INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
LEGALITY OF USE OF FORCE

(YUGOSLAVIA v. GERMANY)

PRELIMINARY OBJECTIONS

OF

THE FEDERAL REPUBLIC OF GERMANY

Volume I

(Text of the Preliminary Objections)

05 July 2000

TABLE OF CONTENTS

VOLUME I

VOLUME II

ANNEXES

Scheme of this Preliminary Objections Submission

This Preliminary Objections Submission contains the following parts:

- In the first section, Germany explains that it raises preliminary objections against the application of the Federal Republic of Yugoslavia. Germany refrains from commenting on the issues related to the merits of the case.

- In the second section, Germany sets out the factual background of the present dispute, solely for the purpose of showing that the Court lacks jurisdiction to adjudicate Yugoslavia's claims.

- In the third section, Germany explains in details the nature and scope of its preliminary objections.

- In the fourth section, Germany sets out its requests.

SECTION 1

GERMANY RAISES PRELIMINARY OBJECTIONS

1.1. The Federal Republic of Yugoslavia (FRY) has no standing before the Court. Not being a member of the United Nations, it is not automatically party to the Statute of the Court and has not been admitted to the Statute. On the other hand, it has not made the declaration required by resolution 9 (1946) of the Security Council which permits States non-members of the United Nations to avail themselves of the services of the Court. Thus, *ratione personae* the Court is not open to the FRY. The FRY is not entitled to institute judicial proceedings against other States.

1.2. Germany holds that the Application filed by the FRY in the Registry of the Court on 29 April 1999, instituting proceedings against the Federal Republic of Germany, lacks any jurisdictional basis. None of the requirements specified by Article 36 of the Court's Statute is met. There exists no agreement between the two Parties to the effect that the current dispute should be judicially settled by the Court (Article 36 (1), first clause). In particular, the dispute does not fall within the scope of any clause of jurisdiction established by a treaty in force and applicable between the two Parties (Article 36 (1), second clause). Article IX of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter: Genocide Convention) does not cover the instant case. Lastly, Germany is not subject to the jurisdiction of the Court by virtue of a unilateral declaration in accordance with the optional clause set forth in Article 36 (2) of the Statute.

1.3 Regarding the post-conflict period, Germany is of the view that in the absence of the United Nations in the instant proceedings the Court is debarred from assuming jurisdiction inasmuch as any charges of genocide or non-respect of Security Council resolution 1244 (1999) primarily target the World Organization. The Court cannot pronounce on the rights and duties of a third who is not present in a proceeding pending before it.

1.4. Accordingly, Germany avails itself of the opportunities provided for by Article 79 (1, 2) of the Rules of the Court to contest the jurisdiction of the Court by raising preliminary objections. It is of the view that these preliminary objections must be decided upon first before the dispute could possibly be adjudicated as to its merits.

According to its firm conviction, however, the merits stage cannot be reached in the instant case. Above all, it will be shown in this Preliminary Objections Submission that Article IX of the Genocide Convention is inapplicable in the relationship between Germany and the FRY, in the same way as it is inapplicable in the relationships between the FRY and the other States impleaded by the Applicant in connection with the air operations launched by NATO from March to June 1999 with a view to putting an end to the atrocities committed by Serbian forces in the Yugoslav province of Kosovo.

1.5. At the very outset, Germany observes that most of the documents submitted in the Annexes to the FRY's Memorial are in Serbo-Croat. These documents cannot be relied upon inasmuch as the official languages of the Court are English and French (Article 39 of the Statute). Germany is not prepared to conduct the proceedings on the basis of a language other than these two official languages. In accordance with Article 51 (3) of the Rules, translations would have to be provided.

SECTION 2

THE FACTUAL BACKGROUND

2.0. In the following (Section 2), Germany will give a summary account of the historical antecedents of the conflict between the FRY and the international community, the developments during NATO's air operations and the aftermath of the military confrontation pursuant to the assumption of responsibility for Kosovo by the United Nations. This is done solely in order to prove that the compromissory clause of Article IX of the Genocide Convention[1] is inapplicable in the relationship between the FRY and Germany. Germany does not enter into a discussion of the merits of the case since it is firmly convinced that the Court lacks jurisdiction to entertain the FRY's application.

