the principle that each of the new states is a successor to the SFRY, the Arbitration Commission also expressed the opinion that none of the successor states could be considered to be the successor to SFRY membership in international organisations, including the UN;

(f) this assessment mirrors that of the Security Council and General Assembly in respect of FRY claims to have continued the UN membership of the SFRY;

(g) the approach adopted by the Security Council and General Assembly in respect of the FRY reflects the approach adopted within the UN more generally to membership by new states;

(h) as the organs responsible for issues of membership of the UN, the practice of the Security Council and General Assembly is controlling in this matter. Such practice as there may be of the UN Secretariat which is at odds with

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[161] WTO Document WT/L/181, 18 October 1996. **(Annex 48)**

the approach taken by the Security Council and General Assembly cannot form the basis of a claim by the FRY to have continued the SFRY's UN membership;

(i) the practice of the Security Council and General Assembly in respect of FRY membership of the UN is mirrored by the approach taken by other international organisations and bodies of which the SFRY was a member in the face of claims by the FRY to have continued that membership.

206. In Belgium's contention, the evidence against FRY membership of the United Nations is overwhelming. The FRY is not now and has never been a member of the United Nations. This being the case, there is no basis for the FRY's claim to be a party to the *Statute* of the Court pursuant to Article 93(1) of the *Charter*. The Court is not therefore, on this basis, open to the FRY in accordance with Article 35(1) of the *Statute*.

2. The FRY is not otherwise a party to the *Statute* of the Court pursuant to Article 93(2) of the *Charter*

207. The only basis on which a non-member of the United Nations may become a party to the *Statute* of the Court is pursuant to Article 93(2) of the *Charter* "on conditions to be determined in each case by the General Assembly on the recommendation of the Security Council". In accordance with this provision – and pursuant to recommendations of the Security Council and decisions of the General Assembly in each case – Japan, Liechtenstein, Nauru and San Marino became parties to the *Statute* prior to their admission to membership of the UN. Switzerland is currently a party to the *Statute* on this basis.

208. The FRY does not claim to be a party to the *Statute* pursuant to Article 93(2) of the Charter. There could be no basis for any such claim, the Security Council and General Assembly having taken no action pursuant to this provision. As with the preceding section, the Court is not therefore, on this basis, open to the FRY pursuant to Article 35(1) of the *Statute*.

3. The Court is not open to the FRY pursuant to Article 35(2) of the *Statute*

209. Article 35(2) of the Statute addresses circumstances in which the Court shall be open to states not party to the *Statute* in the following terms:

> "The conditions under which the Court shall be open to other states 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 a position of inequality before the Court."

210. Acting pursuant to the powers conferred upon it by Article 35(2) of the *Statute*, the Security Council adopted Resolution 9 on 15 October 1946. In relevant part, this provides:

> "1. The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations Article 94 of the Charter;
>
> 2. Such declaration may be either particular or general. A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen. A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future. A State, in making such a general declaration, may, in accordance with Article 36, paragraph 2, of the Statute, recognise as compulsory, *ipso facto* and without special agreement the jurisdiction of the Court, provided, however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice".

211. The FRY has not advanced a claim of access to the Court pursuant to Article 35(2) of the *Statute*. Nor should such an argument be presumed on its behalf. It may nevertheless assist the Court for Belgium to make a number of general observations on the matter.

212. Two elements of Article 35(2) warrant particular comment: (a) the conditions under which the Court is to be open to states not party to the *Statute* are

to be laid down by the Security Council; and (b) action by the Council is subject to the special provisions contained in treaties in force.

213. Subject to special conditions contained in treaties in force, the basis for access to the Court pursuant to Article 35(2) is action by the Security Council laying down the conditions under which the Court shall be open to states not party to the *Statute*. As noted above, action by the Council pursuant to this provision took the form of Resolution 9 of 15 October 1946.

214. Insofar as is material for present purposes, the conditions laid down by Resolution 9 (1946) for access to the Court by a state not party to the *Statute* are as follows:

(a) the state in question "shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court" in accordance with UN *Charter* and the Court's *Statute* and *Rules*;

(b) in so doing the state in question must undertake "to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations Article 94 of the Charter";

(c) in making a general declaration, the state may recognise the compulsory jurisdiction of the Court in accordance with Article 36(2) of the *Statute*, "provided, however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice".

215. Addressing the institution of proceedings by a state which is not party to the *Statute* but which, under Article 35(2) of the *Statute*, has made a declaration in accordance with Resolution 9 (1946), the Court, in Article 41 of its *Rules*, provides that "[t]he institution of proceedings ... shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar".

216. The FRY satisfies none of the conditions of Resolution 9 (1946) and Article 41 of the Court's *Rules*. It has not deposited with the Registrar a declaration accepting the jurisdiction of the Court pursuant to Resolution 9 (1946). The FRY

Declaration of 25 April 1999 did not purport to be and cannot be regarded as such a declaration. The FRY has not undertaken to comply in good faith with the decision of the Court and to accept the obligations of a UN member under Article 94 of the *Charter*. In this regard, Belgium notes the further requirement of Article 35(2) that the conditions under which the Court is to be open to states not party to the *Statute* cannot place the parties in a position of inequality before the Court. Absent compliance by the FRY with the requirements of Resolution 9 (1946) - formal, procedural and substantive - access to the Court by the FRY under Article 35(2) would place Belgium in a position of inequality before the Court *vis-à-vis* the FRY insofar as the FRY would have access to the Court without any corresponding obligations.

217. Belgium also notes that, pursuant to paragraph 2 of Resolution 9 (1946), a declaration accepting the compulsory jurisdiction of the Court in accordance with the Resolution cannot, without explicit agreement, be relied upon *vis-à-vis* states parties to the *Statute* which have made optional clause declarations under Article 36(2). No such agreement has been forthcoming from Belgium in this case.

218. Article 35(2) provides that action by the Security Council laying down conditions for access to the Court is "subject to the special provisions contained in treaties in force".

219. In the absence of a claim by the FRY under this heading, a detailed review of the meaning of this phrase is not necessary. For completeness, however, Belgium notes that the phrase, based on the virtually identical provision in the *Statute* of the Permanent Court, was intended to provide an exceptional basis of access to the Court pursuant to the peace treaties concluded after the First World War in circumstances in which the former enemy states could not be party to the Protocol of Signature of the Statute of the Permanent Court. This focus on the First World War peace treaties emerges clearly from comments made by Judges Huber and Anzilotti in the context of a review of the *Rules* of the Permanent Court in 1926.[162] There is nothing to suggest that a different interpretation was intended when the provision was adopted as part of the *Statute* of the present Court.

220. The scope of the clause was, however, the subject of passing comment by the Court in its first Provisional Measures Order in the *Genocide Convention* case

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[162] PCIJ, *Acts and Documents Concerning the Organisation of the Court* (1926), Series D, No.2 (Add.), pp.104-107.

between Bosnia-Herzegovina and the FRY. Noting that "the question of whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings", the Court referred to Article 35(2) of the *Statute* and observed:

> "the Court therefore considers that proceedings may validly be instituted against a State which is a party to such special provisions in a treaty in force, but is not a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 ... accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court."[163]

221. The Court has not returned to the matter in subsequent phases of that case.

222. In Belgium's contention, apart from the evident focus of the clause in question on the peace treaties concluded after the First World War, there are persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case. The consequence of an interpretation of Article 35(2) of the *Statute* which construed the phrase "the special provisions contained in treaties in force" to mean *jurisdictional clauses contained in treaties in force* would be to fundamentally undermine the scheme of the *Statute* and the distinction between access to the Court and the jurisdiction of the Court in particular cases. It would, for example, completely erode any distinction between access to the Court and the jurisdiction of the Court under Article 36(1) of the *Statute* pursuant to provisions in treaties or conventions in force. Such an interpretation would be fundamentally at odds with the accepted appreciation of the Court's competence.

223. An expansive interpretation of Article 35(2) would also sit uneasily with its character as an exception to the general provisions relating to access to the Court. It would, furthermore, place states not party to the *Statute* in a privileged position as they would have access to the Court without any assumption of the obligations ordinarily required of states to which the Court is open.

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[163] *Application of the Convention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p.3, at paragraphs 18-19.

224. On the basis of these considerations, Belgium contends that the Article IX of the *Genocide Convention* cannot be construed to be a special provision in a treaty in force within the scope of Article 35(2) of the *Statute*. The same is true for Article 4 of the *1930 Convention*. In respect of the latter treaty, there is the added hurdle of Article 37 of the *Statute* which operates to give the Court jurisdiction only "as between parties to the present Statute". By its express terms, Article 37 of the *Statute* can therefore only operate insofar as the Court is competent pursuant to Article 35(1) of the *Statute*.[164]

225. In the light of the preceding observations, Belgium contends that the Court is not open to the FRY pursuant to Article 35(2) of the *Statute*. The FRY has not met the requirements of Resolution 9 (1946). Nor can the reference to "treaties in force" in Article 35(2) be relied upon to provide a basis of access to the Court by the FRY in this case.

4. Conclusions

226. Access to the Court is a condition precedent to any question arising as to the Court's jurisdiction in a particular case. The FRY claims such access on the ground that it is a member of the United Nations. This is the only basis of access relied upon by the FRY.

227. As the preceding review shows, there is no basis for such a claim. The FRY did not succeed to the UN membership of the SFRY. It has not become a member of the United Nations pursuant to the terms of Article 4 of the *Charter*. The FRY is not therefore a party to the *Statute* pursuant to Article 93(1) of the *Charter*.

228. Nor has the FRY become a party to the *Statute* in accordance with the procedure laid down in Article 93(2) of the *Charter*.

229. The FRY is not, accordingly, a party to the *Statute* of the Court. The Court is not therefore open to the FRY pursuant to Article 35(1) of its *Statute*.

230. The FRY has not advanced a claim for access to the Court on the basis of Article 35(2) of the *Statute*. There would be no basis for such a claim. The FRY

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[164] In practice, the effect of the interaction between Articles 35(2) and 37 of the *Statute* will be to limit the operation of Article 35(2) to cases in which the state in question has made a declaration under Resolution 9 (1946).

has not satisfied the requirements of Resolution 9 (1946) and Article 41 of the Court's *Rules*. The reference to "treaties in force" in Article 35(2) cannot provide a basis for FRY access to the Court in this case.

231. Absent standing to appear, the FRY cannot found jurisdiction on its Declaration of 25 April 1999, on Article IX of the *Genocide Convention* or on Article 4 of the *1930 Convention*. The FRY is not competent to make a declaration under Article 36(2) of the *Statute*. Article IX of the *Genocide Convention* and Article 4 of the *1930 Convention* cannot give the Court jurisdiction in the absence of standing *ratione personae*. Neither convention can be regarded as a *treaty in force* within the meaning of this phrase in Article 35(2). As regards the *1930 Convention*, as Article 37 of the *Statute* only operates insofar as the Court is competent pursuant to Article 35(1), Article 35(2) cannot provide a basis of access to the Court by reference to this treaty.

232. One concluding observation is necessary. In its Memorial, the FRY seeks to rely on the fact that it is the Respondent in separate proceedings before the Court initiated by Bosnia-Herzegovina and Croatia to support the claim that it is a party to the *Statute*.[165] Whatever the circumstances of those cases, Belgium observes that there is a fundamental difference between those cases and the one here in issue. Whereas in the other cases the FRY is the Respondent, in the present case the FRY is the Applicant. Where, in proceedings in which a state is respondent, it chooses, for its own reasons, to acquiesce to the jurisdiction of the Court *ratione personae*, there may be good grounds, consonant with Article 1(1) of the *Charter*, for the Court to assume the existence of such jurisdiction. Although not precisely analogous, the assumption of jurisdiction by the Court in the *Corfu Channel* case points in this direction.[166] In such cases, at least insofar as jurisdiction *ratione personae* is concerned, both applicant and respondent accept the jurisdiction of the Court. Against the backdrop of the limitations expressed in Article 59 of the *Statute*, the Court therefore proceeds on the basis of the agreement of the parties.

233. The position is entirely different in the present case. The FRY is the Applicant. Belgium contests the jurisdiction of the Court by reference *inter alia* to the FRY's lack of standing. There is no question of acquiescence. There is no agreement of the parties. In accordance with the scheme of the *Statute*, jurisdiction *ratione personae* must be established.

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[165] FRY Memorial, at paragraphs 3.1.9-3.1.21.

[166] *Corfu Channel Case (Preliminary Objections), I.C.J. Reports 1948,* p.15.

234. In undertaking, from time to time, an evaluation of its relations with the FRY, Belgium is entitled to rely on the appreciation that, absent access to the Court pursuant to Articles 35(1) or (2) of the *Statute*, the FRY lacks standing to initiate proceedings against it. FRY acquiescence to the Court's jurisdiction *ratione personae* as Respondent in other cases cannot provide a basis on which it can initiate proceedings as Applicant in the present case. The proceedings initiated by Bosnia-Herzegovina and Croatia against the FRY cannot therefore be relied upon to found a generalised claim to standing before the Court by the FRY.

CHAPTER FIVE: THE COURT DOES NOT HAVE JURISDICTION ON THE BASIS OF THE FRY'S DECLARATION OF 25 APRIL 1999

235. In the preceding chapter, Belgium contended that the Court was not open to the FRY. Absent an entitlement to appear, the FRY cannot, simply by lodging a Declaration purportedly under Article 36(2) of the *Statute*, perfect its otherwise fundamentally flawed position and avail itself of the procedures of the Court. The FRY was not competent to make a declaration under Article 36(2) of the *Statute*. The FRY's Declaration of 25 April 1999 cannot therefore give the Court jurisdiction in this case.

236. If, contrary to this contention, the Court accepts that the FRY was competent to make a Declaration under Article 36(2) of the *Statute*, Belgium contends, in the alternative, that the Declaration of 25 April 1999 cannot in any event give the Court jurisdiction in the case brought by the FRY. The reason for this is the temporal limitation contained in the FRY's Declaration restricting the jurisdiction of the Court to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations of facts subsequent to this signature".

237. As the Court observed in its *Provisional Measures Order*,

> "the Application is directed, in essence, against the 'bombing of the territory of the Federal Republic of Yugoslavia' ...
>
> Whereas it is an established fact that the bombings in question began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999; and whereas the Court has no doubt, in the light, *inter alia*, of the discussions at the Security Council meetings of 24 and 26 March 1999 (S/PV.3988 and 3989), that a 'legal dispute' (*East Timor (Portugal v. Australia), I.C.J. reports 1995*, p.100, para.22) 'arose' between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole;
>
> Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas, at this stage of the

> proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium".[167]

238. Belgium contends that this assessment is as accurate now, in the light of the FRY's Memorial, as it was at the provisional measures phase of the case. Not only has the FRY not established that new disputes, as distinct from the initial one, have arisen between the Parties since 25 April 1999 but it has not even attempted to do so. As will be clear from the extract of the FRY's Memorial quoted at paragraph 71 above, the FRY argues that certain new disputed elements which it raises "are part and parcel of the dispute related to the bombing of the territory of the Applicant". There is thus no new dispute. The dispute that the FRY seeks to bring before the Court arose well before the signature of its Declaration on 25 April 1999. Pursuant to the temporal limitation in the FRY's Declaration, the Court therefore has no jurisdiction in this matter. These issues are addressed in more detail below.

1. The nature and interpretation of Declarations under Article 36(2) of the *Statute*

239. A declaration under Article 36(2) of the *Statute* "is a unilateral act of State sovereignty".[168] It is a facultative, unilateral engagement that states are free to make or not to make and free to do so unconditionally and without limit of time or to qualify with conditions or reservations.[169] "[J]urisdiction only exists within the limits within which it has been accepted."[170] At the same time, however, such declarations establish a "consensual bond and the potential for a jurisdictional link" with other states that have made such declarations.[171] Reciprocal consent to the jurisdiction of the Court is thus at the heart of the Optional Clause arrangements.

240. In circumstances in which the jurisdiction of the Court depends on such declarations, on the basis of the principle of reciprocity, "since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it".[172] In other words,

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[167] *Provisional Measures Order*, at paragraphs 27-29.
[168] *Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction, Judgment of 4 December 1998*, at paragraph 46.
[169] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p.418, paragraph 59.
[170] *Phosphates in Morocco (Preliminary Objections), P.C.I.J., Series A/B, No.74*, at p.23.
[171] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 46.
[172] *Case of Certain Norwegian Loans, I.C.J. Reports 1957*, p.9, at p.23.

limitations in the declaration of one party will hold good as between both parties to a dispute.[173]

241. The Court is trustee of these arrangements. It is frequently called upon to interpret Optional Clause Declarations for purposes of establishing whether they do in fact embody the reciprocal consent of the states in question in respect of the subject-matter of the dispute before the Court. The role of the Court in this regard is not to construe the declarations in question so as to found jurisdiction. There is not, in other words, a presumption in favour of jurisdiction which shapes the outcome of the interpretative exercise. As the Court observed in its *Provisional Measures Order*, the Court's jurisdiction remains fundamentally hinged on consent.[174] Construing Optional Clause Declarations in any given case is thus an exercise in defining the parameters of the states' acceptance of the compulsory jurisdiction of the Court. The question is whether the reciprocal consent of the states is actually evident. In this context,

> "[c]onditions or reservations ... do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance of the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles throughout."[175]

242. For purposes of this interpretative exercise, the Court has elaborated various principles:

> "Every declaration 'must be interpreted as it stands, having regard to the words actually used' (*Anglo-Iranian Oil Co., Preliminary Objections, Judgment, I.C.J. Reports 1952*, p.105). Every reservation must be given effect 'as it stands' (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p.27). Therefore, declarations and reservations are to be read as a whole. Moreover, 'the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which in harmony with a natural and reasonable way of reading the text.' (*Anglo-Iranian Oil Co., Preliminary Objections, Judgment, I.C.J. Reports 1952*, p.104.)

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[173] *Phosphates in Morocco*, note 170 supra, at p.22.
[174] *Provisional Measures Order*, at paragraph 20.
[175] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 44.

> At the same time, since a declaration under Article 36, paragraph 2, of the Statute, is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State. ...
>
> The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[176]

2. The Belgian and FRY Declarations

243. Belgium's Declaration under Article 36(2) of the *Statute* provides as follows:

> "I declare on behalf of the Belgian Government that I recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement.
>
> This declaration is made subject to ratification. It shall take effect on the day of deposit of the instrument of ratification for a period of five years. Upon the expiry of that period, it shall continue to have effect until notice of its termination is given."

244. The instrument of ratification was deposited on 17 June 1958.

245. The FRY's Declaration, dated 25 April 1999 and deposited with the Secretary-General of the United Nations on 26 April 1999, provides as follows:

> "I hereby declare that the Government of the Federal Republic of Yugoslavia recognises, in accordance with Article 36, paragraph

[176] *Fisheries Jurisdiction Case*, note 168 supra, at paragraphs 47-49.

> 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 Federal Republic of Yugoslavia, as well as to territorial disputes.
>
> The aforesaid obligation is accepted until such time as notice may be given to terminate the acceptance."

246. Putting these two Declarations side-by-side, it is evident that, depending on how they are read, they coincide to give the Court jurisdiction in either (a) legal disputes arising after the signature of the FRY's Declaration concerning situations or facts subsequent to that date, or (b) legal disputes arising after the signature of the FRY's Declaration, with regard to the situations or facts subsequent to that signature. The element of "legal dispute" emerges from the language of the Belgian Declaration. Formulation (a) reflects the language of the Belgian Declaration, reading the "crucial date"[177] in the FRY's Declaration into this text - viz. "in legal disputes arising after [25 April 1999] concerning situations or facts subsequent to that date". Formulation (b) reflects the language of the FRY's Declaration *simpliciter*.

247. Insofar as there are differences in these two formulations - slight variations in language, the use of the definite article in the formulation based on the authentic English text of the FRY's Declaration and the presence of a comma after "Declaration" also in the formulation based on the FRY's Declaration - Belgium is not at this point convinced that these differences are of significance in the context of the present case. Belgium notes, nevertheless, that, in keeping with the essential character of the arrangements under Article 36(2) of the *Statute*, in contesting the jurisdiction of the Court pursuant to these Declarations, Belgium may avail itself of the limitations that emerge from the formulations drawn from both its own and from the FRY's Declaration.

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[177] *Phosphates in Morocco*, note 170 supra, at p.23.

248. Without prejudice to any further argument that Belgium may wish to make on this matter in due course, Belgium submits that, for present purposes the two Declarations coincide to give the Court jurisdiction in *legal disputes arising after 25 April 1999 concerning situations or facts subsequent to that date*. This formulation reflects the language of the Belgian Declaration subject to the temporal limitation in the FRY's Declaration.

3. The scope of the Court's jurisdiction on the basis of the Belgian and FRY Declarations

(a) Belgium's arguments in outline

249. As regards the various elements apparent in the formulation just mentioned, Belgium accepts that there is a "dispute" between the Parties, as this term has been defined in the Court's jurisprudence, and accepts, also, that this amounts to a "legal dispute". The Court, indeed, has already concluded as much in its *Provisional Measures Order*:

> "the Court has no doubt, in the light, *inter alia*, of the discussions at the Security Council meetings of 24 and 26 March 1999 (S/PV.3988 and 3989), that a 'legal dispute' (*East Timor (Portugal v. Australia), I.C.J. reports 1995*, p.100, para.22) 'arose' between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole."[178]

250. While, however, there may be a legal dispute between the Parties, Belgium does not accept that the dispute arose only after the signature of the FRY's Declaration on 25 April 1999. As the passage just cited makes clear, the Court, in its *Provisional Measures Order*, had no doubt that the legal dispute in question arose "well before 25 April 1999". That assessment, in Belgium's contention, remains cogent, notwithstanding any argument advanced in the FRY's Memorial. By operation of the temporal limitation in the FRY's Declaration the Court therefore lacks jurisdiction in this matter. The various elements of this contention are addressed below.

251. Although the preceding contention is sufficient to dispose of the matter, Belgium also contends that the Court lacks jurisdiction by operation of the second

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[178] *Provisional Measures Order*, at paragraph 28.

element of the temporal limitation in the FRY's Declaration, namely, in respect of disputes concerning situations or facts subsequent to the signature of the FRY's Declaration. This element would only be relevant in the event that the Court were to conclude that the FRY had, in the language of the Court, "established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium". The essential element of this contention is that, even if it could be shown that a dispute arose after the "crucial date" in the FRY's Declaration, the FRY would also have to show that the situations or facts *giving rise to*, or which were *the source of*, the dispute arose after this date. In Belgium's contention, however, even if a dispute between the FRY and Belgium was found to have arisen after 25 April 1999, the relevant situations or facts would be those of the NATO use of force in the FRY, ie, situations or facts that in their origin and in other critical respects predated the signature of the FRY Declaration. As such, the Court would lack jurisdiction to address the matter. The various elements of this contention are addressed further below.

(b) The reasons for and consequences of the temporal limitation in the FRY's Declaration

252. Before turning to address the various constituent elements at the heart of these contentions, it is illuminating to consider briefly the reasons for the temporal limitation in the FRY's Declaration and to identify the consequences that flow therefrom. Notwithstanding the speculative element concerning the FRY's motives, this is not simply an academic exercise. It goes ultimately to the proposition that, in the absence of agreement to the contrary by parties to proceedings before the Court, the Court can only have jurisdiction to adjudicate upon a complaint if that complaint embodies what may reasonably be said to constitute the *whole* of the dispute between the parties. The Court cannot, in other words, in the absence of the consent of the parties, assume jurisdiction over a partial element of a dispute only as to do so would run the risk of a miscarriage of justice in that it may deprive the respondent of the ability to raise arguments in its defence.[179] The reasons for and

[179] In making this submission, Belgium is mindful of the Court's jurisprudence to the effect that "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p.3, at paragraph 36; also *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p.69, at paragraph 54). In the *Hostages* case, the Court went on to state, in respect of Iranian allegations against the United States that, "if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, *it was open to that Government to present its*

consequences of the FRY's temporal limitation also go to the matter of the admissibility of the FRY's application insofar as they suggest an element of bad faith on the part of the FRY. This latter element is addressed further in Chapter Nine below.

253. As will be evident both from the description of the FRY's case in Chapter One of these Preliminary Objections and from the Court's appreciation of the matter at the provisional measures phase, the FRY's case "is directed, in essence, 'against the bombing of the Federal Republic of Yugoslavia'".[180] This began on 24 March 1999. Given this to be the case, the question that arises is why did the FRY draft its Declaration in such terms as to exclude the jurisdiction of the Court in respect of *disputes arising prior to 25 April 1999, with regard to the situations and facts prior to this date*. Why, in other words, with the evident intention of submitting an Application to the Court four days later on the subject of the NATO bombing of the FRY, did the FRY cast its Declaration in such terms as to exclude from the Court's jurisdiction the very dispute with which it was then concerned?

254. Two possibilities are apparent. First, the consequences of the chosen formulation may simply not have occurred to the drafters of the Declaration. They may have considered that the Declaration would have been sufficient to give the Court jurisdiction over the on-going dispute and simply intended the Declaration to become operational from the date of its signature. In other words, the drafters may not have seen their formulation as excluding in any way the Court's jurisdiction over the subject-matter of the dispute in contemplation. Second, the drafters may have considered that the language of the Declaration would permit the Court to assume jurisdiction over the on-going dispute but would restrict the Court's competence to address matters predating the signature of the Declaration.

