INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING LEGALITY OF USE OF FORCE

(YUGOSLAVIA v. CANADA)

PRELIMINARY OBJECTIONS OF CANADA

JULY 2000

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INTRODUCTION

1. This Pleading sets out the preliminary objections of the Respondent to the jurisdiction of the International Court of Justice and to the admissibility of the claims in the present case, in accordance with Article 79 of the Rules of the Court.

Procedural Background

2. On 29 April 1999, the Federal Republic of Yugoslavia filed an Application instituting proceedings against Canada "for violation of the obligation not to use force", followed by a request for the indication of provisional measures. Similar but separate proceedings were filed against nine other States then participating in the North Atlantic Treaty Organization ("NATO") Allied Force operation against the Applicant. Canada opposed the request for provisional measures on the ground, *inter alia*, that the Court lacked prima facie jurisdiction in the case, either under the purported declaration made by the Applicant under Article 36, paragraph 2, of the Statute of the Court or under Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide*[1]. The Court upheld this position, without prejudging the ultimate decision. In an Order dated 2 June 1999 it held that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application ..."[2].

3. By an Order dated 30 June 1999, the Court set the following time limits for the filing of written Pleadings envisaged by Article 45 of the Rules of the Court:

- 5 January 2000, for the Memorial of the Federal Republic of Yugoslavia; and,
- 5 July 2000, for the Counter-Memorial of Canada[3].

The Applicant filed its Memorial on 5 January 2000. In accordance with Article 79, paragraphs 1 and 3, of the Rules, providing that preliminary objections may be made "within the time-limit fixed for the delivery of the Counter-Memorial", whereupon the "proceedings on the merits shall be suspended", Canada has chosen to file preliminary objections at this time. The preliminary objections set out in this Pleading deal with both jurisdiction and admissibility. They may be summarized as follows.

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[1] 9 Dec. 1948, 78 U.N.T.S. 277, Can. T.S. 1949/27 ("*Genocide Convention*") (Annex 2).

[2] *Legality of Use of Force (Yugoslavia v. Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999* (*Order of 2 June 1999*), para. 41.

[3] *Legality of Use of Force (Yugoslavia v. Canada), Order of 30 June 1999, I.C.J. Reports 1999.*

The absence of jurisdiction under the Optional Clause

(a) *The purported Optional Clause declaration is a nullity*

4. The Applicant's purported declaration of 25 April 1999 is a nullity. Only parties to the Statute of the Court may take advantage of the provision in Article 36, paragraph 2, of the Statute, and the Applicant does not fulfil this condition. For the same reason, it does not have access to the Court under Article 35, paragraph 1, of the Statute. Such access is a condition precedent to the existence of jurisdiction.

5. The Applicant is not a Member of the United Nations, and for that reason it is not a party to the Statute of the Court under Article 93, paragraph 1, of the *Charter of the United Nations* [4]. Security Council Resolution 777 of 1992, along with General Assembly Resolution 47/1 of the same year, declare in unequivocal terms 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[5]. The resolutions also decide that the Federal Republic of Yugoslavia should apply for membership in the United Nations.

6. The legal issue is straightforward. If the Applicant continued the legal personality of the former Socialist Federal Republic of Yugoslavia, then it would automatically be a Member of the United Nations. If, on the other hand, it is one of several successor States to the former Socialist Federal Republic of Yugoslavia, then it can only become a Member in accordance with paragraph 2 of Article 4 of the Charter, through a decision of the General Assembly on the recommendation of the Security Council.

7. The principal political organs of the United Nations have spoken with clarity on this question. The resolutions just referred to would make no sense except on the basis that the Federal Republic of Yugoslavia is a new State which does not continue the legal personality of the former Socialist Federal Republic of Yugoslavia. It is not, for that reason, a Member of the United Nations and cannot become a Member except in accordance with Article 4 of the Charter. The executive acts and communications on which the Applicant relies to overcome this obstacle are practical accommodations, which are not intended to, and in any event cannot, prevail over authoritative pronouncements of the competent political organs of the United Nations in the exercise of their powers under Article 4 of the Charter.

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[4] Nor has the Applicant become a party to the Statute of the Court under Article 93, para. 2, of the Charter. There has been no attempt in this case to rely on Article 35, para. 2, of the Statute, providing that the conditions under which the Court shall be open to non-parties shall be specified by the Security Council. Article 41 of the Rules of the Court would have required the deposit of a declaration made under the authority of the relevant Security Council resolution, which was not done and would in any event have been inconsistent with the purported reliance on Article 36, para. 2.

[5] SC Res. 777, UN SCOR, 47th Year, UN Doc. S/RES/777 (1992) (Annex 1A); GA Res. 47/1, UN GAOR, 47th Sess., UN Doc. A/RES/47/1 (1992) (Annex 1B).

(b) *The temporal reservation in the purported declaration excludes jurisdiction*

8. It was on the basis of the reservation *ratione temporis* of the Applicant's purported declaration that the Court decided it lacked prima facie jurisdiction in its *Order of 2 June 1999*. So far as the original claim is concerned, absolutely nothing has been added that would lead to a reconsideration of the Court's reasoning.

9. The reservation, based on a well-known formula, has two elements. First, it excludes pre-existing, known disputes. This was unquestionably a pre-existing dispute as of 25 April 1999. Secondly, the reservation limits jurisdiction to disputes "with regard to the situations or facts subsequent to" 25 April 1999[6]. Yet the Application covers situations or facts that already existed at that date. In both respects, the Application would be outside the jurisdiction of the Court, even if the declaration were otherwise a valid one by a Member of the United Nations.

10. The Applicant has relied upon the "new elements" it has added to its claim based on events related to the peacekeeping efforts pursued by the United Nations Kosovo Force ("KFOR") since June 1999[7]. But under the formula freely chosen by the Applicant, events subsequent to the declaration are immaterial if the dispute arose before that time. And the Court has already determined that this dispute arose "well before 25 April 1999 ..."[8]. This necessarily implies, contrary to the Applicant's argument, that all its "constituent elements", within the meaning of the *Right of Passage (Merits)* case, had arisen before that date[9].

11. The inferences the Applicant draws from the "new elements" since June 1999 would lead, in any event, to an absurd position. The Applicant argues that the dispute did not arise "in full" until the developments related to the peacekeeping operation had occurred[10]. That would entail at least two untenable consequences. First, it would mean that the Application was filed on 29 April 1999 in relation to a future dispute that had not yet crystallized - something that would contradict facts of almost universal public knowledge. Second, it would mean that a dispute which both the Applicant and the Court have characterized as one relating to the use of force arose only when the use of force had been brought to an end.

12. The Applicant's position on the effect of its temporal reservation also disregards the principle that jurisdiction is established as of the date of the application, not later. This principle may admit of exceptions to overcome formal defects, but not to nullify reservations on jurisdiction that were freely adopted by the Applicant itself.

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[6] Application.

[7] Memorial, p. 8, para. 12, and p. 339, para. 3.2.11ff.

[8] *Order of 2 June 1999, supra*, n. 2, para. 27.

[9] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 34.

[10] Memorial, p. 340, para. 3.2.14.

The absence of jurisdiction under the Genocide Convention

13. The Applicant also relies upon Article IX of the *Genocide Convention* as a basis of jurisdiction.

(a) *The use of force cannot in itself constitute an act of genocide*

14. In its *Order of 2 June 1999*, the Court applied the test of treaty-based jurisdiction set out in the *Oil Platforms* decision[11]. It is not enough that one party should maintain that a dispute exists under the treaty and that the other denies it; instead, the Court must ascertain whether the violations pleaded "do or do not fall within" the provisions of the treaty[12]. The *Order of 2 June 1999* therefore addressed the nature of the *Genocide Convention*. The Court stated, in accordance with earlier jurisprudence, that the "essential characteristic of genocide is the intended destruction of 'a national, ethnical, racial or religious group'", and noted that the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Convention[13]. For these reasons it was unable, at that stage of the proceedings, to see a prima facie basis of jurisdiction in the Convention.

15. So far as the original claim is concerned, namely, the use of force by NATO, this analysis still provides a complete answer to the misplaced reliance on Article IX of the *Genocide Convention*. The Memorial in fact provides little more than a bare assertion that evidence of intent has been provided. It would be difficult to imagine a clearer example of a Pleading that simply "maintains", but in no way demonstrates the applicability of a treaty, which the Court has very clearly held to be insufficient to establish jurisdiction[14].

16. The Memorial alleges intentional harm to civilian populations through environmental destruction and the use of improper weapons[15]. Though the allegations are vigorously denied, it is unnecessary to consider their truth or falsehood in order to ascertain the complete lack of any substance to the Applicant's claim that the subject matter is within the provisions of the *Genocide Convention*. On the contrary, it is clear that the position of the Applicant is based on a systematic confusion of the law of genocide with the provisions of certain instruments of international

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[11] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 803.

[12] *Id.*, p. 810, para. 16.

[13] *Order of 2 June 1999, supra*, n. 2, para. 39, quoting *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. 345, para. 42.

[14] *Oil Platforms, supra*, n. 11, p. 810, para. 16.

[15] Memorial, p. 174, paras. 1.2.7.1ff, and p. 177, paras. 1.3.1ff.

humanitarian law, especially *Geneva Protocol I*[16]. This position is legally incorrect because it overlooks the need for a specific intent to destroy physically a group "as such" - the defining feature of the *Genocide Convention*, as the Court has repeatedly held.

(b) *The new claims fail to connect Canada to the allegations of genocide*

17. The new elements of the claim, as now embodied in the Applicant's Memorial, focus on the "killings, wounding and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija ..."[17]. Quite apart from the considerations of admissibility set out below, these allegations refer to acts by "Albanian terrorists"[18]. There is no allegation of complicity or negligence by Canada, and no direct or indirect attribution of acts or omissions to Canada that could engage its responsibility under the *Genocide Convention*. In fact, there are no violations pleaded against Canada as such to which the test of jurisdiction in the *Oil Platforms* case can be applied.

18. The provision of the *Genocide Convention* that Canada is said to have violated has not been expressly identified, but the terms of the relevant submission at the end of the Applicant's Memorial indicate that it must be the general obligation to punish and prevent genocide in Article I of the Convention[19]. In the absence of any causal link between Canadian conduct and the incidents cited as evidence of genocide, however, it is impossible to see how the subject matter of the new claims can fall within that provision. The basic principle illustrated by the *Oil Platforms* case is that jurisdiction under a treaty cannot be established if the conduct complained of does not fall within its provisions. The test also assumes the existence of pleaded "violations" that pertain to the Respondent[20]. On both counts, the Memorial of the Federal Republic of Yugoslavia fails to establish even an arguable basis for jurisdiction under Article IX of the *Genocide Convention*.

Inadmissibility of the new elements of the claim

19. If, as the Applicant contends, the events since the *Order of 2 June 1999* are "part and parcel" of the original dispute, then they are excluded from jurisdiction on the basis of the temporal reservation for the reasons given above[21]. If, on the other hand, the Court is unable to accept this characterization, it must follow that these "new elements" are inadmissible. They would introduce

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[16] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict*, 8 June 1977, 1125 U.N.T.S. 3, Can. T.S. 1991/2 (Annex 3).

[17] Memorial, p. 339, para. 3.2.11. See also p. 9, para. 15, p. 283, para 1.6.2, p. 339, para. 3.2.12, and p. 349, para. 3.4.3. At places, the Memorial also refers to ethnic cleansing in relation to the "new elements" (p. 201, para. 1.5, p. 249, para. 1.5.6, and p. 352).

[18] *Id.*, p. 201, para. 1.5.1.1.1ff.

[19] *Id.*, p. 352.

[20] *Oil Platforms*, *supra*, n. 11, p. 810, para. 16.

[21] Memorial, p. 339, para. 3.2.12.

factors "extraneous to the original claim"[22] and transform "the subject of the dispute originally brought before [the Court] under the terms of the Application"[23], contrary to principles well-established in the jurisprudence of the Court.

20. It is therefore clear that the "new elements" of the claim are either outside the jurisdiction of the Court on the basis of the temporal reservation in the Applicant's purported declaration, or else inadmissible on the basis of the various features that distinguish them from the original claim. In either event, they are not properly before the Court.

Inadmissibility of the claim in the absence of essential third parties

21. The proceedings are being pursued against a very limited selection of the States involved in the dispute. Only eight out of fourteen of the participants in the use of force by NATO are before the Court. The substantial majority of the KFOR participants are also absent from the proceedings, including both the United States and the Russian Federation, as well as all the other non-NATO participants. Perhaps more important, KFOR is an operation under the auspices of the United Nations carried out under the authority and continuing oversight of the Security Council, an entity that is not and cannot be brought into the present proceedings.

22. The Court is therefore faced with the anomaly of litigation in which most of the principal actors are missing. While the circumstances are unique, the very subject matter of the case would require an adjudication of the legal rights and duties of essential third parties that are not before the Court, including the United Nations itself. The case is therefore inadmissible under the principle established in the *Monetary Gold* case [24]. Significantly, the Court has never declined to apply that principle in a case where the main protagonists were missing from the litigation. The collective basis on which the Applicant has imputed responsibility to each party without any individual imputation of wrongdoing, as well as the central role of international organizations, also distinguish the present case from situations where the Court has held the *Monetary Gold* principle to be inapplicable.

The formal and substantive defects of the Memorial

23. The title of the case used by the Applicant in its Memorial does not correspond to that adopted by the Court. The Applicant has named all the Respondents in the proceedings instituted on 29 April 1999, with the exception of those in the two cases that were dismissed. This case, however, has a single Respondent, no Order having been made under Article 47 of the Rules joining any of the cases brought against NATO members by the Applicant last year.

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[22] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992 (Nauru)*, p. 266, para. 68.

[23] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction, Judgment, I.C.J. Reports 1998 (Fisheries Jurisdiction)*, para. 29.

[24] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19.

24. That may be an essentially formal defect, but it has substantive implications. What is more important is that the Applicant has prepared an identical text for all eight pending cases, on the ground that the "substance of the dispute in all eight cases is identical"[25]. The practical result of this approach is that nothing is attributed to any individual Respondent, and each participating State is held responsible for every act that occurred during the Allied Force operation and during the subsequent peacekeeping phase.

25. The assumption is that no allegations need be attributed to any individual State, because the acts of each of them are imputable to all the others. This assumption pervades every aspect of the argument. It is by no means restricted to the use of force *per se*. It extends beyond that issue to serious accusations respecting, *inter alia*, genocide and the use of unlawful means and methods of warfare - crimes that, if proved, would shock "the conscience of mankind ..."[26]. Even in the context of a collective military effort, it is unthinkable that such crimes should be attributed to an individual State in the absence of any real or alleged misconduct on the part of its organs or of persons under its control.

26. The specific legal consequence of the omission of any particulars respecting individual Respondents is that the Memorial necessarily fails to establish any legal connection between the parties and the alleged violations of the treaty invoked as a basis of jurisdiction. So far as the relations between the parties are concerned, therefore, the pleaded violations do not fall within the treaty. This consideration is fatal to the reliance on Article IX of the *Genocide Convention* as a basis of jurisdiction.

27. The Memorial is also fatally flawed in its failure to provide adequate evidence in support of its assertions, particularly with respect to the "new elements". There are two volumes entitled *NATO Crimes in Yugoslavia: Documentary Evidence* respecting only the bombing campaign from 24 March to 10 June 1999. The annexes proper consist largely of documents in Serbian, but it seems clear (on the assumption that the few documents from June 1999 are depositions about the bombing) that no documentary evidence whatsoever has been filed on the "new elements" of the claims respecting KFOR.