I. The Situation before the Launching of NATO's Air Operations

2.1. There is a long history of dispute between Serbs and Albanians over who is the rightful owner of Kosovo. It is not the purpose of these lines to give an account of these controversies. Suffice it to note that under the Yugoslav Constitution of 1974[2] Kosovo enjoyed the status of an autonomous province, which according to the explanation given in Article 4 was an "autonomous, socialist, self-managing democratic socio-political community". Gradually, however, this status was abolished. In 1989, the Constitution was amended for the first time to confer increased powers on central authorities in Belgrade. Use of the Albanian language for official purposes was forbidden. With the imposition of a state of emergency, Kosovo's autonomy came *de facto* to an end.

2.2. In 1990, this *de facto* situation was quickly formalized. The Government of the Serbian Republic first dissolved the Assembly and the Executive Council of Kosovo, and with the adoption of a new Constitution of that Republic in September of that year the status of autonomy of Kosovo lost all of its substance. Serbia assumed total control over the province. When, after the disintegration of the Socialist Federal Republic of Yugoslavia, a new Constitution was adopted in April 1992, any hint at a status of autonomy for certain provinces was deleted. According

[1] Adopted by UN General Assembly resolution 260 A (III), 9 December 1948.
[2] Annex 1.

to that Constitution, which is in force still today, Kosovo is just a part of the Republic of Serbia without any special rights.

2.3. Very soon after these events reports about repressive measures of Serbian authorities reached international institutions, which from then on continually expressed their dismay over what they had learned about serious human rights violations in Kosovo.

2.4. In July 1992, at its Helsinki summit, the then Conference on Security and Cooperation in Europe adopted a Declaration on the Yugoslav crisis, in which it specifically addressed the situation in Kosovo (para. 3):

> "The situation in Kosovo remains extremely dangerous and requires immediate preventive action. We strongly urge the authorities in Belgrade to refrain from further repression and to engage in serious dialogue with representatives of Kosovo, in the presence of a third party".[3]

A few months later, it decided to send a long-term mission to Kosovo, out of growing fears that the ethnic conflict might escalate.

2.5. In August 1993, however, this mission had to be withdrawn since the competent authorities of the FRY refused to give their consent to the continuance of its activities. The UN Security Council, in resolution 855 (1993), called upon them to reconsider their refusal and to cooperate with the CSCE by taking the practical steps needed to the resumption of the activities of the mission (op. para. 2). However, the FRY did not comply with this call.

2.6. As from 1992, the General Assembly expressed its "grave concern" regarding the handling of the situation in Kosovo. In resolution 47/147 of 18 December 1992 it urged all parties there (op. para. 14):

> "to act with utmost restraint and to settle disputes in full compliance with human rights and fundamental freedoms, and calls upon the Serbian authorities to refrain from the use of force, to stop immediately the practice of 'ethnic cleansing' and to respect fully the rights of persons belonging to ethnic communities or minorities ..."

[3] Document CSCE/HS/1, 10 July 1992, Annex 2.

At this early stage already, as shown by this text, 'ethnic cleansing' was a charge brought against the Serbian authorities.

2.7. In 1993, the charges which were held against the Government in Belgrade became even more specific. In resolution 48/153 of 20 December 1993, the General Assembly had this to say:

> "17. *Expresses its grave concern* at the deteriorating human rights situation in the Federal Republic of Yugoslavia (Serbia and Montenegro), particularly in Kosovo, as described in the reports of the Special Rapporteur, and strongly condemns the violations of human rights occurring there;
>
> 18. *Strongly condemns* in particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including:
> (a) Police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, which leads to a climate of lawlessness in which criminal acts, particularly against ethnic Albanians, take place with impunity;
> (b) The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities;
> (c) Arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations;
> (d) Repression by the Serbian police and military;
>
> 19. Urges the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro):
> (a) To take all necessary measures to bring to an immediate end the human rights violations inflicted on the ethnic-Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman or degrading treatment and the occurrence of summary executions;
> (b) to revoke all discriminatory legislation, in particular that which has entered into force since 1989;
> (c) to re-establish the democratic institutions of Kosovo, including the parliament and the judiciary;
> (d) To resume dialogue with the ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia;
>
> 20. *Also urges* the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to respect the human rights and fundamental freedoms of ethnic Albanians in Kosovo, and expresses the view that the best means to safeguard human rights in Kosovo is to restore its autonomy."