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own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim" (emphasis added). In the case now before the Court, the alternative avenues contemplated by the Court in this passage are precisely what the temporal limitation in the FRY's Declaration appears to be an attempt to exclude. As is reflected in the body of these submissions, Belgium contends therefore that, particularly in circumstances in which the jurisdiction of the Court is temporally limited, the Court cannot, in the absence of the consent of the parties, assume jurisdiction over a partial element of a dispute only. For the avoidance of doubt, Belgium notes that the present case is not in any way analogous to either the *Hostages* or the *Border and Transborder Armed Actions* cases. Issues relating to events in Kosovo prior to 25 April 1999 are intimately and inextricably connected with those to which the FRY refers, not simply part of the broader background. The 25 April 1999 date of signature of the FRY's Declaration was an entirely artificial point of separation between various elements of an on-going dispute.

[180] *Provisional Measures Order*, at paragraph 27.

255. As regards these possibilities, the first seems unlikely. The Declaration was evidently drafted with care, a matter attested to by the variation, even if only slight, in the language of the Declaration by comparison to the Belgian Declaration on which it appears to have been based. For example, by reference to the authentic English text of the FRY's Declaration, the exclusion of the Court's jurisdiction "with regard to *the* situations or facts" prior to 25 April 1999 seems to contemplate the possibility that the Court could assume jurisdiction over a dispute which involved factual elements which straddled the date of signature of the FRY's Declaration but that, if so, the Court would only have jurisdiction "with regard to *the* situations or facts subsequent to this signature".

256. It is also evident, from the statement by Counsel for the FRY during the oral proceedings on provisional measures, that the FRY's intention was to allow "all disputes effectively arising after 25 April 1999 to be taken into account".[181] This does not suggest any oversight by the drafters of the Declaration. On the contrary, it suggests a clear intent to impose a temporal limitation in respect of the Court's consideration of the events in and concerning Kosovo.

257. This leaves the second of the possibilities advanced above, namely, that the drafters considered that the language of the Declaration would permit the Court to assume jurisdiction over the on-going dispute but that it would restrict the Court's competence to address elements of that dispute predating the signature of the Declaration.

258. In every respect, this explanation commends itself. It is consistent with a plain reading of the text of the Declaration. It is consistent with the statements by Counsel for the FRY during the provisional measures phase.[182] It is consistent with a presumed intent to keep from the Court consideration of all matters relating to the conduct of the FRY in Kosovo leading up to the NATO action and in the early period of that action. By its Declaration and subsequent Application, the FRY evidently hoped to impugn the conduct of NATO in the FRY while excluding the possibility of any examination by the Court of the FRY's own conduct in Kosovo and the causes of the NATO action.

259. If these are the reasons for the FRY's temporal limitation, what are its consequences? Three are apparent. First, the temporal limitation in the FRY's

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[181] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.9.
[182] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at pp.9-14.

Declaration precludes the possibility of any other state with an Optional Clause Declaration bringing proceedings against the FRY in respect of the FRY's conduct prior to the date in question. This is not relevant for present purposes. Second, and of more importance, the temporal limitation appears to be an attempt to preclude the possibility of Belgium basing a substantive defence on the merits of the case on the conduct of the FRY prior to 25 April 1999.[183] Third, and also of importance, the temporal limitation appears to be intended to preclude the possibility that Belgium could bring a counter-claim against the FRY in respect of its conduct in Kosovo prior to 25 April 1999. In this regard, Belgium notes that Article 80(1) of the Court's *Rules* provides that "[a] counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party *and that it comes within the jurisdiction of the Court.*"[184]

260. These are not factors of an academic or abstract nature. The FRY has attempted, in a peremptory manner, to preclude a full appreciation of the underlying subject-matter of the dispute. The wilful attempt by the FRY to hive off one element of the legal dispute that it brings before the Court from other elements that clearly come within the scope of the dispute *as presented in the FRY's Application* strikes at the heart of the Optional Clause arrangements. An applicant cannot, by the device of a temporal limitation in its Optional Clause Declaration, isolate the elements of the dispute it wishes to present from the elements of the dispute that it has no wish to defend. That, in Belgium's contention, is an abuse of the Optional Clause arrangements and cannot be relied upon to found the jurisdiction of the Court. As the Court has observed in another context, when a case is referred to the Court, "[t]he Court must ... examine whether [its] jurisdiction is co-extensive with the task entrusted to it".[185] In Belgium's contention, in the light of the temporal limitation in the FRY's Declaration but the scope of the case as formulated by the FRY, the Court's jurisdiction is not co-extensive with the task entrusted to it and the Court must accordingly decline jurisdiction in the matter.

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[183] For the avoidance of doubt, Belgium rejects any suggestion that the temporal limitation could achieve this end.

[184] Emphasis added. The Court has recently confirmed that a counter-claim cannot exceed the limits of the Court's jurisdiction as recognised by the parties. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p.243, at paragraph 31; also *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p.190, at paragraph 33.

[185] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), I.C.J. Reports 1954*, p.19, at p.31.

261. For the avoidance of doubt, Belgium emphasises that this submission hinges on a purely formal appreciation of the dispute that the FRY has brought before the Court based on the material that is before the Court at present. It is not a contention on the merits. It does not join argument with the FRY on, or address in any way, the substance of the FRY's allegations.

(c) The Court's jurisdiction under the Optional Clause

262. Three elements require more detailed examination: (i) in respect of Belgium's principal contention, the dispute between the Parties and the point at which it crystallised, (ii) in respect of Belgium's subsidiary contention, the meaning of the phrase "situations or facts", and (iii) the consequences of the FRY's allegations concerning post-10 June 1999 events. Each of these elements is addressed in turn.

(i) The dispute between the Parties and the point at which it crystallised

263. The Court's jurisprudence makes clear that the starting point for the identification of the dispute with which the Court is seised is the Application instituting proceedings.[186] Where, however, there is disagreement or uncertainty with regard to the real subject of the dispute or the exact nature of the claims, the Court will not be restricted to a consideration of the terms of the Application alone.[187] In such circumstances,

> "[i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties".[188]

264. The Court will also consider "diplomatic exchanges, public statements and other pertinent evidence".[189]

265. The concept of "dispute" is at the heart of the contentious jurisdiction of the Court. The term was defined by the Permanent Court in *The Mavrommatis Palestine Concessions* case as connoting "a disagreement on a point of law or fact, a

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[186] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 29.
[187] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 29.
[188] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 30.
[189] *Fisheries Jurisdiction Case*, note 168 supra, at paragraph 31.

conflict of legal views or of interests between two persons",[190] a definition adopted and applied consistently by the Court in its own jurisprudence with only minor variation.[191] The key element in this definition is the positive opposition by one party of a claim by another.[192]

266. As will have been apparent from the discussion of the FRY's case in Chapter One above, it is clear that the dispute *as formulated by the FRY in its Application* was focused on the NATO use of force in the FRY by bombing targets in the FRY.[193] It is agreed that this commenced on 24 March 1999.

267. This focus, and the temporal dimension of the dispute as formulated by the FRY, was reiterated by the FRY in its *Request for the Indication of Provisional Measures*.[194] It was reiterated again by Counsel to the FRY in the first round of the oral hearings on the provisional measures request.[195]

268. The FRY attempted to move away from this position in the course of the second round of oral argument at the provisional measures phase when Counsel for the FRY argued that there were in fact "a large number of separate disputes" arising from a series of individual, separate, "instantaneous wrongful acts" after 25 April 1999. Based on this analysis, the FRY argued that the Court had jurisdiction over the disputes that arose after 25 April 1999.[196]

269. The Court unambiguously rejected this analysis in its *Provisional Measures Order*:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute".[197]

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[190] *The Mavrommatis Palestine Concessions, P.C.I.J., Series A, No.2*, at p.11.
[191] As expressed by the Court in the *East Timor* case, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties" (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p.90, at paragraph 22).
[192] *East Timor*, ibid, at paragraph 22.
[193] See paragraphs 26, 29-30 above.
[194] See paragraphs 34-37 above.
[195] See paragraphs 39-40 above.
[196] See paragraphs 43-44 above.
[197] *Provisional Measures Order*, at paragraph 29.

270. In the light of this assessment by the Court, the FRY has chosen not to pursue this line of argument in its Memorial, arguing instead that, since the Court's Order, "the dispute aggravated and extended ... matured, through new elements".[198] The FRY has not argued, however, that these new elements constitute a new dispute. Rather, in the FRY's contention, they were "part and parcel of the dispute related to the bombing" of the FRY.[199] The dispute as formulated by the FRY remains therefore the dispute focused on the use of force by NATO against the FRY.

271. In the light of the foregoing, on the basis of the FRY's Application as well as its subsequent submissions to the Court, the dispute before the Court *as characterised by the FRY* is a dispute focused on the NATO use of force in the FRY. This dispute crystallised on 24 March 1999.

272. Before leaving the FRY's characterisation of the dispute, two further observations are warranted. First, the FRY's "instantaneous wrongful acts" argument is patently without merit. The FRY has not pursued this analysis in its Memorial and there is therefore no need for Belgium to address it further. It may however be helpful to note that such an analysis would require as a precondition an act-by-act particularisation of the allegations against Belgium and would necessarily have to involve thereafter an assessment of the Court's jurisdiction on the same basis. Quite apart from the legal shortcomings of such an analysis, a matter not addressed here, the absurdity of this position fundamentally undermines any residual credibility this argument may have.

273. Second, Belgium notes that the FRY, during the oral proceedings on provisional measures, expressly rejected any notion that the NATO action constituted a "continuing situation".[200] Nor is this an argument that the FRY has sought to develop in its Memorial. It is not, therefore, an argument upon which there is any need for Belgium to comment. Once again, however, it may be helpful simply to observe that a "continuing situation" analysis could not bring within the jurisdiction of the Court a dispute which would otherwise be excluded by operation of a temporal limitation in an Optional Clause Declaration merely on grounds that some aspect of the dispute was not temporally barred. In other words, the point at

[198] See paragraph 61 above.
[199] See paragraph 71 above.
[200] See paragraph 44 above.

which a dispute crystallises will be determined by the point at which its critical, originating elements occur.[201]

274. Turning from the dispute as characterised by the FRY to other more objective pointers on the matter. There is manifest evidence pointing to the existence of a legal dispute between the FRY and Belgium "well before 25 April 1999 concerning the legality of [the NATO] bombings as such, taken as a whole".[202] The evidence to this effect – all attesting to a disagreement on a point of law or fact between the Parties – includes *inter alia* the following:

(a) the FRY's letter of 24 March 1999 addressed to the President of the Security Council requesting the convening of an urgent meeting of the UN Security Council "to condemn and to stop the NATO aggression against the Federal Republic of Yugoslavia and to protect its sovereignty and territorial integrity";[203]

(b) the FRY's declaration of a "state of war" in response to the commencement of military action by NATO;[204]

(c) the various statements made during the course of the 3988th and 3989th meetings of the UN Security Council on 24 and 26 March 1999 respectively at which the matter of NATO action against the FRY was considered. These statements leave no room for doubt about the existence of a disagreement between the Parties on the question of the NATO action against the FRY;[205]

(d) a Statement of 25 March 1999 issued by the European Council (representing the Member States of the European Union, including Belgium) concerning Kosovo. This noted *inter alia* that

> "Europe cannot tolerate a humanitarian catastrophe in its midst ... [in which] the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. ... An aggressor must know that he will have to pay a high price. ... Now the North Atlantic

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[201] See further paragraphs 302-308 below.
[202] *Provisional Measures Order*, at paragraph 28.
[203] S/1999/322, 24 March 1999. **(Annex 49)**
[204] S/1999/327, 24 March 1999. **(Annex 50)**
[205] S/PV.3988, 24 March 1999 **(Annex 51)** and S/PV.3989, 26 March 1999 **(Annex 52)**.

> Alliance is taking action against military targets in the Federal Republic of Yugoslavia in order to put an end to the humanitarian catastrophe in Kosovo";[206]

(e) a letter of 25 March 1999 from the FRY Foreign Minister to the Chairman-in-Office of the Organisation for Security and Cooperation in Europe addressing NATO "aggression" against the FRY;[207]

(f) a letter of 27 March 1999 from the Secretary-General of NATO to the UN Secretary-General indicating that, in response to "serious human rights abuses and atrocities against the civilian population" the NATO Supreme Allied Command Europe had been directed "to initiate a broader scope of operations to intensify action against the Federal Republic of Yugoslavia forces to compel them to desist from further attacks in Kosovo and to meet the demands of the international community";[208]

(g) a letter of 31 March 1999 from the FRY to the UN Secretary-General taking issue with NATO's allegations of FRY non-compliance with the provisions of Security Council Resolution 1199 (1998) and noting that, following the expiry of the period covered by the NATO report, "NATO commenced an all-out armed aggression against Yugoslavia on 24 March 1999 ...";[209] and

(h) the Conclusions of the Special General Council of the European Union on 8 April 1999 on the situation in Kosovo which stated *inter alia* as follows:

> "The Council is appalled by the human tragedy inflicted upon the population of Kosovo by the criminal and barbaric acts being perpetrated by the authorities of the Federal Republic of Yugoslavia and Serbia.
>
> In the face of extreme and criminally irresponsible policies, and repeated violations of resolutions of the Security Council, the use of the severest measures, including military action, has been both necessary and warranted. The North Atlantic Alliance is taking action against military targets in the Federal Republic of Yugoslavia in order to put an end to the humanitarian

[206] S/1999/342, 26 March 1999. **(Annex 53)**
[207] S/1999/353, 28 March 1999. **(Annex 54)**
[208] S/1999/360, 30 March 1999. **(Annex 55)**
[209] S/1999/367, 1 April 1999. **(Annex 56)**

> catastrophe in Kosovo. The European Union (EU) emphasises that the responsibility for the armed conflict that is now taking place lies entirely with President Milosevic and his regime, who and which deliberately worked to destroy the chances of a diplomatic settlement which others strove so hard, and so exhaustively, to bring about." [210]

275. In each case, these documents attest to the existence of a dispute between the Parties on the question of NATO military action against the FRY from 24 March 1999.

276. Without prejudice to any argument that Belgium may wish to make in due course regarding the more precise temporal dimensions of the dispute, Belgium would also draw the following to the Court's attention:

(a) the Security Council had been seized of the matter of FRY acts in Kosovo from at least the point of its adoption, on 31 March 1998, acting under Chapter VII of the *Charter*, of Resolution 1160 (1998) by which it imposed an arms embargo against the FRY.[211] Other action taken by the Security Council with regard to events in Kosovo in the period from 31 March 1998 to 24 March 1999 includes:

(i) Security Council Presidential Statement of 24 August 1998;[212]
(ii) Security Council Resolution 1199 (1998) of 23 September 1998;[213]
(iii) Security Council Resolution 1203 (1998) of 24 October 1998;[214]
(iv) Security Council Resolution 1207 (1998) of 17 November 1998;[215]
(v) Security Council Presidential Statement of 19 January 1999;[216]
(vi) Security Council Presidential Statement of 29 January 1999.[217]

(b) by a letter of 1 February 1999 addressed to the President of the Security Council, the FRY responded directly to a communiqué from the Secretary-General of NATO addressed to the President of the FRY. Noting various

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[210] S/1999/414, 13 April 1999. **(Annex 57)**
[211] S/RES/1160, 31 March 1998. **(Annex 6)**
[212] S/PRST/1998/25, 24 August 1998. **(Annex 13)**
[213] S/RES/1199, 23 September 1998. **(Annex 14)**
[214] S/RES/1203, 24 October 1998. **(Annex 16)**
[215] S/RES/1207, 17 November 1998. **(Annex 58)**
[216] S/PRST/1999/2, 19 January 1999. **(Annex 19)**
[217] S/PRST/1999/5, 29 January 1999. **(Annex 59)**

demands of the international community, this communiqué provided *inter alia*:

> "If these steps are not taken, NATO is ready to take whatever measures are necessary in the light of both parties' compliance with international commitments and requirements ... The Council has therefore agreed today that the NATO Secretary-General may authorise air strikes against targets on territory of the Federal Republic of Yugoslavia."

In response, the FRY requested the convening of an emergency meeting of the Security Council "in order to prevent aggression against the Federal Republic of Yugoslavia".[218]

(c) by a letter dated 17 March 1999 addressed to the President of the Security Council, the FRY addressed "open threats of aggression" by NATO.[219]

277. As these documents attest, the dispute over NATO military action against the FRY from 24 March 1999 had direct and immediate antecedents in the period prior to this, a matter accepted by the Agent for the FRY during the oral phase of the provisional measures proceedings.[220] This antecedent activity involved action by the UN Security Council. As the documents referred to in sub-paragraphs (b) and (c) in paragraph 276 above indicate, this period also witnessed the direct opposition of NATO and FRY claims.

278. In the light of this evidence, Belgium contends that it is quite clear that a legal dispute arose between the FRY and Belgium, as it did also with the other NATO Member States, well before 25 April 1999. As, by operation of the principle of reciprocity, the Court lacks jurisdiction in respect of disputes arising between the Parties before 25 April 1999, Belgium contends that the Court lacks jurisdiction under Article 36(2) of its *Statute* in respect of the case initiated by the FRY.

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[218] S/1999/107*, 3 February 1999, at p.4, paragraph 5. **(Annex 22)**
[219] S/1999/292, 17 March 1999. **(Annex 60)**
[220] See paragraph 41 above.

(ii) The meaning of the phrase "situations or facts"

279. Pursuant to the Belgian and FRY Optional Clause Declarations, the Court has jurisdiction in *legal disputes arising after 25 April 1999 concerning situations or facts subsequent to that date*. As just noted, Belgium contends, principally, that the Court lacks jurisdiction over the case initiated by the FRY as the dispute in question arose at some point prior to the signature of the FRY's Declaration on 25 April 1999. Although this contention is sufficient to dispose of the matter, Belgium also contends, as a subsidiary matter, that the Court lacks jurisdiction by operation of the second limb of the temporal limitation in the FRY's Declaration, namely, that jurisdiction will be absent in respect of disputes concerning situations or facts prior to 25 April 1999.

280. In the event that the Court accepts Belgium's principal contention regarding the point of crystallisation of the dispute, this subsidiary contention will not require further consideration. If, however, the Court was persuaded that a new dispute arose between the Parties subsequent to the signature of the FRY's Declaration, it would also be necessary, if the Court was to assume jurisdiction, to show that this new dispute concerned situations or facts subsequent to this date. Jurisdiction only exists in respect of legal disputes arising after 25 April 1999 *concerning situations or facts subsequent to that date*.

281. The FRY has not addressed the temporal dimension of the situations or facts that it alleges directly or in any detail. In the context of its arguments on the question of the temporal dimension of the *dispute* between the Parties, it has, however, variously suggested that "instantaneous wrongful acts" occurred after 25 April 1999 and that "new elements" of the dispute occurred after this date.

282. Belgium does not take these references to amount to an argument concerning the temporal dimension of any alleged situations or facts. This is not, therefore, an issue that requires a response from Belgium. As, however, these references raise the risk that the terms "situations" and "facts" might erroneously be construed simply to mean "acts" or "elements", some brief discussion of the matter is appropriate.

283. As a preliminary matter, Belgium notes that the phrase "situations or facts" is not an abstract concept that can be detached from the remainder of the temporal limitation in the FRY's Declaration. It is directly linked to the "dispute" with

which the Court is seised. Insofar as the Court must identify the dispute with which it is seised, it must also have an appreciation of the situations or facts from which the dispute arose. Identifying the situations or facts giving rise to the dispute is thus inextricably bound up with the identification of the dispute itself. It is therefore properly a matter for the Court to address at this phase of the proceedings.

284. Turning to the meaning of the phrase "situations or facts", the issue has been addressed both by the Permanent Court and the International Court in a number of cases including, most significantly, the *Phosphates in Morocco* and *Electricity Company of Sofia and Bulgaria* cases before the PCIJ[221] and the *Right of Passage* case before the present Court.[222] Although there is some discussion about variations in the nuance of these decisions, there is sufficient consistency in the thread of these cases for purposes of the present matter to avoid the necessity of a close comparative scrutiny. Belgium, in any event, is content to rely on the principal decision of the present Court on the matter – in the *Right of Passage* case – a decision which is commonly regarded as having endorsed the narrower of earlier approaches to the interpretation of the phrase in question.

285. Addressing the meaning of the phrase "situations or facts" as found in the Indian Optional Clause Declaration, the Court, in the *Right of Passage* case, stated as follows:

> "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'."[223]

286. In its subsequent analysis in this case, the Court emphasised that the relevant situations or facts are those which are the source of the dispute between the parties rather than those which are the source of the rights upon which they rely. This approach is consistent with that adopted by the Court in respect of the definition of a "dispute" to the effect that it involves a *disagreement* or *conflict* or *opposition* between the parties in question. The relevant situations or facts are, in

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[221] *Phosphates in Morocco,* note 170 supra; and *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No.77.*

[222] *Case concerning Right of Passage over Indian Territory (Merits), I.C.J. Reports 1960,* p.6.

[223] *Right of Passage Case*, ibid, at p.35.

other words, the situations or facts that are the proximate cause of the dispute before the Court.

287. As Belgium reads the statement from the *Right of Passage* case quoted above in the context of the present case, even if the FRY were able to show that a dispute arose after 25 April 1999, it would also have to show that the situations or facts "with regard to which the dispute has arisen" or "which must be considered as being the source of the dispute" occurred after this date.

288. The FRY has made no attempt to develop such a case. Belgium contends that no credible case could be developed on this point. Even if a dispute were found to have arisen after 25 April 1999, the relevant situations or facts – whether by reference to the terms of the FRY's Application or its wider submissions to the Court – would be those of the NATO use of force in the FRY. In other words, they would be situations or facts that in their origin and in other critical respects predated the signature of the FRY Declaration.

289. Belgium further contends that the terms "situations" or "facts" do not connote a series of isolated, disjointed events. They are collective nouns that refer, as the Court made clear in the *Right of Passage* extract quoted above, to the events or circumstances which are the source of the dispute; ie, to the events as a whole, not to individual acts in isolation. Where, in their origin, the situations or facts which give rise to, or are the source of, a dispute predate the relevant "crucial date" in an Optional Clause Declaration, the Declaration must be construed as being insufficient to constitute a basis of consent to the jurisdiction of the Court. Any other interpretation would be contrary to the Court's position of trustee in respect of these Declarations. The consent of a state cannot be implied in circumstances in which the situations or facts giving rise to the dispute in question predate the "crucial date" relevant to the Court's jurisdiction.

290. Turning to the identification of the relevant situations or facts which gave rise to, or were the source of, the dispute before the Court, this will be closely bound up with the identification of the dispute with which the Court is seised. It will thus be closely connected to the exercise addressed above concerning the point of crystallisation of the dispute initiated by the FRY.

291. This close connection notwithstanding, there is some indication in the jurisprudence that the exercise of identifying the *subject-matter* of the dispute – as

opposed, more generally, to the dispute itself – will involve a narrower methodological exercise. Thus, in the *Phosphates in Morocco* case, the Permanent Court limited its examination to the "facts and circumstances" set out in Application alone.[224] Broadening this approach slightly, the present Court, in the *Interhandel Case*, stated that "the subject of the present dispute is indicated in the Application and in the Principal Final Submission of the Swiss Government".[225] Both separate and dissenting views in this case suggested, however, that the exercise may be broadened further to include the Applicant's Memorial.[226]

292. In the context of the present case, the necessity of identifying the relevant situations of facts would only arise in the event that the Court were to conclude that the FRY had established that a new dispute arose after 25 April 1999.

293. It is not for Belgium to suggest, even *arguendo*, what such a "new dispute" might be, particularly in circumstances in which the FRY has expressly rejected any notion that the dispute that it has brought before the Court is any other than the dispute over NATO's use of force in the FRY. Belgium simply observes, therefore, that, whether one looks at the FRY's Application alone, its Application in conjunction with its Principal Final Submission, or its Application in conjunction with its pleadings more generally, the subject-matter of the dispute is unavoidably the NATO military action in the FRY that began on 24 March 1999. Whatever characterisation is given to the dispute, the "situations or facts" with regard to which the dispute arose or which must be considered as being the source of the dispute are therefore situations or facts that occurred prior to 25 April 1999. This being the case, Belgium contends, that, even if the Court were to conclude that the FRY had established that a new dispute arose in the period after 25 April 1999, the Court would lack jurisdiction pursuant to the second element of the FRY's temporal limitation, namely, that the dispute concerned situations or facts that arose prior to the "crucial date" in the FRY's Optional Clause Declaration.

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[224] *Phosphates in Morocco*, note 170 supra, at p.21.

[225] *Interhandel Case (Switzerland v. United States of America) (Preliminary Objections), I.C.J. Reports 1959*, p.6, at p.21.

[226] See the Separate Opinion of Sir Percy Spender, ibid, at p.62 and the Dissenting Opinion of Sir Hersch Lauterpacht, ibid, at p.95. In a concurring declaration, Judge Basdevant considered that attention had to be directed towards "the subject of the dispute and not to any particular claim put forward in connection with the dispute" (ibid, at p.30).

