INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

LEGALITY OF USE OF FORCE

(YUGOSLAVIA *v.* FRANCE)

PRELIMINARY OBJECTIONS OF THE FRENCH REPUBLIC

5 July 2000

INTRODUCTION

1. Pursuant to Article 79, paragraph 1, of the Rules of Court,

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial."

2. The French Republic has chosen to avail itself of this possibility and to submit preliminary objections. That is the object of the observations set out herein, which have been submitted within the time-limit fixed in the Court's Order of 30 June 1999 for the filing of France's Counter-Memorial.

3. These preliminary objections will be brief, as it is patently clear that the Court lacks jurisdiction and that the Application is inadmissible.

A. Procedural history

4. On 29 April 1999, the Federal Republic of Yugoslavia (hereinafter the "FRY") filed an Application against France "for violation of the obligation not to use force". Similar Applications were filed on the same day against nine other member States of the North Atlantic Treaty Organization (NATO): Belgium, Canada, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America.

5. At the same time, the FRY made requests for the indication of provisional measures against those same States. In the request concerning France, the Court was asked to indicate the following measure:

> "The Republic of France shall cease immediately its acts of use of force and shall refrain from any act or threat or use of force against the Federal Republic of Yugoslavia."

6. After holding hearings from 10 May to 12 May 1999, the Court, in Orders dated 2 June 1999, rejected the FRY's requests for the indication of provisional measures. In two cases, those concerning Spain and the United States of America, the Court ordered that the case be removed from the List. In the other eight it found that it

> "lacks prima facie jurisdiction to entertain Yugoslavia's Application; and . . . it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein" (para. 32 of the Order concerning France; the other seven decisions are worded in identical terms).

7. Despite that finding, which admittedly "in no way prejudge[s] the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention, or any questions relating to the admissibility of the Application, or relating to the merits themselves" (*ibid.*, para. 33), the FRY chose to file a document entitled "Memorial" on

5 January 2000, in the submissions of which the Court was requested to adjudge and declare that, as a result of various alleged breaches of its obligations under international law:

> "— the Respondent is responsible for the violation of the above obligations;
>
> — the Respondent is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;
>
> — the Respondent is obliged to provide compensation for the damages, injuries and losses done to the Federal Republic of Yugoslavia and to its citizens and juridical persons" (p. 352).

B. Defects in the FRY's "Memorial"

8. As a preliminary matter, note should be taken of the great many serious defects, both formal and substantive, tainting this document, which fails to comply with the Court's procedural requirements. These defects relate primarily to, first, the fact that the FRY chose to submit a single Memorial against the eight respondent States and, second, the manner whereby the "evidence" has been presented, which prevents not only those States but also the Court from being able to verify the truthfulness of, or where appropriate contest, the allegations made by the Yugoslav Party.

(a) A single "Memorial" of the FRY

9. The FRY's Memorial relates to the "Case [*singular*] concerning legality of the use of force (Yugoslavia *v.* Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom)" and fails to make any distinction, anywhere in its 352 pages, among the Respondents.

10. Moreover, the FRY states in paragraph 11:

> "Due to substantial and technical reasons, the Applicant has prepared an identical text of the Memorial in all eight pending cases. The substance of dispute in all eight cases is identical. There are some differences concerning the jurisdiction of the Court among some of the cases which will be indicated in the relevant part of the Memorial. Whereas all Respondents are in the same interest, according to Article 31, para. 5, of Statute of the Court, they should, for the purpose of the nomination of *ad hoc* judge, be reckoned as one party only. Alternatively, for the said purpose, Belgium and the Netherlands are in the same interest; Canada, Portugal and the United Kingdom are in the same interest; and France, Germany and Italy are in the same interest" (p. 8).

11. While it stands solidly together with the other States against which the FRY has filed applications, France believes that these arguments are without merit.

12. Pursuant to Article 38, paragraph 2, of the Rules of Court, the application "shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". Also, Article 49, paragraph 1, states that "[a] Memorial shall contain a statement of the relevant facts, a statement of the law, and the submissions".

13. The FRY has completely failed to meet these requirements. Its Application, identical with the nine other Applications submitted at the same time, did not specify the "*precise* nature" of the claim made against the French Republic. Nor does the Memorial anywhere state the specific charges against the French Republic, even though this requirement follows from the wording of Article 49 of the Rules of Court. What is more, unlike Article 38, which requires that the legal grounds upon which the jurisdiction of the Court is said to be based must be specified only in so far as that is possible, this provision does not permit an Applicant to hide behind vague allegations of "substantial and technical reasons" to justify a failure to specify those grounds.

14. The FRY does not specify them in any way. It even acknowledges implicitly, on page 335 of its Memorial, that the Court's jurisdiction cannot be founded on Article 36, paragraph 2, of the Statute of the Court, when it fails to include France among the States having made the optional declaration of acceptance of compulsory jurisdiction provided for by that Article. It appears to maintain that jurisdiction could, on the other hand, be founded on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, because it adds, after quoting at length from the Order of 2 June 1999 whereby the International Court of Justice rejected its request for the indication of provisional measures *against Belgium* (para. 3.4.2, pp. 346-349): "The identical text appeared in the Orders referred to other Respondents" (*ibid.*, p. 349).

15. The vagueness of the applicant State's claims *against the French Republic* prevent both the French Republic and the Court itself from identifying the precise subject of the dispute. This difficulty is compounded by the fact that, because the basis of the Court's jurisdiction as implicitly alleged differs from, or at the very least is more limited than, the basis put forward in support of the Applications filed against several other States, it is impossible to determine which of the factual and legal arguments could relate to this alleged basis for jurisdiction.

16. As a result, the FRY deprives the Court, no doubt intentionally, of any possibility of assessing whether "the dispute in question does indeed fall within the provisions of Article IX of the Genocide Convention" (Judgment of 11 July 1996, case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide), Preliminary Objections, I.C.J. Reports 1996*, p. 615, para. 30). That, however, is a *sine qua non* condition for the exercise of the Court's jurisdiction in the present case (see Chap. 2, Sect. 2, below).

17. The FRY's Memorial does not permit either the Court or the Respondent to ascertain the link made by the Applicant between the basis of jurisdiction which it would appear implicitly to assert and the facts it alleges.

***(b)* Formal defects in the FRY's "Memorial"**

18. One of the most striking aspects of the Memorial submitted by the FRY is that it contains absolutely no evidence of the facts alleged. The statement of those facts takes the form of a long list of alleged "facts" grouped into rough categories whose legal relevance is not explained anywhere.

19. In the vast majority of cases, no evidence is offered in support of these "facts".

20. The FRY attached three sets of documents to its Memorial:

— the first, entitled "Annexes", contains 178 documents, most in Serbo-Croat;

— the second, dated July 1999 and entitled "NATO Crimes in Yugoslavia — Documentary Evidence (25 April-10 June 1999), includes English translations of some of those documents, appearing in a different order, and various commentaries;

— the third is a booklet entitled "Diplomatic Documents — Correspondence concerning acts of violence and banditry by Albanians in Old Serbia (*vilayet* of Kosovo) 1898-1899", reproducing a number of documents in either Serbo-Croat or French.

21. This presentation satisfies neither the requirements of orderly judicial procedure nor the provisions of the Rules of Court.

22. This is obviously the case of the documents in Serbo-Croat (or German — see Ann. No. 165). Either no translation of them has been furnished or the translation has not been certified, in breach of Article 51, paragraph 2, of the Rules of Court.

23. More generally, the Yugoslav Memorial also contravenes the evidentiary rules binding on all States in international proceedings. As the Mexico-United States Claims Commission stated in the *Parker* case, in such proceedings the parties "are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them" (Arbitral Award, 31 March 1926, *RIAA*, Vol. IV, p. 39; see also the decision of the French—Mexican Claims Commission, 19 October 1928, *Georges Pinson,* opinion of President Verzijl, *RIAA*, Vol. V, p. 327). "The litigating States have not merely the right but also the duty to prove their cases. They are under a true obligation to collaborate in producing exact information for the international judge" (J. C. Witenberg, "La théorie des preuves devant les juridictions internationales", *Recueil des cours*, 1936-II, Vol. 56, pp. 97-98; see also Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, Procedure, Nijhoff, The Hague, 1997, p. 1091) [translation appearing in *ibid.*, p. 1092, footnote 67].

24. The FRY has failed to fulfil this duty in putting forward a jumble of alleged facts, the overwhelming majority of which are not supported by any evidence. In so doing, it prevents the Court from ensuring that "the dispute is one which the Court has jurisdiction . . . to entertain" (case concerning *Legality of Use of Force (Yugoslavia* v. *France), Order of 2 June 1999*, para. 25) and, where the facts have not been established, any examination of a connection between the alleged facts and the asserted basis for the Court's jurisdiction is impossible (see para. 16, above).

C. Overall description and scheme of the preliminary objections

25. Except where it finds itself obliged in theory to prove that (unestablished) facts clearly do not fall within the provisions of Article IX of the 1948 Genocide Convention — a *probatio diabolica* —, France does not intend to enter into a factual discussion, which is out of place in preliminary objections.