Similar appeals to the FRY were made by resolutions 49/196 of 23 December 1994 (op. para. 19), 50/193 of 22 December 1995 (op. paras. 16-18), 51/116 of 12 December 1996 (op. paras. 10-12) and 52/147 of 12 December 1997 (op. paras. 15-17).

2.8. The Security Council, on its part, remained an attentive observer of the developments as they were unfolding. In resolution 1160 (1998) of 31 March 1998 it condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army. According to its judgment, both sides had contributed to the spiral of violence.

2.9. In the summer of 1998, the Security Council made a new appeal for the end of the fighting, highlighting at the same time the grave dangers threatening the civilian population in the province. Through the voice of the President, it stated:

> "The Security Council remains gravely concerned about the recent intense fighting in Kosovo which has had a devastating impact on the civilian population and has greatly increased the numbers of refugees and displaced persons ... given the increasing numbers of displaced persons, coupled with the approaching winter, the situation in Kosovo has the potential to become an even greater humanitarian disaster ... It remains essential that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanians accept responsibility for ending the violence in Kosovo ..."[4]

2.10. In September and October 1998 the UN Secretary-General submitted two reports to the UN Security Council in which he expressed serious concern over the deteriorating conditions in the province. In his report of 4 September 1998,[5] which was complemented by an addendum on 21 September 1998,[6] he drew attention to the increasing number of persons displaced from their homes, estimating that out of 230,000 such persons 170,000 were still living within Kosovo. He added in the main body of the report:

[4] Presidential statement of 24 August 1998, UN doc. S/PRST/1998/25, Annex 3.
[5] Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998) of the Security Council, UN doc. S/1998/834, 4 September 1998, Annex 4.
[6] UN doc. S/1998/834/Add.1.

> "8. According to UNHCR estimates, there could be up to 50,000 displaced people in Kosovo who have been forced from their homes into the woods and mountains. These people are the most vulnerable and are in need of urgent help. Despite assurances from the authorities, access is hindered, and the immediate priority of the humanitarian agencies is to find these groups and to deliver essential relief. It is clear that if these people remain in their current locations over the winter, they will be at serious risk of death. It remains a priority to assist them to return to their homes, or to move them to host families, or, as a last resort, into collective centres where assistance can be more reliably provided.
> ...
> 11. A prolongation of the Government's present policies is likely to result in further displacement of the wider population. This is particularly worrying because of the approaching winter, which could transform what is currently a humanitarian crisis into a humanitarian catastrophe. It is likely that most of the displacement will continue to be concentrated within Kosovo itself, although an increasing number of those displaced appear to be electing to move to other areas within the Federal Republic of Yugoslavia (Montenegro in particular) and abroad."

2.11. This report together with its addendum led the Security Council, acting under Chapter VII of the Charter, to adopt, on 23 September 1998, resolution 1199 (1998), in which it stated (preamb. para. 10) that it was

> "deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe as described in the report of the Secretary-General, and emphasizing the need to prevent this from happening,"

and demanded (op. para. 2) that

> "the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe".

In addition, it demanded (op. para. 4) that the FRY

> "(a) cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression;
> (b) enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic mission accredited to the Federal Republic of Yugoslavia, including access and complete freedom of movement of such monitors to, from and within Kosovo

unimpeded by government authorities, and expeditious issuance of appropriate travel documents to international personnel contributing to the monitoring;

(c) facilitate, in agreement with the UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo;

(d) make rapid progress to a clear timetable, in the dialogue referred to in paragraph 3 with the Kosovo Albanian community called for in resolution 1160 (1998), with the aim of agreeing confidence-building measures and finding a political solution to the problems of Kosovo."