28. A failure to present even a commencement of proof would obviously be fatal on the merits. But this almost unprecedented insufficiency of material is also relevant at the present stage, because it means there is virtually no material before the Court showing that the "new elements" might fall within the treaty invoked as a basis of jurisdiction. In principle, a State seeking to rely on jurisdiction under a specific treaty must be required - as a matter relating to the admissibility of its application - to adduce facts which, if true, would be capable of bringing its claim within the scope of the treaty

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[25] Memorial, p. 8, para. 11.

[26] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951* (*Reservations*), p. 23.

so far as the Respondent State is concerned. The Applicant has not done so and the "new elements" should therefore be held inadmissible.

Structure of this Pleading

29. This Pleading is organized as follows. Chapter I sets forth the Canadian position with respect to the purported Optional Clause declaration of 25 April 1999. Chapter II deals with the claim to jurisdiction under Article IX of the *Genocide Convention*. Chapter III sets out the objections respecting the admissibility of the claim. There follows a Summary of the Preliminary Objections and the Pleading concludes with the Submissions of the Respondent.

30. Having regard to Article 79, paragraph 2, of the Rules, Canada has included an Annex setting out the factual background to this matter[27]. In Canada's view, however, the preliminary objections submitted herein can be decided on purely legal grounds without addressing contested issues of fact.

[27] Annex 1.

CHAPTER I

THE COURT LACKS JURISDICTION UNDER THE OPTIONAL CLAUSE

Introduction

31. There are two independent reasons why the purported declaration of 25 April 1999 confers no jurisdiction on the Court: the status of the Applicant and the terms of the declaration itself.

32. As Canada argued at the hearings on provisional measures, the declaration is a radical nullity with no legal effects whatsoever. The Applicant is not a Member of the United Nations and accordingly is not party to the Statute of the Court. It is therefore not eligible, under the terms of the Statute, to make a declaration under the Optional Clause.

33. Even if the question of its validity is set to one side, the declaration by its own terms confers no jurisdiction. The temporal reservation it contains, based on a time-honoured formula, limits jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature"[28].

34. With respect to the use of force by the North Atlantic Treaty Organization ("NATO"), there is absolutely nothing to alter the provisional conclusion reached by the Court last year that the dispute arose in late March 1999, several weeks before the declaration was signed. It follows that, to the extent that the "new elements" of the case regarding the United Nations Kosovo Force ("KFOR") might be considered to form "part and parcel" of the original dispute, as the Applicant contends, they are excluded from jurisdiction for exactly the same reason[29]. If, on the other hand, they do not form "part and parcel" of the original dispute, then they are inadmissible for the reasons set out in Chapter III.

A. The purported declaration of 25 April 1999 is a nullity

35. In order to have access to the Court, the Applicant must either be a party to the Statute of the Court, or claim to apply the exceptional mechanisms provided for in Article 93, paragraph 2, of the *Charter of the United Nations* or in Article 35, paragraph 2, of the Statute. The Applicant meets neither of these requirements.

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[28] Application.

[29] Memorial, p. 339, para. 3.2.12.

36. Under Article 36, paragraph 2, of the Statute, only parties to the Statute are entitled to participate in the Optional Clause system. Following the dissolution of the former Socialist Federal Republic of Yugoslavia and the admission of four of its former constituent republics to United Nations membership, the Applicant has been expressly determined not to be a member State of the United Nations by the organs of the United Nations that are empowered by the Charter with determining issues of membership. It follows necessarily from this finding that the Applicant is not a party to the Statute of the Court. The Court is thus not open to it through this approach, and its purported declaration of 25 April 1999, made under Article 36, paragraph 2, of the Statute, seeking to initiate an action before the Court, is a nullity.

1. The former Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia are separate legal entities, and the issue of their respective memberships in the United Nations must be treated separately

37. In its argument concerning its membership in the United Nations, the Federal Republic of Yugoslavia deliberately obscures the issue of the status of the membership in the United Nations of two entities: the former Socialist Federal Republic of Yugoslavia, which Security Council Resolution 777 states "has ceased to exist"[30]; and an entirely new entity, the Federal Republic of Yugoslavia, which emerged as one of five new States from the disintegration of the former Socialist Federal Republic of Yugoslavia.

38. The Court noted in its April 1993 Order on provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case certain ambiguities which surround the status of the membership of the former Socialist Federal Republic of Yugoslavia[31]. This left the issue of the United Nations membership of that entity prima facie unresolved[32]. This situation, however, does not in any way affect the membership status of the new legal entity known as the Federal Republic of Yugoslavia. On the membership of the Federal Republic of Yugoslavia there exists a series of clear, unambiguous, authoritative and legally binding pronouncements, by the organs of the United Nations competent to determine issues of membership.

2. The Federal Republic of Yugoslavia does not continue the United Nations membership once held by the former Socialist Federal Republic of Yugoslavia

39. In order to become a Member of the United Nations, a State must apply and qualify for membership in accordance with the terms of Article 4 of the Charter. By that Article, the sole power to determine which States may be granted membership in the United Nations is given to the General Assembly, upon recommendation by the Security Council. In accordance with determinations of the

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[30] *Supra*, n. 5 (Annex 1A).

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 13-14, paras. 17-18.

[32] *Ibid.*

General Assembly and the Security Council, the Federal Republic of Yugoslavia is not a member State of the United Nations.

40. Security Council Resolution 757, adopted on 30 May 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"[33].

41. In further explicit recognition of the fact that the Federal Republic of Yugoslavia could not lay claim to the United Nations membership once held by the former Socialist Federal Republic of Yugoslavia, Security Council Resolution 777, dated 19 September 1992, states that -

> "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist"

and 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 ..."[34].

Upon the recommendation of the Security Council in Resolution 777, the General Assembly, on 22 September 1992, in Resolution 47/1, therefore 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"[35].

42. The legal status of the Federal Republic of Yugoslavia as a non-member State of the United Nations and its inability to participate in General Assembly work has been authoritatively decided by the combination of the resolutions of these two bodies, in the due exercise of their respective

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[33] SC Res. 757, UN SCOR, 47th Year, UN Doc. S/RES/757 (1992) (Annex 4).

[34] *Supra*, n. 5 (Annex 1A).

[35] *Supra*, n. 5 (Annex 1B). On 28 April 1993, the Security Council, recalling its Resolution 777 (1992) and General Assembly Resolution 47/1, recommended in Resolution 821 (1993) to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) "shall not participate in the work of the Economic and Social Council" (SC Res. 821, UN SCOR, 47th Year, UN Doc. S/RES/821 (1993) (Annex 5)). On 5 May 1993, the General Assembly adopted Resolution 47/229 in which it decided "that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council" (GA Res. 47/229, UN GAOR, 47th Sess., UN Doc. A/RES/47/229 (1993) (Annex 6)).

powers under Article 4 of the Charter. In his treatise on *Legal Effects of United Nations Resolutions*, Castañeda confirms the authoritative character of such determinations:

> "But the determination as such is a *pronouncement* of the Organization, which is legally definitive, and against which there is no legal recourse. Inasmuch as it represents the official United Nations position on the existence of a fact or legal situation, it is the only one that the Organization takes into account as the basis for eventual action; thus the individual dissident attitude lacks juridical relevance. In this sense these pronouncements have legal validity, and the resolutions that contain them can properly be characterized as *binding in what they determine*"[36].

43. The status of the alleged continuation by the Federal Republic of Yugoslavia of the legal rights and privileges of the former Socialist Federal Republic of Yugoslavia was also the subject of deliberations of the Arbitration Commission of the Peace Conference on Yugoslavia. The Arbitration Commission was established by a joint statement on Yugoslavia adopted at an extraordinary meeting of Ministers in the context of European Political Cooperation on 27 August 1991. This arrangement was accepted by the six Yugoslav Republics at the opening of the Peace Conference on 7 September 1991.

44. The Arbitration Commission, in its *Opinion No. 8* of 4 July 1992, took the position "that the process of dissolution of the SFRY ... is now complete and that the SFRY no longer exists"; that "Serbia and Montenegro ... have constituted a new State, the 'Federal Republic of Yugoslavia'"; and that "the former national territory and population of the SFRY are now entirely under the sovereign authority of the new States"[37].

45. In *Opinion No. 9* of the same date, the Arbitration Commission stated: "New States have been created on the territory of the former SFRY and replaced it. All are successor States to the former SFRY"[38], and added in its conclusions that -

> "the SFRY's membership of international organizations 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"[39].

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[36] CASTAÑEDA, *Legal Effects of United Nations Resolutions*, trans. Alba Amoia, New York, Columbia University Press, 1969, p. 121 (Annex 7) [emphasis in original].

[37] (1993) 92 I.L.R. 199, p. 202 (Annex 8).

[38] (1993) 92 I.L.R. 203, p. 204 (Annex 9).

[39] *Id.*, p. 205.

46. In *Opinion No. 10*, also of the same date, the Arbitration Commission stated that "none of the resulting entities could claim to be the sole successor to the SFRY"[40] and that "the FRY is actually a new State and could not be the sole successor to the SFRY"[41].

47. In accordance with the decisions taken by the relevant bodies, Canada has never acknowledged the Federal Republic of Yugoslavia to be the continuation of the former Socialist Federal Republic of Yugoslavia, but has treated it as one of the five equal successor States.

3. The Federal Republic of Yugoslavia has not applied for membership in the United Nations

48. The issue of membership in the United Nations - and hence that of jurisdiction of the Court *qua* a State's status as a party to the Court's Statute - is directly tied to the legal status of the entity referred to as the Federal Republic of Yugoslavia. This entity is not the continuing State of the former Socialist Federal Republic of Yugoslavia. It is a new State and, as such, it must make an application under Article 4 of the Charter to become a Member of the United Nations.

49. The other independent States that were created following the break-up of the former Socialist Federal Republic of Yugoslavia all applied for membership to the United Nations and were admitted to the United Nations by the General Assembly upon recommendation of the Security Council, in accordance with the provisions of Article 4, paragraph 2, of the Charter.

50. Bosnia and Herzegovina, Croatia, and Slovenia were admitted on 22 May 1992. Their admission doubtless informed the adoption four months later of Security Council Resolution 777. The former Yugoslav Republic of Macedonia was admitted to membership on 8 April 1993.

51. Only the Federal Republic of Yugoslavia has not followed the clear legal path directed by both the Charter and the various resolutions of the competent organs of the United Nations. On 29 September 1992, following the General Assembly's adoption of Resolution 47/1, Mr. Milan Panic, then Prime Minister of the Federal Republic of Yugoslavia, made the following statement on the floor of the Assembly:

> "I herewith formally request membership in the United Nations on behalf of the **new Yugoslavia**, whose Government I represent"[42].

52. The Federal Republic of Yugoslavia did not follow up on this request, and it is a matter of record that the Security Council made no subsequent recommendation concerning its United Nations

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[40] (1993) 92 I.L.R. 206, p. 207 (Annex 10).

[41] *Id.*, p. 208.

[42] UN GAOR, 47th Sess., 7th Plen. Mtg., UN Doc. A/47/PV.7 (1992) [provisional], p. 149 (Annex 11) [emphasis added].

membership, and that the General Assembly made no decision on its admission. Accordingly, the Federal Republic of Yugoslavia has failed to comply with the requirements for membership in the United Nations.

4. Administrative decisions or practices of the United Nations Secretariat are practical accommodations of diplomacy and do not affect the decisions of the relevant principal organs of the United Nations

53. The Federal Republic of Yugoslavia has cited certain correspondence and resolutions pertaining to the assessment of membership fees to "Yugoslavia", and which it claims are inconsistent with the position that it is not a Member of the United Nations [43]. There is no legal or factual basis for treating these various measures as anything but the pragmatic accommodations of diplomacy, in a situation in which: (a) the United Nations has a practical need to maintain contact and communication with the Applicant, whose conduct has been a core concern of the United Nations since the dissolution of the former Socialist Federal Republic of Yugoslavia; and (b) the governing principles and legal parameters had already been established by the competent principal organs.

54. Such administrative flexibility in the context of multilateral diplomacy cannot affect the underlying juridical situation. No executive acts or communications, even from the highest sources within the United Nations Secretariat, can affect the *de jure* position reflected in the relevant United Nations decisions, nor can they create membership in the absence of a positive decision on admission.

55. The Federal Republic of Yugoslavia's payment of assessed membership fees in the United Nations is not evidence of its status. The Federal Republic of Yugoslavia must apply for membership in the United Nations, as it has been expressly told it must do. Such payment does not permit the Applicant to continue the membership of the former Socialist Federal Republic of Yugoslavia, to which it has been expressly told it does not "automatically succeed"[44].

56. In any event, Article 4 of the Charter sets out the requirements for membership in the United Nations. In the *Admissions* case, the Court stated clearly that no further or additional conditions in

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[43] Notwithstanding the Applicant's claim to United Nations membership, documents presented to this Court by the Applicant itself demonstrate the differing status accorded to Mr. Jovanović (of the Federal Republic of Yugoslavia) and to representatives of United Nations member States by the Security Council. In UN Doc. S/PV.3988 (1999), the President of the Security Council (China) makes a clear distinction between member States invited "to participate in the discussion, without the right to vote, in accordance with the relevant provisions of the Charter [Art. 32] and rule 37 of the Council's provisional rules of procedure" and Mr. Jovanović, whom the President - without referring to him by his State of origin - merely proposes "to invite ... to address the Council in the course of its discussion of the item before it" (UN SCOR, 54th Year, 3988th Mtg., UN Doc. S/PV.3988 (1999), p. 2 (Annex 177 of the Memorial)).

[44] SC Res. 777, *supra*, n. 5 (Annex 1A), and GA Res. 47/1, *supra*, n. 5 (Annex 1B).

respect of membership, beyond those set out in Article 4, could be imposed by the Security Council or other organ of the United Nations[45]. It follows that payment of membership fees cannot be linked to admission or membership. An ancillary provision, Article 19 of the Charter, links fee payment only to the exercise of the voting rights that attach to an existing membership. Accordingly, the Applicant's claim that its payment of fees was evidence of United Nations membership is inconsistent with clear provisions of the Charter.

57. The principal political organs of the United Nations have spoken and reiterated their decisions, with authority and exemplary clarity. Their pronouncements are binding in what they have determined, namely that:

- the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist;

- the present Applicant, the Federal Republic of Yugoslavia, cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations;

- the Federal Republic of Yugoslavia cannot be considered a Member of the United Nations and therefore needs to apply under Article 4 of the Charter in order to become a Member of the United Nations.

Not being a Member of the United Nations, the Federal Republic of Yugoslavia is not a party to the Statute of the Court, under Article 93, paragraph 1, of the Charter.

5. The Federal Republic of Yugoslavia has chosen not to apply other available mechanisms for access to the Court

58. As a non-member State of the United Nations, the Applicant could have sought to apply the exceptional mechanisms for access to the Court contained in Article 93, paragraph 2, of the Charter or in Article 35, paragraph 2, of the Statute.

59. Article 93, paragraph 2, enables a State which is not a Member of the United Nations to become party to the Statute on conditions determined in each case by the General Assembly upon the recommendation of the Security Council. No such determination has been made in the present case, nor has one been sought by the Applicant.