(iii) The FRY's allegations concerning post-10 June 1999 events

294. The FRY's allegations in respect of the post-10 June 1999 period have already been addressed in Chapter Two above. Belgium there contended that the Court lacks jurisdiction in respect of these allegations and/or that these allegations are inadmissible. This is Belgium's principal contention concerning these allegations.

295. Given the Court's *Provisional Measures Order*, these allegations are critical to the FRY's case on jurisdiction as, absent these "new elements", it may be assumed that the Court would endorse the conclusion expressed in its Order to the effect that the legal dispute between the Parties arose "well before 25 April 1999". It may be expected, therefore, that this element of the FRY's case will feature prominently in any future submissions by the FRY on this phase of the case. These allegations accordingly warrant some further comment by Belgium.

296. Without detracting from Belgium's principal contention on this matter, the question arises of the effect of these allegations on the FRY's claim to jurisdiction under the Optional Clause in the event that the Court were to conclude that it has jurisdiction to consider these allegations and that these allegations are admissible. In other words, do the FRY's allegations in respect of the post-10 June 1999 period alter the assessment advanced above that the dispute in question arose well before 25 April 1999 and that the Court, accordingly, lacks jurisdiction in respect thereof?

297. In Belgium's contention, the FRY's allegations concerning post-10 June 1999 events do not alter the assessment that the Court lacks jurisdiction under Article 36(2) of its *Statute* in the case initiated by the FRY.

298. Two readings of the FRY's allegations concerning post-10 June 1999 events are possible: (a) that they concern the same dispute as was raised by the FRY's Application of 29 April 1999, or (b) that they concern a new dispute, one not raised in the FRY's Application. Of these possibilities, the FRY has expressly advanced only the first of these arguments, ie, that its allegations concerning post-10 June 1999 events "are part and parcel of the dispute related to the bombing of the territory of the Applicant".[227] In keeping with this argument, the FRY has asserted that its allegations concerning post-10 June 1999 events constitute "some of the

[227] FRY Memorial, at p.339, paragraph 3.2.12.

constituent elements of the dispute ... which started to arise before 25 April 1999".[228]

299. In Belgium's contention, it makes no difference which of the two possibilities just identified is preferred. In either case, the allegations concerning post-10 June 1999 events do not serve to bring the FRY's case within the scope of the temporal limitation in its Optional Clause Declaration.

300. Of these possibilities, Belgium submits that the "same dispute" analysis is to be preferred as this reflects the manner in which the dispute has been characterised by the FRY as the party initiating the proceedings. It is not for Belgium – nor, for that matter, for the Court – to recast the FRY's arguments.

301. In respect of this analysis, the argument advanced above on the issue of the identification of the dispute and the point at which it crystallised applies equally with respect to the allegations concerning post-10 June 1999 events. In other words, these allegations are, on the FRY's assertion, "part and parcel" of the dispute that arose between the Parties sometime prior to 25 April 1999. They, together with the dispute more generally, accordingly fall outside of the jurisdiction of the Court.

302. One additional comment on this analysis is required. The FRY has asserted *en passant* and without further explanation that its post-10 June 1999 allegations constitute "some of the constituent elements of the dispute ... which started to arise before 25 April 1999". Its purpose in doing so is to attempt to haul the dispute with which the Court is seised into the post-25 April 1999 period and thereby to establish the Court's jurisdiction. Thus, the FRY asserts that the dispute "has arisen in full after 10 June 1999 ... [and is therefore] within the compulsory jurisdiction of the Court".[229]

303. As Belgium has previously observed, the FRY, during the oral proceedings on provisional measures, expressly rejected any notion that the NATO action constituted a continuing situation, viz:

> "Mr President, the Canadian Agent mentioned last Monday a 'continuing situation' to describe the use of force by the NATO member States since 24 March. *Yugoslavia does not accept this description* ...

[228] FRY Memorial, at p.340, paragraph 3.2.14.
[229] FRY Memorial, at p.340, paragraph 3.2.14.

> *Nor can there be any question of subsuming the totality of these acts into a single and exclusive dispute* which, as it were, would absorb the subsequent disputes that have effectively arisen."[230]

304. In the light of this statement, it is not clear what should be made of the FRY's unexplained "constituent elements" assertion. Subject to further argument on this point by the FRY, Belgium cannot accordingly comment usefully on the matter.

305. For the avoidance of doubt, it may nevertheless assist the Court for Belgium to elaborate briefly on an observation it has already made.[231] A "constituent elements" or "continuing situation" analysis cannot bring within the jurisdiction of the Court a dispute that would otherwise be excluded by operation of a temporal limitation in an Optional Clause Declaration merely on grounds that some aspect of the dispute falls outside of the "crucial date". For purposes of the jurisdiction of the Court, the point at which a dispute arises will be determined by the point at which its critical, originating elements occur.

306. Thus, the Permanent Court, in the *Phosphates in Morocco* case, drew a distinction between the situations or facts which constitute "the real cause of the dispute" and those "subsequent factors which either presume the existence or are merely the confirmation or development of [the] earlier [constitutive] situations or facts".[232] On this analysis, the point of crystallisation of a dispute was determined by "the essential facts constituting ... the dispute"[233] and not by facts which "in no way altered the situation which had been established".[234] Nor could complaints which could not be separated from the dispute that had crystallised prior to the "crucial date" give the Court jurisdiction.[235]

307. The same analysis is evident in the Court's Judgment in the *Right of Passage Case*. While the Court there observed that the dispute in question could not arise "until all its constituent elements had come into existence",[236] the critical factor underlying its analysis was that the essential constitutive element of any dispute was the point at which the parties "adopt clearly-defined legal positions as

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[230] Statement by Mr Corten, CR 99/25, 12 May 1999, Translation, at p.11 (emphasis added).
[231] See paragraph 273 above.
[232] *Phosphates in Morocco*, note 170 supra, at p.24.
[233] *Phosphates in Morocco*, note 170 supra, at p.26.
[234] *Phosphates in Morocco*, note 170 supra, at p.27.
[235] *Phosphates in Morocco*, note 170 supra, at pp.28-29.
[236] *Right of Passage Case*, note 222 supra, at p.34.

against each other".[237] The Court in this case thus identified the point at which the dispute in question crystallised by reference to the essential situations or facts, or those which were the "real cause" of the dispute.[238]

308. Applying these principles to the circumstances of the present case, it is evident that a "constituent elements" or "continuing situation" analysis based on the FRY's allegations concerning post-10 June 1999 events could not serve to bring the already crystallised pre-25 April 1999 dispute within the jurisdiction of the Court. Taking the FRY's case in its own words, its post-10 June 1999 allegations "are part and parcel of the dispute related to the bombing of the territory of the Applicant".[239] They are, in the language of the Permanent Court in the *Phosphates in Morocco Case*, subsequent factors which amount to a development of the earlier constitutive situations or facts, which did not alter the situation which had been established and which could not be separated from the dispute that had crystallised prior to 25 April 1999.

309. Turning to the "new dispute" argument, notwithstanding the FRY's expressed preference for a "same dispute" analysis, there are grounds for considering that the FRY's allegations concerning post-10 June 1999 events in reality amount to a new, quite distinct dispute. As noted in paragraph 86 above, these allegations raise issues of a fundamentally different nature from those raised in respect of the pre-10 June 1999 period. These are likely to include *inter alia*: (a) the interpretation and application of Security Council Resolution 1244 (1999), (b) the responsibility of UN members acting pursuant to a mandate laid down in a binding resolution of the Council, (c) the law applicable to forces acting pursuant to a UN mandate, (d) the imputability of acts to individual troop-contributing states, (e) the application of the *Genocide Convention* to situations involving UN peacekeeping or peace-enforcement operations, and (f) questions relating to the immunity of states and/or forces engaged in such operations. These allegations do not come within the scope of the case initiated by the FRY's Application.

310. In Chapter Two, Belgium contended that the Court lacks jurisdiction in respect of these allegations and/or that they are inadmissible on the ground that they are new *claims* advanced for the first time in the FRY's Memorial. The argument and analysis there advanced apply *mutatis mutandis* to the proposition addressed in this part that the allegations in question amount to a new *dispute*. The Court lacks

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[237] *Right of Passage Case*, note 222 supra, at p.34.
[238] *Right of Passage Case*, note 222 supra, at p.35.
[239] FRY Memorial, at p.339, paragraph 3.2.12.

jurisdiction in respect of allegations set out in the FRY's Memorial that seek to raise a new dispute and/or these new allegations are inadmissible.

311. One additional observation on this matter is required. There is long-standing jurisprudence of both the Permanent Court and International Court to the effect that the Court "should not penalise a defect in a procedural act which the applicant could easily remedy".[240] Lest there be any suggestion that this principle might avail the FRY in respect of the "new dispute" analysis here in issue, Belgium notes that the case law relevant to this principle is concerned either with situations involving shortcomings of form[241] or with circumstances in which the applicant had relied on a basis of jurisdiction which was in some way imperfect[242] or failed initially to identify a basis of jurisdiction on which it subsequently sought to rely.[243]

312. This is not the situation in the present case. In this case, the "new dispute" hypothesis would take the FRY to have submitted to the Court an entirely new dispute *en passant* in the course of argument developed in its Memorial. This would not be a mere matter of form or a "defect in a procedural act". This would be a development of substance of the utmost importance insofar as it would purport to implead Belgium in passing in the absence of any indication of the legal grounds upon which the jurisdiction of the Court was said to be based or any specification of the precise nature of the claim. In Belgium's contention, the principle relating to defects of a formal nature can have no place in any consideration of the matter here in issue.

313. On the basis of the preceding observations and analysis, Belgium contends that the FRY's allegations concerning post-10 June 1999 events do not alter the assessment advanced in the earlier parts of this Chapter to the effect that the Court lacks jurisdiction under Article 36(2) of its *Statute* in the case initiated by the FRY in consequence of the temporal limitation in the FRY's Optional Clause Declaration.

4. Conclusions

314. If, contrary to Belgium's contention in Chapter Four above, the Court accepts that the FRY was competent to make a Declaration under Article 36(2) of

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[240] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p.595, at paragraph 26.
[241] As in the *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports*, p.15, at p.28.
[242] As in the *Genocide Convention Case*, note 240 supra, at paragraph 26.
[243] As in the *Nicaragua Case*, note 169 supra, at paragraph 83.

the *Statute*, Belgium contends that the FRY's Declaration of 25 April 1999 cannot in any event give the Court jurisdiction in this case. In this regard, Belgium's principal submissions in this Chapter may be summarised as follows:

(a) on the basis of the principle of reciprocity, the Belgian and FRY Optional Clause Declarations coincide to give the Court jurisdiction in legal disputes arising after 25 April 1999 concerning situations or facts subsequent to that date;

(b) the Court lacks jurisdiction in this matter as the dispute with which it was seised is a dispute that arose prior to 25 April 1999;

(c) separately, the Court also lacks jurisdiction in this matter on the ground that the dispute with which it has been seised concerns situations or facts that arose prior to 25 April 1999;

(d) furthermore, in the light of the temporal limitation in the FRY's Optional Clause Declaration, the Court's jurisdiction is not co-extensive with the task entrusted to it. The Court must accordingly decline jurisdiction in this matter; and

(e) whether construed as being part and parcel of the dispute that arose prior to 25 April 1999 or as constituting a new dispute arising after that date, the FRY's allegations concerning post-10 June 1999 events do not alter the assessment that the Court lacks jurisdiction under Article 36(2) of its *Statute* in the case initiated by the FRY.

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CHAPTER SIX: THE COURT DOES NOT HAVE JURISDICTION ON THE BASIS OF ARTICLE IX OF THE *GENOCIDE CONVENTION*

315. In Chapter Four, Belgium contended that the Court was not open to the FRY. The FRY is not a party to the *Statute*. Nor can Article IX of *Genocide Convention* be construed to be a special provision in a treaty in force within the scope of Article 35(2) of the *Statute*. Absent an entitlement to appear, the FRY cannot rely on Article IX of the *Genocide Convention* to found jurisdiction in this case.

316. If contrary to these contentions, the Court concludes that it does have jurisdiction *ratione personae* in respect of proceedings initiated by the FRY, Belgium contends that Article IX of the *Genocide Convention* cannot in any event give the Court jurisdiction in this case. The reason for this is straightforward. The acts alleged by the FRY do not come within the scope of the *Genocide Convention*. The dispute is thus not one that the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX of the Convention.

317. More specifically, Belgium contends that the FRY's allegations, even if accepted, are not capable of sustaining an argument that there has been a breach of the *Genocide Convention*. Pursuant to the jurisdictional test laid down by the Court in the *Oil Platforms* case, the Court must ascertain at this stage whether the violations pleaded by the FRY fall within the provisions of the *Genocide Convention*.[244] In Belgium's contention, they do not. The FRY cannot, accordingly, rely on Article IX of the Convention to found jurisdiction in this case. The issues relevant to this contention are addressed further below.

1. Article IX of the *Genocide Convention* and the nature of the test to be satisfied at the jurisdictional stage

318. Article IX of the *Genocide Convention* provides as follows:[245]

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be

[244] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p.803, at paragraph 16.
[245] The text of the *Genocide Convention* is at **Annex 1**.

> submitted to the International Court of Justice at the request of any of the parties to the dispute."

319. The scope of the Article is clear. It constitutes "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".[246] The Court will accordingly have jurisdiction pursuant to this provision in the case of allegations concerning acts that come within the scope of the Convention *ratione materiae* and in respect of such acts only. Article IX of the *Genocide Convention* does not constitute a basis on which the jurisdiction of the Court may be founded more generally.

320. The scope of the *Genocide Convention* is evident from its terms. Thus, insofar as is relevant for present purposes, Article II defines genocide as follows:

> **"Article II** – In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."

321. As this makes clear, the essential focus of the Convention is the protection of national, ethnical, racial or religious groups. At its most fundamental, the crime of genocide thus involves acts directed at these particular protected groups. Within this scheme, two essential elements define the crime: the *actus reus*, the commission of any of the acts enumerated in paragraphs (a) – (e) of Article II, and the *mens rea*, the intention to destroy, in whole or in part, the protected group against which the acts were directed. Of these elements, it is the *mens rea* of the offence that constitutes the "essential characteristic" of genocide.[247]

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[246] *Provisional Measures Order*, at paragraph 37.

[247] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p.325, at paragraph 42.

322. Insofar as these elements define the crime of genocide, they also, for present purposes, identify the essential parameters of the scope of the Convention *ratione materiae*. Thus, in the case of a claim of genocide, if the Court is to have jurisdiction pursuant to Article IX of the Convention, the specific allegations pleaded must fall within the parameters of these elements of crime. The allegations pleaded must, in other words, be capable of sustaining an argument that there has been a breach of the Convention.

323. The nature of the jurisdictional test to be applied in cases such as this has been addressed most recently by the Court in the *Oil Platforms* case. Noting that the parties in that case differed on the question of whether the dispute between them was a dispute "as to the interpretation or application" of the relevant convention, the Court stated:

> "In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty ... pleaded ... do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to [the relevant jurisdictional clause]."[248]

324. As is evident from a number of the Separate Opinions in that case, the test embodied in this statement is one which requires the Court to make a definitive interpretation of the relevant convention at the jurisdictional phase for purposes of determining whether the claims raised come within the scope of the convention *ratione materiae*.[249] As the Court expressed the matter in the *Genocide Convention* case, the task of the Court at the jurisdictional stage is to "verify" whether the dispute falls within the scope of the convention in question.[250] This requirement of a definitive interpretation of the relevant convention at the jurisdictional phase reflects the approach adopted by the Permanent Court in the *Mavrommatis* case.[251]

325. As the Separate Opinion of Judge Higgins in *Oil Platforms* describes, the jurisdictional test applied in cases such as this has varied over time. Thus, for example, in contrast to the approach adopted in *Oil Platforms*, the test applied in the

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[248] *Oil Platforms*, note 244 supra.

[249] See, in particular, the Separate Opinions of Judge Shahabuddeen and Judge Higgins, note 244 supra, at pp.822 and 855 respectively.

[250] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p.595, at paragraph 27.

[251] *Mavrommatis Palestine Concessions, P.C.I.J. Reports, Series A, No.2*, at p.16.

Ambatielos case was whether the arguments advanced in respect of the treaty provisions on which the claim was based "are of a *sufficiently plausible character* to warrant a conclusion that the claim is based on the Treaty."[252] A similar approach was evident in the *Interhandel* and *Nicaragua* cases in which the Court stated, respectively, that it would "confine itself to considering whether the grounds invoked ... are such as to justify the *provisional conclusion* that they may be of relevance in this case" and that "a *reasonable connection* between the Treaty and the claims submitted to the Court" must be established.[253]

326. Notwithstanding this strand of jurisprudence, in the light of *Oil Platforms*, it is apparent that the test to be applied in the present case is whether the allegations raised by the FRY come definitively within the scope *ratione materiae* of the *Genocide Convention*. The issue is thus essentially whether, even taking *pro tem* the facts as alleged by the FRY, they are capable of coming within the terms of the Convention. As the Court observed in its *Provisional Measures Order*:

> "... in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; ... *the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument* and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p.810, para.16)".[254]

327. In Belgium's contention, even accepting *pro tem* the facts as alleged by the FRY, the violations pleaded are not capable of falling within the provisions of the *Genocide Convention*. Article IX of the Convention cannot accordingly be relied upon to found the jurisdiction of the Court in this case.

328. For completeness, Belgium observes that, even on the *Ambatielos* line of jurisprudence noted above, the breaches alleged by the FRY do not come within the scope *ratione materiae* of the *Genocide Convention*. The facts alleged and the

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[252] *Ambatielos Case (Greece v. United Kingdom), I.C.J. Reports 1953*, p.10, at p.18 (emphasis added).
[253] *Interhandel Case, I.C.J. Reports 1959*, p.6, at p.24 (emphasis added); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p.392, at paragraph 81 (emphasis added).
[254] *Provisional Measures Order*, at paragraph 38 (emphasis added).

arguments advanced by the FRY are not of a "sufficiently plausible character" to warrant the conclusion that the FRY's claims come properly within the scope of the *Genocide Convention*.

2. The FRY's allegations

329. The FRY's allegations of genocide are stated in the barest terms. Indeed, in its Application, the FRY makes no explicit mention of "genocide" contending simply that Belgium has violated "the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".[255] The only elaboration of this takes the form of the allegation that

> "by taking part in activities listed above [involving the use of force], and in particular by causing enormous environmental damage and by using depleted uranium, The Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part".[256]

330. Under the heading "facts upon which the claim is based", this allegation is varied slightly insofar as it refers to "conditions calculated at the physical destruction of an *ethnic* group, in whole or in part".[257] Whether anything is to be made of these alternate references to a *national group* and an *ethnic group* is not clear. Given, however, that the fundamental element of genocide is that it involves acts directed at a particular group, the evident lack of clarity about the identity of the group in issue raises, at the very least, a question about the sufficiency of the FRY's particularisation of its claim under this heading.

331. Given the seriousness of the allegations, the portion of the FRY's Memorial devoted to developing its claim of genocide is astonishingly short.[258] Thus, focusing on the period of the NATO action – ie, the period from 24 March to 9 June 1999 – under the heading "[t]he facts related to the existence of an intent to commit genocide by the bombing, causing environmental disaster and using depleted uranium",[259] the FRY advances two allegations in the following terms:

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[255] FRY Application, at p.1 (Subject of the dispute). See also at p.5 (Legal grounds on which the claim is based).
[256] FRY Application, at p.3 (Claim).
[257] FRY Application, at p.4 (Facts upon which the claim is based) (emphasis added).
[258] FRY Memorial, pp.282-284.
[259] FRY Memorial, p.282, paragraph 1.6.1.

First

> "The Respondents intentionally bombed chemical industry plants (in Pancevo, especially) which are not known for any military purposes while at the same time it is a well-known fact that their destruction and damaging have extremely severe consequences for health of a large number of people in a very wide area. ...
>
> Genocidal intention of the responsible individuals for the strikes against chemical industry facilities in Yugoslavia is clearly implied by destruction of the plants of this industry in Pancevo."

Second

> "Scientists at a conference on depleted uranium and cancers in Iraq, held on 30 July 1999, contended that depleted uranium shells can cause birth defects and serious illness, including cancers. Mr. Coghill, a biologist who runs a research centre in Gwent, Wales, said: 'We think there will be 10,000 extra deaths in Kosovo'."

332. No further detail is provided in support of these claims. It is not alleged that Belgium was responsible for the bombing of the facilities at Pancevo, nor that Belgium used depleted uranium. No indication is given of large scale loss of life or injury. No indication is given of the identity of the group against which the alleged acts are said to have been directed. Apart from the suggestion that the *mens rea* of genocide is to be implied from the act of bombing of the Pancevo facilities, nothing further is adduced in support of the allegation of Belgium's intent to commit genocide.

333. Addressing the period from 10 June 1999, the FRY, under the heading of "[t]he facts related to the existence of an intent to commit genocide by killing and wounding Serbs and other non-Albanian groups in Kosovo and Metohija",[260] states as follows:

> "The intent to commit genocide is implied in the fact that Serbs and members of other non-Albanian groups were killed, injured or expelled as such, it is due to their ethnicity. Proof of intent to commit genocide is inferred from the fact that great majority of Serbian institutions, like monasteries, churches, monuments of

[260] FRY Memorial, p.283, paragraph 1.6.2.

> cultures and Orthodox tombstones on cemeteries were destroyed or damaged."[261]

334. No further detail is provided in support of this claim. It is not alleged that Belgium committed any of the acts that are the subject of this claim. The allegations of fact concerning this period charge uniformly that the acts alleged were committed by "Albanian terrorists".[262] Although the allegations identify acts said to have been perpetrated against Serbs, they also identify acts said to have been committed against others - Roma, Muslims, Turks and other non-Albanian persons.[263] The identity of the group against which the genocidal acts are alleged to have been directed is thus unclear. No documentary evidence is provided in support of any of these allegations.

335. Summing up its claims under Article IX of the *Genocide Convention*, the FRY concludes as follows:

> "By this Memorial, the Applicant has submitted the evidence on the intent to commit genocide referring to acts of the Respondents (acts of bombing) and to acts of killing and wounding of Serbs and other non-Albanian population in Kosovo and Metohija after the 10th of June 1999. Accordingly, the Applicant claims that the jurisdiction of the Court, based on Article IX of the Genocide Convention is established."[264]

336. This constitutes the sum total of the FRY's claims under the *Genocide Convention*.

337. On the basis of these claims, the FRY's allegations in respect of the pre-10 June 1999 period appear to be that Belgium is in breach of the obligation under Article II(c) of the Convention not to deliberately inflict on a protected group conditions of life calculated to bring about its physical destruction in whole or in part. In the absence of any express indication on the matter, the basis of the FRY's allegations in respect of the post-10 June 1999 period is less clear. From its claims in respect of this period, the FRY appears, however, to be alleging that Belgium is in breach of Article II(a) or (b) of the Convention concerning the killing of members of a protected group or causing serious bodily or mental harm to members of such a group.

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[261] FRY Memorial, at p.283, paragraph 1.6.2.1.
[262] FRY Memorial, at pp.201-282.
[263] See, for example, the FRY Memorial, at pp.210-211, 221-222, 233 and 240.
[264] FRY Memorial, at p.349, paragraph 3.4.3.

3. The breaches alleged by the FRY are not capable of falling within the provisions of the *Genocide Convention*

338. The shortcomings of the FRY's allegations are manifest. There is a quite fundamental absence of essential detail. The group against which the alleged acts are said to have been directed is not identified. The allegations do not indicate specific acts said to have been committed by Belgium which are alleged to amount to genocide. Nothing of substance is said about the *actus reus* of the alleged breaches. The question of *mens rea* is addressed in passing on the basis of two brief sentences suggesting that intent to commit genocide is to be implied from the facts alleged.

339. The test at this stage of the proceedings is whether the violations pleaded by the FRY fall, or are capable of falling, within the provisions of the *Genocide Convention*; whether they are capable of sustaining a claim under the Convention. In Belgium's contention, even taking *pro tem* the facts alleged, they are not capable of sustaining such a claim. At a formal level, the allegations do not address matters that would be fundamental to any credible claim of genocide. At a substantive level, the essential, defining elements of genocide – the *actus reus* and *mens rea* of the crime – have not been addressed other than by the barest of propositions. Furthermore, as is addressed below, the acts alleged cannot of themselves constitute genocide within the meaning of Article II of the Convention. The allegation of intent to commit genocide also falls so far short of established legal standards that it cannot sustain a claim under the Convention. The violations pleaded by the FRY are not therefore capable of falling within the provisions of the *Genocide Convention*.

340. Three elements warrant further comment:

(a) the requirement to show that the acts alleged were directed against a protected group;

(b) the requirement to show that Belgium committed acts with the intention of destroying in whole or in part the group in question as such (the *mens rea* of the offence); and

(c) the requirement to show that Belgium committed the acts alleged (the *actus reus* of the offence).