2.12. The second report was issued by the Secretary-General on 3 October 1998.[7] In that report, he stated *inter alia*:

"7. The desperate situation of the civilian population remains the most disturbing aspect of the hostilities in Kosovo. I am particularly concerned that civilians increasingly have become the main target in the conflict. Fighting in Kosovo has resulted in a mass displacement of civilian populations, the extensive destruction of villages and means of livelihood and the deep trauma and despair of displaced populations. Many villages have been destroyed by shelling and burning following operations conducted by federal and Serbian government forces. There are concerns that the disproportionate use of force and actions of the security forces are designed to terrorize and subjugate the population, a collective punishment to teach them that the price of supporting the Kosovo Albanian paramilitary units is too high and will be even higher in future. The Serbian security forces have demanded the surrender of weapons and have been reported to use terror and violence against civilians to force people to flee their homes or the places where they had sought refuge, under the guise of separating them from fighters of the Kosovo Albanian paramilitary units. The tactics include shelling, detentions and threats to life, and finally short-notice demands to leave or face the consequences. There have been disruptions in electricity and other services, and empty dwellings have been burned and looted, abandoned farm vehicles have been destroyed, and farm animals have been burned in their barns or shot in the fields....

...

9. I am outraged by reports of mass killings of civilians in Kosovo, which recall the atrocities committed in Bosnia and Herzegovina ...

...

11. The pattern of displacement is fast-changing and unpredictable as people flee in response to the actions and real or perceived threats of the security forces. Even though there have been some returns, the Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that more than 200,000 persons remain displaced in Kosovo and some 80,000 are in neighbouring countries and other parts of Serbia..."

[7] Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council, UN doc. S/1998/912, 3 October 1998, Annex 5.

2.13. When on the strength of these alarming reports the NATO Council authorized, on 13 October 1998, activation orders for air strikes against Yugoslavia in an attempt to induce President Milosevic to withdraw his forces from Kosovo and to co-operate in bringing an end to the violence, President Milosevic did indeed make some concessions. He agreed to limits on the number of military and security forces within Kosovo and also accepted the deployment of an observer mission to the province led by the Organization for Security and Co-operation in Europe (OSCE) – the Kosovo Verification Mission (KVM).[8] The Security Council, acting under Chapter VII of the Charter, endorsed and supported this agreement in resolution 1203 (1998) of 24 October 1998. The resolution stressed the need to prevent the impending humanitarian catastrophe (preamb. para. 11), and demanded that the authorities of the FRY as well as the leadership of the Kosovo Albanians cooperate to avert such a catastrophe (op. para. 11). Nonetheless, as shown below, violence in Kosovo continued unabated and even increased.

2.14. Speaking of a "humanitarian catastrophe" was no hollow formula. What this meant in real terms was clearly expressed in the report of the Secretary-General of 3 October 1998 (para. 17):

> "With only a few weeks before the onset of winter, the issue of the return of displaced persons and refugees remains one of the most pressing issues. Some 50,000 internally displaced persons currently lack shelter or any support network, and are ill-prepared for inclement winter weather that may arrive as early as next month. The priority of any humanitarian strategy should be to assist these people. Children and the elderly will almost certainly risk death from exposure if they remain at their current locations -–especially the ones at higher elevations – into the winter."

2.15. In the following month, on 17 November 1998, the Security Council, acting again under Chapter VII of the Charter, focused attention on the FRY in a different context. Noting that the arrest warrants of the International Criminal Tribunal for the Former Yugoslavia issued against three prominent political leaders had not been executed by the FRY authorities, it not only called upon the FRY to make good its omission, but pronounced an outright condemnation of that failure (resolution 1207, op. para. 3).

[8] See UN doc. S/1998/994, 26 October 1998, reproducing Decision No. 263 adopted by the Permanent Council of the Organization for Security and Cooperation in Europe on 15 October 1998, Annex 6.