26. It does nevertheless wish

— to point out that its silence does not indicate any admission on its part of the truth of the alleged facts listed by the FRY or any acceptance of the FRY's interpretation of them, and

— to state that it shares the concerns expressed by the Court in paragraph 15 of the Order of 2 June 1999 in regard to the human tragedy, the loss of life and the enormous suffering in Kosovo, for which the FRY alone is responsible.

27. The Applicant devotes the short Part Three of its Memorial to the Court's jurisdiction ("Jurisdiction of the Court", pp. 329-349). This brief treatment is all the more surprising because the respondent States had all laid emphasis, during the hearings on the Yugoslav requests for the indication of provisional measures, on the lack of any basis for the Court's jurisdiction. In its Orders of 2 June 1999, the Court concluded that it "lack[ed] prima facie jurisdiction to entertain Yugoslavia's Application" (see paragraph 32 of the Order made in the case *Yugoslavia* v. *France*).

28. The brief part which the FRY devotes to this question is divided into four sections. The first is grounded on the assertion that: "The Federal Republic of Yugoslavia is a Member State of the United Nations" (pp. 329-335). France does not believe it helpful in the context of the present case to dispute that assertion, but the absence of any discussion on this point is not to be taken as implying any degree of acceptance of the proposition thus advanced. Sections 2 and 3 deal, respectively, with the jurisdiction of the Court based on Article 36, paragraph 2, of the Statute of the Court (pp. 335-343), even though France has not made the optional declaration provided for by that provision, and with bilateral treaties, none of which are between France and the FRY (pp. 343-346). Section 4 concerns jurisdiction of the Court allegedly based on Article IX of the Genocide Convention (pp. 246-349) and merely quotes passages from the Court's Order of 2 June 1999 concerning the FRY's request for the indication of provisional measures against Belgium (see para. 14, above).

29. It is noteworthy that the Applicant no longer asserts the second "legal ground for jurisdiction of the Court" which it advanced in its Application (p. 8), namely, Article 38, paragraph 5, of the Rules of Court. That provision states as follows:

> "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

30. It goes without saying that the FRY would not have initially invoked this provision if it had truly believed that Article IX of the 1948 Convention represented a relevant basis of jurisdiction.

31. Moreover, in its Order of 2 June 1999, the Court noted that France did not accept its jurisdiction in the case. The Court drew the inescapable conclusion from that, holding

> "it is quite clear that, in the absence of consent by France, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case [on that basis], even prima facie" (para. 31).

32. The same applies to the other texts and principles of international law relied on by the FRY in its Application instituting proceedings and in its Memorial, which clearly provide no basis for suing France in the International Court of Justice or even, generally, for seisin of the Court.

33. This is true of the United Nations Charter and also of the texts concerning international humanitarian law (the Hague Convention No. IV of 1907, the Geneva Protocol of 1925, the Geneva Conventions of 1949, the Hague Convention of 1954 and additional Protocol I of 1977 to the Geneva Conventions of 1949, to which France is moreover not yet party).

34. The Court already stated in 1993 that it could find "no provision relevant to its jurisdiction" in any of the texts referred to above (which had been invoked by Bosnia and Herzegovina at the time) (*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. 341, para. 33; see also the Court's Judgment of 11 July 1996 on the preliminary objections in the same case, *I.C.J. Reports 1996*, p. 620, para. 39).

35. Nor obviously do the resolutions of the United Nations General Assembly relied on by the FRY (see Part Two of the Yugoslav Memorial, pp. 301 *et seq.*) and relating to international humanitarian law, human rights and environmental law provide a basis for recourse to the Court. What is more, the Court has pointed out that General Assembly resolutions "are not binding", even though they "may sometimes have normative value" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 254, para. 70).

36. This holds as well for Security Council resolution 1244, invoked in Section 2.6 of the Yugoslav Memorial, which, while in itself constituting a decision, does not however allow for recourse to the Court. Furthermore, it should be noted now, though the French Republic will return to this point in Chapter 2 of this Memorial (Sect. 1), that the resolution was adopted on 10 June 1999, thus after the filing of the Application instituting proceedings on 29 April 1999.

37. Whatever the undeniable importance of the texts and principles relied on by the FRY in its Memorial, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

38. It was obviously in anticipation of a refusal by the Court to exercise its jurisdiction on these patently ineffective bases that the applicant State also invoked Article IX of the 1948 Convention, even though the dispute, as defined by the Applicant itself, is in no way concerned with any notion of genocide but exclusively with the "legality of use of force". The Court moreover made no mistake when it decided on the name to be given to the case (in contradistinction to, for example, the cases instituted by Bosnia and Herzegovina and by Croatia against, precisely, the FRY).

39. Tellingly, only the brief Section 1.6 of the Memorial (pp. 282-284), which purports to set out the "Facts Related to the Existence of an Intent to Commit Genocide", employs the term "genocide". That word is not found in paragraph 2, setting out "[t]he subject-matter of the dispute" (p. 5) and is simply slipped quietly into the submissions in an assertion that "the Respondent" (which includes the eight respondent States collectively — see para. 9, above) has allegedly, "by [its] failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija", breached its obligations to ensure public order in that area and to prevent genocide and other acts enumerated in Article III of the 1948 Convention.

40. In its Order of 2 June 1999, the Court stated that:

> "it is not disputed that both Yugoslavia and France are parties to the Genocide Convention without reservation; and . . . Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III' of the said Convention" (para. 24).

But it pointed out that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention" and added, quoting from its Advisory Opinion of 8 July 1996 (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 240, para. 26), that, in the Court's opinion, it did not appear "that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such', required by the provision quoted above" (para. 27). It therefore concluded that Article IX could not constitute "a basis on which the jurisdiction of the Court could prima facie be founded in this case" (para. 28).

41. France will show in Chapter I that the basis of jurisdiction which the Court considered unfounded prima facie is in fact wholly artificial and that the acts which the FRY ascribes indiscriminately to the Respondents cannot in any event fall within the provisions of the Genocide Convention.

42. Further, it will in Chapter II show alternatively that several additional reasons preclude consideration of the case on the merits. First, in its Memorial the FRY changes the very nature of the dispute into a dispute of another kind, having a character different from that of the dispute which is the subject of the Application. This radical change in the basis of the case before the Court deprives the Court of jurisdiction in all events. Second, the French Republic also takes the view, in the alternative, that the acts alleged in the FRY's Memorial cannot be attributed to France, and this negates the existence of a dispute within the Court's jurisdiction. At all events, there is a bar to such jurisdiction in the present case because the exercise of jurisdiction would lead the Court to rule on the legality of conduct by States, international organizations and various entities which are not, and cannot be, participants in the proceedings.

43. These preliminary objections will therefore be presented according to the following scheme:

Chapter I. Absence of the Court's jurisdiction under Article IX of the Genocide Convention

Chapter II. Other reasons barring consideration of the Application on the merits

CHAPTER I

ABSENCE OF THE COURT'S JURISDICTION UNDER ARTICLE IX OF THE 1948 GENOCIDE CONVENTION

1. Despite the absence of any plausible basis for the Court's jurisdiction, of which the Court itself found no evidence, even prima facie, in its Order of 2 June 1999 concerning the FRY's request for the indication of provisional measures, the FRY imagined that it could, to ends that are obviously purely political, attempt to bring proceedings against France before the International Court of Justice. It did so by relying on the only text binding between it and France and containing a clause concerning the Court's jurisdiction: the 1948 Genocide Convention.

2. France has been party to this Convention since 12 January 1951. As for the FRY, the Court found in its Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, that it too was party to the Convention (*I.C.J. Reports 1996 (II)*, p. 610, para. 17). In its Order of 2 June 1999, the Court considered there to be no dispute that France and the FRY were parties to the 1948 Convention (para. 24).

3. Article IX of the Convention provides as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

4. In claiming reliance on this provision to found the jurisdiction of the Court in the present case, the FRY misapplies the 1948 Convention and the compromissory clause therein and acts in breach of the principle of good faith. It utilizes the Convention to bring proceedings against France before the Court even though its accusations relate essentially to alleged violations of the United Nations Charter and of principles and rules of international humanitarian law applicable in armed conflict which cannot in themselves found the jurisdiction of the Court (see Introduction, paras. 33-37, above).

5. The Court's refusal to indicate the provisional measures sought by the FRY last year establishes beyond all doubt that Article IX of the 1948 Genocide Convention cannot be considered a relevant basis of jurisdiction in this case.

6. Yet, totally disregarding this finding of no prima facie jurisdiction, the applicant State devotes barely three pages of its Memorial to the "Jurisdiction of the Court based on Article IX of the Genocide Convention" (Sect. 3.4, pp. 346-349). And these three pages are devoted exclusively to quoting the gist of the Court's Order of 2 June 1999 rejecting the FRY's request for the indication of provisional measures against . . . Belgium. The Applicant confines itself to adding that "[t]he identical text appeared in the Orders referred to other Respondents" (para. 3.4.2, p. 349), and to asserting that its Memorial provides "the evidence on the intent to commit genocide referring to acts of the Respondents (acts of bombing) and to acts of killing and wounding of Serbs and other non-Albanian population in Kosovo and Metohija after the 10th of June 1999" (para. 3.4.3, p. 349).

7. Truth to tell, neither of these two allegations is supported by even a scintilla of prima facie evidence in the Memorial and, acting in disregard of the applicable principles (Sect. 1), the Applicant has clearly failed to demonstrate the existence of any "genocidal intent" in respect of the NATO air strikes before 10 June 1999 (Sect. 2) or the events in Kosovo after that date (Sect. 3).