341. Before turning to address these matters, a preliminary observation is warranted. The *Genocide Convention* is a treaty with special characteristics. As the Court observed in its *Reservations* Advisory Opinion:

> "... it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946)."[265]

342. While the Convention was adopted, in the words of the Court, "for a purely humanitarian and civilising purpose",[266] its principal focus is not the conduct of hostilities in the course of armed conflict. Although such conduct may come within the purview of the Convention, it will only do so to the extent that the *mens rea* and *actus reus* of the offence can be shown. This point emerges clearly from the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[267]

343. In this regard, as the Court observed in its *Provisional Measures Order*, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group, as such.[268] Whatever the wider issues raised by such conduct, "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention".[269]

344. Insofar as the present case is concerned, the issue is thus whether the FRY's allegations, on their face, adduce evidence showing both Belgium's intent to destroy, in whole or in part, a national, ethnical, racial or religious group and the commission by Belgium of acts coming within paragraphs (a) - (e) of Article II of the Convention.

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[265] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.15, at p.23.
[266] Id.
[267] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, at paragraph 26.
[268] *Provisional Measures Order*, at paragraph 40.
[269] Id.

(a) The requirement to show that the acts alleged were directed against a protected group

345. The Convention identifies national, ethnical, racial and religious groups as protected groups under the Convention. While, in the light of the jurisprudence of the *International Tribunal for the Former Yugoslavia* ("ICTY") and the *International Tribunal for Rwanda* ("ICTR"), there is some scope for debate about how precisely these categories should be defined, it is clear that the identification of the group against which the acts alleged are said to have been directed is a fundamental element of any allegation of genocide. The existence and identity of a targeted group is the essential nexus between the *actus reus* and the *mens rea* of the offence. Thus, it must be shown that the alleged perpetrator committed acts with intent to destroy a given group, as such, and that the acts alleged were directed against the group in question.

346. However the categories of national, ethnical, racial and religious groups are to be defined, it is evident that the mere coincidence of nationality, ethnicity, race or religion across members of a given group will not of itself be sufficient to characterise the group in question as a protected group under the Convention. Thus, the *ICTY* in *Jelisic* indicated that political groups were excluded from the purview of the Convention.[270] The fact that members of a political group are all of the same nationality, ethnicity, race or religion will not therefore of itself be sufficient to bring the group in question within the purview of the Convention.

347. Similarly, there is some suggestion on the basis of the *Akayesu* Judgment of the *ICTR* that members of the armed forces of a state, even if of the same nationality, ethnicity, race or religion, will not constitute a group coming within the purview of the Convention.[271] This appreciation is supported by the jurisprudence on the *mens rea* of genocide, addressed below, which indicates that it is not sufficient to show simply that acts were committed against members of a protected group. It must be shown that the acts were committed against members of a protected group *because of their membership of that group*.[272]

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[270] *The Prosecutor v. Goran Jelisic, ICTY*, Judgment of the Trial Chamber, 14 December 1999, Case No.IT-95-10, at paragraph 69.

[271] *The Prosecutor v. Jean-Paul Akayesu, ICTR*, Judgment of the Trial Chamber, 2 September 1998, Case No.ICTR-96-4-T, at paragraphs 125 and 128.

[272] See, for example, *Akayesu*, ibid, at paragraph 521. Also *The Prosecutor v. Alfred Musema, ICTR*, Judgment of the Trial Chamber, 27 January 2000, Case No.ICTR-96-13-T, at paragraph 165.

348. In the present case, apart from the bare assertions in the FRY's Application that Belgium is in breach of its obligation not to deliberately inflict on a *national* or, alternatively, on an *ethnic* group conditions of life calculated to bring about its physical destruction, there is no identification by the FRY of the group against which the alleged acts are said to have been directed or any elaboration of the essential characteristics of the group that bring it within the purview of the Convention. Thus, in the context of the alleged attack on the facilities in Pancevo, the FRY describes the group said to have been affected as "a large number of inhabitants of Yugoslavia".[273] Subsequently, reference is made to "killing and wounding Serbs and other non-Albanian groups in Kosovo and Metohija",[274] a category that, as has already been noted, includes Serbs, Roma, Muslims, Turks as well as other non-Albanian persons.[275]

349. Insofar as the identification of a group coming within the purview of the Convention is an essential element of both the *mens rea* and the *actus reus* of genocide, the FRY's allegations are fundamentally flawed. As they stand, the violations pleaded fail to identify with any clarity the group against which the alleged acts are said to have been directed and which Belgium is said to have had the intent to destroy.

350. In Belgium's contention, this shortcoming is in itself a sufficient basis for concluding that the violations pleaded by the FRY are not capable of falling within the provisions of the *Genocide Convention*.

(b) The requirement to show that Belgium committed acts with the intention of destroying in whole or in part a protected group, as such – the question of mens rea

351. The *mens rea* of genocide, the intention to destroy, in whole or in part, a group protected by the Convention, is the "essential characteristic" of the offence.[276] The importance and singular character of this element was addressed by the *ICTR* in *Musema* in the following terms:

> "164. Genocide is distinct from other crimes because it requires a *dolus specialis*, a special intent. The special intent of a crime is

[273] FRY Memorial, at p.283, paragraph 1.6.1.3.
[274] FRY Memorial, at p.283, paragraph 1.6.2.
[275] See paragraph 334 above.
[276] *Provisional Measures Order*, at paragraph 40.

> the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged. The *dolus specialis* of the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. A person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute[277] with the specific intent to destroy, in whole or in part, a particular protected group.
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> 165. For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission – for example, the murder of a particular person – to encompass the realisation of the ulterior purpose to destroy the group in whole or in part."[278]

352. This analysis is echoed in other decisions of the *ICTR*.[279] The issue of the *mens rea* of genocide was addressed by the *ICTY* in *Jelisic* in the following terms:

> "It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law. The underlying crime or crimes must be characterised as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Stated otherwise, '[t]he prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group'. Two elements which may therefore be drawn from the special intent are:

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[277] The definition of genocide in Article II of the *Genocide Convention* was inserted verbatim as Article 2(2) of the Statute of the *ICTR* and Article 4(2) of the Statute of the *ICTY*.

[278] *Musema*, note 272 supra.

[279] See, for example, *Akayesu*, note 271 supra, at paragraphs 498-499 and 517-522; also *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment of the Trial Chamber, 21 May 1999, Case No.ICTR-95-1-T, at paragraph 91.

- that the victims belonged to an identified group;
- that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such."[280]

353. In the light of this decision, if the FRY is to satisfy the requirements of the *mens rea* of genocide, it must show - or, at this stage of the proceedings, the violations pleaded must be capable of showing - that the victims of the alleged acts belonged to a group protected by the Convention and that Belgium committed the acts in question as part of a wider plan to destroy the group as such.

354. Of the two elements identified in *Jelisic*, the question of the identification of the group against which the alleged acts are said to have been directed has already been addressed. It suffices therefore simply to recall that the FRY has failed to identify with any clarity the group alleged to have been the victim of the acts in question.

355. The evidence adduced by the FRY of Belgian intent to destroy an (indeterminate) group is equally unsatisfactory. Insofar as any evidence is offered, or any argument made, in support of the proposition that Belgium intended to destroy some or other protected group, it is simply that Belgium's intent to commit genocide is to be implied from the bombing of the facilities at Pancevo and from the fact that Serbs and other non-Albanian groups were killed, injured or expelled by "Albanian terrorists" on grounds of their ethnicity. Nothing is said about requisite intent to commit genocide in the case of the allegations concerning the use of depleted uranium.

356. To these formal shortcomings of the FRY's allegations in respect of *mens rea* must also be added legal shortcomings. Thus, while there may be circumstances from which the requisite intention to commit genocide may be inferred, the jurisprudence of both the *ICTY* and the *ICTR* indicate that the sufficiency of the circumstantial evidence on this point will depend on the weight and extent of the evidence adduced.

357. The starting point for the analysis of this matter is *Jelisic* in which the *ICTY*, subsequently acquitting the accused of the charge of genocide, noted that

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[280] *Jelisic*, note 270 supra, at paragraph 66 (quoting the ILC Draft Code of Crimes against the Peace and Security of Mankind, A/51/10 (1996), at p.88).

> "the intention necessary for the commission of the crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened. The Trial Chamber must verify whether the accused had the 'special' intention which, beyond the discrimination of the crimes he commits, characterises his intent to destroy the discriminated group as such, at least in part."[281]

358. The starting point is thus against any presumption of the requisite intent for genocide.

359. In the light of the intrinsic difficulty of proving intent, both the *ICTY* and *ICTR* have, however, accepted that, where it is difficult to find explicit manifestations of intent by the alleged perpetrators, intent may be inferred. The matter was addressed by the *ICTR* in *Kayishema* in the following terms:

> "Regarding the assessment of the requisite intent, the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator's actions, including circumstantial evidence, however may provide sufficient evidence of intent. The Commission of Experts in their Final Report on the situation in Rwanda also noted this difficulty. Their Report suggested that the necessary element of intent can be inferred from sufficient facts, such as the number of group members affected. The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language towards members of the targeted group; the weapons employed and the extent of the bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important. In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that 'the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Article II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part."[282]

360. As this extract makes clear, while evidence of intent may be inferred, the weight and extent of the circumstantial evidence adduced will be critical to this

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[281] *Jelisic*, note 270 supra, at paragraph 78.
[282] *Kayishema*, note 279 supra, at paragraph 93.

exercise. A similar approach was adopted by the *ICTR* in other cases[283] and by the *ICTY* in the case of its Rule 61 Decisions in *Nikolic* and *Karadzic and Mladic*.[284]

361. The issue at this preliminary stage of these proceedings is not whether the evidence adduced by the FRY in support of its claim of intent is meritorious. That would ultimately be a matter for the merits. The issue is whether the FRY has adduced *any* credible evidence at all in support of its claims of genocidal intent. The test at this stage of the proceedings is whether, even accepting *pro tem* the facts alleged by the FRY, they are capable of coming within the terms of the Convention.

362. The paucity of detail in the FRY's claims under this heading speaks for itself. Adopting the language of the *ICTR* in *Kayishema*, the FRY has not adduced any evidence showing, on the part of Belgium, a "pattern of purposeful action", or the "physical targeting" of an identified protected group or their property, or the "use of derogatory language towards members of the targeted group"; or "weapons employed and the extent of the bodily injury"; or the "methodical way of planning, the systematic manner of killing". No evidence has been adduced of "the number of victims" from the identified protected group. In short, the basic proposition apart – that intent is to be implied from the bombing of the facilities at Pancevo and from the fact that Serbs and other non-Albanian groups were killed, injured or expelled by "Albanian terrorists" on grounds of their ethnicity – nothing at all is adduced in support of the allegation of genocidal intent on the part of Belgium.

363. It is also worth observing that the FRY has not pointed to any statement by Belgium showing the slightest indication of a plan or political doctrine whose objective might have been the destruction of any protected group. The FRY does not report any manifestation of hatred or insult or other humiliating behaviour on the part of Belgium to any group within the FRY.

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[283] See, for example, *Akayesu*, note 271 supra, at paragraph 523; and *Musema*, note 272 supra, at paragraphs 166-167.

[284] *Prosecutor v. Nikolic (Rule 61)*, Decision of the Trial Chamber, 20 October 1995, 108 *ILR* 21, at paragraph 34; *Prosecutor v. Karadzic and Mladic (Rule 61)*, Decision of the Trial Chamber, 11 July 1996, 108 *ILR* 85, at paragraph 94. Pursuant to Rule 61 of the *ICTY's Rules of Procedure*, where a warrant of arrest has not been executed despite reasonable steps having been taken to do so, the Prosecutor may be ordered to submit the matter to the Trial Chamber of the Judge confirming the indictment. In so doing, the Prosecutor shall submit, in open Court, all the evidence that was before the Judge who initially confirmed the indictment as well as any additional evidence. If the Trial Chamber is satisfied, on this evidence, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine.

364. It also merits observation that, where genocidal intent is inferred from the circumstances of the acts alleged, a cardinal principle in such an exercise must be that such intent cannot be inferred in the abstract. In other words, genocidal intent on the part of a named respondent such as Belgium cannot be inferred from acts with which that respondent has no clear and demonstrable connection. To proceed otherwise would be to introduce a significant and unacceptable margin of uncertainty into an exercise that is already adopting a deductive approach to the determination of responsibility. This factor is important in respect of all three of the allegations of genocide raised by the FRY: the bombing of the Pancevo facilities and the use of depleted uranium, in respect of which no particular perpetrator has been alleged, and the killing and injuring of Serbs and other non-Albanian groups, in respect of which "Albanian terrorists" are named as the alleged perpetrators. In no case can it be shown that Belgium had a clear and demonstrable connection to the commission of the acts. Yet the FRY would have the Court infer the *mens rea* of genocide from these actions.

365. As is addressed in more detail in Chapter Eight below, pursuant to the Court's *Rules*, the FRY's Memorial is the principal, and perhaps only, document in which the FRY is to make its case. Every pleading beyond this is at the discretion of the Court. Subsequent pleadings are to have as their object the bringing out of the issues that still divide the Parties.[285] They are not, in other words, intended for the presentation of new material. The allegations advanced by the FRY in its Application and Memorial, and the material adduced in support of those allegations, must therefore be taken as constituting a full statement of the FRY's case.

366. The *mens rea* of genocide is the "essential characteristic" of offence. It requires evidence that the alleged perpetrator committed the acts alleged as part of a wider plan to destroy an identified protected group as such. The FRY has not identified the protected group alleged to be the target of genocidal intent. Nor has it adduced *any* evidence to show that Belgium intended the destruction, in whole or in part, of any group within the FRY, let alone an identified group within the purview of the Convention. These shortcomings are both manifest and, in Belgium's contention, fatal to the FRY's claim at the most basic level. They are of such an order as to invite the contention that the FRY's claim is manifestly ill-founded. The facts put forward cannot by any means justify the claim of genocide. They are wholly unsubstantiated. In Belgium's contention, the violations pleaded are not capable of falling within the provisions of the *Genocide Convention*.

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[285] As per Article 49(3) of the Court's *Rules*.

(c) The requirement to show that Belgium committed the acts alleged – the actus reus *of genocide*

367. The FRY alleges distinct genocidal acts in respect of the pre- and post-10 June 1999 periods. Thus, in respect of the pre-10 June 1999 period, the acts alleged are the bombing of the factory at Pancevo and the use of depleted uranium. In respect of the post-10 June 1999 period, the acts alleged are the killing and injuring of "Serbs and members of other non-Albanian groups". These allegations of fact translate into different allegations of breach of the *Genocide Convention*. Thus, in respect of the pre-10 June 1999 period, the FRY alleges that Belgium has violated Article II(c) of the Convention by "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". Insofar as it is possible to discern, the allegation in respect of the post-10 June 1999 period appears to be that Belgium has violated Article II(a) or (b) of the Convention by "[k]illing members of the group" or "[c]ausing serious bodily or mental harm to members of the group".

368. A number of observations are warranted on these allegations. First, as the Court noted in its *Provisional Measures Order*, "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention".[286] The same is true in the case of the acts mentioned in paragraphs (a) – (e) of Article II. The *Genocide Convention* is structured on the basis of an essential nexus between the *actus reus* and *mens rea* of the offence. A credible allegation of genocide – one capable of coming within the scope of the Convention – thus requires both the *actus reus* and the *mens rea* of the offence to be shown.

369. Second, the critical factor linking the *actus reus* with the *mens rea* is the requirement in each of the paragraphs of Article II that the acts in question must be directed towards "the group", ie, the group in respect of which the alleged perpetrator is said to have had the requisite genocidal intent. The shortcomings of the FRY's allegations on this matter have already been addressed. It suffices therefore simply to reiterate that the failure by the FRY to identify with any clarity the group against which the alleged acts are said to have been directed also constitutes a fundamental flaw in this element of the FRY's allegations.

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[286] *Provisional Measures Order*, at paragraph 40.

370. Third, as with its allegations on the question of *mens rea*, the FRY makes no specific allegations against Belgium in respect of the *actus reus*. Thus, the generality of the FRY's allegations apart, it is not alleged that Belgium killed members of the (indeterminate) group or caused serious bodily or mental harm to members of the group or deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part.

371. Fourth, linked to the preceding, there is nothing of substance in the FRY's Memorial to substantiate any of its claims in respect of the *actus reus* of genocide. Thus, in respect of the bombing of the facilities in Pancevo, there is nothing in either the FRY's description of the bombing[287] or in its allegations on intent[288] that identify any conditions of life having been *deliberately* inflicted on any group which were *calculated* to bring about its physical destruction in whole or in part. As the language of Article II(c) makes clear, independently of the *mens rea* of genocide more generally, a claim under this provision requires both that an intention to inflict certain conditions of life on the group in question must be shown and that the conditions in issue must be calculated to bring about the physical destruction of the group. Absent any evidence of intent to inflict the conditions in question and to bring about the physical destruction of the group by the infliction of these conditions, no credible claim of genocide can be made. There being nothing in the FRY's Memorial to support its claim under this heading, Belgium contends that the violations pleaded are not capable of coming within the provisions of the *Genocide Convention*.

372. The same is true of the FRY's allegations concerning the use of depleted uranium. Against the background of a total absence of any detail regarding the alleged use of depleted uranium, the FRY attaches a single annex consisting of a news report referring to a conference on "depleted uranium in Iraq".[289] While the FRY attempts to make much of one sentence in this news report which speculates about 10,000 extra deaths in Kosovo,[290] the full report is both infinitely more equivocal than the FRY implies and serves to undermine the FRY's claim against Belgium. Thus, citing an experimental biologist from Wales, a Mr Coghill, the news report states:

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[287] FRY Memorial, at pp.44-45, paragraphs 1.1.24.1.-1.1.24.2.
[288] FRY Memorial, at pp.282-283, paragraphs 1.6.1.1.-1.6.1.3.
[289] FRY Memorial, Annex No.161.
[290] FRY Memorial, at p.283, paragraph 1.6.1.4.

> "The use of DU [depleted uranium] shells in Kosovo, fired mainly from US A-10 'tank-busting' aircraft, was endangering the health of returning refugees, peacekeepers, aid workers and the people of neighbouring countries, he [Mr Coghill] said.
>
> 'We think there will be be [sic] 10,000 extra deaths in Kosovo,' Mr Coghill said, basing the figure on extrapolations from US statements about the use of DU weapons during the war.
>
> ...
>
> But critics of the claimed link between the use of DU weapons and increase in cancer and genetic abnormalities say the problem could, instead, be connected with the use of chemical weapons used against the Kurds and others in Iraq during the 1980s.
>
> Richard Guthrie of Sussex university's science policy research unit told the conference in London yesterday that the case was 'not cut and dried' and there needed to be more research – something Dr Coghill conceded."[291]

373. Not only is the "evidence" adduced by the FRY in support of its claim considerably more equivocal than the FRY would have the Court believe but it also suggests that depleted uranium was "fired mainly from US A-10 'tank-busting' aircraft". There is no suggestion here of the use of depleted uranium by Belgium, a suggestion that Belgium would in any event deny. The news report further suggests that the use of depleted uranium was "endangering the health of returning refugees, peacekeepers, aid workers and the people of neighbouring countries". There is no suggestion here of any acts having been committed against a protected group within the purview of the *Genocide Convention* or conditions of life having been *deliberately* inflicted on the group *calculated* to bring about its physical destruction.

374. There being nothing of substance in the FRY's Memorial to support its claim under this heading, Belgium contends that these violations too are not capable of coming within the provisions of the *Genocide Convention*.

375. Turning, lastly, to the FRY's allegations in respect of the post-10 June 1999 period – ie, the killing and injuring of "Serbs and members of other non-Albanian groups" – the critical shortcoming of this allegation is that the FRY, in its Memorial, uniformly and explicitly alleges that the acts in question were committed by "Albanian terrorists". There is no suggestion that Belgium committed any of the

[291] FRY Memorial, Annex No.161.

acts. There is no basis whatever for the FRY's allegation of genocide against Belgium under this heading. These allegations too are accordingly not capable of coming within the provisions of the *Genocide Convention*.

376. For completeness on this matter, Belgium recalls that, as was addressed in detail in Chapter Two, the Court in any event lacks jurisdiction in respect of the FRY's allegations concerning the post-10 June 1999 period and/or that such allegations are inadmissible.

377. On the basis of the preceding, Belgium contends that there is nothing in the FRY's allegations of fact that is even remotely capable of sustaining a claim of genocide against Belgium. The violations pleaded are not, accordingly, capable of falling within the provisions of the *Genocide Convention*.

4. Conclusions

378. At the provisional measures phase, the jurisdictional question for the Court was whether "the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established".[292] In respect of the FRY's claim under Article IX of the *Genocide Convention*, the Court responded to that question indicating that it was "not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention".[293]

379. Nothing has changed since that phase of the proceedings to warrant the Court changing its assessment of the matter. The FRY has not developed its claim of genocide in any significant fashion in its Memorial. It has failed to identify with any clarity the protected group alleged to have been the target of Belgian genocidal intent or action. It has not adduced any evidence of genocidal intent on the part of Belgium. Its allegations of fact are incapable of sustaining a claim of genocide. Even taking *pro tem* the facts as alleged by the FRY, they are incapable of coming within the terms of the *Genocide Convention*. The violations pleaded do not, accordingly, fall within the provisions of the Convention. In consequence, the dispute is not one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX of the *Genocide Convention*.

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[292] *Provisional Measures Order*, at paragraph 21.
[293] *Provisional Measures Order*, at paragraph 41.

380. For completeness, Belgium contends that the FRY's allegations of genocide are not even of a "sufficiently plausible character" to come within the scope of the *Genocide Convention* on the basis of the jurisdictional test outlined in the *Ambatielos* line of jurisprudence noted above.

[blank]

CHAPTER SEVEN: THE COURT DOES NOT HAVE JURISDICTION ON THE BASIS OF ARTICLE 4 OF THE *1930 CONVENTION*

381. In Chapter Four, Belgium contended that the Court is not open to the FRY. Absent an entitlement to appear, the FRY cannot rely on Article 4 of the *1930 Convention* to provide a basis of jurisdiction in this case.[294] Closely associated with this contention, Article 37 of the Court's *Statute*, relied on by the FRY to perfect its claim to jurisdiction under the *1930 Convention*,[295] only operates "as between parties to the present Statute". The FRY is not a party to the *Statute*. Article 37 of the *Statute* cannot therefore combine with Article 4 of the *1930 Convention* to give the Court jurisdiction in this case. This issue is addressed further below.

382. If, contrary to these contentions, the Court were to conclude that the FRY is a party to the *Statute*, Belgium contends that Article 4 of the *1930 Convention* cannot in any event give the Court jurisdiction in this case. The reasons for this, in addition or in the alternative, are that: (a) the *1930 Convention* is no longer in force, and/or (b) the FRY is not a successor to the *1930 Convention*, and/or (c) the conditions laid down by the *1930 Convention* have not been satisfied. Each of these elements is addressed further below.

1. The *1930 Convention*

383. The *1930 Convention*, signed by the representatives of Belgium and "Yugoslavia" on 25 March 1930, entered into force on 3 September 1930 for a period of five years. Pursuant to Article 38(3), the Convention was to remain in force for further periods of five years unless denounced. The Convention was registered with the Secretariat of the League of Nations on 8 September 1930. The official language of the Convention was French. For purposes of the English text of these Preliminary Objections, reference is made to the English translation of the Convention produced by the League of Nations Secretariat.

384. The Convention was concluded "[c]onsidering that the faithful observance under the auspices of the League of Nations, of peaceful procedure allows of the settlement of all international disputes".[296] The interaction between the Convention

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[294] The text of the *1930 Convention* is at **Annex 4**.
[295] FRY Memorial, at p.346, paragraph 3.3.12.
[296] *1930 Convention*, Preamble.

arrangements and the League of Nations was addressed *inter alia* in Article 37 of the Convention in the following terms:

> "The present Convention which is in conformity with the Covenant of the League of Nations, shall not be interpreted as restricting the duty of the League to take at any time whatever action may be deemed wise and effectual to safeguard the peace of the world."

385. The Convention thus operated within and subject to the general framework of action by the League of Nations.

386. Within this framework, the Convention established a complex regime for the peaceful settlement of disputes based on interacting arrangements involving judicial settlement, conciliation and arbitration.

387. The general intent of the Convention was set out in Article 1(1) in the following terms:

> "Disputes of every kind which may arise between the High Contracting Parties and which it has not been possible to settle through diplomatic channels shall be submitted, under the conditions laid down in the present Convention, for judicial settlement or arbitration, preceded, according to circumstances, as a compulsory or optional measure, by recourse to the procedure of conciliation."

388. Article 2 went on to provide:

> "Disputes for the settlement of which a special procedure is laid down in other conventions in force between the High Contracting Parties shall be settled in conformity with the provisions of those conventions. If, however, the dispute is not settled by application of this procedure, the provisions of the present Convention concerning arbitration or judicial settlement shall apply."

389. As this provision makes clear, the arrangements established by the *1930 Convention* were intended – insofar as disputes governed by a special procedure in other conventions were concerned – to be residual dispute settlement arrangements that would become operative only if the dispute in question was not settled by the application of the other procedure.