60. Article 35, paragraph 2, of the Statute permits the Court to be open to a State not a Member of the United Nations, according to conditions laid down by the Security Council. The conditions

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[45] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* pp. 64-65.

now in force were set out by the Security Council in its Resolution 9 of 15 October 1946[46]. However, the Applicant, in its purported declaration, neither claims to apply Article 35, paragraph 2, nor to have accepted the conditions required by Resolution 9 of the Security Council, perhaps because to do so would not be consistent with its claim to be a member State of the United Nations. Even had it done so, access to the Court under this mechanism would require the "explicit agreement" of Canada for this case to proceed[47]. No such agreement has been sought or given.

B. The purported declaration is inapplicable

61. The question of the Applicant's entitlement to invoke the Optional Clause is logically prior to a consideration of the meaning and interpretation of its declaration purporting to accept the Court's jurisdiction under that Clause. But the Court's jurisdiction is also plainly excluded by the terms of the Applicant's own declaration. This, in and of itself, is a sufficient basis for the Court to dismiss the present Application so far as it seeks to rely on the Optional Clause.

1. The Optional Clause jurisdiction is governed by consent and reciprocity

a. Jurisdiction is based on consent

62. The principle of consent was summarized by the Court in its *Order of 2 June 1999* on provisional measures, where it stated that "'it cannot decide a dispute between States without the consent of those States ...'", and that -

> "the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned"[48].

It is a consequence of this principle that States are free, in depositing declarations under the Optional Clause, to stipulate reservations of any kind limiting their acceptance of jurisdiction. As stated in the 1998 *Fisheries Jurisdiction* case:

> "It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: 'This jurisdiction only exists within the limits within which it has been accepted' (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series*

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[46] SC Res. 9, UN SCOR, 1st Year, UN Doc. S/RES/9 (1946) (Annex 12).

[47] *Ibid.*

[48] *Order of 2 June 1999, supra*, n. 2, para. 19, quoting *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984* (*Military and Paramilitary Activities*), p. 418, para. 59, where the Court characterized declarations under the Optional Clause as "facultative, unilateral engagements, that States are absolutely free to make or not to make".

A/B, No. 74, p. 23). Conditions or reservations ... operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court"[49].

b. Jurisdiction is based on reciprocity

63. Reciprocity controls the operation of Optional Clause declarations in conferring compulsory jurisdiction[50]. The principle appears in Article 36, paragraph 2, of the Statute ("in relation to any other State accepting the same obligation"), in the Canadian declaration of 10 May 1994 ("on condition of reciprocity")[51], and in the purported declaration of the Applicant ("in relation to any other State accepting the same obligation, that is on condition of reciprocity")[52].

64. There are two implications of the principle of reciprocity. First, the compulsory jurisdiction of the Court under the Optional Clause extends only to the common ground covered by the declarations of both parties. As the Court stated in *Anglo-Iranian Oil*, "jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it"[53]. Second - and, for present purposes, more important - Canada is entitled to invoke the reservations in the Applicant's declaration as though they appeared in the Canadian reservation. As the Court put it in the *Interhandel* case:

> "Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration"[54].

65. The Applicant cannot be allowed to invoke the declaration it has itself made, when on the face of that declaration there is a reservation which plainly disqualifies it from bringing its Application. Without prejudice to the objections made above as to the status of the Applicant,

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[49] *Supra*, n. 23, para. 44.

[50] "The principle of reciprocity forms part of the system of the Optional Clause by virtue of the express terms both of Article 36 of the Statute and of most Declarations of Acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of Certain Norwegian Loans ..." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957* (*Right of Passage (Preliminary Objections)*), p. 145).

[51] Annex 13.

[52] Application.

[53] *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952,* p. 103.

[54] *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 23. See also *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77,* p. 81, where the Permanent Court said with respect to the reservation *ratione temporis* of the Applicant: "Although this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration, it is applicable as between the Parties."

Canada therefore invokes and relies upon the reservation *ratione temporis* in the purported declaration of the Applicant dated 25 April 1999.

2. The reservation *ratione temporis* of the purported declaration excludes jurisdiction

a. The reservation is designed to exclude all pre-existing disputes

66. The purported declaration filed on 25 April 1999 contains a self-imposed jurisdictional limitation that is fatal to these proceedings. The declaration, by its own terms, is limited to "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"[55]. The Federal Republic of Yugoslavia, for reasons that are easily surmised, was unwilling to incur the risk of litigation respecting any existing disputes and any existing facts and situations. Its priority was to protect itself against that threat, even at obvious cost to itself in respect of its intended Application. Reciprocity, the key principle of the Optional Clause, means that the Applicant cannot itself invoke the compulsory jurisdiction of the Court in connection with disputes whose origin or whose factual basis pre-dates the signature of the declaration.

67. As a result, as of 29 April 1999 when the Application in this case was filed, compulsory jurisdiction under the declaration was limited to disputes arising on only three days - from 26 April to 28 April 1999 inclusive. Because the dispute arose a full month before this time, no jurisdiction in this case could be founded on the declaration even if it were valid.

68. Temporal conditions are a typical feature of Optional Clause declarations. Their purpose is to ensure that a newly-filed declaration has no retroactive effect[56]. In particular, as Rosenne has put it, they "are designed to exclude known disputes with which the State[s] making the declaration ... were concerned when they made the declaration ..."[57]. This perfectly captures the reason why the temporal limitation in the declaration of 25 April 1999 rules out compulsory jurisdiction in this case. At the material time this was indisputably an existing dispute - a known dispute. It also related to existing "situations or facts". Its exclusion from jurisdiction is not an incidental or unintended consequence of the terms freely chosen by the Applicant. On the contrary, it is central to the Applicant's own purpose in formulating its temporal reservation.

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[55] Application.

[56] Under the jurisprudence of the Permanent Court (in particular *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35, and *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24) it would appear that in the absence of qualification a title of jurisdiction may have a retroactive effect. See ROSENNE, *The Law and Practice of the International Court, 1920-1996*, The Hague, Martinus Nijhoff, 3rd Ed., 1997, Vol. II, pp. 785-786 and pp. 943-952 (Annex 14).

[57] ROSENNE, *supra*, n. 56, Vol. II, p. 785 (Annex 14).

b. The dispute arose before the declaration

69. The 25 April 1999 declaration uses the well-known "Belgian" formula[58], which is based on a double exclusion. It refers both to disputes arising subsequent to the signature of the declaration and to situations or facts subsequent to that signature. Both conditions must be met for a dispute to be subject to compulsory jurisdiction. The first condition is the simpler of the two. It is far easier to identify a single point in time at which a dispute originated - *terminus a quo* - than to identify a single critical date in the course of a lengthy, complex and evolving dispute.

70. In many cases the dual criterion has no practical significance. It takes on critical importance, however, in the case of ongoing, complex disputes whose "situations or facts" are multi-dimensional and prolonged over a period of time that may continue after the declaration. In these situations, it is immaterial that some of the relevant situations or facts may have occurred subsequent to the date of the declaration. If in fact the dispute arose before that date, then jurisdiction is excluded.

71. These considerations were the basis of the Court's conclusion that it lacked prima facie jurisdiction under the Optional Clause in its *Order of 2 June 1999*[59]. The reasons of the Court distinguish between the two separate conditions of the double exclusion formula, noting that it was sufficient to decide whether the dispute arose before or after the date of the declaration. Referring to discussions in the Security Council in late March 1999, the Court held that a legal dispute had arisen well before the declaration. Moreover, the fact that the dispute and the use of force giving rise to the dispute had persisted was "not such as to alter the date on which the dispute arose ..."[60]. And finally, the Court pointed out that the Applicant had 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 Canada"[61].

72. Nothing has been added that would change this assessment. On the contrary, the material filed with the Applicant's Memorial places it beyond any doubt. The chronology of "facts" in Part I of the Memorial begins on 24 March 1999 with the inception of the NATO bombing. There is no suggestion that anything changed when 25 April 1999 was reached: it appears as a date like any other in a continuous sequence of events[62]. The two volumes entitled *NATO Crimes in Yugoslavia: Documentary Evidence* cover the entire period from 24 March 1999 to 10 June of that year. Annex 177 of the Memorial sets out the records of the Security Council meetings to which the Court attached importance in its *Order of 2 June 1999*. There could be no doubt on reading Mr. Jovanović's statement before the Security Council that the dispute forming the object of the

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[58] See para. 2 of the separate opinion of Judge Higgins appended to the *Order of 2 June 1999, supra*, n. 2.

[59] *Order of 2 June 1999, supra,* n. 2, paras. 25-29.

[60] *Id.*, para. 28.

[61] *Ibid.*

[62] Memorial, p. 52.

Application had crystallized several weeks before the purported Optional Clause declaration was signed[63].

73. Indeed, except when addressing the issue of jurisdiction, the Applicant has always agreed that the dispute arose at the latest when the use of force began. This is clear from the terms of its letter of 24 March 1999 addressed to the President of the Security Council requesting an urgent meeting "to condemn and to stop the NATO aggression against the Federal Republic of Yugoslavia and to protect its sovereignty and territorial integrity"[64], and from its declaration of a "state of war" on the same date[65]. It is clear as well from the terms of the Application, from the request for provisional measures, which specifically refers to events in March and April 1999 that pre-date the declaration, and from statements made by counsel in the oral Pleadings on that request[66]. There is no need to dwell on the point, because it is inconceivable that a dispute relating to a military action should have arisen weeks after it began, which is what the Applicant would have to show in order to overcome its own reservation.

74. Nowhere has the issue of continuing disputes in relation to time conditions been more closely scrutinized than in *Phosphates in Morocco*, and nowhere have the guiding principles been more clearly stated. The Permanent Court of International Justice was faced with a dispute that had several phases and several dimensions, originating before the ratification of the declaration but extending well beyond that date. The applicant in that case submitted that the whole sequence of events constituted "a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date ..."[67]. The Permanent Court was unequivocal in rejecting the view that an evolving dispute relates to situations or facts subsequent to the relevant date, where those situations or facts "either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute"[68].

75. In one important respect the issue in *Phosphates in Morocco* differed from the present case. The time condition was based, as here, on the double exclusion of the Belgian formula. It was agreed, however, that the dispute had arisen after the relevant date. Thus the first condition under the double formula created no obstacle to jurisdiction. The focus was on the second aspect: whether the dispute had arisen "with regard to situations or facts" subsequent to the relevant date. The present

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[63] Annex 177 of the Memorial, p. 523ff.

[64] 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, UN Doc. S/1999/322 (1999) (Annex 15).

[65] 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, UN Doc. S/1999/327 (1999) (Annex 16).

[66] Statement by Mr. Mitic, counsel for the Applicant, before the International Court of Justice, CR 99/14, 10 May 1999, referring to "the beginning of the aggression on 24 March 1999" (Annex 17).

[67] *Phosphates in Morocco*, *supra*, n. 56, p. 23.

[68] *Id.*, p. 24. See also para. 6 of the separate opinion of Judge Higgins appended to the *Order of 2 June 1999*, *supra*, n. 2.

case presents far less difficulty. Since the dispute arose before the entry into force of the declaration, that by itself is enough to exclude jurisdiction. There is nothing further to be considered.

76. Less than a year following *Phosphates in Morocco*, the Permanent Court had a second occasion to apply a temporal reservation based on the double exclusion of the Belgian formula, in *Electricity Company of Sofia and Bulgaria*. Once again it was conceded that the dispute had arisen after the relevant date, and once again the distinction is fundamental.

77. The present case - unlike either *Phosphates in Morocco* or *Electricity Company of Sofia and Bulgaria* - can be decided exclusively on the basis of the first condition in the formula. In other words, it can be decided on the basis of when the dispute arose. And this, in fact, is precisely what the Court decided in its *Order of 2 June 1999*.

c. "New elements" in the dispute cannot change its date of origin

78. The Applicant has attempted to overcome its own reservation by grafting on to its claim a series of allegations about the United Nations peacekeeping operation under Security Council Resolution 1244[69]. The Applicant submits that the dispute "matured", "aggravated and extended", and acquired "new elements" as a result of alleged mistreatment of Serbs and other non-Albanian groups after 10 June 1999[70]. It argues, on this basis, that the dispute did not arise "in full" until after that date[71].

79. The implications of this argument are astonishing. It would mean that the Application was filed on 29 April 1999 in relation to a future dispute - a dispute that had not yet crystallized, and that remained in the realm of speculation and hypothesis. It would mean as well that a dispute relating to the "Violation of the Obligation Not to Use Force" - terms chosen by the Applicant - or the "Legality of Use of Force" - as the Court describes this case - arose only when the use of force had ended, in June 1999. No argument so much at odds with reality and common sense could have a legal basis.

80. The argument overlooks the duality of the criterion in the Belgian formula which the Applicant has elected to use. The Applicant has treated the two conditions as if they were alternatives, linked by the word "or". But the word "or" is not used to connect the two conditions. The conditions are cumulative, not alternative. If the dispute originated in the past, the introduction of new "situations or facts" as time goes on does nothing to cure the absence of jurisdiction.

81. The argument is also replete with contradictions, explicit and implicit. In a single passage the Applicant states first that the dispute "arose" in Security Council discussions on 24 and 26

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[69] SC Res. 1244, UN SCOR, 54th Year, UN Doc. S/RES/1244 (1999) (Annex 1KK).

[70] Memorial, pp. 8-9, paras. 12-16, and pp. 339-340, paras. 3.2.11-3.2.16.

[71] *Id.*, p. 340, para. 3.2.14.

March 1999, and then that the dispute "arose" only after 25 April 1999 "when all its constituent elements arose"[72]. More fundamentally, the argument implies one of two untenable propositions: either that there was no dispute when the Application was filed on 29 April 1999, or else that a single dispute may be said to have arisen at several different times. Consequently, the Applicant must either take the position that the new elements form part of the original dispute, or else it must take the position that they form part of a new and separate dispute. In the first case, the time condition excludes jurisdiction. In the second, the new allegations are inadmissible and irrelevant to the present case. On either basis, the new elements can have no effect on the jurisdiction of the Court.

82. In fact, the Applicant has insisted with some emphasis that the "new elements" form an integral part of the original dispute. It states: "No doubt that these new disputed elements are part and parcel of the dispute related to the bombing of the territory of the Applicant"[73]. On this view, the new elements would represent no more than the continuation and extension of the original dispute. It would make no difference whether the dispute has been aggravated or extended, or whether it has acquired new elements. If it were a single dispute, it would necessarily have a single point of origin, which has already been identified by the Court as late March 1999, well before the effective date of the declaration.

d. All the "constituent elements" of the dispute were in place by 25 April 1999

83. According to the *Right of Passage (Merits)* case, a dispute cannot be said to "arise" until all its constituent elements have come into existence[74]. It is impossible to see how this precedent can provide any assistance to the Applicant. The constituent elements of a dispute are complete, in the words of the *Right of Passage (Merits)* case, when the parties "adopt clearly-defined legal positions as against each other"[75]. The *Order of 2 June 1999* has already determined that the dispute - and therefore all its constituent elements - had come into existence before 25 April 1999, with the result that there is no basis for jurisdiction under the declaration.