Section 1 — The applicable principles

A. The requirement of a plausible link between the alleged basis of jurisdiction and the subject of the claim

8. The Court's jurisdiction can be founded on Article IX of the 1948 Genocide Convention only in respect of a dispute relating to "the interpretation, application or fulfilment" of that Convention and not in respect of other disputes relating to France's alleged violations of rights which the FRY claims to possess pursuant to other texts and principles of international law.

9. As Ambassador Rosenne has written, "[i]t is not sufficient that a valid title of jurisdiction is invoked unilaterally. There has to exist at least a prima-facie link between the subject of the dispute as set out in the instrument instituting the proceedings and the title of jurisdiction that is invoked" (*The Law and Practice of the International Court, 1920-1996,* Vol. III, Procedure, Nijhoff, The Hague/Boston/London, 1997, p. 1209). In order to found the jurisdiction of the Court, it is thus not enough that there exist *in abstracto* a jurisdictional link between the applicant State and the Respondent, nor that the claimant "establish a remote connection between the facts of the claim" and the treaty establishing that link; the arguments advanced must also be "of a sufficiently plausible character to warrant a conclusion that the claim is based on the [t]reaty" (see *Ambatielos, Merits, Judgment, I.C.J. Reports* 1953, p. 18).

10. As the Permanent Court had already stated in the case concerning *Certain German Interests in Polish Upper Silesia*:

> "It is clear that the Court's jurisdiction cannot depend solely on the wording of the Application . . . The Court must, in the first place, consider . . . whether the clauses upon which the decision on the Application must be based, are amongst those in regard to which the Court's jurisdiction is established" (*Judgment No. 6, 1925, P.C.I.J., Series A,* p. 15; see also *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 86 or *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 427, para. 81).

11. Whenever the parties before the Court disagree as to whether a dispute between them is a dispute "relating to the interpretation and application" of a particular treaty,

> "the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the [t]reaty . . . pleaded by [one of them] do or do not fall within the provisions of the [t]reaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to"

the compromissory clause of the treaty in question (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 810, para. 16). In the present case, the Court must therefore satisfy itself that "the dispute in question does indeed

fall within the provisions of Article IX of the Genocide Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 615, para. 30).

12. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court said clearly in its Order of 8 April 1993 that in a case where the applicant State founds the jurisdiction of the Court in a dispute over a clause in a multilateral convention, the Court's jurisdiction is limited to those questions falling within the provisions of that clause:

> "the Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; whereas accordingly the Court will confine its examination of the measures requested, and of the grounds asserted for the request for such measures, to those which fall within the scope of the Genocide Convention" (*I.C.J. Reports 1993*, p. 19, para. 35).

13. The Court reaffirmed this reasoning in its Order of 13 October 1993, stating that it "ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction thus prima facie established" (*I.C.J. Reports 1993*, p. 342, para. 36). As Sir Elihu Lauterpacht, judge *ad hoc* in that case, pointed out:

> "Whatever form the consent may take, the range of matters that the Court can then deal with is limited to the matters covered by that consent. Thus, jurisdiction conferred on the Court by the Genocide Convention can extend only to cases involving the interpretation, application or fulfilment of the Convention . . . there are a number . . . of substantive rights protected by international law which, for want of a suitable jurisdictional link to the Court, cannot be made the subject of consideration and decision by it" (*I.C.J. Reports 1993*, separate opinion, p. 412, paras. 14-15).

Sir Elihu Lauterpacht added, and rightly so, that "[t]he mere existence of relevant substantive rules of law does not by itself confer in respect of matters governed by them any jurisdiction whatsoever upon any international tribunal" (*ibid.*, p. 414, para. 19).

14. The Court is therefore without jurisdiction to rule on the issues concerning alleged violations of the United Nations Charter and of certain principles and rules of international humanitarian law applicable in armed conflict, as those issues do not fall within the provisions of Article IX of the 1948 Genocide Convention.

15. The Court moreover recalled this fundamental jurisprudence in paragraph 25 of its Order of 2 June 1999 in the present case:

> "Whereas, in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX (cf. *Oil*

Platforms (Islamic Republic of Iran v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 810, para. 16)."

16. As clearly shown by the words underlined by the French Republic ("even prima facie"), this requirement applies *a fortiori* whenever it is necessary to ascertain at the preliminary objection stage whether the Court has jurisdiction. Yet the FRY totally disregards this admonition and does not at any point show that its Application could, whether largely or narrowly, "fall within the provisions" of the 1948 Convention.

B. The definition of genocide: the requirement of an element of intent

17. For that to be the case, the Applicant would have to establish, in accordance with Article II of the 1948 Genocide Convention, that the acts which it imputes to France were accomplished "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

18. The Court itself has repeatedly laid stress on the element of intent, which is the defining criterion of genocide. Thus, in its Order of 13 September 1993, referring to paragraph 39 of its Order of 8 April 1993 in the same case, in which it had set out the relevant passages of Article II of the 1948 Convention defining genocide (*I.C.J. Reports 1993*, para. 39, p. 20), the Court emphasized that:

"[the] essential characteristic [of genocide] is the *intended* destruction of 'a national, ethnical, racial or religious group'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993*, p. 345, para. 42; emphasis added).

19. Similarly, after again quoting Article II of the 1948 Convention, the Court in its Advisory Opinion of 8 July 1996 concerning *Legality of the Threat or Use of Nuclear Weapons* pointed out that the prohibition of genocide would be pertinent in responding to the request by the United Nations General Assembly for an Advisory Opinion only "if the recourse to nuclear weapons did indeed entail the *element of intent*, towards a group as such, required by the provision quoted above" (*I.C.J. Reports 1996*, p. 240, para. 26 — emphasis added).

20. Other international tribunals that have had occasion to consider the definition of genocide have ruled to the same effect. Thus, the International Criminal Tribunal for the former Yugoslavia said in the case *The Prosecutor* v. *Goran Jelisic*:

"Apart from its discriminatory character, the underlying crime is also characterised by the fact that it is part of a wider plan to *destroy*, in whole or in part, the group *as such*. As indicated by the ILC, 'the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group'. By killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member" (Judgment of 14 December 1999, case IT-95-10-T, para. 79; original emphasis).

21. The International Criminal Tribunal for Rwanda, for its part, said in the case *The Prosecutor* v. *Jean-Paul Akayesu*:

> "Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'" (Judgment of 2 September 1998, case ICTR-96-4-T, para. 498; italics original; on this point, see also the judgment of 2 February 1999 in the case *The Prosecutor* v. *Serushago*, case ITCR-98-39-S, paras. 15 *et seq.*, and the judgment of 27 January 2000 in the case *The Prosecutor* v. *Musema*, case ICTR-96-13-I, paras. 884 *et seq.* In that last case, the Trial Chamber said: "the intention underlying each specific act was to destroy the Tutsi group as a whole" (para. 933); it declared itself "satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as a whole" (para. 934)).

22. In its Judgment of 1 June 2000 in the case *The Prosecutor* v. *Georges Ruggiu*, Trial Chamber I of the International Criminal Tribunal for Rwanda also stressed the element of intent. It emphasized that the accused had acted with the intention to destroy, in whole or in part, an ethnic or racial group, the Tutsi group in that case, as such (case ICTR-97-32-I, verdict).

23. For its part, the International Law Commission has stated, in the Commentary to Article 17 of its draft Code of Crimes against the Peace and Security of Mankind, that:

> "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 . . . an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is 'committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.'" (Report of the International Law Commission on the work of its forty-eighth session, document A/51/10, commentary to Art. 17, published in the Yearbook of the International Law Commission 1966, Vol. II, Part Two, p. 44.)

The Commission emphasized, and rightly so, that the criminal intent required for the crime of genocide must meet a number of criteria:

— the intention must be to destroy a group and not merely one or more individuals who are members of a particular group; 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 intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group; thus there is a clear distinction between genocide and homicide;

— the intention must be to destroy a group "in whole or in part"; the crime of genocide by its very nature requires the intention to destroy a substantial part of the group in question;

— the intention must be to destroy one of the types of groups covered by the 1948 Convention, namely, a national, ethnic, racial or religious group.

24. Lastly, in like manner, the Preparatory Commission for the International Criminal Court is at present charged with drafting the "Elements of Crimes" which will assist "the Court in the interpretation and application of articles 6, 7 and 8" of the Statute of the International Criminal Court (see Art. 9 of the Statute). It has drafted the Elements of Crimes concerning Article 6 *(c)* (genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part) as follows:

"1. The accused inflicted certain conditions of life upon one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The accused intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." (Document PCNICC/2000/L.1/Rev.1/Add.2, dated 7 April 2000.)

25. All of these judicial precedents and texts confirm that intent is a decisive element of genocide. In the cases cited above (paras. 20-22) the existence of this element was established. On the other hand, it cannot be denied that in the cases concerning *Legality of Use of Force*, whether the one against France or those against its NATO partners, the FRY fails — and for good reason — to establish the existence of this element.

26. This complete failure even to begin to provide evidence concerning this crucial element is all the more noteworthy in that the Court in its Order of 2 June 1999 refused to indicate the provisional measures sought by the FRY, clearly stating that it took that decision because the Applicant had failed to demonstrate, even prima facie, the existence of any genocidal intent, within the meaning of Article II of the 1948 Convention, on the part of France (paras. 25-28).