390. The three forms of dispute settlement under the Convention were addressed in distinct parts of the Convention – judicial settlement in Chapter II, conciliation in Chapter III, and arbitration in Chapter IV. Although the matter does not emerge clearly from a cursory review of the Convention's provisions, the operation of and interaction between these three forms of dispute settlement was based on the classification of the dispute in question. That the Convention embodied an implicit "classification of disputes" emerges clearly from Article 36 of the Convention which provided:

> "Disputes relating to the interpretation or application of the present Convention, *including those concerning the classification of disputes*, shall be submitted to the Permanent Court of International Justice."[297]

391. Under the heading "Judicial Settlement", Article 4 of the Convention, invoked by the FRY, provided:

> "All disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice unless the Parties agree in the manner hereinafter provided, to resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

392. Articles 5 and 6 went on to address various aspects of the arbitral procedure contemplated as an alternative to judicial settlement in Article 4. To avoid confusion, this arbitration is hereinafter described as *judicial settlement alternative arbitration* ("JSA arbitration").

393. Confirming that the Convention was based on an appreciation of different kinds of disputes, Article 7(1) provided:

> "*In the case of the disputes mentioned in Article 4*, before any procedure before the Permanent Court of International Justice or any other arbitral procedure, the Parties may by common consent, have recourse to the conciliation procedure provided for in the present Convention."[298]

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[297] Emphasis added.
[298] Emphasis added.

394. Conciliation pursuant to Article 7(1) is hereinafter referred to as *optional conciliation*.

395. Articles 8-23 contained detailed procedural provisions in respect of conciliation generally. Article 8 provided that "[a]ll disputes between the Parties *other than disputes mentioned in Article 4* shall be submitted obligatorily to a procedure of conciliation before they can form the subject of a settlement by arbitration".[299] The italicised phrase reaffirms the perception at the core of the Convention that Article 4 was concerned with particular types of dispute. Pursuant to Article 8, conciliation was an obligatory prerequisite to arbitration.

396. By way of contrast with conciliation pursuant to Article 7(1), conciliation pursuant to Article 8 is hereinafter referred to as *compulsory conciliation*.

397. Pursuant to Article 9, disputes referred to *compulsory conciliation* in accordance with Article 8, were to be "submitted to a permanent or special Conciliation Commission constituted by the Parties". By Article 22(1),

> "[t]he task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the Parties to an agreement. It may, after the case has been examined, inform the Parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision."

398. As this indicates, although compulsory, this conciliation procedure was not binding. It was a traditional conciliation procedure which was designed to facilitate the settlement of the dispute by the agreement of the parties.

399. Arbitration was addressed in Articles 24-32. Insofar as is relevant for present purposes, Article 24(1) provided:

> "If the Parties have not reached an agreement within a month from the termination of the work of the Conciliation Commission, the question may, if the Parties agree, be brought before an arbitral tribunal."

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[299] Emphasis added.

400. As this makes clear, arbitration pursuant to Article 24 was an optional procedure dependent on the consent of the parties. Pursuant to Article 32, if the parties had not agreed to refer the dispute to arbitration in accordance with Article 24, "the dispute shall be settled in conformity with the provisions of Article 15 of the Covenant of the League of Nations". Article 15 of the Covenant provided *inter alia* as follows:

> "If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. ...
>
> The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.
>
> If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto."[300]

401. By reference to these various provisions, while arbitration would have resulted in a decision binding upon the parties, resort to arbitration was optional and dependent on the agreement of the parties. In contrast, while the operation of Article 15 of the Covenant of the League constituted a *compulsory* default procedure, the outcome of the procedure would not have been binding upon the parties.

402. A number of observations are warranted on the Convention and its operation in the light of these provisions. First, the Convention operated within and subject to the general framework of the League of Nations. Second, the Convention established a relatively complex set of interacting dispute settlement arrangements including judicial settlement, JSA arbitration, optional conciliation, compulsory conciliation, arbitration and settlement by the Council of the League. Within this

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[300] Articles 12 and 13 of the Covenant provided *inter alia* as follows:

Article 12, paragraph one: "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council."

Article 13, paragraph one: "The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which

scheme, there were however two broad categories of arrangements: (a) judicial settlement, JSA arbitration (as an optional alternative to judicial settlement), and optional conciliation (as an optional procedure preliminary to both); and (b) compulsory conciliation leading either to arbitration (optional) or settlement by the Council of the League in conformity with the provisions of Article 15 of the Covenant (compulsory, if the parties did not opt for arbitration). Within this framework, the outcome of the category (a) procedures would be a decision binding upon the parties. In contrast, the outcome of the category (b) procedures would only be binding if both parties had elected to refer the matter to arbitration.

403. Third, the Convention was based on an appreciation by the Parties of different types or classifications of dispute. While the Convention did not enumerate a classification of types of dispute, Article 4, paragraph 2 provided that it was understood that the disputes to be submitted to the Permanent Court included in particular those disputes mentioned in Article 36 of the *Statute* of the Permanent Court.

404. Fourth, Article 2 of the Convention – providing that disputes for the settlement of which special procedures were laid down in conventions in force were to be settled in accordance with those procedures – indicates that the intent of the Convention was to safeguard existing dispute settlement arrangements. Only if the dispute in question was not settled by such procedures would the Convention's arbitration or judicial settlement provisions operate. Article 2 was thus in effect a sequencing provision which provided for the operation of *inter alia* Article 4 at the point at which the other relevant special procedures failed to achieve a settlement of the dispute.

2. The FRY's claims under the *1930 Convention*

405. By a letter dated 12 May 1999, during the oral proceedings before the Court on the FRY's *Provisional Measures Request*, the FRY invoked Article 4 of the *1930 Convention* as an additional basis of jurisdiction in this case. In so doing, the FRY did not specify particular allegations that fell to be addressed under the *1930 Convention*. It has not done so in its Memorial. The *1930 Convention* is thus relied upon by the FRY as a basis of general jurisdiction, operating in parallel and additional to the other bases of jurisdiction relied upon by the FRY.

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cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration."

406. The application of the *1930 Convention* to the circumstances of this case is addressed only briefly in the FRY's Memorial. Thus, the FRY alleges that the Convention is in force; that Article 4 of the Convention "does not provide any preliminary procedures whose exhaustion is a necessary condition for the seisin of the PCIJ"; and that, in accordance with Article 37 of the *Statute* of the Court, the reference to the Permanent Court in Article 4 of the Convention is to be read as a reference to the International Court.[301] As has already been intimated, Belgium rejects each element of this claim. It is to these issues that Belgium now turns.

3. The Court lacks jurisdiction on the basis of the *1930 Convention*

407. In Belgium's contention, the Court lacks jurisdiction on the basis of the *1930 Convention* on one or more of the following grounds:

(a) Article 37 of the *Statute* is not applicable in the circumstances of this case, and/or
(b) the *1930 Convention* is no longer in force, and/or
(c) the FRY has not succeeded to the *1930 Convention*, and/or
(d) the conditions laid down by the *1930 Convention* have not been satisfied.

(a) Article 37 of the Statute *is not applicable in the circumstances of this case*

408. In Chapter Four, Belgium addressed the issue of the Court's jurisdiction *ratione personae*. As was there shown, the Court is not open to the FRY, whether pursuant to Article 35(1) or (2) of its *Statute*. Absent jurisdiction *ratione personae*, the question of whether the Court has jurisdiction *ratione materiae* or *ratione temporis* under a treaty does not arise.

409. In the case of treaties containing jurisdictional clauses which provide for reference of a matter to the Permanent Court, the position is narrower still. While, pursuant to Article 37 of the *Statute*, the International Court will have jurisdiction in such cases, this provision only operates "as between the parties to the present Statute". Article 37 of the *Statute* is thus only relevant insofar as the Court is competent pursuant to Article 35(1) of the *Statute*.

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[301] FRY Memorial, at p.346, paragraphs 3.3.10-3.3.12.

410. This appreciation of the scope and limitations of Article 37 is reflected in the Court's detailed review of the operation of this provision in the *Barcelona Traction Case*.[302]

411. As has already been contended, the FRY is not a party to the *Statute*, whether under Article 93(1) or (2) of the *Charter*. Article 37 of the *Statute* does not therefore apply in the circumstances of this case. It cannot therefore operate to give the Court jurisdiction on the basis of Article 4 of the *1930 Convention* in these proceedings.

(b) The 1930 Convention *is no longer in force*

412. The *1930 Convention* was a bilateral treaty. It was concluded between Belgium and "Yugoslavia" in 1930. It was conceived of as operating within and subject to the general framework of action by the League of Nations. Insofar as Belgium has been able to establish, it was not invoked by either party in the course of more than 60 years of bilateral relations following its entry into force.

413. "Yugoslavia" (ie, the SFRY) ceased to exist as a state by no later than 4 July 1992.[303] In the period from 8 October 1991 to 27 April 1992, it was succeeded by five new states.[304] Despite extensive negotiations between Belgium and each of the successor states (with the exception of Bosnia-Herzegovina[305]) in the period following the dissolution of the SFRY on the question of their succession to bilateral Belgian-"Yugoslav" treaties, not a single reference was made to the *1930 Convention* by any of these states, in any context, including by the FRY. The first and only occasion on which the Convention was referred to was by the FRY in its letter to the Court of 12 May 1999.

414. In Belgium's contention, the *1930 Convention* had lapsed - whether through obsolescence or desuetude or on the basis of the implied consent of the parties - by no later than 4 July 1992, ie, the point at which the SFRY was considered by the Arbitration Commission of the *Conference on Yugoslavia* to have ceased to exist. The dissolution of the SFRY and the conduct of both Belgium and

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[302] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964,* p.6, at pp.32-36.

[303] See paragraph 141 above.

[304] See *Opinion No.11* of 16 July 1993 of the Arbitration Commission of the *Conference on Yugoslavia*, 96 *ILR* 719.

[305] Negotiations between Belgium and Bosnia-Herzegovina on this matter have been delayed for reasons concerning the internal situation in Bosnia-Herzegovina.

the various successor states to the SFRY in the period following the dissolution of "Yugoslavia" supports this conclusion.

415. Although there is little direct practice on the matter, it is evident that "'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty".[306] The legal basis of the termination in such cases, "is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty."[307]

416. A number of factors support the conclusion that the *1930 Convention* had lapsed by, or did so at, the point of the dissolution of the SFRY. These include the following:

(a) *the scheme of the Convention* – as has already been observed, the Convention was conceived of as operating within and subject to the general framework of action by the League of Nations. This is attested to *inter alia* by the preambular paragraphs of the Convention, the role of the Council of the League pursuant to Article 32 of the Convention in cases in which parties to a dispute chose not to have recourse to arbitration in accordance with Article 24 of the Convention, and Article 37 of the Convention. This last provision is of particular importance as it would require an assessment of the lawfulness of a respondent's action to take account of the "duty of the League to take at any time whatever action may be deemed wise and effectual to safeguard the peace of the world". In the circumstances of the present case, if the *1930 Convention* were still in force, this would open the possibility of Belgium arguing on the merits that its participation in the NATO action in the FRY was justified by reference to the duty of the League of Nations under its *Covenant*. In a world in which the League and its *Covenant* no longer have any role to play in the conduct of international relations, the possibility of such an argument is absurd. Yet this would be the logical consequence of the continued application of the *1930 Convention*;

(b) *the Convention was not conceived of as operating in perpetuity* – although the Convention was not concluded for a determined period, nor was it

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[306] *Report of the International Law Commission on the Law of Treaties*, Report of the Commission to the General Assembly, YILC, 1966, Vol.II, p.172, at p.237, paragraph (5), commentary to draft Article 39.
[307] Id.

contemplated that it would operate without limit. Article 38(3) of the Convention provided that it was to remain in force for successive periods of five years. This approach may be contrasted with that adopted in the case of treaties which are intended to operate without temporal limitation and which do not therefore contain any temporal limitation clause. While the *1930 Convention* was never denounced, this simply reflects the appreciation of the parties that it had lapsed, whether on the dissolution of the League of Nations or thereafter;

(c) *the practice of the parties* – insofar as it has been possible to establish, the *1930 Convention* was neither invoked nor even referred to by either of its parties (Belgium and "Yugoslavia") in their bilateral relations following the Convention's entry into force. While the failure to invoke or refer to a treaty may not of itself be sufficiently conclusive of the obsolescence or desuetude of the treaty, silence of this kind over an extended period – such as the 62 years between the Convention's entry into force in 1930 and the dissolution of "Yugoslavia" in 1992 – lends supports the conclusion that the parties no longer regarded the treaty as operative;

(d) *the disappearance of "Yugoslavia" and the attitude of its successors* – "Yugoslavia" ceased to exist as a state by no later than 4 July 1992. While the disappearance of one of the parties to a bilateral arrangement does not preclude the possibility that the arrangement may continue to operate between the remaining party and a successor to the party that has disappeared, it necessarily involves the termination of the arrangements as between the original parties. Without prejudging questions of succession – addressed as a separate issue in the next section of this Chapter – the disappearance of one of the original parties to a bilateral treaty also necessarily raises the question of whether the treaty continues in force. The attitude of both the remaining party and any potential successors to the treaty following the disappearance of the first party will thus be critical in any assessment of whether the treaty continues in force. In the case of the *1930 Convention*, the appreciation of both Belgium and the various successor states of the SFRY with which issues of succession were addressed supports the conclusion that the Convention is no longer in force. This element is addressed further in the following paragraphs.

417. As has already been noted, in the period following the dissolution of the SFRY, Belgium conducted extensive negotiations with Croatia, Macedonia, Slovenia and the FRY – all equal successors to the SFRY – on the question of their succession to bilateral Belgian-"Yugoslav" treaties. The negotiations with the FRY are addressed fully in the following section of this part dealing with the question of FRY succession to the *1930 Convention*. The significant point that emerges, for present purposes, from all of these negotiations is that neither Belgium nor any one of these four equal successors to the SFRY considered that the *1930 Convention* remained in force. The Convention was not, for example, included on the original list of treaties between Belgium and the SFRY drawn up for internal working purposes by the Belgian Ministry of Foreign Affairs in the period following the dissolution of the SFRY in 1992.[308] It was not included on the revised internal (Belgian) working list of treaties of 27 September 1994 which, by reference to the earlier list, reflected Belgium's preliminary view on whether the treaties identified on the first list continued in force.[309] It did not feature on the further revised list of treaties that the Belgian Foreign Ministry prepared, following a 28 September 1994 internal meeting, setting out the treaties that Belgium considered continued in force.[310] Nor did it feature on a further Belgian list of treaties of 9 September 1996 which had as its declared object

> "to establish the list of agreements, concluded between Belgium (BLEU) and the former Republic of Yugoslavia which remain in force between Belgium and the respective successor States (Slovenia, Croatia, Bosnia and Herzegovina, the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia)".[311]

418. These lists – and notably the final list of 9 September 1996 – reflect Belgium's considered view, arrived at after careful assessment, of the treaties concluded between Belgium and "Yugoslavia" that continued in force between Belgium and each of the five successor states of the SFRY. The *1930 Convention* did not feature on any of these lists. These lists thus attest clearly and objectively to Belgium's view – a view formed well before the present litigation – that the *1930 Convention* was no longer in force.

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[308] **Annex 61.**
[309] **Annex 62.**
[310] **Annex 63.**
[311] **Annex 64** (at paragraph one). On the basis of this working document, a revised final list comprising 16 treaties was drawn up, also on 9 September 1996, reflecting Belgium's view of the treaties that continued in force between Belgium and the successors to the SFRY. **(Annex 65)**

419. The final Belgian list of 9 September 1996 served as a basis for talks between Belgium and, separately, Croatia, Slovenia and Macedonia in the latter part of 1996 and 1997 on the question of their succession to "Yugoslav" treaties concluded with Belgium. In no case did any of these three states – each an equal successor to the SFRY – suggest the continuation in force of, or raise the question of succession, or even refer, to the *1930 Convention*. On the basis of these talks, separate agreements were concluded between Belgium and, respectively, Croatia,[312] Slovenia[313] and Macedonia[314] on the continuation in force of various treaties that had been concluded between Belgium and "Yugoslavia". The *1930 Convention* is not referred to in any of these agreements.

420. Talks between Belgium and the FRY on the issue of FRY succession to "Yugoslav" treaties took place in Belgrade on 13 November 1996. The basis of these discussions was the final Belgian list of 9 September 1996 referred to above as well as various lists submitted by the FRY on 6 December 1995[315] and 9 October 1996.[316] The *1930 Convention* is not referred to on any of these lists.

421. Further exchanges took place between Belgium and the FRY on this matter on 14 March 1997[317] at which point the FRY raised a number of questions concerning the continuation in force of various financial and trade treaties. No mention was made by the FRY of the *1930 Convention* at this point. Discussions between the parties on these matters remained unresolved in mid-February 1998[318] and were subsequently suspended in the light of events in Kosovo.

422. As these documents and exchanges attest, notwithstanding the evident and careful attention given by the FRY to the question of the continuation in force of various "Yugoslav" treaties with Belgium, at no time did the FRY make any reference to the *1930 Convention*. In the light of the documented appreciation of Belgium, Croatia, Slovenia and Macedonia that the *1930 Convention* was no longer in force, the clear implication to be drawn from the FRY's lists of treaties of 6 December 1995 and 9 October 1996, as well as from its communication of 14 March 1997, is that the FRY also was of the view that the *1930 Convention* was no longer in force.

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[312] **Annex 66.**
[313] **Annex 67.**
[314] **Annex 68.**
[315] **Annex 69.**
[316] **Annex 70.**
[317] **Annex 71.**
[318] **Annex 72.**

423. On the basis of the preceding, Belgium contends that the *1930 Convention* is no longer in force. This conclusion is dictated by the terms of the Convention, the practice of the parties in the period following its entry into force, the fact of the disappearance of "Yugoslavia" as one of the two original parties to the Convention, and the clear and documented appreciation of Belgium, Croatia, Slovenia, Macedonia and the FRY that the treaty was no longer in force. Article 4 of the *1930 Convention* cannot, accordingly, be relied upon by the FRY to found jurisdiction in this case.

(c) The FRY has not succeeded to the 1930 Convention

424. Distinct from the argument advanced in the preceding section, Belgium contends that, in the event that the Court were to conclude that the *1930 Convention* does continue in force, the FRY has not succeeded to the Convention and that it cannot, accordingly, rely on Article 4 of the Convention to found jurisdiction in this case.

425. The FRY is a successor to the SFRY. There is no dispute about this. It is, however, one amongst five new states to have succeeded the SFRY. It is neither the sole successor nor the continuation of the SFRY.

426. The dissolution of the SFRY has given rise to complex issues of succession concerning the entitlements, rights and obligations of the five successor states *inter se* as well as in the relationship of each of them with the world at large. In many cases, these issues remain unresolved.

427. Insofar as issues of succession between the successor states *inter se* are concerned, the Arbitration Commission of the *Conference on Yugoslavia* provided some guidance on how these matters ought to be resolved.[319] In contrast, with the exception of the principle that none of the successors can be regarded as the continuation or sole successor of the SFRY, the relationship between the successor states and the world at large was not addressed. This matter thus falls to be addressed by reference to such general principles of international law as may be applicable and the relevant circumstances and practice of the states concerned.

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[319] See, for example, *Opinion No.9* of 4 July 1992, 92 *ILR* 203; *Opinion No.12* of 16 July 1993, 96 *ILR* 723; *Opinion No.13* of 16 July 1993, 96 *ILR* 727; *Opinion No.14* of 13 August 1993, 96 *ILR* 729; and *Opinion No.15* of 13 August 1993, 96 *ILR* 733.

428. Belgium is not a party to the *Vienna Convention on State Succession in Respect of Treaties 1978* ("Vienna Succession Convention"). This Convention does not therefore apply *qua* treaty in respect of relations between Belgium and the FRY. Nor, in Belgium's contention, can the Convention generally be said to reflect principles of customary international law. Indeed, with the exception of certain treaties of a particular character – eg, treaties establishing a boundary or other territorial or "objective" regimes, or human rights treaties – about which there is a broad measure of agreement, there are few generally accepted principles of international law relating to succession. As the International Law Commission ("ILC") itself noted in respect of its work on state succession in respect of treaties:

> "A close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution."[320]

429. This view is echoed by a contemporary and authoritative treatise in the following terms:

> "When a succession of states has occurred, the extent to which the rights and duties of the predecessor devolve on the successor is uncertain and controversial. ... The practice of states suggests that no *general* succession takes place according to international law."[321]

430. While the extent of succession is controversial, a number of accepted principles relevant to the present circumstances are discernible. First, it is evident that succession to bilateral treaties is to be treated differently from succession to multilateral treaties. This emerges clearly from the approach adopted in the *Vienna Succession Convention*, which, in respect of succession by newly independent states, addresses multilateral treaties and bilateral treaties separately, setting out different rules in respect of each.[322] It also emerges from the ILC's commentary to the draft articles that formed the basis of the *Vienna Succession Convention*:

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[320] *Succession of States in Respect of Treaties*, Report of the Commission to the General Assembly, YILC, 1974, Vol.II, Part One, at p.168, paragraph 51.

[321] Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992), at § 61, pp.209-210 (emphasis in the original).

[322] *Vienna Convention on Succession of States in Respect of Treaties, 1978* **(Annex 73)**, at Part III, Section 2 (Multilateral Treaties: Articles 17-23) and Section 3 (Bilateral Treaties: Articles 24-26), respectively.

> "(2) ... the former legal nexus between the territory and the treaties of the predecessor State has at any rate some implications for the subsequent relations between the successor State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the successor State to establish itself as a party or a contracting State, this does not appear to be so in the case of bilateral treaties.
>
> (3) The reasons are twofold. First, the personal equation – the identity of the other contracting party – although an element also in multilateral treaties, necessarily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the successor State and its predecessor* ..."[323]

431. Second, as regards succession to bilateral treaties, the basic principle is that succession depends on consent to this effect by *both* the remaining original party and the successor state. In the absence of such consent, there is no presumption of continuity. This principle is reflected uncontroversially in Articles 24(1) and 9(1) of the *Vienna Succession Convention* in the following terms:

> **"Article 24**
>
> *Conditions under which a treaty is considered as being in force in the case of a succession of States*
>
> 1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:
>
> (a) they expressly so agree; or
>
> (b) by reason of their conduct they are to be considered as having so agreed."

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[323] *Succession of States: Succession in Respect of Treaties*, Report of the Commission to the General Assembly, YILC, 1972, Vol.II, p.223, at pp.272-273 (emphasis in the original).

"Article 9

Unilateral declaration by a successor State regarding treaties of the predecessor State

1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuation in force of the treaties in respect of its territory."

432. The ILC's commentary on what became Article 24 of the *Vienna Succession Convention* addresses the matter in the following terms:

"(4) From the considerable measure of continuity found in practice, a general presumption has sometimes been derived that bilateral treaties in force with respect to a territory and known to the successor State continue in force unless the contrary is declared within a reasonable time after the successor State's attainment of independence. ...

(8) The Commission is therefore aware that State practice shows a tendency towards continuity in the case of certain categories of treaties. It does not believe however that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the successor State and the other party to its predecessor's treaty). At any rate, practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declarations by newly independent States examined in the commentary to article 8 have unmistakably been based in the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. The Commission is aware that those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. ...

(12) From the evidence adduced in the preceding paragraphs, the Commission concludes that succession in respect of bilateral treaties has an essentially voluntary character: voluntary, that is,

> on the part not only of the successor State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other State party to the predecessor State's treaty."[324]

433. There is broad agreement on the two principles just stated concerning succession to bilateral conventions. In Belgium's contention, these principles are accordingly applicable to the determination of the question of whether the FRY has succeeded to the 1930 Convention. In contrast, there is no general agreement on the application of the principle of continuity of treaties contained in Article 34 of the *Vienna Succession Convention* dealing with succession in the case of the separation of parts of a state. Quite to the contrary. As Belgium, in common with other states, noted in its comments on draft Article 27 dealing with succession in the case of the dissolution of a state, rather than the principle of continuity, the circumstances in contemplation would have been better addressed by reference to the clean slate principle which would "have led to a conclusion directly opposite to that which the Commission had reached".[325]

434. In the light of the accepted principles applicable to succession in the case of bilateral treaties identified above, the question of whether the FRY has succeeded to the *1930 Convention* is to be addressed by reference to the consent or otherwise of both Belgium and the FRY on the matter. Absent the consent of both states, FRY succession to the *1930 Convention* will not have occurred.

435. As is addressed further below, the position is in fact relatively clear. Belgium has never considered the FRY to have succeeded to the *1930 Convention* and has never, accordingly, consented to such succession. There is objective evidence to attest to this. In view of the bilateral character of the treaty, and the singular importance of the "personal equation - the identity of the other contracting party"[326] - in the conclusion of a dispute settlement treaty of this kind, Belgium contends that the absence of consent on its part to FRY succession is a sufficient basis for concluding that succession has not occurred.

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[324] Ibid, at pp.273-275.

[325] *Succession of States in Respect of Treaties*, First Report of the Special Rapporteur, Sir Francis Vallat, YILC, 1974, Vol.II, Part One, at p.68, paragraph 390. See also the observations of the Special Rapporteur at p.70, paragraphs 398-402.

[326] See text at note 323 above.