84. The dispute arose when the conditions specified in the classic definition from the *Mavrommatis Palestine Concessions* judgment had been fulfilled: in other words, as soon as the parties were divided by "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons"[76]. It would be ludicrous to suggest that there was no such conflict of legal views or interests during the NATO bombing campaign. If the essential constituent elements of the dispute were held to include "new elements" subsequent to 10 June 1999, the result would be that there was no dispute between the parties when the proceedings were brought and that the

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[72] *Id.*, p. 340, para. 3.2.16, last two sentences.

[73] *Id.*, p. 339, para. 3.2.12.

[74] *Supra*, n. 9, p. 34.

[75] *Ibid.*

[76] *Supra*, n. 56, p. 11.

Application had no object. That would be incompatible not only with reality but with the assumptions on which the Court relied in issuing its *Order of 2 June 1999*.

85. Nor, of course, can the *Right of Passage (Merits)* doctrine be taken to mean that a protracted, evolving dispute can never arise until its evolution has come to an end. This would lead to the absurd position that the dispute could not arise until it had been settled[77]. Clearly, then, the "constituent elements" essential to the existence of a dispute need not include all the various phases and developments of an evolving dispute from its inception to its final conclusion[78]. Just as there could not be a new dispute with "each individual air attack", as the Court observed in its *Order of 2 June 1999*, a single dispute cannot be born anew, arising over and over again, with each new phase of its continuing development[79]. This would subvert the intent of the temporal reservation.

e. The dispute also relates to "situations or facts" prior to the declaration

86. For all these reasons, jurisdiction is excluded in this case by virtue of the first condition of the temporal reservation: its limitation to disputes "arising or which may arise" subsequent to the signature of the declaration[80]. And while there is strictly speaking no need to consider the second condition, it is also clear that the dispute, characterized by the Applicant as one involving the use of force by NATO members, has arisen "with regard to situations or facts" prior to the signature of the declaration, and jurisdiction can be ruled out on that basis as well[81].

87. The continuing use of force after the date of the declaration until June 1999 entails no difficulty: it represents at most what the *Phosphates in Morocco* judgment termed the "confirmation or development of earlier situations or facts ..."[82]. The Court has already determined that continuing use of force does not imply the existence of "new disputes, distinct from the initial one", and there is nothing that should prompt a reconsideration of that finding[83].

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[77] That, moreover, would lead to the further absurdity that protracted disputes could never be the object of a judicial settlement. No dispute could arise while the conflict remained active - since that implies new developments as time goes on - while after its final settlement the dispute would lose its object and become moot (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457).

[78] *Right of Passage (Merits)*, *supra*, n. 9, p. 34

[79] *Order of 2 June 1999*, *supra*, n. 2, para. 28.

[80] Application.

[81] *Ibid.*

[82] *Supra*, n. 56, p. 24.

[83] *Order of 2 June 1999*, *supra*, n. 2, para. 28.

88. By contrast, the "new elements" relating to ethnic strife in Kosovo since June 1999 are fundamentally distinct from the original claim and are therefore inadmissible[84]. But the Applicant has elected to treat the entire sequence of events as an indivisible whole, and it is bound by the consequences of its own position. If the new elements were really "part and parcel" of the original dispute, they would necessarily constitute merely the "confirmation or development" of earlier situations or facts[85]. As such, they would do nothing to overcome the absence of jurisdiction flowing from the Applicant's own temporal reservation.

89. The jurisprudence - *Phosphates in Morocco* and *Right of Passage (Merits)* among others - also shows that where a dispute evolves over time, and it is necessary to determine whether the relevant "situations or facts" are prior or subsequent to the declaration, what counts is the situations or facts that constitute the "source"[86] of the dispute or the "real cause"[87]. This leaves some room for judicial appreciation, but it also shows that the decisive facts are those at the origin of the dispute, not those arising over the course of its evolution or at its culminating point. In this case, the "real cause" of the dispute - and thus the origin of all that followed - was the use of force by NATO, coupled with the antecedent pattern of humanitarian abuses and failed negotiations that precipitated the conflict. On no view of the matter could the "real cause" be situated after the signature of the declaration.

90. The attempt to use the latest events in Kosovo to overcome the temporal reservation commits the Applicant to an insoluble dilemma. If the new elements are not "part and parcel" of the original dispute, then they are inadmissible for reasons that will be developed below. If they are "part and parcel" of the original dispute, then they are excluded from jurisdiction by virtue of both parts of the double exclusion used in the reservation. On either basis, the attempt to bring these new elements before the Court must fail. When the Application was filed, the dispute had arisen with regard to situations and facts that preceded the signature of the declaration, and so it remains to this day.

f. *Jurisdiction is established as of the date of the application and not later*

91. There is a further consideration. The jurisdiction of the Court is established once and for all as of the date of the application. Jurisdiction in relation to a case is not and cannot be a moving target, something that fluctuates from day to day as the litigation develops. The certainty and stability essential to the proper administration of justice require a fixed date on which jurisdiction either exists or does not exist.

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[84] See Chapter III below.

[85] Memorial, p. 339, para. 3.2.12; *Phosphates in Morocco, supra*, n. 56, p. 24.

[86] *Phosphates in Morocco, supra*, n. 56, p. 23; see also *Right of Passage (Merits), supra*, n. 9, p. 35, and *Electricity Company of Sofia and Bulgaria, supra*, n. 54, p. 82.

[87] *Right of Passage (Merits), supra*, n. 9, p. 35.

92. The principle is one of long standing, applied in both *Nottebohm* and *Right of Passage (Preliminary Objections)* in support of the proposition that the withdrawal of a declaration after the institution of proceedings cannot deprive the Court of jurisdiction validly conferred as of the date of the application[88]. It was reaffirmed recently in 1998, in the *Lockerbie* case, where the Court referred to the date of the application and to certain subsequent Security Council resolutions and went on to state:

> "In accordance with its established jurisprudence, if the Court had jurisdiction at that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established ..."[89].

The converse of this proposition is that a substantive absence of jurisdiction on the date of the application cannot be cured by subsequent events.

93. The application of this principle has been relaxed to overcome defects of form which are within the power of the Applicant to remedy at any time. The Applicant relies in this respect on the recent decision on preliminary objections in the *Application of the Genocide Convention* case, though only in connection with the twelve-month restriction in the United Kingdom declaration, which is not relevant here[90]. In that decision, the Court held that jurisdiction could not be set aside only because - on one possible view - the application might have been a few days early. The Court said "it should not penalize a defect in a procedural act which the applicant could easily remedy"[91].

94. But a substantive absence of jurisdiction under the self-imposed limitations of the Applicant's own instrument is in no sense a defect of form. It makes the Application a nullity, which no one can remedy. In the judgment on preliminary objections in the *Application of the Genocide Convention* case and the other cases referred to in that decision, the dispute was within what the Court has referred to as the "scope and substance" of the jurisdictional instrument, subject only to a prescribed lapse of time or to a procedural precondition[92]. Here, the absence of jurisdiction is

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[88] *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953* p. 123; *Right of Passage (Preliminary Objections), supra*, n. 50, p. 142.

[89] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, para. 38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, para. 37.

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

[91] *Id.*, p. 613, para. 26. The application in that case would have been premature only on the assumption that Bosnia and Herzegovina did not **succeed** to the *Genocide Convention* (as contended), but rather **acceded** to it subject to the 90-day delay provided for in that Convention. The Court preferred the view that Bosnia and Herzegovina had succeeded to the Convention.

[92] *Military and Paramilitary Activities, supra*, n. 48, p. 419, para. 62.

inherent, and central to the purpose of the temporal limitation the Applicant freely chose to adopt. If the substance of reservations - be they *ratione materiae* or *ratione temporis* - could be disregarded at will as mere procedural or formal defects, the whole principle of consent and the importance attached to the intention of States would be seriously impaired, if not destroyed.

Conclusion

95. The applicable resolutions are authoritative and clear: the Applicant "cannot continue automatically" the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations[93]. The relevant instruments are consistent only with the position that the Applicant does not continue the legal personality of the former Socialist Federal Republic of Yugoslavia and that, in order to become a Member of the United Nations, it must apply and be admitted in accordance with Article 4 of the Charter.

96. Only a party to the Statute of the Court can make a valid declaration under the Optional Clause, and only Members of the United Nations and other States that have met the conditions of Article 93, paragraph 2, of the Charter, are parties to the Statute. The Applicant belongs to neither category. It is not therefore eligible to avail itself of the provisions of Article 36, paragraph 2, and the purported declaration it signed on 25 April 1999 is a nullity.

97. Nevertheless, the Court may find it appropriate to deal with the issue on the basis of the terms used by the Applicant itself, as it did in the *Order of 2 June 1999*, with respect to provisional measures. If so, the outcome for these proceedings is the same: the Court has no jurisdiction under the terms of the purported declaration because of the reservation *ratione temporis* it contains.

98. The Court has recently reaffirmed the basic principles for the interpretation of Optional Clause declarations in the *Fisheries Jurisdiction* case: a declaration is to be interpreted "'in harmony with a natural and reasonable way of reading the text'"[94]. The notion that the dispute arose weeks after the application was filed, or that a dispute triggered by a military campaign that began in March arose after the campaign ended, is not in harmony with such a reading of the text. Indeed, the suggestion that a dispute respecting the use of force arose only when the use of force was brought to an end is about as far from a "natural and reasonable" reading as it would be possible to imagine.

99. An Optional Clause declaration is also to be interpreted "having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court"[95], although this of course is the intention disclosed by the text "'as it stands, having regard to the words

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[93] SC Res. 777, *supra*, n. 5 (Annex 1A), and GA Res. 47/1, *supra*, n. 5 (Annex 1B).

[94] *Supra*, n. 23, para. 47, quoting *Anglo-Iranian Oil, supra*, n. 53, p. 104.

[95] *Id.*, para. 49. See also *Anglo-Iranian Oil, supra*, n. 53, p. 104, and *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 29, para. 69.

actually used'"[96]. The intent of the Federal Republic of Yugoslavia as disclosed by the text as it stands is clear: to limit its acceptance to disputes arising after 25 April 1999, with regard to situations or facts subsequent to the same date, in accordance with a time-honoured formula.

100. Though the intention is clear, there may have been a strategic calculation that somehow a distinct dispute subsequent to 25 April 1999 could be identified, and that the Applicant could enjoy the protection of its reservation without paying the price exacted by the principle of reciprocity - namely, that it could "have its cake and eat it too". If so, the strategy has no basis in law. The Court has already rejected the contention that the dispute consists of a multiplicity of disputes, some of which could meet the temporal condition. The Court has rejected the attempt to subdivide the dispute and has instead asserted the unity of the dispute, which is the real lesson to be drawn from the *Right of Passage (Merits)* case. This dispute, as the Court noted in its initial ruling, arose in March 1999, weeks before the declaration was filed. Even if the declaration were valid, it would confer no jurisdiction on the Court in relation to the present dispute.

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[96] *Fisheries Jurisdiction, supra,* n. 23, para. 47, quoting *Anglo-Iranian Oil, supra,* n. 53, p. 105.

CHAPTER II

THE COURT LACKS JURISDICTION UNDER THE *GENOCIDE CONVENTION*

Introduction: The test of treaty-based jurisdiction

101. At the most fundamental level, the basis of jurisdiction under the Optional Clause and under treaties containing a compromissory clause is the same. A genuine consent freely given is the essential prerequisite, whatever the basis of jurisdiction. There are, however, two differences where a treaty is at issue. First, the special considerations arising out of the unilateral nature of an Optional Clause declaration no longer apply. Second, the rules of treaty interpretation codified in Articles 31 and 32 of the 1969 *Vienna Convention on the Law of Treaties* have a direct and not merely an analogical application to the language conferring jurisdiction[97].

102. The Applicant relies in this case on Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* as a basis of jurisdiction. What must be determined is whether, on accepted principles of interpretation, it is reasonable to impute an intention to the parties to consent to an adjudication on the merits of allegations that - even if they had a basis in fact, which they do not - amount in substance to allegations of violations of quite different instruments respecting the law of war, and which fail to disclose any of the specific features that distinguish the crime of genocide from *jus ad bellum* and *jus in bello*. And the answer is clear: no such consent can reasonably be inferred from Article IX.

103. The recent jurisprudence of the Court provides authoritative guidance on the test of jurisdiction to be applied under a compromissory clause of a treaty. The Court must determine whether the alleged violations "do or do not fall within the provisions of the Treaty ..."[98]. This is the formulation used in the judgment on preliminary objections in *Oil Platforms*, where the Court stated that it -

> "cannot limit itself to noting that one of the Parties maintains that ... 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 ..."[99].

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[97] 23 May 1969, UN Doc. A/CONF.39/27 (1969), Can. T.S. 1980/37 (Annex 18).

[98] *Oil Platforms*, *supra*, n. 11, p. 810, para. 16.

[99] *Ibid.*

The same test had been applied by the Court some months earlier, in a matter of obvious relevance to the present case, in the judgment on preliminary objections in the *Application of the Genocide Convention* case[100].

104. The test as formulated in these cases sets a high standard. It is not sufficient that a treaty with a compromissory clause should be invoked in the Pleadings, or that a violation of such a treaty should be alleged by one party and denied by the other. The test adopted by the Court in *Oil Platforms* and *Application of the Genocide Convention* requires a definitive determination that the allegations made by the Applicant would "fall within" the provisions of the treaty if proved[101].

105. The practical application of the test in *Oil Platforms* is illustrative. The Court undertook a painstaking and exhaustive analysis of the provisions of the 1955 *Treaty of Amity, Economic Relations and Consular Rights* between Iran and the United States, and reached a number of definite conclusions about the scope of the treaty as related to the claim before the Court. There was nothing provisional about its findings in this respect. Jurisdiction was assumed on the basis of the Court's interpretation of the expression "freedom of commerce" in Article X, which was found capable of providing a basis for evaluating the lawfulness of the destruction of the oil platforms[102]. Had the Court reached the opposite conclusion - that the subject matter was outside the scope of Article X (as in fact it did with respect to Articles I and IV) - it is clear that the case would have been dismissed for want of jurisdiction.

A. The Applicant disregards the special nature of the *Genocide Convention*

1. The historical background of the *Genocide Convention*

106. The Federal Republic of Yugoslavia has asked the Court to take jurisdiction over its Application against Canada in respect of the North Atlantic Treaty Organization's ("NATO") military campaign, as well as in respect of Canada's participation in the United Nations Kosovo Force ("KFOR"), based on Article IX of the *Genocide Convention*. Because of the gravity of any allegation of genocide, it is useful briefly to recall the conceptual and legal basis of the Convention.

107. The *Genocide Convention* was born out of the atrocities committed by Germany's National Socialist regime prior to and during World War II. Among the very earliest human rights-related instruments to obtain sufficient political momentum to enter into force as a legally binding treaty, the *Genocide Convention* served to give legal expression to States' revulsion over the deliberately planned and meticulously executed slaughter of whole population groups, based on an ideology founded on discrimination by race, religion, ethnicity or nationality.

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[100] *Supra*, n. 90, p. 615, para. 30.

[101] *Ibid.; Oil Platforms, supra*, n. 11, p. 810, para. 16.

[102] *Oil Platforms, supra*, n. 11, p. 820, para. 51.