27. This was moreover the first occasion on which the Court rejected a request for the indication of provisional measures for lack of prima facie jurisdiction. Thus, in the earlier cases in which it had refused to indicate provisional measures, it did so either because there was no urgency (*Interhandel, Order of 24 October 1957, I.C.J. Reports 1957*, p. 105; *Passage through the Great Belt (Finland* v. *Denmark)*, *Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, *Provisional Measures, Orders of 14 April 1992, I.C.J. Reports 1992*, p. 3 and p. 114) or because there was no risk of irreparable prejudice (*Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3). And in another case, that concerning the *Arbitral Award of 31 July 1989*, the Court rejected the request for the indication of provisional measures made by Guinea-Bissau because the rights sought to be protected by the request were not "the subject of the proceedings before the Court on the merits of the case" (*Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26).

28. The same holds true in the present case. The Court's refusal to indicate the provisional measures sought by Belgrade attests to the fact that Article IX of the 1948 Genocide Convention cannot be considered a basis for jurisdiction in this case. True, the Court's finding that it lacked jurisdiction prima facie does not prevent it from reconsidering that conclusion upon completion of a more thorough examination (see paragraph 33 of the Court's Order of 2 June 1999), but it shows at least the extreme weakness of the FRY's claim and, at a minimum, requires the FRY to prove its case by arguments other than those put forward during the consideration of the request for the indication of provisional measures.

C. The burden of proof

29. In proceeding as it does, the FRY fails to respect the rules of evidence applicable to all States before international tribunals. As Witenberg clearly explained however, "[t]he litigating States have not merely the right but also the duty to prove their cases. They are under a true obligation to collaborate in producing exact information for the international judge" ("La théorie des preuves devant les juridictions internationales", *Recueil des cours*, 1936-II, Vol. 56, pp. 97-98, quoted in Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, Nijhoff, The Hague, 1997, p. 1091) [translation appearing in *ibid.*, p. 1092, footnote 67]. The Court itself has had occasion to underline that the State seeking to establish a fact bears the burden of proving it (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). The FRY's submissions concerning the acts of which it accuses France and its NATO partners ought necessarily to have been supported by sufficient proof, but they have not been.

30. As D. W. Sandifer notes forcefully in his seminal work on evidence before international tribunals:

> "The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: That the burden of proof rests upon him who asserts the affirmative of a proposition which if not substantiated will result in a decision adverse to his contention" (*Evidence Before International Tribunals*, University Press of Virginia, 1975, p. 127).
>
> "In other words, the fundamental principle will be *to impose the burden of proof on the party asserting the fact*" (J.-C. Witenberg, "*Onus probandi* devant les juridictions arbitrales", *RGDIP* 1951, p. 323). *[Translation by the Registry]*

31. To be sure, this principle normally applies during the consideration of a case on the merits (see the above-cited ICJ Judgment of 26 November 1984, *I.C.J. Reports 1984*, p. 437, para. 101), but it takes on major importance in the present case from the preliminary objections stage. If the principle were to be disregarded, any State could file an application against any other on the basis of Article IX of the Genocide Convention, alleging that genocide had been committed by the respondent, thereby forcing the latter to defend itself against this defamatory accusation even though the applicant was not required to produce the slightest evidence in support of its allegations. This would put at grave "risk the obligation of the Court to keep separate the jurisdictional [preliminary] and merits phases" (separate opinion by Judge Higgins annexed to the ICJ's Judgment of 12 December 1996 in the case concerning *Oil Platforms, I.C.J. Reports 1996*, p. 856) and, even further, the principle of consent to the Court's jurisdiction. That is precisely the situation in the present case.

32. In the French Republic's view, the cavalier attitude of the Applicant, which offers not a shred of evidence in support of its allegations, should lead the Court to find summarily that the Applicant has not adduced any evidence in support of its claim concerning the jurisdiction of the Court in this case and to strike the case from its List.

33. It is therefore only out of respect for the Court and in order not to leave unanswered the serious allegation that it has committed genocide that the French Republic will briefly rebut this offensive accusation, it being understood that it is always difficult to prove a negative proposition *(probatio diabolica)*, especially where the accusation does not rest on any specific fact (or rests on vague and wild allegations, which amounts to the same thing), as is the case here. As has been said:

> "The object of the proof is then no longer a self-revealing concrete manifestation, but rather the lack of any concrete manifestation" (Jean Larguier, "L'absence d'un fait négatif", *Revue trimestrielle de droit civil*, 1953, p. 3). *[Translation by the Registry]*
>
> "[F]orcing the obligor to prove the absence of fault is in reality an extremely generous solution for the victim of the damage . . .
>
> He who asserts, either as claimant or respondent, an indefinite negative proposition which he bears the burden of proving cannot *directly* prove his claim. Demanding this proof from him would be tantamount to eliminating his possibilities to attack or defend. At least he will be allowed to make an indirect showing, through proof of positive facts — as many of them as possible — the sum total of which will succeed in persuading the court . . .
>
> Negative facts cannot be proved directly: it must be done by proving positive facts" (*ibid.*, p. 28). *[Translation by the Registry]*
>
> "It would seem clear on principle that a case should be dismissed when the claimant fails to substantiate the allegations of his pleadings even if no evidence is submitted by the other party" (D. V. Sandifer, *op cit.*; see also the many examples in the quoted case-law and J.-C. Witenberg, "*Onus probandi* . . .", *prec.*, p. 332).

34. On the basis of these observations, France will accordingly show that, contrary to the FRY's allegations (see Sects. 2 and 3, above), neither the NATO bombing up to 10 June 1999, carried out to avert an irreparable humanitarian disaster, nor the events in Kosovo since that date, evidence any genocidal intent on its part.

Section 2 — The NATO bombing before 10 June 1999 does not evidence any genocidal intent

35. The FRY confuses — or rather tries to equate — armed conflict and genocide. It seeks, unsuccessfully, to show that the armed conflict occurring in 1999 on its territory resulted in genocide. It implies that the commission of genocide is the unavoidable consequence of all armed conflict.

36. But, as France has shown above (paras. 17-25), the essential characteristic of genocide is the "intentional destruction" of a national, ethnical, racial or religious group, not the use of force in armed conflict. It should moreover be noted that when the United States acceded to the 1948

Convention in 1988, it included the following understanding: "That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention" (see *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1999*. ST/LEG/SER.E/18, Vol. I, p. 94). No objection was raised to that understanding.

37. It goes without saying that an armed conflict could appear to constitute genocide if the armed actions taken on the ground in fact included the element of intent required by Article II of the 1948 Convention and if, as the Court has had occasion to state, it involved "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" (Advisory Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23).

38. But, as the Court forcefully recalled in its Order of 2 June 1999:

> "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention" (para. 27; see also the Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 240, para. 26, quoted above in para. 19).

39. France does not in any event seek to deny that it participated in an armed conflict pitting NATO against the FRY. But it was obviously never the intent of NATO and its Members to destroy, in whole or in part, any national, ethnical, racial or religious group in the FRY. A number of statements by French political and military leaders attest to this.

40. For example, the Minister of Defence, Mr. Alain Richard, said on 27 March 1999 that "the aim of the air campaign is to limit and then neutralize the offensive capability of the Serb forces and their ability to attack the civilian population" (interview with the daily *Le Figaro*). The Chief of Staff of the French armed forces, General Jean-Pierre Kelche, stated during a press conference on 30 March 1999 that "the absolute imperative is to limit civilian losses as much as possible". Similarly, the Minister for Foreign Affairs, Mr. Hubert Védrine, explained on 14 April 1999 that "the care that is being taken to cause the least possible harm to the civilian population results in the cancellation or modification of a number of missions" (interview on radio France Inter). Similarly, the President of the Republic, Mr. Jacques Chirac, stated on 3 May 1999 during an address broadcast on radio and television: "do we accept ethnic cleansing by a régime within the heart of Europe? If we accept that, we are aware of where this cowardice can lead democracies. If we reject it, then the action undertaken must be resolutely pursued, with all possible efforts made to spare the civilian population." Finally, on 8 June 1999, the Prime Minister, Mr. Lionel Jospin, recalled before the National Assembly that in order "to reduce the risks to our soldiers and to minimize the damage to the civilian population, the military action cannot be total but must be controlled and incremental". He added: "Despite all the precautions taken, a number of — serious — errors have occurred. Even if they are probably inevitable in this sort of conflict, we must regret these civilian victims."

41. As these statements attest, France and its NATO partners did everything possible to prevent the air strikes from affecting the civilian population in the FRY. The leaders of the military operations took all necessary measures to ensure that the air strikes were directed solely at military targets. The precautions taken with respect to the civilian population flatly disprove — as if any such proof were necessary given the absurdity and lack of substance of the Yugoslav allegations —

the existence of any intent to inflict on that population conditions of life calculated to bring about the physical destruction in whole or in part of a given group.

42. The FRY's only argument in its attempt to prove the existence of intent is to accuse "the Respondents" of having used depleted uranium weapons and having bombed chemical plants in Pancevo (Memorial, pp. 282-283, paras. 1.6.1 *et seq.*).