436. The matter is, however, clearer still as all the evidence indicates that, prior to 12 May 1999 when the FRY invoked the Convention as a basis of the Court's jurisdiction, *the FRY* was also of the view that there was no succession in respect of the Convention. There was therefore, until the advent of this case, a coincidence of opinion by both Belgium and the FRY that there was no succession to the *1930 Convention*. This matter is addressed further below.

437. In the light of these factors, Belgium contends that there is no basis for concluding that the FRY is a successor to the *1930 Convention*.

438. As has already been described, the Belgian Foreign Ministry undertook a review of all bilateral treaties in force between Belgium and "Yugoslavia" in the period following the dissolution of the SFRY in 1992. As part of this process, the Foreign Ministry drew up an initial list of 28 agreements concluded between Belgium and "Yugoslavia" that, pending review, might be considered to be still in force.[327] Although the precise date of this initial list is not clear, it was drawn up sometime prior to 23 September 1994, the date on which a meeting was held in the Belgian Foreign Ministry to consider the list.[328] The *1930 Convention* was not included on this list.

439. Again at a date that is not clear but at some point well before 6 December 1995, this list was communicated to the FRY. That this occurred is attested to by the "preliminary analysis of the contractual relations between the two states" undertaken by the FRY and sent to Belgium on 6 December 1995.[329] This document contains four lists of agreements under the following headings:

> "I. Accords en vigeur, *se trouvant sur la liste Yougoslave et Belge*, selon le Ministère Yougoslave des affaires étrangères";
>
> "II. Accords qui ne sont pas en vigeur *et qui se trouvent sur la liste Yougoslave et Belge*, selon le Ministère Yougoslave des affaires étrangères";
>
> "III. Accords qui se trouvent seulement sur la liste Yougoslave"; and

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[327] **Annex 61.**

[328] See the introductory notation to the list of 27 September 1994 cited at note 309 above. **(Annex 62)**

[329] **Annex 69.**

"IV. Accords qui se trouvent seulement *sur la liste Belge*".[330]

440. As the references to a *Belgian list* in these headings attest, the FRY's lists took as their basis a prior Belgian list of agreements. A comparison of the agreements set out on the initial Belgian list referred to in paragraph 438 above and FRY lists number I, II and IV of 6 December 1995 indicates that the FRY lists were compiled on the basis of and in response to the initial Belgian list.

441. The *1930 Convention* was not referred to in any of the FRY lists.

442. In the light of the Belgian and FRY lists, the Belgian Foreign Minister wrote to the Foreign Minister of the FRY on 29 April 1996 proposing an interim arrangement on the question of FRY succession to SFRY treaties in *inter alia* the following terms:

> "Le Royaume de Belgique espère qu'une coopération fructueuse pourra s'établir avec la République Fédérale de Yougoslavie, tant sur le plan bilatéral que multilatéral dans le respect du Droit international et des traités internationaux auxquels nos deux pays sont parties. A ce propos, la Belgique part du principe que les accords bilatéraux liant, d'une part, le Royaume de Belgique (en ce compris ceux conclus avec l'Union Economique Belgo-Luxembourgeoise) et, d'autre part, la République Socialiste Fédérative de Yougoslavie, continueront à produire leurs effets jusqu'à ce qu'ils aient été soit confirmés soit renégociés par les deux parties."[331]

443. Given the prior exchange of lists between the parties, the proposition that bilateral agreements between Belgium and the SFRY would continue in force until either confirmed or renegotiated had in contemplation the agreements already identified by the parties.

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[330] "I. Agreements in force, *which are to be found on the Yugoslav and Belgian lists*, according to the Yugoslav Minister of Foreign Affairs"; "II. Agreements which are not in force, *which are found on the Yugoslav and Belgian lists*, according to the Yugoslav Minister of Foreign Affairs"; "III. Agreements that are found only on the Yugoslav list"; and "IV. Agreements that are found only *on the Belgian list*" (emphasis added; translations by Belgium).

[331] "The Kingdom of Belgium hopes that a fruitful cooperation can be established with the Federal Republic of Yugoslavia as much at the bilateral level as well as the multilateral level in conformity with international law and international treaties to which our two countries are parties. In this regard, Belgium proceeds on the assumption that the bilateral agreements binding, on the one hand, the Kingdom of Belgium (including those agreements entered into with the Belgo-Luxembourg Economic Union) and, on the other hand, the Socialist Federal Republic of Yugoslavia, will continue to have effect until they are either confirmed or renegotiated by both parties." [Translation by Belgium] **(Annex 74)**

444. Subsequent to the letter from the Belgian Foreign Minister to his FRY counterpart, the Belgian Foreign Ministry undertook a further review of Belgian-SFRY treaties. Following an internal meeting on 9 September 1996, a revised list was drawn up comprising 16 agreements that Belgium considered continued in force. The *1930 Convention* was not included on this list.

445. In prospect of a meeting scheduled to take place in Belgrade on 28-29 October 1996 (although subsequently cancelled), the FRY, on 9 October 1996, sent Belgium a further list of bilateral agreements which did not appear on the Belgian list but which, according to the FRY, continued in force.[332] The *1930 Convention* did not appear on this list.

446. Following talks between Belgium and the FRY on questions of succession on 13 November 1996, further exchanges took place on 14 March 1997.[333] No mention was made by the FRY of the *1930 Convention* either in the course of the bilateral talks or in the later exchanges. Discussions between the parties on these matters remained unresolved and were subsequently suspended in the light of events in Kosovo.

447. The absence of any reference to the *1930 Convention* both on the Belgian and FRY lists and in their bilateral discussions on the matter was matched by an evident appreciation on the part of Croatia, Slovenia and Macedonia that there was no question of succession on their part to the *1930 Convention*. Given that these states are successors to the SFRY of equal standing to the FRY, the fact that the *1930 Convention* did not even feature as part of the succession discussions involving these states lends objective support to the appreciation that succession to the *1930 Convention* cannot be presumed in the absence of explicit and unambiguous agreement in favour of succession by the states concerned. It also lends support to the proposition that Belgium has never considered the FRY to have succeeded to the *1930 Convention* and that it has never, either expressly or implicitly, consented to FRY succession to this Convention. The absence of any indication, at any time, by any state having an interest in the matter, that the *1930 Convention* gave rise to questions of succession, coupled with the fact that the Convention did not feature on any of the Belgian lists drawn up for this purpose, suggests that it is virtually inconceivable that Belgium would have at any time considered the FRY to have

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[332] "... la liste des Accords bilatéraux qui ne figurent pas sur la liste belge et qui, d'après la position yougoslave, sont applicables" **(Annex 70)**

[333] See paragraphs 420-421 above.

succeeded to the Convention and indicated its consent in any way to such succession.

448. The common appreciation of Belgium, Croatia, Slovenia and Macedonia that the *1930 Convention* did not give rise to any question of succession also supports the implication that the absence of any reference to the *1930 Convention* by the FRY prior to 12 May 1999 reflected an appreciation *on the part of the FRY* that there was no question of succession on its part to the Convention.

449. Beyond the practice of the states, the character of the *1930 Convention* also supports the conclusion that succession cannot be presumed in the absence of explicit and unambiguous agreement in favour of succession by both Belgium and the FRY. A bilateral dispute settlement agreement such as the *1930 Convention* is quintessentially the kind of agreement that, to adopt the language of the International Law Commission, "regulate[s] the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests".[334] Particularly given the events surrounding the dissolution of the SFRY, it is not possible to infer from Belgium's acceptance of a bilateral treaty with "Yugoslavia" in 1930 its willingness to do so with the FRY, and on the same terms despite evident shortcomings in the text, and without any discussion on the matter, more than 60 years later.

450. In the light of the foregoing, Belgium contends that the FRY has not succeeded to the *1930 Convention*. The bilateral nature and particular character of the Convention militates against succession in the absence of agreement to this effect by both Belgium and the FRY. Belgium has never considered the FRY to have succeeded, and has never consented to FRY succession, to the Convention. FRY practice, in the form of various lists of agreements drawn up addressing the question of FRY succession to SFRY treaties with Belgium, as well as other bilateral exchanges with Belgium on the matter, has been consistent with the appreciation that there was no question of succession to the *1930 Convention*. The practice of Croatia, Slovenia and Macedonia on the issue of succession to SFRY treaties with Belgium is also consistent with the appreciation that the *1930 Convention* did not give rise to any question of succession by the SFRY successor states. There is therefore no basis for concluding that the FRY has succeeded to the *1930 Convention*. The FRY cannot, accordingly, rely on Article 4 of the Convention to found jurisdiction in this case.

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[334] See text at note 323 above.

(d) The conditions laid down by the 1930 Convention *have not been satisfied*

451. In the alternative to the preceding submissions, Belgium contends that in the event that the Court were to conclude that the FRY is a party to the *Statute*, that the *1930 Convention* is in force and that the FRY has succeeded to the Convention, the conditions laid down by the Convention for the application of Article 4 have not been satisfied. Accordingly, the FRY cannot rely on Article 4 of the Convention to found jurisdiction in this case.

452. The structure and content of the *1930 Convention* have already been addressed in section 1 of this Chapter. The question of the conditions laid down by the Convention for the application of Article 4 can therefore be dealt with relatively briefly.

453. As was observed in the earlier discussion, the Convention lays down a relatively complex regime of interacting dispute settlement procedures. This interaction highlights a central feature of the Convention, namely, the sequential and controlled application of the various procedures. So, for example, before resorting to judicial settlement or arbitration, the parties to a dispute may have recourse to conciliation pursuant to Article 7(1) of the Convention. Pursuant to Article 7(2), if conciliation fails to resolve the dispute, the parties must wait one month from the termination of the conciliation proceedings before resorting to judicial settlement or arbitration. In similar vein, if the parties choose to resort to arbitration but fail to agree on the terms of the arbitration, either party may refer the matter to the Permanent Court, subject to the requirement in Article 6 of a three months' notice period.

454. The same sequential approach is evident in the case of the other dispute settlement procedures. Thus, disputes other than those mentioned in Article 4, must, pursuant to Article 8, be referred initially to conciliation. If this fails to resolve the dispute, the parties may, pursuant to Article 24(1), refer the matter to arbitration within a month. If, on the expiration of this month, the parties have not referred the matter to arbitration, Article 32 provides that it is to be settled in conformity with Article 15 of the *Covenant* of the League.

455. In similar vein, and of relevance for present purposes, Article 2 of the Convention provides, first, that

> "[d]isputes for the settlement of which a special procedure is laid down in other conventions in force between the High Contracting Parties shall be settled in conformity with the provisions of those conventions",

and, second, that

> "[i]f, however, the dispute is not settled by application of this procedure, the provisions of the present Convention concerning arbitration or judicial settlement shall apply."

456. As with the approach adopted by the Convention more generally, Article 2 is in effect a sequencing provision which provides for the operation of *inter alia* Article 4 (concerning judicial settlement) at the point at which the other relevant special procedures have failed to achieve a settlement of the dispute in question. Article 4 was thus envisaged as an alternative basis of jurisdiction that would only become operational at the point at which a dispute was not settled in conformity with some other designated procedure.

457. In Belgium's contention, the reference in Article 2 to special procedures in conventions in force must be construed as a reference both to dispute settlement clauses in treaties in force and to the "consensual bond" established on the basis of Optional Clause arrangements under Article 36 of the Court's *Statute*. Both such arrangements are based on conventional commitments. Both establish special procedures for the settlement of disputes.

458. In the present case, the FRY has relied on Article 4 of the Convention as a basis of general jurisdiction, operating in parallel and additional to Article 36 of the *Statute* and Article IX of the *Genocide Convention*. By operation of Article 2 of the *1930 Convention*, however, judicial settlement pursuant to Article 4 of the Convention is only available if the dispute is not settled by the application of other special procedures. Article 4 could therefore only operate to establish jurisdiction in respect of the present complaint by the FRY if and when, and to the extent that, the Court concluded that it had no jurisdiction under Article 36 of the *Statute* and Article IX of the *Genocide Convention* in this matter. The FRY's invocation of Article 4 of the *1930 Convention* as a basis of jurisdiction is therefore, in respect of the present complaint, premature.

459. There is, of course, a degree of formalism to this argument and Belgium acknowledges that the Court, in other circumstances, has been disinclined to refuse

jurisdiction on grounds that a procedural step dealing with a time limit has not been respected. The issue, however, in Belgium's contention, cannot be so easily dismissed in this case for a number of reasons. First, the sequential operation of various dispute settlement procedures was clearly conceived of as an essential element of the *1930 Convention*. If the Convention is to be applied, it must therefore be applied in accordance with its terms. Second, the FRY is purporting, in quite exceptional circumstances, to rely on an agreement concluded 70 years ago, in the context of the dispute settlement environment of the League of Nations, by parties of which it was not one. If it is to be permitted to do so, it must at the very least satisfy the conditions laid down by the Convention. Third, in the light of the present analysis, the only circumstances in which Article 4 of the *1930 Convention* could conceivably provide a basis of jurisdiction in this case would be if one or both of the other bases of jurisdiction relied upon by the FRY were rejected by the Court with the inevitable consequence that some or all of the parallel cases brought by the FRY against the other Respondent members of NATO would be removed from the Court's list. In such circumstances, if the FRY sought to proceed against Belgium alone, Belgium considers that the FRY should be required to initiate proceedings afresh indicating, as it has not done in its present Application and Memorial, precisely the acts alleged to have been committed by Belgium.

460. In the light of the foregoing, if, contrary to Belgium's submissions in the preceding sections of this Chapter, the Court were to conclude that (a) the FRY is a party to the *Statute*, and (b) the *1930 Convention* is in force, and (c) the FRY has succeeded to the Convention, Belgium contends that the FRY has not satisfied the conditions laid down by the *1930 Convention* for the application of Article 4 and that it cannot therefore rely on Article 4 of the Convention to found jurisdiction in this case.

4. Conclusions

461. If, contrary to Belgium's submissions in Chapter Four, the Court were to conclude that it has jurisdiction *ratione personae* in proceedings initiated by the FRY, Belgium contends that the Court does not have jurisdiction under Article 4 of the *1930 Convention* in the present case on the following grounds:

(a) insofar as the FRY is not a party to the Court's *Statute*, Article 37 of the *Statute* does not operate to found jurisdiction in the Court on the basis of Article 4 of the *1930 Convention*; and/or

(b) the *1930 Convention* is no longer in force; and/or

(c) the FRY has not succeeded to the *1930 Convention*; and/or

(d) the conditions laid down by the *1930 Convention* have not been satisfied.

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PART III: OBJECTIONS TO ADMISSIBILITY

462. In its Judgment on preliminary objections in the *Nottebohm Case*, the Court observed:

> "The purpose of Article 36, paragraph 2, and of the Declarations relating thereto, is to regulate the seising of the Court ... But the seising of the Court is one thing, the administration of justice is another."[335]

463. Noting that the filing of an application instituting proceedings "does not prejudge the action that the Court may take to deal with the case", the Court, in the *Northern Cameroons Case*, elaborated upon its comments in the *Nottebohm Case* as follows:

> "It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[336]

464. The issue, to echo the words of a distinguished former Judge of the Court, is the "propriety" of the Court exercising jurisdiction in the particular circumstances of a case, notwithstanding that it may be entitled to do so.[337] While an assessment of "propriety" is generally a matter falling within the discretion of the Court, the Court's jurisprudence makes clear that, in certain circumstances, notably concerned with the interests of third states absent from the proceedings, the exercise of jurisdiction *must* be declined.[338]

465. In Belgium's contention, even if, contrary to the submissions in Part II of these Preliminary Objections, the Court were to conclude that it has jurisdiction to

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[335] *Nottebohm Case (Preliminary Objections), I.C.J. Reports 1953*, p.111, at p.122.

[336] *Case concerning Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, p.15, at p.29.

[337] Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", (1958) BYIL 1, at pp.22-23.

[338] See H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989: Part Nine – IV. Questions of Jurisdiction and Competence, 1954-1989", (1998) BYIL 1, at pp.34-35.

hear this case, there are compelling reasons for it not to assume that jurisdiction. The FRY's application is inadmissible on grounds relating to the administration of justice and the judicial integrity of the Court. Specifically, Belgium contends that the case is inadmissible on the grounds:

(a) that the FRY has not identified any actions specifically alleged to have been committed by Belgium with which it takes issue;

(b) that the FRY has acted in bad faith; and

(c) of the absence of the United States and other "Respondents" in the parallel proceedings.

466. On the basis of general principles relating to the sound administration of justice, Belgium contends that it would be inappropriate for the Court to assume jurisdiction in these circumstances. Each of the contentions is addressed further below.

467. Before turning to address these matters, a preliminary point warrants comment. In Chapter Nine below, Belgium alleges that the FRY has acted in bad faith. In support of this allegation, Belgium refers to certain matters of a factual nature. For the avoidance of doubt, Belgium notes that this material is cited for purposes of its contentions on admissibility only. It is not cited, either expressly or by implication, in response to the FRY's allegations on the substance. Belgium makes no comment herein on the merits of the FRY's claims. The allegation by Belgium of bad faith on the part of the FRY does not join issue with the FRY on its claims on the merits.

CHAPTER EIGHT: THE FRY HAS NOT IDENTIFIED ANY ACTIONS SPECIFICALLY ALLEGED TO HAVE BEEN COMMITTED BY BELGIUM WITH WHICH IT TAKES ISSUE

468. In its Application instituting proceedings, the FRY alleged that "by taking part in" various specified acts, Belgium is in breach of certain obligations under international law. These allegations are repeated in the introduction to the FRY's Memorial. Throughout the remaining 360 or so pages of the Memorial, no further reference is to be found to Belgium, with the sole exception of that part of the Memorial which addresses the *1930 Convention* as a possible basis of the Court's jurisdiction. No attempt is made by the FRY to particularise any acts specifically alleged to have been committed by Belgium.

469. Absent specific allegations against Belgium, the FRY simply argues that the acts of NATO and KFOR are imputable *inter alia* to Belgium. This allegation is developed in a few short paragraphs in the FRY's Memorial.[339] The essence and virtually the sum total of these claims is that NATO organs take their decisions on the basis of consent of the Member States, "each separately and all together", and that, in consequence, all NATO acts are imputable to Belgium.[340] As regards the acts of KFOR, the FRY simply asserts that "KFOR is under NATO command and control structure. NATO countries are prominently represented in the force."[341]

470. As has already been addressed, Article 38(2) of the Court's *Rules* requires that an application shall specify "the precise nature of the claim". Article 45(1) of the *Rules* goes on to provide that the pleadings shall consist of a Memorial by the applicant and a Counter-Memorial by the respondent. Pursuant to Article 45(2) of the *Rules*, other pleadings are at the direction of the Court. As regards the applicant's Memorial, Article 49(1) of the *Rules* provides that this "shall contain a statement of the relevant facts, a statement of law, and the submissions". As these provisions make clear, the applicant's Memorial is the principal, and perhaps only, document by which an applicant is to make its case. This being so, an applicant must set out and substantiate, *in its Memorial*, its allegations against the respondent with a sufficiency of detail that meets a basic threshold test of foundation. In other words, general principles relating to the administration of justice require that allegations be particularised in a Memorial in enough detail to provide the respondent with sufficient information to allow it to address the allegations by way

[339] FRY Memorial, pp.327-328. See also pp.291-299.
[340] FRY Memorial, p.327, paragraphs 2.8.1.1.1 and 2.8.1.1.5.
[341] FRY Memorial, p.327, paragraph 2.8.1.2.1.

of defence. The basis of the allegations must also be sufficiently well-founded so as not to fall so far short of a basic threshold of justiciability as to be considered manifestly ill-founded and, accordingly, an abuse of the process of the Court.

471. While questions going to the sufficiency of allegations, proof and evidence are sometimes left for determination in proceedings on the merits, it is clear that they have an important place in preliminary objections proceedings. Indeed, the manifest insufficiency of allegations is commonly a matter of admissibility. So, for example, Article 294 of the UN Convention on the Law of the Sea addressing preliminary proceedings by a court or tribunal indicated in Article 287 of the Convention, including the International Court of Justice, provides that the court or tribunal in question

> "shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the Court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case."

472. By way of further example, the European Court of Human Rights is required to declare inadmissible an application "which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application".[342]

473. The requirement for a sufficiency of detail in the allegations raised by an applicant is also implicit in the basic principle relating to the burden of proof, namely, that a party seeking to establish a fact bears the burden of proving it. As described by Professor Bin Cheng in his seminal work on general principles of law, "a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their proof, lest they be disregarded for want, or insufficiency, of proof".[343] The necessity for a sufficiency of detail and particularity in the allegations raised by an applicant is thus an elementary aspect of the basic principles relating to the administration of justice.

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[342] Article 35(3), *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No.11.

[343] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at p.329.

474. Insofar as these matters call for consideration at the preliminary objections phase of proceedings, Belgium contends that the question for the Court is whether, by reference to the information before the Court at that point – notably the Application and the applicant's Memorial – the applicant's case is stated in sufficient detail and particularity as to provide the respondent with sufficient information to allow it to address the allegations by way of defence and is sufficiently well-founded so as not to fall so far short of a basic threshold of justiciability as to be considered manifestly ill-founded and an abuse of the process of the Court. This question is a threshold question – a test of admissibility – which does not require the Court to address the merits of the applicant's allegations.

475. Belgium contends that the FRY's case falls short of this threshold. Insofar as the allegations against Belgium are concerned, the FRY's case proceeds by way of assertion rather than proof. Other than implying that Belgium voted in favour of NATO military action against the FRY in some unspecified NATO organ, nothing is said about Belgian involvement in the NATO action. Nothing is alleged specifically against Belgium. The FRY does not address the constituent elements of the offences alleged insofar as they may be fundamental to the allegations levelled at Belgium. The case for the imputability of NATO's acts to Belgium is not made; it rests on proposition alone. If required to file a defence on the merits, Belgium would have to presume some specific substantive content into the FRY's allegations before responding. This would be contrary to the most basic principles relating to the administration of justice. In Belgium's contention, the FRY's case does not accordingly meet the most basic threshold test of justiciability. It is inadmissible. The Court should take no further action in the case.

476. For completeness, Belgium notes that the Court addressed the question of the adequacy of allegations of fact advanced by an applicant in its Judgment on preliminary objections in *Cameroon v. Nigeria*.[344] The issue in that case concerned the Nigerian objection that the Application and subsequent pleadings of Cameroon did not meet the required standard of adequacy as to the facts on which it was based, including on such matters as the dates, circumstances and locations of the alleged breaches by Nigeria.

477. The circumstances of the present case are different. The FRY filed a largely identical Application in separate proceedings initiated against 10

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[344] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p.275.

Respondents. It has filed a single Memorial on the merits in the eight cases remaining on the Court's docket. It has not, in either its Application or its Memorial, particularised allegations against Belgium. This is not a question of the absence of details such as the dates, circumstances or locations of the alleged breaches. It is a question of the complete absence of any allegations particularising acts said to have been committed by Belgium. Belgium reiterates, if required to file a defence, Belgium would have to presume some specific substantive content into the FRY's allegations before responding.

478. The question at this point in the proceedings is whether the FRY's case *against Belgium* is *prima facie* well founded. In other words, it is whether the case advanced by the FRY is, in the absence of any argument or evidence to the contrary, capable of sustaining the allegations levelled *against Belgium*. In Belgium's contention, it is not. The application must accordingly be considered inadmissible.

CHAPTER NINE: THE FRY HAS ACTED IN BAD FAITH

479. The principle of good faith is a cornerstone of international law. It is, as the Court observed in the *Nuclear Tests Cases*, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, ... Trust and confidence are inherent in international co-operation".[345] As with good faith, so too with its corollary, bad faith or abuse of rights, concepts which address the application of the principle of good faith to the exercise of rights.[346] The principle of *abus de droit*, or the equitable doctrine of "clean hands", has long been acknowledged in both Judgments and the Separate and Dissenting Opinions of Judges of both the Permanent Court and International Court[347] and has been widely held by publicists to constitute a general principle of law.[348]

480. To allege bad faith or abuse of right against a state in the course of legal proceedings is not a step to be taken lightly. The circumstances of the present case are, however, wholly exceptional and the evidence in support of the claim manifest, objective and persuasive. Notwithstanding the gravity of the allegation, it is therefore warranted in this case. The FRY has acted, and continues to act, in bad faith. The FRY's application must accordingly be considered inadmissible.[349]

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[345] *Nuclear Tests (Australia v. France) (New Zealand v. France), I.C.J. Reports 1974*, pp.253 and 457, at paragraphs 46 and 49 respectively.

[346] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at p.121.

[347] See, for example, *Factory at Chorzow, P.C.I.J., Series A, No.9*, at p.31; *Free Zones Case, P.C.I.J., Series A/B No.46*, at p.167; *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53*, as per Judge Anzilloti, at p.95; *Diversion of Water from the Meuse, P.C.I.J., Series A/B, No.70*, as per Judge Anzilloti, at p.50, and Judge Hudson, at p.77; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p.3, as per Judge Morozov, at pp.53-55, and Judge Tarazi, at pp.62-63; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p.14, as per Judge Schwebel, at paragraphs 240 and 268-272.