2.16. Massive killings were perpetrated by Serbian forces even during the presence of the OSCE-KVM. In particular, at Racak on 15 January 1999 45 civilians were murdered. This atrocity led to clearly worded reactions on the part of the international community. The Security Council "strongly condemn(ed)" that massacre.[9] The Islamic Group at the United Nations in New York expressed "deep shock and anger".[10]

2.17. On 29 January 1999, the President of the Security Council made again a statement agreed upon by the 15 members. He said that the Security Council was deeply concerned by the escalating violence in Kosovo:

> "It underlines the risk of a further deterioration in the humanitarian situation if steps are not taken by the parties to reduce tensions".[11]

In the same statement, the Security Council welcomed and supported the decision of the Foreign Ministers of the Contact Group to establish a framework for negotiations aiming to reach a political settlement between the parties. The Council demanded that the parties should accept their responsibilities and comply fully with these decisions and requirements, as with its relevant resolutions. It is on this basis that the Rambouillet negotiations for a compromise solution commenced.

2.18. During a first round of negotiations in February 1999 substantial agreement was reached on a package of solutions to settle the dispute ("Rambouillet Accords").[12] In principle, the FRY, too, accepted these texts[13] which provided for substantial autonomy for Kosovo.[14] A second round of talks was held in Paris from 15 to 19 March. Reacting to suggestions of the FRY to introduce major changes to the Accords, which would have unravelled their key elements, the Contact Group, composed of European Union member States (France, Germany, Italy, United Kingdom), Russia and the United States, made clear that in its "unanimous view" only technical adjustments to the Accords were acceptable. Given the refusal of the

[9] Statement by the President of the Security Council, 19 January 1999, UN doc. S/PRST/1992/2, Annex 7.
[10] UN doc. S/1999/76, 26 January 1999, Annex 8.
[11] Statement of 29 January 1999, UN doc. S/PRST/1999/5, Annex 9.
[12] Annex 10.
[13] Letter of the Delegation of the Government of the Republic of Serbia, Meeting in Rambouillet, 23 February 1999, Annex 11.
[14] Contact Group, Co-Chairmen's Conclusions, 23 February 1999, Annex 12.

FRY delegation to abide by its former constructive approach, the negotiations were adjourned. Obviously, an impasse had been reached. The French and United Kingdom Foreign Ministers sent a joint message to the FRY President, making it clear that the Accords remained the basis for a compromise and urging him to accept them.[15]

2.19. On the same day, the OSCE Chairman-in-Office (the Foreign Minister of Norway) decided to withdraw the Kosovo Verification Mission, given the fact that as a result of the unsuccessful outcome of the Rambouillet talks the situation had worsened to such an extent that the security of the members of the Mission could not be guaranteed any more.

2.20. At that time, the situation in Kosovo raised indeed most serious concerns. As recently (February 2000) indicated by the UN High Commissioner for Refugees on the basis of more complete information as it is now available, there were approximately 260,000 internally displaced persons before the launching of the NATO operation, and some 35,000 persons had fled to countries bordering the former Yugoslavia.[16]

2.21. The most detailed information on the situation was provided by the Kosovo Verification Mission, deployed in the Yugoslav province from October 1998 to 20 March 1999. The OSCE has submitted a detailed report[17] on the atrocities committed by Serbian security forces during that period of roughly six months, well before military conflict began between NATO and the FRY, covering at the same time, however, the period up to 9 June 1999, the day when the military conflict ended. The general lesson to be drawn from this report may be summarized in a few words. The Yugoslav Government had created a climate of absolute lawlessness in the region. Abundant information demonstrates that the responsible authorities not only failed to protect the life and physical integrity of their citizens of Albanian ethnicity, but that these citizens had become objects of constant persecution, subjected to the most complete arbitrariness. Generally it was clearly conveyed to all ethnic Albanians that

[15] Declaration of the Co-Chairmen Hubert Védrine and Robin Cook, 19 March 1999, Annex 13.
[16] The Kosovo refugee crisis: an independent evaluation of UNHCR's emergency preparedness and response, www.unhcr.ch.evaluate/kosovo/toc.htm, February 2000, paras. 80, 81, Annex 14.
[17] Kosovo/Kosova. As Seen, as Told. An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999, www.osce.org/kosovo/reports/hr/part1/index.htm (undated).