43. With respect to the first of these allegations, France never used depleted uranium weapons or munitions in the military operations conducted last year in the FRY and the Applicant does not produce any evidence whatever to the contrary. Also, the Court has already explained that intent, an essential element of the act of genocide, cannot be inferred from the use of a particular weapon. It said in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> "It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.
>
> The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case." (*I.C.J. Reports 1996*, p. 240, para. 26.)

44. With respect to the bombing of the chemical plants in Pancevo, that cannot constitute an act of genocide. Those plants could have been considered legitimate military targets under the principles and rules of international humanitarian law applicable in armed conflicts. The FRY in no way shows how this bombing could be construed as evidence of the desire by France and its NATO partners to inflict on the civilian population living near those plants conditions of life calculated to bring about the physical destruction in whole or in part of a national, ethnical, racial or religious group, as such.

45. In its Memorial (p. 283, para. 1.6.1.5), the FRY also refers to a statement allegedly made by a French military officer, "General Joffret". According to that statement, "the air force received an order to destroy life in Serbia". This allegation is a pure invention. No French serviceman ever received such an order, which would have violated the most basic principles and rules of international humanitarian law applicable in armed conflict. What is more, there is no General Joffret in the French armed forces.

46. It is to be recalled that the Court stated in its Order of 2 June 1999 that it did not appear to it "at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by'" Article II of the 1948 Convention (para. 27).

47. In the absence of the element of intent, which characterizes genocide, the acts imputed by the FRY to France cannot fall within the provisions of Article IX of the 1948 Convention. That Convention cannot therefore constitute a basis to found the jurisdiction of the Court.

48. The situation is in no way comparable to that prevailing in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia and Herzegovina and Yugoslavia. The Court stated in that case that there was indeed a dispute in this regard between the Parties because not only did they "differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but [were] moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX" (*I.C.J. Reports 1996 (II)*, p. 616, para. 33). However, in the present case, the absence of the element of intent renders inapplicable the provisions of Article IX of the 1948 Convention artificially invoked by the FRY, and the Court is bound to uphold France's preliminary objection and, accordingly, rule that it lacks jurisdiction.

Section 3 — Events in Kosovo since 10 June 1999 do not evidence any genocidal intent

49. The FRY has radically changed the nature of its Application instituting proceedings, in violation of the Rules and jurisprudence of the Court (on this point, see Chap. II, Sect. 1, below). The change is reflected by, *inter alia*, the allegations made against KFOR, whose deployment in Kosovo was authorized by the United Nations Security Council. The FRY is thus no longer only accusing France of having violated the provisions of the 1948 Genocide Convention by participating in the NATO air strikes, it is also accusing KFOR of having committed genocide in Kosovo. To this end, it relies on events occurring after 10 June 1999, i.e., after the filing of the Application and after the Orders of the Court rejecting the Yugoslav requests for the indication of provisional measures.

50. In its Memorial, the FRY accuses France (and its NATO partners) of: "failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija" (p. 352).

51. It accordingly concludes that France:

> "has acted against the Federal Republic of Yugoslavia in breach of its obligations to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in article III of the Genocide Convention" (*ibid.*).

52. In Section 3.4 of its Memorial, concerning the jurisdiction of the Court based on Article IX of the 1948 Genocide Convention, it asserts that it:

> "has submitted the evidence on the intent to commit genocide referring to acts of the Respondents (acts of bombing) [on this point, see Sect. 1, above] and to *acts of killing and wounding of Serbs and other non-Albanian population in Kosovo and Metohija after the 10th of June 1999*. Accordingly, the Applicant claims that the jurisdiction of the Court, based on Article IX of the Genocide Convention is established" (p. 349, para. 3.4.3; emphasis added).

53. Contrary to its assertions in that Section and in violation of the most firmly settled rules of international law concerning the burden of proof (see paras. 30-32, above), the FRY offers absolutely no evidence in support of its submissions. And what is more, it confines itself to providing, in Section 1.5 of its Memorial (pp. 201 *et seq.*), a list of alleged "Facts related to killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups" and to referring summarily, in Section 1.6 of its Memorial, to "[t]he facts related to the existence of an intent to

commit genocide by killing and wounding Serbs and other non-Albanian groups in Kosovo and Metohija" (para. 1.6.2, p. 283), before going on to assert:

> "The intent to commit genocide is implied in the fact that Serbs and members of the other non-Albanian groups were killed, injured or expelled as such, it is due to their ethnicity. Proof of intent to commit genocide is inferred from the fact that great majority of Serbian institutions, like monasteries, churches, monuments of cultures and Orthodox tombstones on cemeteries were destroyed or damaged" (p. 283, para. 1.6.2.1.).

54. One cannot help but note that the sections of the Yugoslav Memorial dealing with events occurring in Kosovo after 10 June 1999 are particularly muddled, even more so than the others. While the FRY accuses France (and its NATO partners) in its submissions (pp. 351-352) of having violated the provisions of the 1948 Genocide Convention, in Sections 1.5 (taken as a whole) and 1.6 (specifically, p. 283, paras. 1.6.2. and 1.6.2.1.) of its Memorial it attacks KFOR and, above all, those it refers to as "Albanian terrorists".

55. In the two Sections referred to above, the FRY does not claim — and for good reason — that France is responsible for the acts which it alleges and of which, according to the FRY, Serbs and other non-Albanian groups were victim. Moreover, France is not specifically named therein. Rather, the FRY asserts repeatedly in Section 1.5 of its Memorial that the acts directed against Serbs and other non-Albanian groups ("killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups") were the work of "Albanian terrorists" and implies that these acts were committed in KFOR-controlled zones. It also contends that KFOR adopted a lenient attitude concerning the attacks (or at least some of them) by those "terrorists" (see, for example, p. 239, para. 1.5.5.1.73.). The two Sections referred to above do not therefore concern France as such.

56. Three heads of comment are called for concerning the Yugoslav allegations:

— First, KFOR's alleged inability — entirely unsubstantiated by the Applicant — to prevent certain acts directed against Serbs and other non-Albanian groups in KFOR-controlled zones, for which attacks "Albanian terrorists" are said to be responsible, cannot in any way mean that KFOR violated provisions of the 1948 Convention.

— Second, this inability — even if demonstrated — could not be construed as evidence of intent on the part of France, as a State participating in KFOR (with regard to the connection between KFOR and France, see Chap. II, Sect. 2, paras. 25-26, below), to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (see Art. II of the 1948 Convention).

— Finally, this inability — assuming it to be established — could not be taken to show a desire on the part of KFOR to act as an accomplice, in any way, in the actions which the FRY seeks to impute to those it calls "Albanian terrorists" (see Art. III of the 1948 Convention); complicity also requires the existence of the element of intent, which is neither established nor even alleged in the present case (see Chap. 1, Sects. 1 B and C, above). Furthermore, the FRY makes absolutely no showing that the acts in question, for which those "terrorists" are allegedly responsible, constitute genocide.

57. Upon reading the Sections of the Yugoslav Memorial referred to above, one cannot but conclude that the acts which the FRY seeks to impute directly to KFOR, and indirectly to France and its NATO partners, do not in any event evidence any genocidal intent and cannot therefore be linked to the application of the 1948 Convention.

58. From a more basic perspective, the acts which the FRY seeks, in the two Sections referred to above, to impute to France through KFOR are not capable of falling within the provisions of Article IX of the 1948 Genocide Convention for the following reasons:

— the acts which the FRY seeks to impute to KFOR cannot be attributed to France and therefore do not relate to any dispute between the FRY and France (on this point, see Chap. 2, Sect. 2, below);

— KFOR's alleged conduct vis-à-vis Serbs and other non-Albanian groups — even if proved — cannot be construed as evidence of intent on the part of France, as a State participating in KFOR, to commit genocide in Kosovo.

59. *In conclusion* to this Chapter, it is apparent that:

1. with regard to the events occurring in Kosovo before 10 June 1999, the FRY has been completely incapable of showing that France and its NATO partners had the intent to commit genocide, i.e., in the terms of Article II of the 1948 Convention, the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"; indeed, it has not even tried;

2. the absence of the element of intent renders inapplicable the provisions of Article IX of the 1948 Convention, artificially invoked by the FRY;

3. the same is true of the events occurring after 10 June 1999, in particular of the acts the FRY seeks to impute to France through KFOR; once again, the FRY has not in any way been able to demonstrate — and for good reason — that these acts evidence genocidal intent on the part of France.

CHAPTER II

OTHER REASONS BARRING CONSIDERATION OF THE APPLICATION ON THE MERITS

1. The French Republic believes that the preceding Chapter amply establishes that the Court does not have jurisdiction to rule on the Application submitted by the FRY. Thus, it is only on an entirely subsidiary basis that the French Republic will also show in this Chapter that there are other, further reasons which bar consideration of the Application on the merits.

2. In addition to its formal defects, which are aggravated by those of the Memorial (see the Introduction, paras. 8-24, above), these bars, upon which the French Republic relies only on a subsidiary basis, derive from three main causes, distinct from but related to each other. First, the FRY's Memorial changes the nature of the dispute of which it seised the Court by its Application of 29 April 1999 (Sect. 1). Second, the acts alleged in the FRY's Application and in its Memorial, even assuming them to be proved *(quod non)*, are not legally attributable to France, so that one cannot even speak of a "dispute between the Contracting Parties", in the sense of Article IX of the 1948 Genocide Convention, related to the interpretation or application of that Convention (Sect. 2). Finally, the Court cannot exercise its jurisdiction in this case (assuming such jurisdiction to be established, *quod non*), without first ruling on the legality of the conduct of States and international organizations that are absent from these proceedings (Sect. 3).