108. Bearing in mind the special nature of the crime that a treaty on genocide was intended to address, and the already well-established legal concepts of crimes against peace, war crimes, and crimes against humanity that were confirmed in the Nuremberg *Charter of the International Military Tribunal*[103], the Secretary-General of the United Nations, in presenting the Convention's initial draft, noted that genocide should be defined so as not to encroach "on other notions which logically are and should be distinct"[104]. This determination was subsequently given effect in Article II of the *Genocide Convention*, which created a *sui generis* crime both the specificity and the gravity of which served - and continue to serve - to give the *Genocide Convention* a special status in international law.

109. In the intervening years since the entry into force of the Convention - in response to what many considered a single historical aberration that has proven to be the most egregious, but far from uncommon, form of State policy - genocide has rightly come to be seen by international tribunals and legal scholars as the "crime of crimes"[105]. As early as 1951, the Court noted in the *Reservations* case that -

> "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 ..."[106].

110. It is against this background, which unequivocally establishes the *Genocide Convention* as the apex of international criminal and human rights law, that the Applicant seeks to convince this Court to take jurisdiction over actions by NATO military forces in the context of the military campaign of March through June 1999, and over actions or omissions by participating States in the Security Council mandated KFOR operation. The argument disregards the core elements of the Convention and the very concept of genocide.

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[103] *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 Aug. 1945, 82 U.N.T.S. 280 (Annex 19).

[104] *Draft Convention on the Crime of Genocide*, UN ESCOR, 1947, UN Doc. E/447, p.15, as quoted in SCHABAS, *The Law of Genocide*, Cambridge University Press [forthcoming, draft of 6 May 1999], p. 64 (Annex 20). The Draft was prepared by the Secretary-General in pursuance of an Economic and Social Council Resolution of 28 March 1947.

[105] See *Prosecutor v. Kambanda* (Case no. ICTR-97-23-S), Judgment and Sentence, 4 Sept. 1998, para. 16 (Annex 21); *Prosecutor v. Serashugo* (Case no. ICTR-98-39-S), Sentence, 5 Feb. 1999, para. II.B.4 (Annex 22); *Prosecutor v. Musema* (Case no. ICTR-96-13-T), Judgment and Sentence, 27 Jan. 2000, para. 981 (Annex 23).

[106] *Supra*, n. 26, p. 23.

2. The unique nature of the *Genocide Convention* requires a rigorous examination of allegations before jurisdiction can be granted under Article IX

111. The *Genocide Convention* is primarily an instrument of international criminal law, and as such mandates specificity in any allegations and charges brought under its purview. Moreover, as noted above, it deals with the most serious of crimes. Accordingly, the standard that must be applied in determining whether the Convention applies to a given set of circumstances must be a high one, and must take into account the specificity of the definition that lies at the heart of the Convention.

112. There is only one recognized definition of the crime of genocide. This definition appears in the *Genocide Convention*, repeated unchanged in the *Draft Code of Crimes against the Peace and Security of Mankind*[107], the Statutes for the International Criminal Tribunals for the former Yugoslavia[108] and for Rwanda[109], and in the *Rome Statute of the International Criminal Court*[110], and is indisputably part of customary international law. Both under the terms of the Convention and under customary international law, that single definition must therefore determine the parameters of the crime of genocide both in respect of individual criminal liability, and in respect of the responsibilities of States Parties. Unless the Court is satisfied that the Federal Republic of Yugoslavia's Application discloses all the constituent elements of the crime of genocide, it would be inappropriate, *ratione materiae*, for it to take jurisdiction on the basis of Article IX of the Convention over the claim brought against Canada.

a. The allegations of genocide must disclose the existence of a specific intent (*dolus specialis*)

i) The specific intent requirement in Article II of the Genocide Convention is an integral element of the crime of genocide

113. Article II of the *Genocide Convention* defines genocide as -

> "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;

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[107] *Report of the International Law Comission on the work of its forty-eighth session (6 May - 26 July 1996)* (UN Doc. A/51/10) in *Yearbook of the International Law Commission 1996*, Vol. II, Part 2, pp. 17-56, Article 17 (Annex 24).

[108] *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, 48th Year, UN Doc. S/25704 (1993), pp. 36-48, Article 4 (Annex 25).

[109] SC Res. 955, UN SCOR, 49th Year, UN Doc. S/RES/955 (1994) and Annex, Article 2 (Annex 26).

[110] UN Doc. A/CONF.183/9 (1998), Article 6 (Annex 27).

(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."

The definition reflects the existence of a mandatory relationship between certain enumerated acts, in themselves intentional, and an overriding specific intent that underlies their commission.

114. In its commentary on Article 17 of the *Draft Code of Crimes against the Peace and Security of Mankind*, which incorporated Article II of the *Genocide Convention* verbatim, the International Law Commission stated in 1996:

> "As regards the first element, the definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law. The prohibited acts enumerated in subparagraphs (*a*) to (*e*) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act"[111].

This view is reflected in the jurisprudence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia[112].

115. In the light of the historical concept of genocide, its definition in the Convention and its consistent application by domestic[113] and international tribunals, it is clear that the specific "intent to destroy" is its primary constituent element. Without that specific intent, the concept of genocide and hence the Convention are wholly inapplicable, both in fact and in law. In respect of individuals charged with the crime of genocide, convictions have succeeded where this specific intent was

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[111] *Supra*, n. 107, p. 44 (Annex 24).

[112] *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 Sept. 1998, para. 498 (Annex 28); *Prosecutor v. Jelisic*, (ICTY Case No. IT-95-10), Judgment and Sentence, 14 Dec. 1999, para. 66 (Annex 29).

[113] See, e.g., *A.-G. Israel v. Adolf Eichmann*, (1968) 36 I.L.R. 5, pp. 233-234 (Annex 30), and *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations* (<http://hrdata.aaas.org/ceh/report/english/conc1.html>), para. 120 (Annex 31). Even where domestic tribunals do not operate with a verbatim reproduction of the Article II definition, their views concerning the specific intent requirement are relevant insofar as they reflect those "principles underlying the Convention [that] are principles which are recognized by civilized nations as binding on States ..." (*Reservations*, *supra*, n. 26, p. 23).

proven to have been present (*Prosecutor v. Akayesu*[114]; *Prosecutor v. Musema*[115]) and failed where it was not (*Prosecutor v. Jelisic*[116]).

116. It is clear from the foregoing that without the element of a specific intent none of the crimes enumerated within Article II can amount to genocide. Even the closely linked crime of extermination, as discussed at length in the 1996 Report of the International Law Commission, must be distinguished from genocide on that basis[117].

117. The Convention holds a special place in international law. In it, and in the definition of the crime it addresses, the international protection of human rights and criminal law intersect and become inseparable. Removing the specific intent requirement, which links the concept of mass murder to the gravest of human rights violations and thus provides the particular element of moral turpitude that underlies the crime of genocide, would lead to an erosion and trivialization of the offence[118]. Without at least *de minimis* evidence of the existence of such an intent, no complaint may be styled or entertained under that Convention.

ii) The specific intent requirement cannot be replaced with references to alleged violations of other bodies of international law

118. The Applicant seeks to infer the necessary intent required under the *Genocide Convention* by introducing a number of concepts and legal instruments from the international law relating to the use of force (*jus ad bellum*) and international humanitarian law (*jus in bello*), as the following sections of this chapter will explain[119]. The Applicant's suggestion that the intent to commit genocide can be inferred from the means and methods of warfare would be an unacceptable and ill-advised extension of the Convention.

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[114] *Supra*, n. 112 (Annex 28).

[115] *Supra*, n. 105 (Annex 23).

[116] *Supra*, n. 112 (Annex 29).

[117] *Supra*, n. 107, p. 48 (Annex 24).

[118] In a forthcoming book, Professor William Schabas makes a cogent argument against erosion of the specific intent requirement: "But while the desire to extend the reach of international law so as to cover negligent behaviour of governments and corporations is commendable, this becomes somewhat far removed from the stigmatization of genocide as the 'crime of crimes' for which the highest level of evil and malicious intent is presumed. The danger, in fact, is that extension of the scope of genocide to crimes of negligence will trivialize the entire concept" (SCHABAS, *supra*, n. 104, p. 197 (Annex 32)).

[119] See, e.g., the 1976 *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques*, 10 Dec. 1976, UN Doc. A/RES/31/72; the 1907 *Hague IV Convention concerning the Laws and Customs Of War on Land* and annexed *Regulations Respecting the Laws and Customs Of War on Land*, 18 Oct. 1907, B.T.S. 1910/9; the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict* and Protocol, 14 May 1954, 249 U.N.T.S. 215, Can. T.S. 1999/52; and, the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects*, and its Protocols, 10 Oct. 1980, UN Doc. A/CONF.95/15 and Corr. 1-5, to name but a few relevant treaties.

119. The terms and intent of the *Genocide Convention* are wholly inconsistent with an approach which merely infers the specific intent to commit genocide from the use of certain means or methods of warfare. Neither do the *travaux préparatoires* suggest that such an inclusion was ever contemplated. The drafters of the Convention, as evident from the *travaux préparatoires*, decided at an early stage to keep the concept of genocide distinct from other bodies of law precisely in order to preserve its special character, and to ensure universal acceptance and adherence[120].

iii) The intent to commit genocide cannot be inferred from the alleged intent or actions of others

120. General principles of criminal law establish that the intent to commit a crime is a subjective one, which must be ascribed to the alleged perpetrator. Article 30, paragraph 2, in Part 3 ("General Principles of Criminal Law") of the *Rome Statute of the International Criminal Court* thus states that:

> "2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, **that person means to engage** in the conduct;
> (b) In relation to a consequence, **that person means to cause** that consequence or is aware that it will occur in the ordinary course of events"[121].

121. Accordingly, for a charge of genocide to succeed, it is insufficient to allege that a genocidal intent resided with a third party or a collective body. It must be shown that the alleged perpetrator had such an intent, or acted in full knowledge and furtherance of genocidal intent in others[122]. It is therefore not open to the Federal Republic of Yugoslavia to plead violations of the *Genocide Convention* by Canada without offering at least prima facie evidence that Canada itself had the special intent or knowledge required to make the provisions of the Convention applicable.

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[120] *Draft Convention on the Crime of Genocide*, *supra*, n. 104, pp. 16-17, as quoted in SCHABAS, *supra*, n. 104, pp. 64-65 (Annex 20).

[121] *Supra*, n. 110 (Annex 27) [emphasis added].

[122] Useful insights as to how the intentions of one accused may intersect with those of third parties are contained in *Prosecutor v. Akayesu*, *supra*, n. 112, a judgment of the International Criminal Tribunal for Rwanda, in the context of an extensive discussion of contributory offences such as conspiracy, aiding and abetting, and being an accomplice (none of which are alleged by the Applicant against Canada) (Annex 28). The Tribunal noted at para. 541 that "if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group."

b. The allegations of genocide must disclose a discriminatory intent towards a group "as such"

122. The second constituent element of the crime of genocide, namely the substantive content of the intent that is required to constitute the crime, is the destruction, "in whole or in part, of a national, ethnical, racial or religious group, **as such**" [emphasis added].

123. As noted above, the *Genocide Convention* cuts across both international criminal law and the international law of human rights. The crime of genocide denies not only the right to life of its individual victims but that of an entire group. The defining characteristic of genocide is therefore an element of persecution and discrimination. The addition of the words "as such" in Article II and their extensive discussion in the meetings of the Ad Hoc Drafting Committee demonstrate that the targeting of a group *qua* its collective character is a necessary element of the offence itself[123]. The United Nations Commission of Experts on violations of international humanitarian law in the former Yugoslavia, established pursuant to Security Council Resolution 780 of 6 October 1992, explained the meaning of these words in the definition most succinctly: "the crimes against a number of individuals must be directed at them in their **collectivity** or at them in their **collective** character or capacity"[124].

124. The International Law Commission, in its 1996 Report, further summarized this second constituent part of the intent requirement in Article II in the following terms:

> "The 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. ... The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means **used to achieve the ultimate criminal objective with respect to the group**"[125].

As a result, at least some evidence of this element must be led by the Applicant in order to bring a claim within the ambit of the *Genocide Convention* and its compromissory clause; the Applicant's Memorial contains none.

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[123] Prof. William Schabas notes that "it should be necessary for the prosecution to establish that genocide, taken in its collective dimension, was committed 'on the grounds of nationality, race, ethnicity, or religion'. The crime must, in other words, be motivated by hatred of the group. The purpose of criminalizing genocide was to punish crimes of this nature, not crimes of collective murder prompted by other motives" (*supra*, n. 104, p. 222) (Annex 32).

[124] As cited in SCHABAS, *supra*, n. 104, pp. 218-219 (Annex 33) [emphasis added].

[125] *Supra*, n. 107, p. 45 (Annex 24) [emphasis added]. The *Jelisic* case confirms this analysis, before elaborating on the need to prove the discriminatory or persecutory nature of the acts alleged to constitute genocide (*Prosecutor v. Jelisic*, *supra*, n. 112, para. 66ff (Annex 29)).

B. The Applicant obscures the distinctions between genocide, the use of force and *jus in bello*

1. No attempt has been made to demonstrate that the claim falls within the *Genocide Convention*

125. In its *Order of 2 June 1999*, the Court concluded that Article IX of the *Genocide Convention* does not "constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case"[126]. This conclusion was based on a number of considerations, including the following:

- the *Oil Platforms* test was cited and applied;
- the Court noted that the threat or use of force does not in itself constitute genocide;
- referring to the recent *Application of the Genocide Convention* case, the Court stated that the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; and,
- quoting the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court said it did not appear at that 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'" as required by the Convention[127].

126. In the face of this careful reasoning, the Applicant's response is cursory in the extreme. It is found in a single paragraph at the end of Part Three of the Memorial ("Jurisdiction of the Court")[128]. There is no attempt whatsoever to come to grips with the difficulties identified in the Court's *Order of 2 June 1999*. The Applicant simply asserts that it has submitted evidence of 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", and that "[a]ccordingly, the Applicant claims that the jurisdiction of the Court, based on Article IX of the Genocide Convention is established"[129].

127. This is not an argument. It is a bare, unsupported affirmation that the Convention applies, which the Court has already described as insufficient to found jurisdiction - even prima facie jurisdiction - based on a compromissory clause in a treaty.

128. The "evidence" of "genocide" adduced by the Federal Republic of Yugoslavia - even apart from any legal considerations - is factually unfounded, distorted and based on unwarranted inference.

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[126] *Supra*, n. 2, para. 40.

[127] *Id.*, para. 39.

[128] Memorial p. 349, para. 3.4.3.

[129] *Ibid.*

But independently of their truth or falsehood, the Applicant's accusations fail to disclose any of the specific traits that distinguish genocide from other crimes against humanity, and make it the gravest of international crimes. There is an affirmation of genocidal intent, but that is not enough. What is lacking is any factual allegation - whether true or false - that would indicate an intention to destroy physically a "national, ethnical, racial or religious group, as such".

129. A close reading of the relevant portions of the Applicant's Memorial shows that no attempt has been made to satisfy the test of treaty-based jurisdiction in *Oil Platforms* and other leading cases. The single paragraph on Article IX jurisdiction - an assertion, but not an argument - has already been mentioned. Part Two ("Law") includes a section of less than a page entitled "Obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide"[130]. It consists of quoted excerpts from Articles I, II, III and IX, with no commentary and with no attempt to link these provisions to the facts alleged. There is no explanation as to exactly why the Applicant considers that its allegations add up to a violation of the Convention. In fact, the Respondent and the Court have been left with no legal argument on the issue at all.