their presence was undesirable in Kosovo and that they would do better to leave the region for good. In the first place, it may be worthwhile to quote a "Background paper" which contains a general summary of the report:

> "The conclusions of the report's analysis are that clear strategies lay behind the human rights violations committed by Serbian forces; that paramilitaries and armed civilians committed acts of extreme lawlessness with the tolerance and collusion of military and security forces whose own actions were generally highly organized and systematic; and that the violations inflicted on the Kosovo Albanian population on a massive scale after 20 March were a continuation of actions by Serbian forces that were well-rehearsed, insofar as they were taking place in many locations well before that date. While both parties to the conflict committed human rights violations, there was no balance or equivalence in the nature or scale of those violations – overwhelmingly it was the Kosovo Albanian population who suffered. The report also notes that persistent human rights violations lay behind the security breakdown which plunged Kosovo into armed conflict and a human rights and humanitarian catastrophe."[18]

2.22. Forced expulsion was perhaps the most disturbing phenomenon of the somber human rights situation. The OSCE report referred to above contains information to the effect that systematic and widespread expulsions were carried out as soon as the OSCE Mission had left the province on 20 March 1999, increasing in intensity after the start of the NATO operation against the FRY.

> "...Once the OSCE-KVM left on 20 March 1999 and in particular after the start of the NATO bombing on 24 March, Serbian police and/or VJ, often accompanied by paramilitaries, went from village to village and, in the towns, from area to area threatening and expelling the Kosovo Albanian population. Those who had avoided this first expulsion or had managed to return were then expelled in repeat operations some days or weeks later. Others who were not directly forcibly expelled fled as a result of the climate of terror created by the systematic beatings, harassment, arrests, killings, shelling and looting carried out across the province."[19]

In order not to enter into a discussion of the merits of the case, Germany abstains from quoting more than these few lines. However, the report exists. It is accessible to anyone who wishes to learn more about the experiences made by the OSCE mission.

[18] OSCE, Background Paper – Human Rights in Kosovo, 1999, p. 2, Annex 15.
[19] *Op. cit.*, *supra* note 17, Chapter 14, p. 1, Annex 16.

2.23. In sum, at the end of March 1999 the humanitarian catastrophe, which had been referred to as an impending event during many months, had fully materialized. The Albanian population in Kosovo lacked the most elementary guarantees which any civilized State must provide to its citizens. Nobody's life was safe, arbitrary expulsion loomed over everyone, and redress for the harm and injustice suffered could not be obtained since it was the State machinery itself which had turned into an instrument of evil. The general climate of lawlessness engendered by the FRY authorities amounted to a denial of all the commitments which the FRY had undertaken under the International Covenant on Civil and Political Rights and other instruments binding upon it.

2.24. Despite the failure of numerous efforts made at all levels, the International Community strove right to the last minute to find a way to avoid a confrontation. That was the reason why, in view of the tense situation, Special Envoy Ambassador Richard Holbrooke once again travelled to Belgrade on 22 March 1999 in a further attempt to urge on the FRY leaders the importance of seizing all opportunities for a peaceful solution. Regrettably, this initiative as well proved unsuccessful.

2.25. It is in these circumstances that NATO, on 23 March 1999, took the decision to commence air operations against the FRY. Its Secretary General, Javier Solana, explained in a press statement[20] the reasons underlying that decision:

> "... Let me be clear: NATO is not waging war against Yugoslavia.
> We have no quarrel with the people of Yugoslavia who for too long have been isolated in Europe because of the policies of their government.
> Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo.
> We must also act to prevent instability spreading in the region.
> ...
> We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo."