Section 1 — The FRY's Memorial transforms the nature of the dispute

3. In its Application, the FRY stated the "subject-matter of the dispute" which in its view existed between it and the French Republic (p. 8). As confirmed by the letters from the applicant State's Agent transmitting the Application to the Registrar of the Court and from the Federal Minister for Foreign Affairs appointing the Agent of the FRY, the dispute relates essentially to the alleged "violation of the obligation not to use force" (*ibid.*, pp. 2 and 6). That this is the subject is also confirmed by the "claim" set out in the Application (pp. 8 and 10).

4. This information is specified in response to the requirements of Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraphs 1 and 2, of the Rules of Court. It is not a formality serving no purpose.

5. As the Court emphasized in its Judgment of 26 June 1992 in the case concerning *Certain Phosphate Lands in Nauru*:

> "Article 40, paragraph 1, of the Statute of the Court provides that the 'subject of the dispute' must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires 'the precise nature of the claim' to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:

> 'under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim set out therein . . .' (*P.C.I.J., Series A/B, No. 52*, p. 14).

In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:

> 'It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute . . . it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute.' (*P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 427, para. 80.)" (*I.C.J. Reports 1992*, pp. 266-267, para. 69; see also the Judgment of 4 December 1998, *Fisheries Jurisdiction Case*, para. 29.)

6. In the present case, however, the FRY has disregarded these requirements and has radically changed the nature of its Application, probably in the hope of artificially coupling the accusation of genocide to it.

7. Curiously, the Applicant itself expressly acknowledges this change:

— Already in paragraph 12 of its Memorial it states:

> "Since the Orders of the Court, dated 2 June 1999, the dispute aggravated and extended. It got new elements concerning *failures of the Respondents to fulfill their obligations established by Security Council resolution 1244* [this resolution was adopted on 10 June 1999, while the Application was filed in the Registry of the Court on 29 April 1999] and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Negating the alleged humanitarian motives of the Respondents, *the new elements are of crucial importance for the substance of the dispute"* (p. 8, emphasis added; see also, for example, p. 339, para. 3.2.11.).

— In paragraph 16, it candidly avows:

> "Due to the fact that the dispute matured, *through the new elements*, the Applicant considers that the circumstances related to the jurisdiction of the Court *have changed so that the Court has jurisdiction* to resolve the dispute" (p. 9, emphasis added).

— Generally, Sections 1.5 and 1.6.2 of its Memorial, dealing respectively with "Facts related to killings, wounding and ethnic cleansing of Serbs and other non-Albanian groups" (pp. 201-282, or nearly one quarter of the Memorial) and to "facts related to the existence of an intent to

commit genocide by killing and wounding Serbs and other non-Albanian groups in Kosovo and Metohija" (pp. 283-284), concern facts arising after the Application was filed and cannot be joined to it.

— And, in concluding the brief section it devotes to the Court's jurisdiction under Article IX of the Genocide Convention — the only basis of jurisdiction it relies on against France —, the FRY asserts that it

> "has submitted the evidence on the intent to commit genocide referring to acts of the Respondents (acts of bombing [on this point, see Chap. 1, Sect. 2, above] and to acts of killing and wounding of Serbs and other non-Albanian population in Kosovo and Metohija *after the 10th of June 1999* [on this point, see Chap. 1, Sect. 3, above]. Accordingly, the Applicant claims that the jurisdiction of the Court . . . is established" (para. 3.4.3, p. 349; emphasis added).

8. The change in the nature of the dispute resides not only in the fact that the FRY relies extensively on new facts, which, by its own admission, are the only ones capable of founding the jurisdiction of the Court. The change is also reflected in:

— a modification of what might be termed the "territorial parameters" of the dispute, because the Application was expressly based on the "use of force against the Federal Republic of Yugoslavia by taking part in bombing targets *in the Federal Republic of Yugoslavia*" (p. 10; emphasis added), while the "new elements" cited by the FRY are limited to what the FRY calls "Kosovo and Metohija";

— accusations against new actors in the dispute, specifically the United Nations (and its Members), KFOR (and its participating States) and groups the Applicant refers to as "Albanian terrorists" (France unqualifiedly reserves its position with respect to the legal characterization of those groups);

— a change in the very nature of the dispute, made clear by the introduction of a new submission, not corresponding to any "claim" made in the Application. That submission is nevertheless crucial because, of the 14 submissions in the Memorial, it is the only one relating to the genocide allegedly committed by France ("by failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in article III of the Genocide Convention", p. 352).

9. As the Court pointed out (and it is for the Court itself "to determine on an objective basis the dispute dividing the parties", "while giving particular attention to the formulation of the dispute chosen by the Applicant" — *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, para. 30) in its Order of 2 June 1999, it is "the bombings which form the subject of the Yugoslav Application" (para. 27). Yet these stopped upon the adoption by the Security Council of resolution 1244 (1999) on 10 June 1999. In the FRY's view, however, it is facts arising subsequently to the cessation of bombing that are the "crucial" facts upon which it relies to found the jurisdiction of the Court, particularly with respect to the basis of jurisdiction under Article IX of the 1948 Convention (see para. 5, above). Far from arising directly out of the question which is the subject-matter of the Application (see *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72, or *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318-319, para. 99), the new facts alleged by the FRY transform the very nature of the dispute. Proof of this lies moreover in the fact that the applicant State relies on them to

found the very jurisdiction of the Court (see Memorial, p. 9, para. 16 or p. 349, para. 3.4.3; see para. 5, above).

10. In so doing, the FRY has transformed the dispute "into another dispute which is different in character" from the one of which it seised the Court by its Application of 29 April 1999 (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also the Judgments of the P.C.I.J. in the case concerning the *Société Commerciale de Belgique* and of the I.C.J. in the case concerning *Certain Phosphate Lands in Nauru*, cited above, para. 3, and the Order of the I.C.J. of 13 September 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993*, p. 17, para. 27).

11. As the Permanent Court of International Justice stated in the case concerning the *Société Commerciale de Belgique* (cited above, para. 3), such a transformation, if admitted, "would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute" (*P.C.I.J., Series A/B, No. 78*, p. 173). This consideration takes on particular significance in the present case. The transformation by the FRY of the dispute before the Court results in bringing in new facts involving States not party to the proceedings. Irrespective of whether this in itself does not bar consideration of the Application on the merits, there can be no doubt that this transformation prejudices the right of intervention of the States in question pursuant to Articles 62 and 63 of the Statute. While the Members of NATO and of the United Nations and the States participating in KFOR — whose legal interests are unquestionably involved here — did have the Application communicated to them (pursuant to Article 40, paragraph 2, of the Statute) and it has been published, they cannot have knowledge of the FRY's Memorial, owing to the confidentiality of the pleadings, in accordance with the principle laid down in Article 53 of the Rules of Court.

12. In accordance with its consistent, settled jurisprudence, the Court is thus bound to find that it is unable to rule on the FRY's claims founded on these new elements, which have no direct connection with its Application.

13. Although this conclusion might appear to be merely a partial objection to admissibility, insofar as it in theory leaves open the possibility for the Court to rule on the facts included, or implied, in the Application, it is in reality, in light of the circumstances of this case, a fatal obstacle to the exercise of any jurisdiction at all. Indeed, according to the FRY itself (see para. 7, above), these new facts, if proved, are the only facts which could engage France's responsibility for genocide and could therefore found the jurisdiction of the Court under Article IX of the Convention.

14. What is more, in reality even these new elements bear absolutely no relation to the 1948 Convention.

Section 2 — The alleged facts are not attributable to France and do not therefore relate to any dispute between the French Republic and the FRY concerning the application and interpretation of the 1948 Convention

15. Not only does the FRY fail, as France has shown in the preceding Chapter, to demonstrate, *ratione materiae*, that genocide has been committed, but also neither its Application

nor its Memorial provides even the slightest evidence to support an inference that the facts on which its claims are based are or could be attributed to the French Republic.

16. Failing such attribution, the very existence of a dispute *between the Parties* relating to the application or interpretation of the Genocide Convention is called into doubt. Even if it were assumed solely for purposes of argument that genocide had been, or was, committed against the Serbian population of the FRY, that would not suffice to found the jurisdiction of the Court in the dispute brought before it by the Applicant. It would also be necessary for the Applicant to offer reasonable evidence enabling that genocide to be attributed to the French Republic (see Chap. 1, Sect. 1 C, above).