130. Part One ("Facts") includes a section entitled "Facts Related to the Existence of an Intent to Commit Genocide"[131]. This is presumably the material referred to in the paragraph on Article IX jurisdiction, where the Applicant states it has satisfied the jurisdictional deficiency apparent at the provisional measures stage by submitting evidence of intent to commit genocide. In fact, it has done no such thing, here or elsewhere.

131. So far as the allegations of killing, wounding and expulsion of Serbs in Kosovo and Metohija are concerned, the next section will demonstrate that there is not the slightest suggestion that any of the alleged crimes are due to acts or omissions by Canada. So far as the use of force by NATO is concerned, there is little or nothing in this Memorial that was not before the Court when it made its initial Order.

132. The Court was fully aware of the nature of the allegations against the NATO bombing campaign when it rendered its *Order of 2 June 1999*. In considering the *Genocide Convention* as a basis of jurisdiction, it took note of the Applicant's allegations with respect to "the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas", "'the pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium'", the targeting of "the Yugoslav nation as a whole" and "the use of certain weapons [with] long-term hazards to health and the environment ..."[132]. In its *Order of 2 June 1999*, the Court simply stressed that the use of force cannot in itself constitute an act of genocide. Nothing has been added since then, beyond the mere assertion that these acts denote a genocidal intent. There is consequently nothing that should lead the Court to alter the conclusions it reached provisionally in June 1999.

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[130] *Id.*, p. 326, paras. 2.7.1-2.7.4.

[131] *Id.*, pp. 282-284, paras. 1.6.6-1.6.2.5.

[132] *Order of 2 June 1999, supra*, n. 2, para. 34.

2. The Applicant obscures the distinction between genocide and other crimes

133. The Applicant's argument centres on the bombing of chemical industry plants in Pancevo, as well as the use of depleted uranium. The Applicant associates depleted uranium with serious illness and birth defects, though it has failed to allege that the substance was used by the Canadian forces[133]. It is asserted that the bombing of chemical plants can have "extremely severe consequences for health of a large number of people in a very wide area"[134] and that, since the bombing allegedly continued after the plants had been incapacitated, there must have been an intention to "expose a large number of inhabitants of Yugoslavia to extensive destruction"[135]. From these considerations, the existence of a genocidal intention is imputed as a logically necessary inference - the "only possible explanation"[136].

134. All these allegations are vigorously denied. But even if the issue of their veracity is put to one side, they do not add up to genocide within the meaning of the Convention. The use of indiscriminate weapons, or intentional damage to the natural environment prejudicing the health and safety of the civilian population, are crimes under international humanitarian law. They are crimes that, to adopt the words of this Court, offend "elementary considerations of humanity ..."[137]. But the suggestion that crimes under provisions of *jus in bello* designed to protect the civilian population can automatically be equated with genocide, and that such crimes *ipso facto* imply the existence of a genocidal intention, does more than blur the distinctions between instruments that are autonomous and distinct. It obliterates the distinctions altogether.

135. If they had any substance, the allegations advanced as evidence of a genocidal intent would fall within Part IV of the *Geneva Protocol I*, dealing with the protection of civilians in time of war. The allegations put forth by the Applicant as evidence of genocidal intent include no distinguishing element that sets them apart from the subject matter of *Geneva Protocol I*. They add absolutely nothing that would not inevitably be included in a charge or indictment under the provisions of that Protocol.

136. The implication is clear. The Applicant is treating genocide as identical in substance to quite distinct prohibitions under international humanitarian law. It is treating genocide as exactly the same thing as certain crimes codified in other legal instruments in the field of international humanitarian law. Crimes against civilians under these other instruments would *ipso facto* constitute genocide - and vice versa, at least in time of armed conflict. Each would become the alter ego of the other, the same thing under a different name.

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[133] Memorial, p. 283, para. 1.6.1.4.

[134] *Id.*, p. 282, para. 1.6.1.1.

[135] *Id.*, p. 283, para. 1.6.1.3.

[136] *Ibid.*

[137] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22.

137. The Applicant treats the two branches of law as if they covered exactly the same ground. This is the legal flaw at the heart of the Applicant's approach, and it is one which is entirely independent of the truth or falsehood of the facts alleged.

3. The Applicant disregards the defining elements of the crime of genocide

a. There is nothing to support the attribution of specific intent to Canada

138. Genocide, as the preceding section has explained, is above all a crime of specific intent. Yet there is not a single passage in the Memorial linking the Canadian government or Canadian officials to conduct that could provide a basis for imputing the requisite specific intent to Canada as a State.

139. Genocide is primarily a crime committed by individuals that States are required to punish and prevent. Assuming, however, that States as such can be charged with the crime of genocide, a specific intent to destroy a group must still constitute the essential defining characteristic of the crime. It is therefore a *sine qua non* of any charge of genocide against a State that it should be supported by assertions of specific intent on the part of that State or persons acting on its behalf. This essential material is lacking in the Applicant's Pleadings. The gap, moreover, could not be filled by allegations against Canada's allies in Operation Allied Force or against NATO itself. Specific intent is a state of mind, which is not something that can be indirectly attributed from the actions of other parties.

b. The Applicant assumes the existence of a presumption of genocidal intent

140. Specific intent as the defining characteristic of genocide has further implications. Allegations that civilians have been needlessly, even intentionally, exposed to destruction cannot by themselves bring the subject matter within the Convention. They must be accompanied by some factual basis - real or alleged - for believing that these acts were committed with intent to destroy a national, ethnical, racial, or religious group "as such". In the absence of such particulars, there can be no objective basis for finding that the subject matter of the claim "fall[s] within" the Convention, as required by the test in *Oil Platforms*[138].

141. There are no such particulars in the Applicant's Memorial. It is not simply that there is no evidence - indeed, all the evidence is to the contrary - but that the Applicant has failed even to allege a factual basis or set of circumstances that would allow the Court to infer the existence of a genocidal intention. It has listed a series of bombings by the NATO forces, along with an assertion that they had no military necessity and must therefore have intended to expose civilians to destruction. That might possibly be enough to bring the dispute within certain other instruments of international humanitarian law. But it does not bring it within the *Genocide Convention*.

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[138] *Oil Platforms*, *supra*, n. 11, p. 810, para. 16.

142. The Applicant's approach is based on the false assumption that an allegation that civilians were intentionally exposed to destruction without military justification, or to indiscriminate means of warfare, is a sufficient basis for inferring a genocidal intention. This is the fallacy implicit in the Applicant's use of the *Genocide Convention*. If it were accepted, three consequences would follow, all of them equally untenable.

- First, the commission of certain quite distinct crimes under international humanitarian law would create an irrebuttable presumption of genocidal intention. There is no textual basis for such a presumption in the *Genocide Convention*, which is clearly predicated on the requirement that the specific intent to destroy a group "as such" must exist in fact and therefore must be proved separately.

- Second, if genocidal intention were read automatically into the commission of these distinct crimes, the practical result would be the disappearance of specific intent from the legal definition of genocide.

- Third, if a genocidal intention were presumed to exist where one of these distinct crimes is committed, such crimes would automatically constitute genocide as well. More specifically, genocide would become, in effect, an included offence within certain other instruments of international humanitarian law and - as argued above - genocide and these distinct crimes would be treated as being synonymous.

143. The last point calls for an additional comment. The principle legal effect of the *Genocide Convention* is to define certain crimes and provide for their prevention and punishment. The Convention is an instrument of international criminal law, and concepts drawn from criminal law should govern its interpretation.

144. In criminal law, a crime of specific intent is one where it is not sufficient to allege that an act was committed. It must also be alleged - and eventually proved - that the act was committed with a specific intent or purpose. If intent could be inferred automatically from the act, this requirement would cease to exist. In practical effect, the crime would become one where it is sufficient to allege and prove the act without concern for the intention or purpose behind the act. The idea that intention can be inferred automatically from the commission of wrongful acts is therefore inconsistent with the very definition of an offence of specific intent or *dolus specialis*.

145. The same point may be put in more technical language drawn from criminal law. Some of the leading legal systems, including the common law, refer to the prohibited act as the *actus reus* and to the intentional element as the *mens rea*. The more serious offences generally require that the *mens rea* be specifically alleged and proved. Any assumption that the *mens rea* can automatically be inferred from the *actus reus* obviously destroys this requirement and would be tantamount to converting the offence from one of specific intent into one of strict liability.

146. This is precisely what the Applicant does with respect to the definition of genocide. It asks the Court to infer a genocidal intent from its allegation that the Pancevo bombings unnecessarily exposed the civilian population to destruction. It similarly asks the Court to infer a genocidal intent from its allegation that depleted uranium creates hazards to human health. This ignores specific intent as an independent legal requirement. It effectively dispenses with the concept at the heart of the Convention, that genocide is something committed with the intention of destroying a national, ethnical, racial, or religious group "as such", and that even the most repugnant crimes committed without that specific intention do not constitute genocide.

c. There is nothing to demonstrate an intention to destroy a group "as such"

147. The Applicant's Memorial fails to address, much less demonstrate, how Canada - or any other NATO members - can be said to have intended the physical destruction of a group "as such". Those two words are vitally important. They underline, beyond intention and purpose, the need for a genocidal motivation - a hostility toward the target group that impels the perpetrators to seek its extermination. The analysis of this aspect of genocide in the 1996 Report of the International Law Commission has already been mentioned[139]. The Report also noted that the expression "as such" implies that the intention must be to destroy the group "as a separate and distinct entity"[140], and added that "the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group"[141]. Without some animus against a group "as such", the crime may be one of the utmost gravity; but it is not genocide.

148. The Applicant's Memorial attempts no explanation, and presents no factual material, that would suggest that Canada or its allies were motivated by an anti-Serbian or anti-Yugoslavian animus of such intensity as to lead to an attempt to destroy the group "as such". The notion would be so implausible as to attract ridicule, and it has not in any event been put forward. But its absence is fatal. It means the Court does not have before it the material that would be required to make the claims "fall within" the Convention[142].

149. Other essential components of the alleged crime are also missing. The words "deliberately" and "calculated" in Article II, paragraph (c), of the Convention were included, *inter alia*, to emphasize the importance of specific intent, but they must be given an independent effect. In a passage cited with approval by the International Law Commission in its 1996 Report, one scholar has stated that the word "deliberately" denotes the premeditation related to the creation of conditions of life that will destroy the group[143]. The word "calculated" has also been taken to imply an element

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[139] *Supra*, para. 124.

[140] *Supra*, n. 107, p. 45 (Annex 24).

[141] *Ibid.*

[142] *Oil Platforms*, *supra*, n. 11, p. 810, para. 16.

[143] ROBINSON, *The Genocide Convention: A Commentary*, New York, Institute of Jewish Affairs, 1960, p. 63, cited with approval in the 1996 Report of the International Law Commission, *supra*, n. 107, p. 46, fn. 124 (Annex 24).

of premeditation[144]. There is not the slightest attempt in the Applicant's Memorial to come to grips with these elements of the definition.

150. One writer on the international law of genocide, citing a United Nations Rapporteur, has aptly written that "[t]he offence can only retain its awesome nature if the strictness of its definitional elements is retained and not in any way trivialized"[145]. The Applicant's Memorial pays little or no heed to these definitional elements. Its approach is not only legally wrong, but is dangerous. It would strip the meaning of genocide of its "awesome nature" and its unique moral stigma. It would turn genocide into an ordinary crime, no longer the "crime of crimes" at the very apex of the wrongs that shock the conscience of humanity[146].

151. The Federal Republic of Yugoslavia claims that it has submitted evidence of genocidal intention. It has done no such thing. It has asserted the existence of intention in response to the Court's stated reservations in the *Order of 2 June 1999*. But an assertion unsupported by material that would allow the Court to determine whether the pleaded violations do or do not fall within the provisions of the treaty cannot satisfy the *Oil Platforms* test. In substance, the most that can be said is that one party "maintains" there is a dispute under the *Genocide Convention* and the other "denies it": and that, the Court held in *Oil Platforms*, is not enough.

152. All these considerations demonstrate that genocide is not and has never been the real issue in this case. The Applicant has simply recycled its factual allegations related to the use of force and *jus in bello* and placed them under the heading of genocide in order to claim the benefit of Article IX. The artificiality of the stratagem is transparent. The nexus between the dispute and the *Genocide Convention* is a sham, and it should be treated as such.

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[144] *Discussion paper proposed by the Co-ordinator: Article 6: The crime of genocide*, UN Doc. PCNICC/1999/WGEC/RT.1, as annexed in Preparatory Commission for the International Criminal Court, 1st Sess., UN Doc. PCNICC/1999/L.C/Rev.1 (1999) (Annex 34).

[145] SHAW, "Genocide and International Law" in DINSTEIN, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht, Martinus Nijhoff, 1989, p. 806 (Annex 35); see also Commission on Human Rights, *Revised and updated report on the question of the prevention and punishment of the crime of genocide by Mr. B. Whitaker*, UN ESCOR, 1985, UN Doc. E/CN.4/Sub.2/1985/6 and Corr.1, p. 16, para. 29 (Annex 36).

[146] *Supra*, n. 105.

C. The new claims related to KFOR fail to connect Canada to the alleged offences

1. There are no allegations of commission or omission against Canada

153. The Memorial of the Applicant presents an unusual feature, possibly unique in the history of proceedings before this Court. Not a single factual allegation is specifically tied to Canada. In the case of the submission related to the alleged "killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija" since June 1999, the failure to impute either acts or omissions to Canada is obviously of central importance[147]. It is, by itself, fatal to jurisdiction under the *Genocide Convention.*

154. No factual connection between Canada and the alleged genocidal acts by "Albanian terrorists" has been asserted [148]. There is not a shred of evidence, or even an allegation, linking Canada or its forces to any of these incidents. There is no suggestion that a lack of due diligence, or a failure to exert best efforts, or even "mere negligence or lack of appropriate means" in preventing the alleged acts, can be laid at Canada's door[149]. The submission stands in complete isolation, unsupported by factual or other material to give it substance. In reality, Canada stands accused of nothing. It has no charges to answer, and nothing to refute.

155. A generalized submission alleging a breach but unsupported by factual allegations or argument capable of linking the breach to the Respondent plainly fails to meet the *Oil Platforms* test. It amounts to a bare assertion that the Convention has been violated. A bare assertion of this character is precisely what was described as a situation where "one of the Parties maintains that such a dispute exists, and the other denies it", which the Court declared to be insufficient to establish jurisdiction under a treaty[150].

156. The *Oil Platforms* case demonstrates that far more is required. The Court carried out a thorough analysis of several provisions of the treaty in order to determine whether or not, on a correct interpretation, they covered the acts described in the Application. Such an analysis could not possibly be carried out in the abstract. It presupposes the existence of a factual context linking the Respondent to the pleaded violations. Nothing of the sort can be found in the Memorial of the Federal Republic of Yugoslavia.

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[147] Memorial, p. 339, para. 3.2.12.

[148] The expression is consistently used in the Memorial (p. 201, para. 1.5.1.1.1ff.). Canada reserves its position with respect to (a) the accuracy of the allegations respecting ethnic violence since June 1999, (b) the characterization of the incidents as genocidal in nature or intent, and (c) the characterization of the alleged perpetrators as "Albanian terrorists", none of which are relevant for present purposes.

[149] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 31, para. 63.

[150] *Oil Platforms, supra*, n. 11, p. 810, para. 16.