[348] See, for example, H. Lauterpacht, *The Function of Law in the International Community* (1933), at chapter 14, and *The Development of International Law by the International Court* (1958), at pp.162-165; Bin Cheng, note 346 supra, at chapter 4; Taylor, "The Content of the Rule Against Abuse of Rights in International Law", (1972-73) BYIL 323; Reuter, *Droit international public* (7e éd., 1993), at p.119; Carreau, *Droit International* (6e éd., 1999), at § 164; Daillier and Pellet, *Droit International Public* (6e éd., 1999), at § 227; and Zoller, *La Bonne foi en droit international public* (1977).

[349] Citing the equitable maxim that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper", Judge Hudson, in his Separate Opinion in *Diversion of Water from the Meuse*, addressed the matter as follows: "The general principle is one of which an international tribunal should make a very sparing application. ... Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." (*Diversion of Water from the Meuse*, note 347 supra, at p.77.)

481. Two elements are necessary to sustain an allegation of bad faith: the allegation must be supported by evidence and the evidence must relate in some direct manner to the matter before the Court. More specifically, if it is to sustain a claim of bad faith, the evidence adduced must address the conduct of the applicant, in respect of the underlying subject-matter of the dispute with which the Court is seised, and must be of such an order as to give rise to real concerns relating to the administration of justice or the judicial integrity of the Court. The issue in such circumstances is the "propriety" of the Court exercising jurisdiction in the case in question notwithstanding that it may be entitled to do so.

482. In Belgium's contention, four clear and objective heads of evidence are apparent in support of the allegation that the FRY has acted, and continues to act, in bad faith in respect of the subject-matter of the case before the Court:

(a) the terms of the FRY's Declaration of 25 April 1999 - specifically, the FRY's attempt to forestall any review of its actions prior to this date, whether by way of a substantive argument in defence by Belgium or by way of a counter-claim;

(b) the fact of the Indictment of FRY President Slobodan Milosevic and other principal leaders of the FRY for crimes against humanity and violations of the laws or customs of war by the *International Criminal Tribunal for the Former Yugoslavia* ("ICTY") in respect of acts committed in Kosovo in the period from 1 January to late April 1999;

(c) the manifest evidence, including the Indictment just referred to, pointing to massive violations of human rights by the FRY in Kosovo in the period prior to the NATO action; and

(d) the documented and persistent failure by the FRY to comply with the obligations required of it by the UN Security Council in respect of the operations of the *ICTY* in Kosovo.

483. Each of these elements concerns the conduct of the FRY and relates to the underlying subject-matter of the proceedings now before the Court, ie, the conduct of the FRY in Kosovo and the international reaction thereto. The evidence raises real concerns relating to the administration of justice and the judicial integrity of the

Court. In the circumstances, Belgium contends that the FRY's application must be considered inadmissible.

1. Bad faith and the terms of the FRY's Declaration of 25 April 1999

484. The reasons for and consequences of the temporal limitation in the FRY's Declaration of 25 April 1999 have already been addressed in Chapter Five above. There is, accordingly, no need to restate them at this point. For ease of reference, Belgium simply recalls that the evident intention behind the temporal limitation in the FRY's Declaration was to give the Court jurisdiction over the dispute relating to the NATO use of force in the FRY but to attempt to restrict the Court's competence to address fundamental elements of that dispute predating the signature of the FRY's Declaration.

485. It is the consequences of this temporal limitation that Belgium alleges amount to bad faith as the FRY evidently hoped to preclude the possibility of Belgium basing a substantive defence on the merits of the case on the conduct of the FRY prior to 25 April 1999. It also evidently intended to preclude the possibility that Belgium might bring a counter-claim against the FRY in respect of its conduct in Kosovo prior to 25 April 1999. Thus, in a manner almost akin to an automatic reservation, the FRY has sought to isolate the elements of the dispute it wishes to present from the elements of the dispute that has no wish to defend. The FRY has purported to give jurisdiction to the Court in respect of some elements of the dispute while at the same time withholding it in respect of crucial matters that may be relevant both to the Respondent's case and the Court's appreciation of the Parties' respective rights and obligations. This is not consistent with the sound administration of justice or the exercise by the Court of its judicial functions. In Belgium's contention, the FRY's application must accordingly be considered inadmissible.

2. Bad faith and the Indictment of FRY President Slobodan Milosevic and other principal leaders of the FRY for crimes against humanity and violations of the laws or customs of war

486. On 22 May 1999, the Prosecutor of the *ICTY*, Justice Louise Arbour, presented an Indictment for confirmation against Slobodan Milosevic, President of the FRY, Milan Milutinovic, President of the Republic of Serbia, Nikola Sainovic, Deputy Prime Minister of the FRY, Dragoljub Ojdanic, Chief of the General Staff

of the Armed Forces of the FRY, and Vlajko Stojhiljkovic, Minister of Internal Affairs of the Republic of Serbia, charging them with crimes against humanity and violations of the law or customs of war in respect of acts committed in Kosovo in the period 1 January to late April 1999.[350] Alleging that "[e]ach of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal's Statute",[351] the Indictment charges *inter alia* that the accused "planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo in the FRY"[352] based "on political, racial, or religious grounds".[353]

487. In accordance with the *Statute* and *Rules of Procedure and Evidence* of the *ICTY*, the Prosecutor was required to present the Indictment for confirmation by a Judge of the Tribunal. This was done on 23 May 1999, the matter being transmitted to Judge David Hunt.[354] After reviewing and considering the Indictment and the detailed supporting material put forward by the Prosecutor, Judge Hunt concluded that the "the material facts pleaded establish a *prima facie* case in respect of each and every count of the indictment and that there is evidence available which supports those material facts."[355] He accordingly confirmed the Indictment.

488. Judge Hunt went on to issue orders *inter alia* for the arrest of the accused[356] and for the freezing of their assets.[357] Pursuant to Article 29(2) of the *ICTY's Statute* and Resolution 827 (1993) of the UN Security Council adopted under Chapter VII of the *Charter*,[358] states are required to comply without undue delay with these orders.

489. The crimes alleged in this Indictment are crimes of the utmost severity. They are alleged against the President and other principal leaders of the Applicant in

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[350] *The Prosecutor of the Tribunal v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanovic and Vlajko Stojhiljkovic,* Indictment, 22 May 1999 ("Indictment"). **(Annex 75)**
[351] Indictment, at paragraph 83. **(Annex 75)**
[352] Indictment, at paragraph 90. **(Annex 75)**
[353] Indictment, at paragraph 99. **(Annex 75)**
[354] Case No.IT-99-37-I, *Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders*, 23 May 1999. **(Annex 76)**
[355] *Decision on Review of Indictment and Application for Consequential Orders*, Decision of Judge David Hunt, 24 May 1999, at paragraph 17. **(Annex 77)**
[356] *Decision on Review of Indictment and Application for Consequential Orders*, ibid, at paragraphs 19-25 and 38(2). **(Annex 77)**
[357] *Decision on Review of Indictment and Application for Consequential Orders*, ibid, at paragraphs 26-29 and 38(2). **(Annex 77)**
[358] S/RES/827, 25 May 1993. **(Annex 78)**

these proceedings. They relate to circumstances which constitute an integral and fundamental part of the subject-matter of the dispute with which the Court is seised. They relate to events that took place in the period between 1 January and late April 1999, ie, the period excluded from the jurisdiction of the Court pursuant to temporal limitation in the FRY's Declaration of 25 April 1999.

490. Those accused in the Indictment are entitled to the benefit of the presumption of innocence. Belgium does not seek to undermine that presumption. It cannot be overlooked, however, that the circumstances addressed in the Indictment are of the utmost seriousness, that they constitute an integral part of the subject-matter of the dispute before the Court, and that the FRY has sought to put them beyond review.

491. Whatever presumptions the individual accused may be entitled to, the Indictment and the circumstances to which it refers, and the attempt by the FRY to put the matters in question beyond the review of the Court, raise questions about the *bona fides* of the Applicant that cannot be overlooked. They constitute, in Belgium's contention, strong evidence of bad faith on the part of the FRY. They also raise real concerns about the administration of justice and the judicial integrity of the Court in this case. In Belgium's contention, the FRY's application must accordingly be considered inadmissible.

3. Bad faith and the manifest evidence of massive violations of human rights by the FRY in Kosovo in the period prior to the NATO action

492. The Indictment of FRY President Slobodan Milosevic and others referred to in the preceding section describes massive violations of human rights perpetrated by the FRY on the Albanian civilian population in Kosovo from January to April 1999. This document stands as independent testimony of the bad faith of the FRY in respect of the events in Kosovo which are at the heart of the dispute with which the Court is seised.

493. This is not the only independent testimony to this effect. As Belgium has already observed in Chapter Three above, the UN Security Council was seised of the matter of FRY acts against the Kosovo civilian population from at least 31 March 1998 when, acting under Chapter VII of the *Charter*, it adopted Resolution 1160 (1998).[359] As has also been noted, pursuant to the terms of Resolution 1160

[359] S/RES/1160, 31 March 1998. **(Annex 6)**

(1998), the UN Secretary-General reported regularly on the situation in Kosovo. These reports mark a steady decline in the human rights and humanitarian situation in Kosovo. They also point to official FRY instigation of and complicity in acts of terror and violence against the ethnic Albanian civilian population in Kosovo.

494. The massacre of Kosovo Albanian civilians in Racak on 15 January 1999 is one example of such acts. The circumstances surrounding this atrocity were described by the Secretary-General in his Report to the Security Council on 30 January 1999 in the following terms:

> "During the period from 15 to 18 January, fighting occurred in and around the village of Racak, near Stimlje. On 15 January, the Serb police and, as indicated in some reports, paramilitary units entered Racak. On 16 January, the Kosovo Verification Mission reported that the bodies of 45 Kosovo civilians, including 3 women, at least 1 child and several elderly men, were found, 11 in houses, 23 on a rise behind the village and others in various locations in the immediate vicinity of the village. Many of the dead appeared to have been summarily executed, shot at close range in the head and neck. ...
>
> The Special Rapporteur on human rights in the territory of the former Yugoslavia, in a statement issued on 16 January from Prague, and the United Nations High Commissioner for Human Rights, in a letter of 19 January to President Milosevic, condemned the massacre and called for an immediate investigation of the Racak deaths. However, investigative and forensic efforts in the wake of this massacre have been wilfully obstructed by the lack of cooperation by the authorities of the Federal Republic of Yugoslavia with the international community. In an attempt to enter the Federal Republic of Yugoslavia to investigate the Racak deaths, the Chief Prosecutor of the International Tribunal for the Former Yugoslavia, Louise Arbour, was turned back, without a visa, at the border of the Federal Republic of Yugoslavia on 18 January 1999; the Government of the Federal Republic of Yugoslavia continues to assert that the International Tribunal for the Former Yugoslavia does not have jurisdiction to investigate alleged war crimes in Kosovo."[360]

[360] S/1999/99, 30 January 1999, at paragraphs 11-12. **(Annex 18)**

495. As noted in Chapter Three, the President of the Security Council issued a statement on 19 January 1999 in response to the events in Racak in which the Council condemned the massacre and took note of the statement of the Head of the Kosovo Verification Mission

> "that the responsibility for the massacre lay with the Federal Republic of Yugoslavia security forces, and that uniformed members of both the Federal Republic of Yugoslavia armed forces and Serbian special police had been involved."[361]

496. Given the restricted character of Belgium's submissions on these matters at this point – ie, objections to admissibility – there is no need to put before the Court the extensive additional documentary material from other sources attesting to the violations of human rights by the FRY in Kosovo in the period prior to 24 March 1999. The position is clear from the Reports of the UN Secretary-General. There is manifest evidence of massive violations of human rights by the FRY in Kosovo in the period prior to 24 March 1999. These circumstances are fundamentally connected to the subject-matter of the dispute with which the Court is seised. The FRY has attempted to exclude them from the scrutiny of the Court by the temporal limitation in its Declaration of 25 April 1999. This amounts, in Belgium's contention, to evidence of bad faith by the FRY in respect of the dispute with which the Court is seised. In Belgium's contention, the FRY's application must accordingly be considered inadmissible.

4. Bad faith and the documented and persistent failure by the FRY to comply with the obligations required of it by the UN Security Council in respect of the operations of the *ICTY* in Kosovo

497. In the preceding section, reference was made to the FRY's refusal to cooperate with the *ICTY* in respect of its attempt to investigate the events in Racak. As will be addressed further below, this particular instance of refusal to cooperate is one example of a general practice by the FRY in respect of the *ICTY's* attempt to investigate events in Kosovo. In Belgium's contention, this refusal by the FRY to cooperate with the *ICTY* constitutes further evidence of FRY bad faith in respect of the proceedings here in issue. The FRY's failure to cooperate with the *ICTY* in respect of events in Kosovo has been persistent. It has been clearly documented in communications from the then *ICTY* Prosecutor, Justice Louise Arbour, and *ICTY* President, Judge Gabrielle Kirk McDonald. The refusal to cooperate relates to

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[361] S/PRST/1992/2, 19 January 1999. **(Annex 19)**

circumstances which are fundamentally connected to the underlying subject-matter of the proceedings with which the Court is seised. The FRY's conduct in this area is also relevant at a more general, but nonetheless important, level insofar as it demonstrates a persistent disregard by the FRY both for the Security Council and an international court competent to address matters arising from events in Kosovo. The FRY's actions in this sphere thus raise very directly the question of the propriety of admitting the FRY as an applicant in proceedings before the International Court of Justice.

498. The *ICTY* was established by the UN Security Council, acting under Chapter VII of the *Charter*, by Resolution 827 (1993) of 25 May 1993.[362] Pursuant to paragraph 2 of the Resolution, the competence of the Tribunal extends to the prosecution of persons responsible for serious violations of international humanitarian law "committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace ..."[363]

499. By Resolution 1160 (1998) of 31 March 1998, the Security Council, acting under Chapter VII of the *Charter*, *inter alia*

> "*[u]rge[d]* the Office of the Prosecutor of the International Tribunal established pursuant to resolution 827 (1993) of 25 May 1993 to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and *note[d]* that the authorities of the Federal Republic of Yugoslavia have an obligation to cooperate with the Tribunal and that the Contact Group countries will make available to the Tribunal substantiated relevant information in their possession."[364]

500. The issue of the FRY's general practice of non-cooperation with the *ICTY* was raised by *ICTY* President, Judge Gabrielle Kirk McDonald, and *ICTY* Prosecutor, Judge Louise Arbour, on numerous occasions.[365] It was also the subject

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[362] S/RES/827, 25 May 1993. **(Annex 78)**

[363] S/RES/827, 25 May 1993. **(Annex 78)**

[364] S/RES/1160, 31 March 1998, at paragraph 17. **(Annex 6)**

[365] See, for example, the Letter from *ICTY* President McDonald to the President of the Security Council, 8 September 1998 (S/1998/839, 8 September 1998) **(Annex 79)**; the address by President McDonald to the Security Council of 2 October 1998 (Press Release CC/PIU/349-E, 2 October 1998) **(Annex 80)**; the Statement by the Office of the Prosecutor on the question of the refusal by the FRY to allow Kosovo investigations (Press Release CC/PIU/351-E, 7 October 1998) **(Annex 81)**; the Letter from President McDonald to the President of the Security Council of 22 October 1998 (S/1998/990, 23 October 1998). **(Annex 82)**

of comment by the Security Council.[366] Addressing this practice in respect of *ICTY* attempts to investigate events in Kosovo, Judge McDonald issued a statement on 5 November 1998 in *inter alia* the following terms:

> "Yesterday evening, the Prosecutor was informed by the Government of the FRY that "*the Federal Republic of Yugoslavia does not accept any investigation of ICTY [sic] in Kosovo and Metohija generally, nor during your stay in the FR of Yugoslavia [sic].*" This statement is a blatant refusal to allow the Prosecutor to investigate events in Kosovo. ...
>
> I would like to emphasise that the position of the Governments of FRY (Serbia and Montenegro) and Serbia have no basis in law and that the refusal to allow the Prosecutor access to Kosovo is illegal. The Security Council has on a number of occasions reaffirmed the legal right of, and indeed has directed, the Prosecutor to investigate events in Kosovo. In March of this year, the Council urged the Prosecutor to begin gathering information related to crimes that may fall within the jurisdiction of the International Tribunal. It further reiterated the obligation of the FRY (Serbia and Montenegro) to co-operate with the International Tribunal. This was subsequently restated in resolution 1199 in September of this year. Most recently, in resolution 1203, the Council called 'for prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full co-operation with the International Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations.'
>
> These resolutions were adopted, and the International Tribunal was established, by the Security Council under Chapter Seven of the United Nations Charter. As a matter of international law, all States are bound by such actions. The Government of the FRY (Serbia and Montenegro) is, thus, under a clear and incontrovertible obligation to co-operate fully with the International Tribunal. It may not take any unilateral action that countermands or undermines the authority of the Security Council. The decisions and orders of the Security Council supersede any statement or assertion made by that Government. Its actions, therefore, are in direct violation of resolutions 1160, 1199 and 1203.
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> This conduct is a further example of the FRY's utter disregard for the norms of the international community. Essentially, it has

[366] See Resolution 1199 (1998), at paragraph 13 **(Annex 14)**, and Resolution 1203 (1998), at paragraph 14. **(Annex 16)**

> become a rogue State, one that holds the international rule of law in contempt."[367]

501. Judge McDonald returned to this matter in her address to the UN General Assembly on 19 November 1998 in the following terms:

> "Twice in the past ten weeks, I have reported to the Security Council the non-compliance of the Federal Republic of Yugoslavia (Serbia and Montenegro). ...
>
> ... The failure to address this non-co-operation in a meaningful way has emboldened the Federal Republic of Yugoslavia to unabashedly obstruct the Tribunal, and in the process, the will and explicit mandate given to it by the United Nations. Thus, the Federal Republic of Yugoslavia's actions, flouting international law, are an affront to the United Nations and the very principles underlying the establishment of this institution. Further, these misdeeds are in direct contravention of express Security Council resolutions regarding events in Kosovo.
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> ...
>
> Ignoring the Federal Republic of Yugoslavia's non-co-operation and non-compliance which has escalated into blatant obstructionism encourages other States to do likewise, inflicting a devastating blow to international law and this institution."[368]

502. FRY non-cooperation with the *ITCY* in respect of events in Kosovo has persisted to the present moment.[369]

503. The non-compliance to which Judge McDonald referred relates to the underlying subject-matter of the dispute with which the Court is seised. It attests to the bad faith of the FRY. It is also conduct that raises a more fundamental challenge to the norms of the international community, the international rule of law and the principles underlying the United Nations. By reference to these

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[367] Statement by President McDonald, 5 November 1998 (Press Release JL/PIU/359-E, 5 November 1998). **(Annex 83)**

[368] Address to the United Nations General Assembly, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, 19 November 1998 (A/53/PV.62, 19 November 1998). **(Annex 84)**

[369] See *inter alia* the Statement by Judge McDonald to the UN Security Council of 8 December 1998 (Press Release JL/PIU/371-E, 8 December 1998) **(Annex 85)**; the Letter from Judge McDonald to Justice Arbour of 16 March 1999 (Press Release JL/PIU/386-E, 18 March 1999) **(Annex 86)**; the Letter from Judge McDonald to the President of the Security Council of 16 March 1999 (S/1999/383, 6 April 1999) **(Annex 87)**; the Letter from President McDonald to the President of the Security Council of 2 November 1999 (S/1999/1117, 2 November 1999). **(Annex 88)**

circumstances, Belgium contends that the FRY's application must be considered inadmissible.

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CHAPTER TEN: THE ABSENCE OF THE UNITED STATES AND OTHER "RESPONDENTS" FROM THE PARALLEL PROCEEDINGS

504. As described in Chapter Three, NATO is composed of 19 members – Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States. Of these, 14 participated in some active manner – although to significantly varying degrees – in the NATO military action in the FRY. These included the United States, France, Italy, the United Kingdom, Germany, the Netherlands, Turkey, Canada, Belgium, Denmark, Spain, Norway, Hungary and Portugal. The Belgian contribution to the NATO force amounted to approximately 1.3% of the total aircraft committed.

505. By comparison to the Belgian contribution, the United States, by a significant margin the largest contributor to the NATO force, committed around 65% of total aircraft.

506. As was also noted in Chapter Three, NATO operates within a wider framework known as the Partnership for Peace ("PfP"). At the point at which NATO action in the FRY began the PfP arrangements comprised a further 27 states.[370] Although PfP states did not participate directly in the NATO action, a number, such as Bulgaria and Romania, opened their airspace and access routes to NATO forces for these purposes.

507. As was described more fully in Chapter Three, the UN Security Council, on 10 June 1999, acting under Chapter VII of the *Charter*, adopted Resolution 1244 (1999). By this Resolution, the Council decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with the appropriate equipment and personnel as required".[371]

508. Pursuant to the terms of this Resolution, the international civil presence in Kosovo was established as UNMIK. The international security presence in Kosovo, known as KFOR, operates on the basis of troop and other personnel contributions from 39 states as follows: Argentina, Austria, Azerbaijan, Belgium, Bulgaria,

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[370] These include Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Croatia, Estonia, Finland, Georgia, Ireland, Kazakstan, the Kyrgyz Republic, Latvia, Lithuania, Moldova, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

[371] S/RES/1244, 10 June 1999, at paragraph 5. **(Annex 5)**

Canada, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lithuania, Luxembourg, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates, United Kingdom and United States.

509. The FRY instituted legal proceedings against 10 NATO Members – the United States, France, Italy, the United Kingdom, the Netherlands, Canada, Germany, Belgium, Spain and Portugal. It did not initiate proceedings against nine other NATO Members, including four which had contributed in some active manner to the NATO action in the FRY. Pursuant to its Orders of 2 June 1999, the Court removed from its General List the FRY Applications against the United States and Spain. Applications thus remain against eight NATO members.

510. By its Memorial, the FRY seeks to broaden its application by adding new allegations in respect of the period after 10 June 1999, ie, the point at which the NATO action ceased and, pursuant to Security Council Resolution 1244 (1999), an international civil presence (UNMIK) and an international security presence (KFOR) assumed various responsibilities in the name of the United Nations. In respect of this period and these allegations, the FRY proposes to proceed against Belgium and, separately, the other seven remaining respondent NATO Members. Although the FRY's allegations in respect of this period are cast in general terms – ie, they do not specify acts alleged to have been committed by Belgium or the Respondents in the other proceedings but refer simply to acts of KFOR – the FRY has not sought to proceed against the 31 other states participating in KFOR.

511. It is, of course, the prerogative of an applicant to decide against whom it wishes to proceed. There may be good reasons, whether in law or politics, for an applicant to decide to proceed against one state but not another. While it may colour the Court's impression of an applicant's good faith if it initiates proceedings against some of the participants in a joint endeavour but not others,

> "[w]here ... claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide on those submissions, with binding force for the parties

> only, and no other State, in accordance with Article 59 of the Statute."[372]

512. In principle, therefore, both the respondent and the Court must take the case as they find it. It is not for them to determine who are the appropriate respondents.

513. While, however, this is the general principle, the jurisprudence of the Court indicates that it is subject to exception. The *Monetary Gold* case, for example, establishes that, where the very subject-matter of the case with which the Court is seised concerns the legal interests of a third state not before the Court, the Court cannot exercise jurisdiction.[373] In such circumstances, the principle that the Court should merely decide on the submissions as between the parties before it does not therefore apply.

514. There are variations on this theme. Thus, where the behaviour of the named respondent cannot be assessed without first entering into a consideration of the lawfulness of the behaviour of some other state not present before the Court, the Court cannot exercise jurisdiction.[374] On this formulation, notwithstanding the existence of a discrete dispute between applicant and respondent with which the Court is seised,[375] the fact that the Court would be required, as a prerequisite, to consider the lawfulness of the conduct of another state not before the Court, requires that the Court decline jurisdiction.

515. Both variations are hinged on the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[376] The Court *must* accordingly decline jurisdiction in circumstances in which the interests of a third state constitute the very subject-matter of the judgment to be rendered.

516. So expressed, the *Monetary Gold* principle is concerned with the legal interests of third states not before the Court. Implicit in this formulation, however, is also the necessary corollary of it, namely, that where the interests of a third state

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[372] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p.392, at paragraph 88.
[373] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), I.C.J. Reports 1954*, p.19, at pp.32-33.
[374] *East Timor (Portugal v, Australia), Judgment, I.C.J. Reports 1995*, p.90, at paragraphs 28-35.
[375] See *East Timor*, ibid, at paragraphs 21-22.
[376] *Monetary Gold*, note 373 supra, at p.32 and *East Timor*, note 374 supra, at paragraph 34.

not before the Court constitute the very subject-matter of the dispute with which the Court is seised, for the Court to assume jurisdiction would be to prejudice the legal interests *of the respondent*. This is particularly so in circumstances in which the acts of the third state constitute the dominant part of the factual dimension of the dispute in question. The respondent may not, in such circumstances, have available to it all the necessary factual material with which to defend its interests. It may find itself under real practical constraints when it comes to developing important arguments by way of defence which hinge on the role and interests of the third state or the relationship between the respondent and the third state. It may, for example, in the absence of that third state, be practically impossible to develop a *de minimis* argument or sustain an argument based on the responsibility of the third state for the acts in question, whether or not they amount to violations of law. There may also, in such circumstances, be a real risk of abuse of the legal process to the extent that a *de minimis* respondent may be impugned in the absence of the principal antagonist but nevertheless stand in jeopardy of allegations levelled non-specifically at unnamed respondents. An abusive applicant may, in other words, proceed against a manifestly *de minimis* respondent on the basis of allegations of a general nature with a view to obtaining, for all practical purposes, a judgment on the acts of the principal antagonist.