17. In its Application, the Applicant:

— asserts that "[t]he subject-matter of the dispute [is] acts of the Republic of France" committed in violation of a number of international obligations (p. 8), but it fails to establish either the fact of these acts — an issue which is not appropriate for discussion in the framework of these preliminary objections — or that France was the perpetrator of them;

— "requests the International Court of Justice to adjudge and declare" that France "is responsible for the violation" of various international obligations it bears as a result of the actions in which it allegedly *"took part"* (pp. 8 and 10), but it does not explain the extent of this participation or the concrete actions involved;

— alleges that "[t]he Government of the Republic of France, *together with the Governments of other Member States of NATO*, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia" and "*is taking part* in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army'" (pp. 10 and 12; emphasis added), but it does not specifically identify which of the acts are allegedly attributable to France; and

— concludes that these acts "of the Government of the Republic of France represent a gross violation of the obligation not to use force against another State", that "[b]y financing, arming, training and equipping the so-called 'Kosovo Liberation Army', support is given to terrorist groups and the secessionist movement in the territory of the Federal Republic of Yugoslavia in breach of the obligation not to intervene in the internal affairs of another State", and that "[f]urthermore, the activities in which the Republic of France is taking part are contrary to Article 53, paragraph 1, of the Charter of the United Nations" (p. 12; emphasis added), but, apart from the fact that it is difficult to see any connection at all between these alleged violations and the Genocide Convention (see Introduction, paras. 32-37, above), on which the FRY places its entire reliance to found the jurisdiction of the Court, these allegations are not supported by the slightest evidence.

18. The Memorial does not change this aspect of the situation at all. In the statement of facts, France and its nationals are referred to a grand total of four times.

19. It must also be noted that one of these allegations, which is mere hearsay, concerns statements by a certain General Joffret (p. 283, para. 1.6.1.5), who is not a member of the French armed forces (see Chap. 1, para. 45, above). As for two of the others, the alleged facts do not concern France as such, but rather French soldiers in KFOR:

— paragraph 1.5.1.1.64 of the Memorial (p. 206) states that members of the French contingent of KFOR informed relatives of the deaths of two people who had been ambushed (with no allegation that the ambush had been set by French soldiers);

— the Memorial states on page 208 that members of the French contingent of KFOR brought Serbian victims of an incident in the village of Banje to the hospital in Mitrovica (para. 1.5.1.1.94); and

— further on, the FRY refers to incidents occurring on 10 September 1999 in Mitrovica:

> "Albanian terrorists and Albanian citizens stoned members of the French KFOR contingent, who separated them from Serb citizens on the other bank of the river. At about 1.30 p.m. Albanian terrorists opened fire from bazookas at the northern part of the city. French members of KFOR threw tear gas on them, trying to scatter them in smaller groups. The attack of Albanian terrorists lasted until late evening hours. Several Serb citizens were slightly injured by the explosion of rifle grenades. To prevent traffic towards Kosovska Mitrovica, KFOR members blocked Ribarice-Kosovska Mitrovica arterial road in the village of Zupce, Zubin Potok municipality" (pp. 239-240, para. 1.5.5.1.75).

20. Far from showing that the French Republic or its nationals in KFOR have breached any international obligation, these alleged actions — and France does not intend to take any position as to the truthfulness of the allegations — moreover resoundingly disprove any genocidal intent on its part (see Chap. 1, Sect. 1 B, above).

21. Furthermore, France is not even mentioned once in the only section of the Memorial (see Introduction, para. 39, above) referring expressly to alleged genocide ("1.6. Facts related to the existence of an intent to commit genocide", pp. 282-284), except in the most indirect manner, and one irrelevant to the question of the attribution of alleged genocidal intent to France, in the form of a statement attributed to a French military officer (p. 283, para. 1.6.1.5; on this point, see Chap. 1, para. 45, above). Nor is France mentioned any more frequently in the very rare passages of the Memorial which could have some remote link with the accusation of genocide (see Sect. 1.2.5, "Facts related to the violations of the rules applying to the prohibition of attacks directed against the objects indispensable to the survival of the civilian population", pp. 168-169, and Sect. 1.5, "Facts related to killings, wounding and ethnic cleansing of Serbs and other non-Albanian groups", pp. 201-300, the only exception being the actions by the French KFOR forces referred to above, which precisely disprove any genocidal intent).

22. Nor does the section which the FRY purports to devote to the "Law related to the issue of responsibility" [sic][1], found in the "Law" part of its Memorial and amounting to a single page (2.8, pp. 327-328) provide any evidence for the attribution to France of the acts listed in the first part. It asserts successively that the acts of NATO (sub-section 2.8.1) and of KFOR (sub-section 2.8.2) are imputable in the first case to the "Respondents" (plural) and in the second to the "Respondent" (singular). Neither of these two allegations is founded.

23. With regard to NATO, it is not sufficient to assert, as the Applicant does, that the Organization "acts under the political and military guidance and control of its Member States" (p. 327, para. 2.8.1.1.2) in order to establish the individual responsibility of those States. This

[1]Note by the Registry: the original text of the Yugoslav document, quoted here by France in English, reads "imputability".

proposition fails to allow for the fact of international legal personality, which precludes a State from being held liable for an organization's acts simply because the State is a member (see Rosalyn Higgins, "Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Towards Third Parties" (provisional report to the Institute of International Law), *Yearbook of the Institute of International Law* 1995, pp. 388-389, and Advocate General Darmon's opinion in the Court of Justice of the European Communities case involving the International Tin Council (*Maclaine Watson* v. *Council and Commission*, case C-241/87, *Reports* 1990, I-1819)). NATO has such a legal personality and cannot therefore be deemed "transparent" as far as international responsibility is concerned (see para. 44, below).

24. It might perhaps be different if a Member could, on its own, impose its will on the Organization. In that case, it would be possible to contend that the State in question engages its individual responsibility if it leads the Organization to commit an illegal act, even though this is a debatable proposition. But the converse is certainly not true: the fact that decisions within NATO may be taken only by unanimous agreement, as the [Applicant][2] points out (p. 327, para. 2.8.1.1.1) shows, to the contrary, that the member States may not be held individually and separately liable and that, if they could be held liable notwithstanding the Organization's own legal personality (a highly doubtful proposition), that could only be on a joint basis (see para. 40, below).

25. As for KFOR, whose creation was endorsed by United Nations Security Council resolution 1244 (1999) dated 10 June 1999, this force is made up of personnel from 35 States, 16 of which are not NATO Members, and is subject at one and the same time to operational direction by NATO and control by the Security Council. Special rules of responsibility apply to it (see paras. 46-47, below).

26. Thus, the legal personality of the United Nations, on the one hand, and of NATO, on the other, create a "double veil" between the acts committed by KFOR and the responsibility which the FRY seeks to impute to France. Moreover, the Applicant makes no showing whatever of the role played by France in the allegedly illegal acts imputed to KFOR.

27. By way of conclusion to the very brief discussion it devotes to the questions concerning attribution, the Applicant asserts that "[t]he general rule on attribution of an act to a State is that a State is responsible for an act committed under guidance and control of its organ as well as for an act endorsed by its organ" (p. 328, para. 2.8.2). This principle is not open to challenge, but the FRY has not offered the slightest evidence showing that organs of the French State guided or controlled or endorsed any act which could be connected, closely or remotely, with a breach of its obligations under the 1948 Genocide Convention.

28. In these circumstances, it would not be open to the Court to find that the dispute brought before it by the FRY is one which it has jurisdiction *ratione materiae* or *ratione personae* to entertain, pursuant to Article IX of that Convention (see *Oil Platforms(Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 810, para. 16; see para. 15, above).

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[2]Note by the Registry: French original *défendeur* (Respondent) appears to be a misprint for *demandeur* (Applicant).

Section 3 — The exercise of jurisdiction by the Court would lead it to rule on the legality of the conduct of States and international organizations which are not participants in the proceedings

29. The French Republic believes that it has shown beyond reasonable doubt that the Court lacks jurisdiction to decide the case submitted to it by the FRY. In the further and altogether subsidiary alternative, the French Republic also argues that in the unlikely event that the Court were to hold that it has jurisdiction, it would be precluded from exercising it because that would require it first to rule on the rights and interests of States and international organizations which are not parties to the proceedings and, in the case of the latter at least, cannot be parties thereto.

30. In accordance with the Court's settled jurisprudence,

> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it" (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 33).

31. This position, formulated so clearly for the first time in the case concerning *Monetary Gold* in 1954, was derived by the Court from "a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*ibid.*, p. 32), and has been reaffirmed repeatedly since then (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 579; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 122, para. 73; and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55). The Court applied it in its Judgment of 30 June 1995 in the case concerning *East Timor*, in which it observed that considering Portugal's application would have obliged it "to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent" (*I.C.J. Reports 1995*, p. 105, para. 35).

32. That would also be the case in these proceedings, in which the Court could not rule on the FRY's claims against France without ruling, as a prerequisite, on the lawfulness of acts and decisions by many players in the tragic events in Kosovo, players who are not participants in these proceedings and some of whom could not in any event participate because of their legal status.

33. The French Republic is well aware that, as the Court held in the case concerning *Certain Phosphate Lands in Nauru* (*I.C.J. Reports 1992*, pp. 261-262, para. 55), the Court is not precluded from exercising its jurisdiction if its judgment does not lead it to rule on the legal position of subjects of international law not present in the proceedings, even though its reasoning could be transposed to them. But that is not the case here: as in the case concerning *East Timor*, the Court could not decide on any responsibility of France without ruling, *as a prerequisite*, on the legality (under the 1948 Genocide Convention, because that instrument is the only one capable of founding the Court's jurisdiction) of the actions by these main players in the drama of Kosovo. Moreover, unlike the case of the alleged "indispensable parties" in the case concerning *Military Activities* (*I.C.J. Reports 1984*, p. 425, para. 74, and p. 431, para. 88), these entities do not enjoy the possibility of bringing separate proceedings before the Court or of employing the intervention procedure.