157. Conventions may be multilateral, but litigation is bilateral[151]. One State brings a claim against another. If in a single application it brings a case against several States, it must still establish its case against each Respondent. It is axiomatic, therefore, that the subject matter must pertain to the Respondent[152]. The Court's requirement in *Oil Platforms* that the "violations" should "fall within" the treaty must be understood in the light of these elementary considerations[153]. The term "violations", by definition, refers to specific actions or omissions attributable to individual States. To plead a violation is to identify specific acts or omissions attributable to the Respondent State that would constitute a breach if proved. Any other definition would leave the notion of a violation empty of content, a pure abstraction that would make it impossible to apply the test in *Oil Platforms* in the manner illustrated by the analysis carried out in that case.

158. By this standard, so far as the new claims related to KFOR are concerned, there is nothing whatsoever to which the test in *Oil Platforms* can be applied. And if the Applicant has provided insufficient material to allow the test of jurisdiction to be applied - much less satisfied - the necessary inference is that there is no basis on which jurisdiction under the treaty can be established.

2. The subject matter of the new claims falls outside the *Genocide Convention*

159. The relevant submission of the Applicant's Memorial states that Canada has acted in breach of its obligation "to prevent genocide and other acts enumerated in article III of the Genocide Convention"[154]. This is presumably an oblique reference to Article I of the Convention, in which the contracting parties undertake to "prevent and to punish" the crime of genocide.

160. Quite apart from considerations of admissibility, it is impossible to see how the new claims could fall within Article I. The acts are said to be those of "Albanian terrorists", and neither complicity, negligence, nor a "lack of appropriate means"[155] or due diligence are alleged against Canada. The Applicant has not even hinted at the existence of a causal link between Canadian conduct and the incidents it cites as evidence of genocide. There is no evidence or even a suggestion that these incidents occurred because of a lack of prevention by Canada[156]. So far as Canada is

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[151] ROSENNE, *supra*, n. 56, Vol. II, p. 567 (Annex 14).

[152] If the subject matter did not pertain to the Respondent, the proceedings would take on the character of a request for an Advisory Opinion, which can only be requested by authorized bodies under Article 65 of the Statute.

[153] *Oil Platforms*, *supra*, n. 11, p. 810, para. 16.

[154] Memorial, p. 352.

[155] *United States Diplomatic and Consular Staff in Tehran*, *supra*, n. 149, p. 31, para. 63.

[156] The Commentary of the International Law Commission on obligations of prevention adopted in 1978 states that the "overwhelming majority of modern writers" consider that "the State cannot be held internationally responsible" under an obligation of prevention "except in cases ... where such acts have been committed precisely because of the lack of prevention by the State" (*Draft articles on State responsibility* in *Report of International Law Commission on the work of its thirtieth session, 8 May - 28 July 1978)* (UN Doc. A/33/10) in *Yearbook of the International Law Commission 1978*, Vol. II, Part 2, p. 85 (Annex 37)). See generally also pp. 81-86, and International Law Commission, *Second Report on State Responsibility*, UN GAOR, 54th Sess., UN Doc. A/CN.4/498 (1999), pp. 36-37 (by Professor James Crawford, Special Rapporteur) (Annex 38).

concerned, therefore, there is nothing that could bring the new claims within Article I or any other provision of the *Genocide Convention.*

161. The argument implies that Canada is automatically responsible for incidents of ethnic violence in Kosovo by reason of its participation in KFOR. There is nothing in the text or the *travaux préparatoires* of the *Genocide Convention* to support such an interpretation. Participation in a United Nations effort to restore peace and security in conditions of ethnic strife is one way in which States may choose to fulfil their undertaking under Article I. Such participation is not mandatory but is an act of international solidarity and goodwill. There can be no legal basis for suggesting that it adds to or extends the legal burdens imposed on States by the *Genocide Convention*, under Article I or otherwise.

3. There is no basis for imputing the acts of third parties to Canada

162. International law holds States responsible for wrongful acts committed by their organs and persons acting on their behalf[157]. Exceptionally, a State may be responsible where it has aided or assisted another State in the commission of a wrongful act, or where another State has acted under its direction or control[158].

163. These principles provide no support for the Applicant's contention that jurisdiction can be founded on Article IX of the *Genocide Convention*. As noted above, the argument consists almost exclusively of an inventory of incidents perpetrated by "Albanian terrorists". In a handful of cases, a very small proportion of the total, the effectiveness of KFOR troops in preventing such incidents is called into question. None of this could begin to reach the level of complicity or negligence necessary for the purposes of the *Genocide Convention*, and - more to the point - none of it is linked either directly or indirectly to Canada. In the circumstances, there can be no question of a joint commission of a wrongful act or of the attribution to one State of wrongful acts committed by another.

164. The basis on which the Applicant argues that acts of KFOR are imputable to the Respondent is in any event erroneous. KFOR is depicted as an instrumentality of NATO, whose acts are also said to be imputable to each of its members. This completely misrepresents KFOR's status and mandate under the terms of United Nations Security Council Resolution 1244. KFOR operates "under United Nations auspices" pursuant to Chapter VII of the *Charter of the United Nations*[159]. It has, in accordance with Resolution 1244, a "substantial North Atlantic Treaty Organization participation", but that does not make it a NATO force[160]. KFOR also includes Russia and thirteen other States that

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[157] *Draft articles on State responsibility* in the *Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996)* (UN Doc. A/51/10) in *Yearbook of the International Law Commission 1996*, Vol. II, Part 2, p. 59, Articles 5-10 (Annex 39).

[158] *Id.*, p. 61, Articles 27-28 (Annex 39).

[159] SC Res. 1244, *supra*, n. 69 (Annex 1KK).

[160] *Ibid.*

are not members of NATO, and it maintains a reporting relationship to the Security Council. All this is of secondary importance in view of the failure of the Applicant to attribute any violations to KFOR that fall within the *Genocide Convention*, but it provides further evidence that this branch of the Applicant's argument for jurisdiction is completely misconceived.

165. At one point, the Applicant submits in the alternative that, if KFOR is not "under command and control of NATO" so as to engage the responsibility of each of its member States, then "every Respondent is responsible for acts committed in the area under its control"[161]. To the extent that this suggests that the participants in KFOR are legally responsible for any genocidal acts that may occur in the areas in which they operate, regardless of any intent or complicity on their part, then - for all the reasons set out above - it is based on an erroneous interpretation of the scope of the Convention. In any event, no attempt has been made to identify those incidents, if any, that took place in the specific sub-sector for which Canada is responsible. Having omitted here again to provide the minimum material necessary to bring the pleaded violation within the terms of the *Genocide Convention*, the attempt to invoke the compromissory clause of that Convention must fail.

Conclusion

166. Genocide is the most odious of crimes against humanity. Nothing inflicts greater damage on a State's reputation than implication, direct or indirect, in acts of genocide - and rightly so, where there is substance to the accusation.

167. One consequence of the gravity of this crime is that responsibility for genocide must not be lightly or casually imputed. Accusations related to the *Genocide Convention* should be sufficiently precise that the implicated persons or States can know the charges and be in a position to rebut them if they can: fundamental principles of justice require no less. Accusations based on an assumed but unstated theory of "guilt by association", or liability *erga omnes* for occurrences beyond the control of the accused, should simply be disregarded. They degrade the content of the Convention, and diminish its moral force.

168. A further consequence is that the interpretation of the Convention should respect its distinctive character. The danger of trivializing the Convention by an overly broad interpretation was recognized in the very early stages of its development, when the Secretary-General of the United Nations, responsible for the preparation of the initial draft, stressed the importance of a narrow definition so as not to confuse genocide with other crimes[162]. A dilution of the terms of the Convention, obscuring its special character and sphere of operation, can only weaken the stigma attached to genocide.

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[161] Memorial, p. 299, para. 1.9.2.8.

[162] *Draft Convention on the Crime of Genocide, supra*, n. 104, pp. 16-17, as quoted in SCHABAS, *supra*, n. 104, p. 64 (Annex 20).

169. The Applicant's approach is inconsistent with these principles. In dealing with the original claims related to the use of force, the Applicant equates genocide with other quite different crimes, disregarding its distinguishing characteristics, in particular, the fact that its essential feature is the specific intent to destroy a national, ethnical, racial, or religious group, as such. So far as this branch of the claim is concerned, there is nothing in the Memorial of the Applicant that should lead to a reconsideration of the conclusions the Court reached provisionally in its *Order of 2 June 1999*.

170. In dealing with the new claims related to KFOR, quite apart from the obvious objections to the admissibility of these new claims, the Applicant fails to establish or even to assert a connection between the cited incidents and the Respondent. The only material before the Court on the subject of the "killing, wounding, and expulsion of Serbs and other non-Albanian groups" is an inventory of incidents said to have been perpetrated by "Albanian terrorists"[163]. None of these is alleged to have been committed by the organs of the Canadian State or by persons acting on its behalf. Moreover, there is no allegation of complicity or negligence against Canada, creating the necessary causal link to the cited incidents, that could possibly bring the matter within Article I. The idea that the subject matter of the Applicant's claim can "fall within" the Convention in these circumstances, or even that there can be a "violation" to which the *Oil Platforms* test can be applied, is untenable[164].

171. The *Oil Platforms* case is conclusive authority that jurisdiction under a treaty cannot be established on the basis of a legally incorrect interpretation of the scope or coverage of that treaty. The case also assumes the existence of pleaded violations that pertain to the State against which the proceedings have been brought. The Applicant's reliance on Article IX of the *Genocide Convention* fails to meet either condition - and necessarily so - because in reality the dispute between Canada and the Applicant has nothing to do with breaches of the *Genocide Convention* by Canada. The Convention has been invoked as an artificial basis for bringing proceedings to which the compulsory jurisdiction of the Court does not extend.

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[163] Memorial, p. 9, para. 15, and p. 201, para. 1.5.1.1.1ff.

[164] *Oil Platforms, supra*, n. 11, p. 810, para. 16.

CHAPTER III

THE CLAIM IS INADMISSIBLE

Introduction

172. The Memorial filed by the Federal Republic of Yugoslavia raises for the first time new elements which, while characterized as an extension of the original dispute, are so fundamentally different from the claim defined in the Application as to transform both the form and substance of the original claim.

173. In its *Order of 2 June 1999,* the Court referred to the title of the case adopted by the Federal Republic of Yugoslavia (Application of the Federal Republic of Yugoslavia against Canada for Violation of the Obligation Not to Use Force), and to the subject matter of the case as described in the Application. It then continued as follows:

> "[I]t can be seen both from the statement of 'facts upon which the claim is based' and from the manner in which the 'claims' themselves are formulated (see paragraphs 3 and 4 above) that **the Application is directed, in essence, against the 'bombing of the territory of the Federal Republic of Yugoslavia', to which the Court is asked to put an end**"[165].

The new elements of the claim do not relate to this subject. They relate, instead, to ethnic disorders in Kosovo since the bombing was brought to a halt, and to the peacekeeping operations of the United Nations Kosovo Force ("KFOR") conducted pursuant to United Nations Security Council Resolution 1244. The shift from war to peace is decisive: they stand at opposite ends of the spectrum of international relations and law. It follows that the new claims cannot properly be grafted on to the proceedings brought on 29 April 1999 in relation to the use of force by the North Atlantic Treaty Organization ("NATO"). They would transform the subject matter of the case. They are consequently inadmissible, under long-established principles whose continuing validity has been reaffirmed in recent years.

174. The claim is also inadmissible under the *Monetary Gold* principle. While this case has been instituted against Canada alone, it was originally accompanied by parallel proceedings against nine other Respondents. There now remain eight parallel cases, each against an individual State, several with distinctive features, but all dealing with the use of force by NATO against the territory of the Applicant in 1999. As a result, only eight out of fourteen NATO members that participated in Operation Allied Force are before the Court in separate but parallel proceedings.

175. It is obvious that proceedings against a limited selection of the NATO participants, not including the most prominent military contributor, would be at the least an anomaly. However, the

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[165] *Order of 2 June 1999, supra*, n. 2, para. 26 [emphasis added].

proceedings are more than anomalous. In all the circumstances, which are in many respects unprecedented, the very subject matter of the proceedings requires the presence of States - and international organizations - that are not before the Court. Further, the pursuit of these cases without the presence of these essential third parties could lead to a substantial miscarriage of justice against the remaining Respondents.

A. The new elements would transform the dispute

1. The new elements that are extraneous to the original claim are inadmissible

176. The new elements would transform the subject matter of the case and are inadmissible for a reason that is of particular relevance to this case. Because jurisdiction must be established as of the date of the application and not later, it is essential that the case as developed in the subsequent phases should be the same as the one originally brought. It is precisely this requirement that the Applicant is seeking to evade through its expanded claim, which is a transparent attempt to shift the critical date of the dispute.

177. This strategy is misconceived in terms of the principles of jurisdiction, for the reasons set out in Chapter I. It is also misconceived in terms of the procedural rules consistently applied by this Court and its predecessor.

178. A fundamental change in the nature of the claims after the institution of proceedings would not be consistent with the orderly administration of justice. The Statute and Rules are predicated upon the idea that a case evolves through several phases, commencing with an application, and then written followed by oral Pleadings. Without an essential continuity of subject matter from beginning to end, this progressive evolution would lose its coherence. It could also prejudice the rights of third States who make decisions on intervention on the basis of the application (the further written Pleadings remaining confidential until the oral hearings). Both the Court and its predecessor therefore have considered to be inadmissible any new claims that would be extraneous to the subject matter of the original application, or that would transform the subject matter of the dispute.

179. The jurisprudence on the subject is abundant. In *Military and Paramilitary Activities*, the Court stated in its judgment on jurisdiction and admissibility that additional grounds of jurisdiction may be invoked, "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 ..."[166]. In 1998 the Court held in the *Fisheries Jurisdiction* case as follows:

> "Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the 'subject of the dispute' be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires 'the precise nature of the claim' to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions.

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[166] *Supra*, n. 48, p. 427, para. 80.

It has characterized them as 'essential from the point of view of legal security and the good administration of justice' and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application"[167].

180. Similarly, in *Nauru*, the Court held that if it were to settle the dispute on the disposal of the overseas assets of the British Phosphate Commission, the subject of that dispute would be necessarily distinct from the subject submitted to it in the application[168]. The additional claim had neither been implicit in the application[169], nor had it arisen directly out of the question which was the subject matter of that application [170]. The Court held:

> "To settle the dispute on the overseas assets of the British Phosphate Commissioners the Court would have to consider a number of questions that appear to it to be extraneous to the original claim, such as the precise make-up and origin of the whole of these overseas assets; and the resolution of an issue of this kind would lead it to consider the activities conducted by the Commissioners not only, *ratione temporis*, after 1 July 1967, but also, *ratione loci*, outside Nauru (on Ocean Island (Banaba) and Christmas Island) and, *ratione materiae*, in fields other than the exploitation of the phosphate ..."[171].

181. These recent pronouncements are identical in substance and in reasoning to the jurisprudence of the Permanent Court of International Justice. In the case concerning the *Prince von Pless Administration*, the Permanent Court stated that while the Pleadings "may elucidate the terms of the Application, [they] must not go beyond the limits of the claim as set out therein"[172]. And in *Société commerciale de Belgique* the Permanent Court reiterated this principle, holding that it would not "allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character"[173]. The relevant passage of the judgment notes that any other approach would be inconsistent with the rights of potential interveners, and - with particular relevance to the present case - that a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction[174].