517. In Belgium's contention, it is not sufficient, in such circumstances, to say simply that the Court has in principle merely to decide on the submissions between the parties. Where the interests of a third state not before the Court constitute the very subject-matter of the dispute with which the Court is seised – and particularly in circumstances in which the acts of the third state constitute the dominant part of the factual dimension of the dispute in question – the assumption of jurisdiction by the Court would both prejudice the position of the respondent and give rise to a risk of abuse of the legal process. It would, in such circumstances, be inappropriate for the Court to assume jurisdiction. The applicant's case must, in such circumstances, be considered inadmissible.

518. For completeness, Belgium notes that the proposition advanced above – concerning the effect *on the respondent* of the absence of a third party which has a direct and essential interest in the very subject matter of the dispute before the Court – is not an "indispensable parties" argument along the lines of that advanced by the United States in the *Nicaragua* case.[377] The proposition is not, in other words, as the United States there argued, that the Court cannot determine the rights and

[377] *Nicaragua v. United States of America*, note 372 supra, at paragraphs 86-88.

obligations of an absent state without its consent. It is that, in some circumstances, the absence of a third party which has a direct and essential interest in the very subject-matter of the dispute may prejudice *the position of the respondent* and may give rise to a risk of abuse of the legal process. The interests, in other words, in the circumstances here addressed, are the interests of the respondent and of the integrity of the judicial process, *not* the interests of the absent third state. This matter is addressed further below in the specific context of this case.

519. Turning to the application of these principles to the present case, two distinct sets of circumstances must be differentiated: (a) the FRY's allegations in respect of the pre-10 June 1999 period, ie, the allegations against Belgium in respect of the NATO action, and (b) the FRY's allegations in respect of the post-10 June 1999 period, ie, the allegations against Belgium in respect of acts said to have been committed in the area under KFOR control. The two sets of allegations give rise to differing considerations relating to the absence from the proceedings of third parties. They are addressed in turn below.

1. The absence of the United States and other NATO Members from proceedings arising from allegations concerning the NATO action

520. NATO consists of 19 Members. Although the brevity and lack of specificity of the FRY's allegations leave the matter unclear, the FRY appears to take the view that NATO Members are both jointly and separately responsible for NATO acts. Of the 19 NATO Members, 14 participated in some active manner in the NATO action in the FRY. The FRY initiated proceedings against 10 of these. Of the 10 parallel cases, eight remain on the docket of the Court.

521. The contribution of the 14 NATO Members participating in the action in the FRY differed significantly. As already noted, the United States, by a significant margin the largest contributor to the NATO action, committed some 65% of total aircraft. As has also been noted, the Belgian contribution to the NATO force amounted to approximately 1.3% of total aircraft committed.

522. The FRY's case does not particularise allegations against Belgium. Indeed, as was noted Chapter One above, insofar as the FRY identified any NATO Member specifically in the context of its allegations, it pointed to the United States alleging that "the Kosovo crisis was a crisis selected and developed by the United States as

part of a long-term anti-Serb campaign".[378] The FRY's fixation on the role of the United States, and its evidently motivating perception that NATO's action was driven by the United States, is also apparent from FRY communications to the United Nations. Thus, for example, in the 3988th Meeting of the UN Security Council called to consider the NATO action, the FRY representative stated that "[t]he United States of America and NATO must assume full responsibility" for the actions in question.[379] Speaking during the following session of the Security Council, the FRY representative stated similarly that "[m]y country has been a victim of the brutal unlawful aggression of the North Atlantic Treaty Organisation (NATO), led by the United States of America".[380] The United States was also expressly singled out by the FRY on other occasions in communications to and statements before the Security Council.[381]

523. Insofar as Belgium has been able to discover, the FRY has not on any occasion levelled allegations against Belgium directly.

524. The FRY initiated legal proceedings on the basis of allegations concerning the NATO action against the United States (as well as nine other respondents). This approach was consistent with its view that the NATO action was driven and directed by the United States. This approach is also consistent with the fact that the United States was the dominant contributor to the NATO action. For reasons of a manifest lack of jurisdiction, the Court ordered the FRY's case against the United States removed from its docket.

525. The absence of the United States from the parallel proceedings initiated by the FRY raises two important questions of principle that go to the integrity of the judicial process. First, to the extent that the FRY has consistently singled out the United States, and the United States alone, in the context of its allegations concerning the NATO action, and to the extent that the interests of the United States manifestly amount to a direct and essential interest in the very subject matter of the dispute with which the Court is seised, is it appropriate – *by reference to the legal interests of the United States* – for the Court to assume jurisdiction in proceedings against Belgium arising out of the NATO action in circumstances in which the United States is not before the Court? Second, to the extent that the interests of the

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[378] See paragraph 38 above.
[379] S/PV.3988, 24 March 1999, at p.14. **(Annex 51)**
[380] S/PV.3989, 26 March 1999, at pp.10-11. **(Annex 52)**
[381] See, for example, S/1999/353, 28 March 1999; S/1999/453, 21 April 1999 and S/PV.4011, 10 June 1999, at p.3.

United States amount to a direct and essential interest in the subject matter of the dispute before the Court, and that the United States was overwhelmingly the dominant participant in the NATO action, is it appropriate – *by reference to the position of Belgium as Respondent as well as by reference to the integrity of the judicial process* – for the Court to assume jurisdiction in the proceedings against Belgium in circumstances in which the United States is not also before the Court?

526. In Belgium's contention, it would be inappropriate on both counts for the Court to assume jurisdiction in this case. By reference to the position of the United States, however the Court may couch a decision on the merits, and whatever the terms of Article 59 of the *Statute*, it is inescapable that such a decision would involve the Court, as a fundamental element of the process, in adjudicating upon the interests of a state not before the Court. The interests of the United States constitute the very subject-matter of the case with which the Court is seised. It is inconceivable that the Court could give judgment on the merits of the FRY's claims against Belgium without also, for all purposes of reality, adjudicating on the merits of the FRY's claims against the United States, claims that were summarily removed from the Court's docket. This is not a case analogous to the situation in *Nauru* in which the Court concluded that the determination of the responsibility of New Zealand and the United Kingdom, absent from the proceedings, was not a prerequisite for the determination of the responsibility of Australia, against whom the case was brought.[382] The interests of the United States go to the very heart of these proceedings. This is not a case for the Court to prefer vestigial notions of form over the looming reality of the substance of the matter.

527. The same conclusion emerges by reference to the position of Belgium as Respondent and the integrity of the judicial process. The overwhelmingly dominant role played by the United States in the NATO action, coupled with the absence of the United States from proceedings on this matter, is bound, unavoidably, to impose practical constraints on the development of arguments that may be important by way of defence. This is particularly so in the circumstances of the present case given that the FRY has not raised specific allegations against Belgium but has simply sought to impugn "the Respondents" as a generic category. Belgium also observes that, in proceeding against a manifestly *de minimis* respondent, on the basis of allegations levelled non-specifically at unnamed respondents, and in the absence of the United States from parallel proceedings before the Court, the FRY is, for all

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[382] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p.240, at paragraph 55.

practical purposes, seeking to obtain a judgment against the United States as its declared principal antagonist. There is thus, in the manner in which the various parallel proceedings have unfolded, a real risk of abuse of the legal process.

528. Two brief concluding observations on this matter are warranted. First, given the different bases of jurisdiction relied on by the FRY in the various parallel proceedings, there is a possibility that the Court may, contrary to Belgium's contentions herein, conclude that it has jurisdiction in proceedings against Belgium in circumstances in which it has rejected jurisdiction in the parallel cases. Belgium contends that such circumstances would raise even more directly the grounds of inadmissibility addressed above.

529. Second, the distinction between the contention advanced herein and the "indispensable parties" argument advanced by the United States in the *Nicaragua* case has already been touched upon. In respect of this matter, Belgium notes that, in its consideration of the "indispensable parties" argument in the *Nicaragua* case, the Court drew attention to the emphasis placed by Nicaragua on the fact that it had asserted "claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State."[383]

530. The circumstances under consideration in the present case are not analogous. By every indicator, the Applicant in this case, the FRY, considered the United States to be its principal antagonist. It initiated proceedings against the United States. It directed the ire and force of its public statements against the United States alone. It is the Applicant that has placed the United States centre stage. Belgium is simply responding to the FRY's case.

2. The absence of other KFOR participants from proceedings arising from the FRY's allegations concerning post-10 June 1999 events

531. The position regarding the FRY's allegations in respect of the post-10 June 1999 period is even more clear cut. From this point, pursuant to Security Council Resolution 1244 (1999), international civil and security presences in Kosovo were established by the United Nations. The United Nations is ultimately responsible for the mandate of these operations as well as for the way in which they are exercised. KFOR includes contingents from 39 states. While there is, in terms of Resolution 1244 (1999), substantial NATO participation in this operation, it is not a NATO

[383] *Nicaragua v. United States of America*, note 372 supra, at paragraph 86.

operation. It is a force authorised by and ultimately answerable to the Security Council.

532. The fundamental shortcomings of the FRY's allegations in this area have already been commented upon. The allegations do not particularise acts said to have been committed by Belgium, or indeed by any other state. No evidence is advanced by the FRY in support of these allegations. These allegations are thus fundamentally flawed as a matter of form. The allegations effectively seek to impugn KFOR, and by implication all of its participating states, on the basis of proceedings against Belgium, in parallel with proceedings against a small group of other participating states, alone.

533. The absence of 31 of the states participating in KFOR, and, indeed, of the United Nations itself, from the proceedings would pose very considerable obstacles to the proper adjudication by the Court of the FRY's allegations in respect of this period. It is inconceivable that any adjudication of these allegations as between the FRY and Belgium could be insulated from the direct and essential interests of the other participating states. The chain linking Belgium to the acts alleged is long, stretching from the alleged perpetrators (invariably characterised simply as "Albanian terrorists"[384]) to KFOR (as the UN supervising force in Kosovo) to NATO (said to be in control of KFOR) to Belgium (as a Member of NATO). It is inconceivable that Belgium's actions and responsibility in respect of these allegations could be assessed without – as a prerequisite to and integral part of – an assessment of the actions and responsibility of all the other organisations and states also in the chain. It is inconceivable, therefore, that an assessment of Belgium's conduct would not inevitably also involve an assessment of the conduct of Russia, Jordan, Ireland, Switzerland and all the other non-NATO participants in KFOR, as well as the 18 other NATO Members.

534. In Belgium's contention, on the basis of the *Monetary Gold* principle, the Court must decline jurisdiction in respect of the FRY's allegations concerning the post-10 June 1999 period. Not to do so would inevitably involve it in rendering judgment on the interests of third states not before the Court.

535. For completeness, Belgium notes that a coherent evaluation of the FRY's allegations on this matter would also inevitably require the Court to consider important question relating to the conduct of the United Nations in

[384] FRY Memorial, at Part 1.5, pp.201-282.

peacekeeping/peace-enforcement operations. The proper mechanism for raising such matters with the Court is by way of a request for an Advisory Opinion rather than in contentious proceedings against individual states participating in UN operations.

536. The same conclusion as has just been expressed by reference to the interests of absent third states is also dictated by reference to Belgium's interests and the integrity of the judicial process. Given the nature of the FRY's allegations in respect of this period, Belgium, or any individual respondent, would face significant practical hurdles in the preparation of its defence. Included amongst these would be obtaining the necessary information to respond specifically to allegations that have been levelled in general terms and in the absence of any supporting evidence. A complete assessment by the Court of the matters in issue would also require the Court to consider issues that it may not be for Belgium, or which Belgium would not be best placed, to address. These relate notably to the role and responsibility of the United Nations and the other KFOR participating states in this matter.

537. In Belgium's contention, therefore, on this ground too, the FRY's allegations must be considered inadmissible. The Court must accordingly decline jurisdiction in respect of these allegations.

CONCLUSIONS

538. On the basis of the preceding, Belgium contends that the Court lacks jurisdiction in the case brought by the FRY against Belgium and/or that the case is inadmissible. For ease of reference, Belgium's principal submissions and arguments may be summarised as follows:

Preliminary Submission (Chapter Two)

- The Court lacks jurisdiction in respect of claims made for the first time in the FRY's Memorial and/or such claims are inadmissible (pp.25-30, paragraphs 75-90);

Objections to Jurisdiction (Part II)

First Submission (Chapter Four)

- The Court is not open to the FRY (pp.41-76, paragraphs 121-234):
  - the FRY is not a member of the United Nations (pp.42-69, paragraphs 130-206);
  - the FRY is not otherwise a party to the *Statute* pursuant to Article 93(2) of the *Charter* (p.69, paragraphs 207-208);
  - the Court is not open to the FRY pursuant to Article 35(2) of the *Statute* (pp.69-74, paragraphs 209-225);

In the alternative:

Second Submission (Chapter Five)

- The Court does not have jurisdiction on the basis of the FRY's Declaration of 25 April 1999 (pp.77-103, paragraphs 235-314);
  - the jurisdiction invoked by the FRY is not co-extensive with the task entrusted to the Court (pp.83-87, paragraphs 252-261);
  - the dispute with which the Court is seised arose prior to the "crucial date" in the FRY's Declaration (pp.87-93, paragraphs 263-278);

- the situations or facts alleged arose prior to the "crucial date" in the FRY's Declaration (pp.94-97, paragraphs 279-293);
- the FRY's allegations concerning post-10 June 1999 events do not alter the assessment that the Court lacks jurisdiction pursuant to the FRY's Declaration (pp.98-102, paragraphs 294-313);

Third Submission (Chapter Six)

- The Court does not have jurisdiction on the basis of Article IX of the *Genocide Convention* (pp.105-125, paragraphs 315-380);

  - the FRY has not identified a protected group against which genocidal intent or acts can be said to have been directed (pp.114-115, paragraphs 345-350);
  - the FRY has not adduced any evidence of genocidal intent on the part of Belgium (pp.115-120, paragraphs 351-366);
  - there is nothing in the FRY's allegations of fact that is capable of sustaining a claim of genocide against Belgium (pp.121-124, paragraphs 367-377);

Fourth Submission (Chapter Seven)

- The Court does not have jurisdiction on the basis of Article 4 of the *1930 Convention* (pp.127-151, paragraphs 381-461);

  - Article 37 of the *Statute* is not applicable in this case and cannot therefore operate to give the Court jurisdiction on the basis of Article 4 of the *1930 Convention* (pp.133-134, paragraphs 408-411);
  - the *1930 Convention* is no longer in force (pp.134-139, paragraphs 412-423);
  - the FRY has not succeeded to the *1930 Convention* (pp.139-147, paragraphs 424-450);
  - the conditions laid down by the *1930 Convention* have not been satisfied (pp.148-150, paragraphs 451-460);

Objections to Admissibility (Part III)

Fifth Submission (Chapter Eight)

- The FRY has not identified any actions specifically alleged to have been committed by Belgium with which it takes issue (pp.155-158, paragraphs 468-478);

Sixth Submission (Chapter Nine)

- The FRY has acted in bad faith (pp.159-169, paragraphs 479-503);
  - the temporal limitation in the FRY's Declaration amounts to bad faith insofar as the FRY has purported to withhold jurisdiction in respect of matters that may be crucial both to Belgium's case and to the Court's appreciation of the Parties' respective rights and obligations (p.161, paragraphs 484-485);
  - the Indictment of FRY President Slobodan Milosevic and other principal leaders of the FRY for crimes against humanity and violations of the laws or customs of war in Kosovo constitutes strong evidence of bad faith on the part of the FRY (pp.161-163, paragraphs 486-491);
  - the manifest evidence of massive violations of human rights by the FRY in Kosovo in the period prior to the NATO action amounts to evidence of bad faith by the FRY in respect of the dispute with which the Court is seised (pp.163-165, paragraphs 492-496);
  - the documented and persistent failure by the FRY to comply with the obligations required of it by the UN Security Council in respect of the operations of the *ICTY* in Kosovo attests to the FRY's bad faith (pp.165-169, paragraphs 497-503);

Seventh Submission (Chapter Ten)

- The FRY's Application is inadmissible in the light of the absence of the United States and other "Respondents" from proceedings before the Court (pp.171-180, paragraphs 504-537);

- the Application is inadmissible on grounds of the absence of the United States and other NATO members from proceedings concerning the NATO action (pp.175-178, paragraphs 520-530);
- the allegations concerning post-10 June 1999 events are inadmissible on grounds of the absence of other KFOR participants from the proceedings (pp.178-180, paragraphs 531-537).

539. For the avoidance of doubt, Belgium reiterates a point made at the outset of these Preliminary Objections. Belgium does not herein join issue with the substance of the FRY's claims. These pleadings are confined to objections to the jurisdiction of the Court and to the admissibility of the Application. Insofar as certain matters of a factual nature are referred to, they are cited for purposes of Belgium's contentions on jurisdiction and admissibility only. Belgium further avers that its objections to jurisdiction and admissibility are of an exclusively preliminary character and do not raise issues that could or should appropriately be joined to proceedings on the merits.

SUBMISSIONS

540. For the reasons stated in these Preliminary Objections, Belgium requests the Court to adjudge and declare that the Court lacks jurisdiction in the case brought against Belgium by the Federal Republic of Yugoslavia and/or that the application brought by the Federal Republic of Yugoslavia against Belgium is inadmissible.

Jan Devadder
Agent of the Kingdom of Belgium

5 July 2000

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LIST OF ANNEXES

The documents indicated below are set out in the order in which reference is first made to them in the Belgian Preliminary Objections. ***Volume I*** *contains documents numbered 1 - 48.* ***Volume II*** *contains documents numbered 49 - 88.*

14. Security Council Resolution 1199 (1998), 23 September 1998

15. S/1998/912, 3 October 1998, Report of the Secretary-General prepared pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council

16. Security Council Resolution 1203 (1998), 24 October 1998

17. S/1998/1221, 24 December 1998, Report of the Secretary-General prepared pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council

18. S/1999/99, 30 January 1999, Report of the Secretary-General prepared pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council

19. S/PRST/1999/2, 19 January 1999, Statement by the President of the Security Council

20. S/1999/293, 17 March 1999, Report of the Secretary-General prepared pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council

21. S/1998/991, 23 October 1998, containing the Kosovo Verification Agreement between NATO and the FRY, 15 October 1998

22. S/1999/107*, 3 February 1999, containing a letter dated 30 January 1999 from the NATO Secretary-General to the President of the FRY

23. S/1999/682, 15 June 1999, Letter dated 15 June 1999 from the Secretary-General addressed to the President of the Security Council

24. S/24073 (A/47/258), 6 June 1992, Letter dated 5 June 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General

25. S/24577, 21 September 1992, Letter dated 19 September 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

26. S/23877, 5 May 1992, Letter dated 27 April 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

27. Security Council Resolution 757 (1992), 30 May 1992

28. S/23876 (A/47/201), 5 May 1992, Letter dated 5 May 1992 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General

29. S/24028, 28 May 1992, Letter dated 27 May 1992 from the Permanent Representative of Slovenia to the United Nations addressed to the Secretary-General

30. General Assembly Resolution 46/242, 27 August 1992

31. Security Council Resolution 777 (1992), 19 September 1992

32. General Assembly Resolution 47/1, 22 September 1992

33. A/47/PV.7, 22 September 1992, containing a statement by Mr. Panic to the General Assembly

34. Security Council Resolution 821 (1993), 28 April 1993

35. General Assembly Resolution 47/229, 5 May 1993

36. General Assembly Resolution 48/88, 20 December 1993

37. A/47/485, 30 September 1992, Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations

38. Resolution WHA46.1, 3 May 1993 of the World Health Organisation

39. Second Report of the Officers of the Governing Body, Participation of the FRY in the 80th Session (1993) of the International Labour Conference, International Labour Organisation Official Bulletin, Vol. LXXVI, Series A, 1993

40. International Labour Organisation Official Bulletin, Vol. LXXVII, Series A, 1994, Participation of the FRY in the 81st Session (1994) of the International Labour Conference

41. International Labour Organisation country and area designations and rules for their use

42. Resolution C.72(70) of the International Maritime Organisation, 18 June 1993

43. Resolution A29-2 of the International Civil Aviation Organisation, 25 September 1992

44. International Monetary Fund Press Release No.92/92, 15 December 1992

45. World Bank Press Release No.93/S43, 26 February 1992

46. General Agreement on Tariffs and Trade, Document C/M/264, 14 July 1993

47. World Trade Organisation, Document WT/L/176, 30 September 1996

48. World Trade Organisation, Document WT/L/181, 18 October 1996

49. S/1999/322, 24 March 1999, Letter dated 24 March 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

50. S/1999/327, 24 March 1999, Letter dated 24 March 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

51. S/PV.3988, 24 March 1999, 3988th Meeting of the Security Council

52. S/PV.3989, 26 March 1999, 3989th Meeting of the Security Council

53. S/1999/342, 26 March 1999, containing a statement issued by the European Council regarding Kosovo

54. S/1999/353, 28 March 1999, Letter dated 27 March 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

55. S/1999/360, 30 March 1999, containing a letter from the NATO Secretary-General to the UN Secretary-General

56. S/1999/367, 1 April 1999, Letter dated 31 March 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General

57. S/1999/414, 13 April 1999, containing the conclusions of 8 April 1999 of the Special General Council of the European Union

58. Security Council Resolution 1207 (1998), 17 November 1998

59. S/PRST/1999/5, 29 January 1999, Statement by the President of the Security Council

60. S/1999/292, 17 March 1999, Letter dated 17 March 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council

61. Belgian Ministry of Foreign Affairs - Initial list of treaties between Belgium and the SFRY

62. Belgian Ministry of Foreign Affairs - Revised list of treaties between Belgium and the SFRY, 27 September 1994

63. Belgian Ministry of Foreign Affairs - Further revised list of treaties between Belgium and the SFRY, 28 September 1994

64. Belgian Ministry of Foreign Affairs - Working list of treaties which remain in force between Belgium and the respective successor states of the SFRY, 9 September 1996

65. Belgian Ministry of Foreign Affairs - Final list of treaties that continue in force between Belgium and the respective successor states of the SFRY, 9 September 1996

66. Exchange of Notes between Belgium and Croatia concerning the continuation in force of agreements and conventions concluded between Belgium and the SFRY, March 1997

67. Exchange of Notes between Belgium and Slovenia concerning the continuation in force of agreements and conventions concluded between Belgium and the SFRY, July - August 1997

68. Exchange of Notes between Belgium and Macedonia concerning the continuation in force of agreements and conventions concluded between Belgium and the SFRY, July - August 1997

69. Federal Republic of Yugoslavia - Lists of bilateral agreements between Belgium and the SFRY, 6 December 1995

70. Federal Republic of Yugoslavia - List of bilateral agreements between Belgium and the SFRY, 9 October 1996

71. Note Verbale from the FRY to Belgium (and related documents) concerning the list of treaties between Belgium and the SFRY which should continue in force, 14 March 1997

72. Report of the Belgian Ambassador of 12 February 1998

73. *Vienna Convention on Succession of States in Respect of Treaties, 1978*, 1978 UNJYB 106

74. Letter from the Belgian Foreign Minister to the Foreign Minister of the FRY, 29 April 1996

75. *The Prosecutor of the Tribunal v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanovic and Vlajko Stojhiljkovic*, Indictment, 22 May 1999

76. *Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders*, Case No.IT-99-37-I, 23 May 1999

77. *Decision on Review of Indictment and Application for Consequential Orders*, Decision of Judge David Hunt, 24 May 1999

78. Security Council Resolution 827 (1993), 25 May 1993

79. S/1998/839, 8 September 1998, Letter dated 8 September 1998 from the President of the *ICTY* addressed to the President of the Security Council

80. Address by *ICTY* President McDonald to the Security Council, *ICTY* Press Release CC/PIU/349-E, 2 October 1998

81. Statement by the Office of the Prosecutor on the question of the refusal by the FRY to allow Kosovo investigations, *ICTY* Press Release CC/PIU/351-E, 7 October 1998

82. S/1998/990, 23 October 1998, Letter dated 22 October 1998 from the President of the *ICTY* addressed to the President of the Security Council

83. Statement by *ICTY* President McDonald, *ICTY* Press Release JL/PIU/359-E, 5 November 1998

84. Address by *ICTY* President McDonald to the UN General Assembly, A/53/PV.62, 19 November 1998

85. Statement by Judge McDonald to the UN Security Council, *ICTY* Press Release JL/PIU/371-E, 8 December 1998

86. Letter of 16 March 1999 from Judge McDonald to Justice Arbour, *ICTY* Press Release JL/PIU/386-E, 18 March 1999

87. S/1999/383, 6 April 1999, Letter dated 16 March 1999 from the President of the *ICTY* addressed to the President of the Security Council

88. S/1999/1117, 2 November 1999, Letter dated 2 November 1999 from the President of the *ICTY* addressed to the President of the Security Council