34. Specifically, this is true of NATO, KFOR (which operates under NATO direction but subject to a degree of control by the United Nations) and the persons whom the FRY calls, according to the case, "Albanian terrorists" or "Albanian separatists" and their organizations, in particular the Kosovo Liberation Army (UCK). The forum of the Court is not open to them, because States alone have access to it, pursuant to Article 35, paragraph 1, of the Statute. Yet the vast majority of the acts described in the FRY's Memorial were primarily, and most of the time exclusively, committed by these players, whose actions, as such, cannot engage the individual responsibility of any State, including the French Republic.

35. It is certain, in particular, that determining the legality of the acts by NATO, which, in the FRY's view, is responsible for the acts of both the UCK (Sect. 1.7, pp. 284-288) and of KFOR (see 1.9.2, pp. 296-299, and 2.8.1.2, pp. 327-328), is an indispensable prerequisite to any finding of responsibility on the part of France. If France had committed the acts of which it stands accused by the Applicant, it would have been acting in pursuance of decisions taken by the Brussels Organization.

36. These decisions were, however, obviously not taken by France alone, but by all the member States (see para. 28, above). The Court cannot therefore judge the responsibility of each independently of the responsibility of all the others. Yet, of the 19 NATO member States (and of the 14 of them which took part in the operations made necessary by an impending humanitarian disaster in Kosovo), the FRY has brought proceedings in the Court against only 10, and the Court has already removed two of these cases from its List (and has rightly not joined the other eight cases). In this connection, determining the responsibility of the other NATO Members and of the Organization itself is not, strictly speaking, a *chronological* prerequisite to determining the responsibility of France, but the former cannot be severed from, and is an indispensable *condition* for, the latter. It is a *logical* prerequisite, in that in any event France could be held responsible only for collective actions from which its own acts cannot be separated. Assuming that decisions of the Organization could engage the responsibility of its Members (which is highly doubtful — see para. 27, above, and paras. 49-50, below), that responsibility could be engaged only collectively: it would result from the Members' combined conduct, not from the juxtaposition of their actions.

37. In any case, determining the legality of the acts which the Applicant imputes (by implication — see Sect. 2, above) to France is a prerequisite, in all senses of the term, to assessing its responsibility.

38. As the FRY stresses in the claim set out in its Application (pp. 8 and 10), France "took part" in these collective actions, but its responsibility can be engaged because of them only if the Court were to decide, first, that the NATO decisions giving rise to those actions were illegal.

39. In this respect, the present case is very different from the case concerning *Certain Phosphate Lands in Nauru*. In that case, "the Administering Authority" for Nauru, made up of the Governments of Australia, New Zealand and the United Kingdom, "did not have an international legal personality distinct from those of the States thus designated" (Judgment of 26 June 1992, *I.C.J. Reports 1992*, p. 258). Also, as the Court pointed out, "of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice" *(ibid.)*. That is not at all the situation here. France played a leading role, which it does not seek to understate, in preventing a humanitarian disaster in Kosovo, but it never decided or acted alone. Furthermore, and above all, NATO, unlike the Administering Authority for Nauru before its independence, has a legal personality distinct from that of its member States, of which it is not simply the "sum total".

40. The establishment of the North Atlantic Council, pursuant to Article 9 of the North Atlantic Treaty, which provided that the Council was to set up "such subsidiary bodies as may be necessary", brought into being a genuine international organization (particularly after the Lisbon Conference of 20 and 21 February 1952), having organs, given special tasks and enjoying legal capacity and privileges and immunities. All of these are elements which led the Court in its Advisory Opinion of 11 April 1949 concerning *Reparation for Injuries Suffered in the Service of the United Nations* to conclude, in the case of the United Nations, that the Organization was an "international person". "What [that] does mean is that [the Organization] is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims" (*I.C.J. Reports 1949*, p. 179). And, as counterpart to this right, it may also have claims made against it, notably whenever, as in the present case, an internationally wrongful act may be attributed to it. The responsibility of international organizations in the international legal order is no longer disputed (see H. G. Schermers and N. M. Blokker, *International Institutional Law*, Nijhoff, The Hague/Boston/London, 3rd ed., 1995, p. 991; C. F. Amerasignhe, *Principles of the Institutional Law of International Organizations*, Cambridge U.P., 1996, p. 239; or P. Klein, *La responsabilité des organisations internationales*, Bruylant, Brussels, 1998, pp. 2 or 311).

41. In the present case, Operation "Allied Force" was devised, decided and carried out by NATO as such and France never acted either individually or autonomously.

42. From the legal perspective, the situation became more complex following the decisions taken concomitantly by NATO and the United Nations. By a decision of 9 June 1999, the North Atlantic Council decided to implement the "Joint Guardian" operation order concerning KFOR's deployment in Kosovo. In a decision of 10 June 1999, it took note of the statement by the President of the Military Committee on KFOR preparation for its rapid deployment in Kosovo. In a decision of 11 June 1999, taken the day after the United Nations Security Council adopted resolution 1244, it authorized the deployment of the KFOR forces in Kosovo. In the above-mentioned resolution, adopted under Chapter VII of the Charter, the Security Council *decided* "on the *deployment* in Kosovo, *under United Nations auspices*, of international civil [MINUK] and security [KFOR] presences" (para. 5), authorized "Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2" (para. 7) and defined the responsibilities of that security presence (para. 9). Point 4 of annex 2 provides: "The international security presence with substantial North Atlantic Treaty Organization participation must be deployed *under unified command and control* . . .".

43. It is therefore apparent that:

— KFOR was created by NATO;

— KFOR was deployed in Kosovo under United Nations auspices;

— NATO participates in it "substantially" (but not alone, because the force is made up of 35 States, including the Russian Federation); and

— KFOR is subject to unified command and control by NATO.

44. For its part, France participates actively in KFOR, but under operational control by NATO's SACEUR (Supreme Allied Commander Europe) and political control by the NAC (North Atlantic Council).

45. On the international level, responsibility for events having occurred after 10 June 1999 (assuming them to be relevant for purposes of this case, *quod non*, as France has shown in Section 1 above) therefore lies primarily with NATO and to a lesser extent with the United Nations, which authorized KFOR's deployment and receives regular reports on its activities, but not with their member States, which do not enjoy freedom of action in Kosovo and which act under unified command and control. Accordingly, all acts by the French contingent or its members were carried out in the name of NATO, to whose power of direction and control they are subject.

46. The principle laid down in Article 28, paragraph 1, of the draft Articles on State Responsibility adopted by the ILC on first reading in 1996 must therefore be applied, *mutatis mutandis*:

> "An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State" (*Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, p. 61).

This principle is fully transposable to cases where the power of direction or control is exercised not by another State but, as is the case here, by one (or two — since NATO is responsible for the "direction" of KFOR and the United Nations for "control" of it) — international organization(s).

47. It therefore follows not only that the Court, in ruling on the internationally wrongful acts allegedly committed by "the Respondents", would at the same time be taking a position on the responsibility of the two relevant international organizations, but, further even, it could rule on France's responsibility only if, before doing so, it found that the NATO and United Nations decisions implemented by the French contingent of KFOR were wrongful. Both before and after 10 June 1999, the situation is indeed that of *Monetary Gold*: the legal interests of NATO and the United Nations "would not only be affected by a decision [on the merits], but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32). This consideration represents an even stronger bar to consideration of the merits of the FRY's Application, in that not only have these two organizations not consented to the Court's jurisdiction, as was the case of Albania in 1954, but also, even if they wished to, they could not, either by accepting the Court's jurisdiction or by intervening, because "[o]nly States may be parties in cases before the Court", in accordance with the fundamental rule laid down in Article 34, paragraph 1, of the Statute.

48. *In conclusion* to Chapter 2, it is apparent that:

1. the FRY has not established, even prima facie, that the acts listed in its Memorial can be attributed to France, which it does not refer to at any time as the perpetrator;

2. it follows that those acts manifestly cannot be considered to fall within the provisions of Article IX of the Genocide Convention, which the FRY claims as the basis of the Court's jurisdiction;

3. those acts were committed either by international organizations (NATO and the United Nations) or under their direction and control and, even assuming them to be proved, they cannot therefore engage the international responsibility of France,

4. on which the Court cannot in any event rule without having first determined the responsibility of those same international organizations, and

5. without adjudicating upon the responsibility of States not parties to the proceedings, whose responsibility is inseparable from that attributed to France, whether concerning the responsibility of States having participated in Operation Allied Force before 10 June 1999 or of those participating in KFOR since that date;

6. furthermore, and in any event, those acts cannot be related to the FRY's initial Application, which predates them, and incorporating them in the Memorial transforms the very nature of the dispute,

7. and this is all the more so since the Applicant itself asserts that they are "crucial" to determining the jurisdiction of the Court.

SUBMISSIONS

For the reasons set out in this Memorial, and for any such others as might be put forward in the subsequent proceedings or raised *proprio motu*, the French Republic requests the International Court of Justice to decide:

— principally, that it lacks jurisdiction to rule on the Application filed by the Federal Republic of Yugoslavia, and

— in the alternative, that the Application is inadmissible.

Paris, 4 July 2000

(Signed and sealed) Ronny ABRAHAM,
Agent of the French Republic.

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