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[167] *Supra*, n. 23, para. 29.

[168] *Supra*, n. 22.

[169] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36.

[170] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72.

[171] *Supra*, n. 22, p. 266, para. 68.

[172] *Prince von Plesss Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14.

[173] *Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173.

[174] *Ibid.*

2. The new elements introduced in the Memorial would transform the subject matter of the case

182. The Applicant claims that, since the Court's *Order of 2 June 1999*, the dispute "aggravated" and "extended" and "got new elements" of crucial importance[175]. According to the Applicant, the new elements concern failures of the Respondents to fulfill their obligations established by Security Council Resolution 1244 and by the *Genocide Convention*[176]: "New elements are related to killings, wounding and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija, after 10 June 1999"[177].

183. The sole object of the new elements of the claim is, therefore, not the bombing of the territory of the Applicant by NATO forces, which had ended by 10 June 1999, but rather the conduct of the peacekeeping mission of KFOR, the international security presence established under Resolution 1244 in order to restore "public safety and order" to Kosovo, and specifically 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[178].

184. Undoubtedly there never would have been a need for a peacekeeping operation and the other special arrangements provided for in Resolution 1244 if the humanitarian crisis in Kosovo had never occurred, precipitating the NATO intervention and the conflict forming the object of the original claim. But under the established principles of the jurisprudence, it is not sufficient that the new claims should stem from the same origins, when in every respect they differ so profoundly as to transform the subject matter of the dispute.

185. The material submitted with the Memorial implicitly recognized that the new elements share little if any common ground with the original claim. The two volumes entitled *NATO Crimes in Yugoslavia: Documentary Evidence* are, as the title implies, limited to the use of force by NATO, and they cover the period from 24 March to 10 June 1999. While the annexes proper are mostly in Serbian, there is nothing to indicate that any of them pertain to the implementation of Resolution 1244 or to KFOR.

186. The new elements introduced in the Memorial differ from the original claim in many more respects than were held to be sufficient for inadmissibility in *Nauru*. In this case:

- the actors are different - of the more than 30 States contributing to KFOR, only eight are before the Court, and they are all from the NATO component of the KFOR mission;

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[175] Memorial, p. 8, para. 12, and p. 339, para. 3.2.11.

[176] *Ibid.*

[177] *Id.*, p. 339, para. 3.2.11.

[178] *Supra*, n. 69 (Annex 1KK).

- the territory is different - the Application refers to events in the entire territory of the Federal Republic of Yugoslavia, whereas the new elements introduced in the Memorial refer to events in the areas covered by Security Council Resolution 1244;

- the time is different - the Application refers to events which took place before 29 April 1999, while the Memorial includes events which took place after 10 June 1999;

- the nature of the acts is different - the Application refers to NATO air strikes, while the new elements relate to United Nation security efforts.

187. Further, the new elements of the claim relate to the implementation of Resolution 1244, in which the Security Council adopted a political solution to the crisis in Kosovo based on the principles set out in the Resolution's annex, and including the deployment of both an international civil presence (the United Nations Mission in Kosovo or "UNMIK") and an international security presence (KFOR). In adopting these measures, the Security Council was, in the terms of the preamble, acting under the special powers vested in it under Chapter VII of the Charter. Any assessment of the implementation of the program of action which the Resolution authorizes, including the conduct of KFOR and its membership, and the adequacy of their efforts to suppress ethnic disorders, would depend upon a legal framework quite distinct from that applicable to the original claim.

188. Above all, however, there could be no sharper contrast of subject matter than that between the use of force and peacekeeping efforts following the cessation of hostilities. The one may lead to the other, but they have nothing else in common. The new claims are entirely out of context in the proceedings brought in April 1999 in relation to the bombing of the territory of the Federal Republic of Yugoslavia to which the Court was asked to put an end.

B. The very subject matter of the case requires the presence of essential third parties that are not before the Court

1. The *Monetary Gold* principle is applicable

189. The *Monetary Gold* case remains the leading authority on essential third parties. The Court decided in *Monetary Gold* that the questions before it could not be answered without determining whether a certain Albanian law was contrary to international law. Since Albania had not consented to jurisdiction, the Court could not make a decision with respect to the Albanian law, and therefore held that it could not answer the questions before it.

190. This principle was applied by the Court in *East Timor*, and it plainly remains valid[179]. The test was also discussed in *Military and Paramilitary Activities* where, although the claim was held

[179] *Supra*, n. 48, pp. 101-105, paras. 23-35.

to be admissible, the Court stated that in order for the *Monetary Gold* test to be met the States which are not parties to the action must be "truly indispensable to the pursuance of the proceedings"[180].

191. The Court has been cautious in the application of this principle, taking account of the fact that third parties cannot be added as they can in national courts, and that their interests are protected by Article 59 of the Statute[181]. But the application of the rule must depend on the concrete circumstances of each case, and the present case is in many respects unique. Its distinguishing features lie in the collective form in which the Applicant has chosen to frame its Pleading, the special importance of the missing Respondents, and the central role of international organizations, particularly with respect to the "new elements" of the claim.

2. This case is different from situations where the Court has declined to apply the *Monetary Gold* principle

192. In *Nauru*, the Court found that the principle established in *Monetary Gold* did not apply to the facts of the case, holding that "the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim"[182]. The Court also cited the reasoning in *Military and Paramilitary Activities*, where the potential implication of Honduras as a staging ground for the military operations at issue was held not to be a sufficient reason for holding the case to be inadmissible[183].

193. The most obvious distinction with both these cases is the relative importance of those parties that are not before the Court. In both *Nauru* and *Military and Paramilitary Activities* the main protagonists were before the Court, and the absent third parties had a relatively secondary and minor role. It is obvious that in *Military and Paramilitary Activities* the United States was in every respect the leader and principal actor in the events that triggered the proceedings. The role of Honduras was incidental, limited essentially to the use of its territory as a staging ground. In *Nauru*, the position of Australia was equally dominant. As the Court stated:

> "As a matter of fact, the Administrator was at all times appointed by the Australian Government and was accordingly under the instructions of that Government. His 'ordinances, proclamations and regulations' were subject to confirmation or rejection by the

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[180] *Supra*, n. 48, p. 431, para. 88.

[181] *Ibid.* See also *Nauru, supra*, n. 22, pp. 260-261, paras. 51-55.

[182] *Supra*, n. 22, p. 261, para. 55.

[183] *Id.*, p. 260, para. 51. Reference was also made to the Chamber decision in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 116, para. 56. This was an application for intervention by Nicaragua, in which the Chamber expressed the view, at p. 122, para. 73, that Nicaragua had an interest (in the status of the Gulf of Fonseca) that might be affected by the decision for the purposes of Article 62 of the Statute respecting intervention. However, that interest did not constitute the "very subject-matter of the decision", since what was at issue was merely the opposability to Honduras of a 1917 decision of the Central American Court of Justice in a case in which Honduras was not a party.

Governor-General of Australia. The other Governments, in accordance with the Agreement, received such decisions for information only"[184].

The two States absent from the proceedings were, in effect, nominal or "silent" partners in the administration of the territory.

194. The contrast is striking. In this case it would be difficult to overlook the essential military and political role of the absent parties, and in particular the United States. The United States alone contributed almost two-thirds of the air power to the campaign. Operation Allied Force could not and would not have taken place without the participation and leadership of participating States that are not before the Court.

195. In sum, the Court has declined to apply the *Monetary Gold* principle where the role of the absent parties was minor or incidental. It has never done so where - as here - the main protagonists were missing from the proceedings.

196. This points to a key distinction with the reasoning in both *Military and Paramilitary Activities* and *Nauru*. In both those cases, the Court focused on the possibility of prejudice to the legal interests of the absent third States, and concluded that their interests were adequately safeguarded by Article 59 of the Statute, which limits the binding effect of judgments to the parties before the Court, and by potential for intervention under Article 62.

197. But it is not merely the interests of absent third States that are threatened in the present circumstances. It is the interests of the Respondents that remain before the Court. This is the critical legal distinction that flows from the fact that in cases like *Nauru* and *Military and Paramilitary Activities* the Respondents were the key players. It would be exceedingly difficult, especially in the context of a political and military operation of great complexity, for an unrepresentative selection of the participants to prepare a full and adequate defence without the presence of the principal actors. The difficulty is compounded by the failure of the Applicant to differentiate in even the slightest degree between the roles of the individual Respondents. They are left in the invidious position of being compelled by the realities of litigation to answer individually for actions of the entire alliance without the presence of certain key members of NATO.

198. Secondly, the intrinsic nature of the argument as framed by the Federal Republic of Yugoslavia implies that the responsibility of all the implicated States, including those not before the Court, is inseparable; that the responsibility of each is inextricably bound up with that of all the others. The premise may be misconceived - it is certainly not accepted by Canada - but it is woven into the argument at every step. This creates a decisive distinction with *Nauru* and *Military and Paramilitary Activities*. The determination of the responsibility of the absent parties in this case may not be a "prerequisite" in a temporal sense, but the Court pointed out in *Nauru* that the term

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[184] *Supra*, n. 22, p. 257, para. 43.

"prerequisite" is "not purely temporal but also logical ..."[185]. It is sufficient, in other words, that the link between the subject matter of the case before the Court and the legal interests of absent parties should be logically non-severable. And so it is in the present matter[186].

199. There is a further consideration, perhaps more fundamental, with respect to the "new elements" of the case concerning KFOR. The essential but missing third parties include an international organization - the United Nations itself. KFOR was established by the United Nations Security Council acting under Chapter VII of the Charter. By the terms of Resolution 1244, it was created "under UN auspices" as an "international security presence" functioning as the counterpart to UNMIK - the United Nations Mission in Kosovo[187]. Its structure, mandate and activities are under the jurisdiction of the Security Council. The Security Council exercises its own autonomous legal powers, resulting in decisions that are not only independent of the individual or collective will of the KFOR participants, but are binding upon them and upon all other United Nations Members.

200. The whole object of the "new elements" of the case - apart from their character as a transparent attempt to circumvent the temporal reservation - is to impugn the conduct of KFOR under its United Nations mandate. This is a thinly disguised attempt to bring the Security Council before the Court, insofar as the subject matter of Resolution 1244 is concerned. The Security Council did not create KFOR and then relinquish its authority. On the contrary, under paragraph 20 of Resolution 1244, the Security Council -

> "Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution"[188].

The activities of KFOR, therefore, were originally mandated by the Security Council and they remain under its continuing surveillance. It is a Security Council activity, not a Canadian activity, that is the essential target of the inadmissible new claims.

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[185] *Id.*, p. 261, para. 55.

[186] It has already been argued that the so-called "new elements" of the case respecting KFOR are extraneous to the claim and therefore inadmissible. Further, the arguments concerning *Monetary Gold* all apply with special force to these "new elements". Almost three-fourths of the participants in KFOR are absent; most, in fact, were never involved in the original proceedings brought in April 1999. The absent parties include the two largest powers, the United States and the Russian Federation, whose political and military leadership within the operation is not only self-evident but is reflected in the structural arrangements for KFOR.

[187] *Supra*, n. 69 (Annex 1KK).

[188] *Ibid.*

Conclusion

201. The test of whether new claims are inadmissible is whether they transform the subject of the dispute originally brought before the Court under the terms of the application. The test is solidly entrenched in the jurisprudence of the Court[189] and has been well documented by scholars[190]. The Court has established a limit on the freedom to present additional facts and legal considerations, and the requirement is that there must be no transformation of the dispute into one that is fundamentally different in character from the original claim.

202. The Application in this case included the customary clause reserving to the Applicant the right to amend or supplement it, a proviso recalled in the introduction to the Memorial[191]. Such a reservation cannot, under the established jurisprudence of the Court, allow the claim to be substantially transformed. That was pointed out by the Permanent Court in the *Société commerciale de Belgique* decision, where it was held 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"[192].

What the Federal Republic of Yugoslavia has attempted in its Memorial goes far beyond the stated criteria. This is not a situation where the new elements can be implied from the Application[193], but one where the new elements are extraneous to the original claim and would transform the dispute brought to the Court by the Application into another dispute which is different in character. The new elements are, therefore, inadmissible.

203. The circumstances are novel but the relevance of the *Monetary Gold* principle is clear. In no case in which the Court has declined to apply that principle have the main protagonists been absent from the proceedings. Moreover, the collective form in which the argument has been presented by the Applicant, while misconceived, implies that the proceedings against a limited and unrepresentative selection of the parties are inappropriate. It follows that the "very subject-matter of the decision" would include the legal interests and responsibilities of other concerned States[194]. The "new elements" also bring the responsibilities of the Security Council to the very centre of the case, and amount to an attempt to subject activities under its jurisdiction to a form of judicial review.

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[189] *Nauru, supra*, n. 22, pp. 266-267, paras. 66-70, *Prince von Pless Administration, supra*, n. 172, p. 14, and *Société commerciale de Belgique, supra*, n. 173, p. 173.

[190] ROSENNE, *supra*, n. 56, Vol. III, pp. 1237-1238, p. 1268, and p. 1377 (Annex 40).

[191] Memorial, p. 7, para. 6.

[192] *Supra*, n. 173, p. 173.

[193] *Temple of Preah Vihear, supra*, n. 169, p. 36.

[194] *Monetary Gold, supra*, n. 24, p. 32.

204. On all these grounds the *Monetary Gold* principle should be applied. It would be not only anomalous but contrary to the proper administration of justice to proceed against a limited and imperfectly representative sample of the NATO members and KFOR participants, in the absence of certain principal actors.

SUMMARY OF PRELIMINARY OBJECTIONS

205. As explained in the body of the Pleading, Canada's preliminary objections with respect to the jurisdiction of the Court are based on the following considerations.

1. The purported declaration of the Applicant dated 25 April 1999 is a nullity because the Federal Republic of Yugoslavia is not a party to the Statute of the Court.

2. The purported declaration is in any event inapplicable by reason of the reservation *ratione temporis* it contains, and the principle of reciprocity in the application of Article 36, paragraph 2, of the Statute.

3. Article IX of the *Genocide Convention* confers no jurisdiction in this case because the subject matter of the case does not fall within the terms of the Convention.

206. While it should not strictly be necessary to consider admissibility in view of the absence of jurisdiction, Canada's preliminary objections with respect to the admissibility of the claims are based on two additional considerations.

1. The new claims respecting the period subsequent to the *Order of 2 June 1999* are inadmissible because they would transform the subject of the dispute originally brought before the Court.

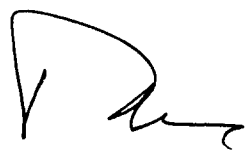
2. The claims in their entirety are inadmissible because the very subject matter of the case requires the presence of essential third parties that are not before the Court.

SUBMISSIONS

May it please the Court to *adjudge and declare* that, for the reasons advanced in this pleading:

- It lacks jurisdiction over the proceedings brought by the Applicant against Canada on 29 April 1999, and

- The claims brought against Canada in the said proceedings are inadmissible to the extent specified in these preliminary objections.



Philippe Kirsch, Q.C.
Agent for Canada
5 July 2000

LIST OF ANNEXES / LISTE DES ANNEXES*

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* The page numbers set out in this list are those of the Annexes to these Preliminary Objections.
Les numéros de page indiqués dans cette liste sont ceux des Annexes aux présentes exceptions préliminaires.