[20] Communiqué PR (1999) 040, 23 March 1999, Annex 17

2.26. On the same day, following the same lines, Chancellor Gerhard Schröder said in a TV address to the German people:

> "... Tonight NATO has started air strikes against military targets in Yugoslavia. Thereby the Alliance wishes to put a brake on grave and systematic violations of human rights and prevent a humanitarian catastrophe. The Yugoslav President Milosevic conducts there a merciless war. Notwithstanding all warnings, the Yugoslav security forces have intensified their terror against the Albanian majority of the population. The international community of States cannot stand idly by while the human tragedy in that part of Europe is occurring. We do not wage a war, but we are called upon to enforce a peaceful solution in Kosovo also by military means.
> The military operation is not directed against the Serbian people. This I wish to tell in particular our Yugoslav fellow citizens. We shall do everything in order to avoid losses among the civilian population."[21]

Two days later, on 25 March 1999, he made a statement in the *Bundestag* concerning the situation in Kosovo after the beginning of NATO operation "Allied Force".[22] This statement contained, *inter alia*, the following:

> "... Ladies and Gentlemen, on Wednesday night NATO began its air strikes against military targets in Yugoslavia. The alliance was forced to take this step to stop further serious and systematic violations of human rights in Kosovo and to prevent a humanitarian catastrophe. The Federal Minister for Foreign Affairs, the Federal Government and the Contact Group have in the past weeks left absolutely no stone unturned in an effort to reach a peaceful solution to the Kosovo conflict. President Milosevic has deceived its own people, the Albanian majority in Kosovo and the community of States time and time again ... the Milosevic regime has further intensified its war against the population in Kosovo. Unspeakable human suffering is the consequence of this policy. More than 250,000 people have had to flee their homes or, worse, were forcibly expelled. In the past six weeks alone another 80,000 people have attempted to escape the raging inferno. If these figures were to be projected onto the population of the Federal Republic of Germany, they would represent the number of inhabitants of a metropolis the size of Berlin. It would have been cynical and irresponsible to sit idly by in the face of this humanitarian catastrophe ...."[23]

[21] Bulletin des Presse- und Informationsamts der Bundesregierung 1999, No.13, p.140, Annex 18 (translated text marked).
[22] Deutscher Bundestag, Plenarprotokoll (Stenographischer Bericht) 14/31, 26 March 1999, p. 2571-2575, at page 2571, Annex 19 (translated text marked).
[23] *Loc. cit.*, p. 2571, Annex 19.

2.27. Before the armed conflict in Kosovo, during the time of the conflict and afterwards till up to the present time a huge community of Yugoslav citizens has been living and is still living peacefully in Germany. On 31 December 1999 not less than 740.000 Yugoslav citizens were officially registered in Germany. To be sure, many of these belong to the Albanian ethnic minority, but it is estimated by the German Government that roughly two thirds are nationals either of the Serbian or the Montenegrin Republic. Given the fact that Germans and persons of non-German nationality live peacefully together side by side on German soil, it would appear to be simply absurd to contend that Germany, within the framework of the NATO operation, pursued genocidal objectives. Quite obviously, the Serbian community in Germany did not feel threatened. Nobody feared for his/her life and fled. Germany remained absolutely quiet, contrary to the heated debate in the media which discussed the relevant issues almost on a daily basis, in a frank and open and sometimes also critical manner. Notwithstanding the lively character of this discussion, nobody ever contended that the *Bundeswehr,* the German Armed Forces, had involved itself into the conflict with the aim to exterminate a specific ethnic group in the FRY.

II. The Occurrences during NATO's Air Operations

2.28. Impartial reports issued during or after the armed conflict confirm that the disastrous wave of violence and crime unleashed by the Serbian security forces during that time was just the further implementation of a strategy well-planned but which, before the launching of the air strikes, had not been put into practice on the same massive scale. Here and there, the most severe forms of repression had been resorted to well before 26 March 1999.

2.29. Thus, the UN High Commissioner for Human Rights, in a Report on the Situation of Human Rights in Kosovo of 31 May 1999, wrote with regard to forcible displacement:

> "13. Forced displacement and expulsions of ethnic Albanians from Kosovo have increased dramatically in scale, swiftness and brutality.

14. A large number of corroborating reports from the field indicate that Serbian military and police forces and paramilitary units have conducted a well-planned and implemented programme of forcible expulsion of ethnic Albanians from Kosovo. More than 750,000 Kosovars are refugees or displaced persons in neighbouring countries and territories, while according to various sources there are hundreds of thousands of internally displaced persons (IDPs) inside Kosovo. This displacement appears to have affected virtually all areas of Kosovo as well as villages in southern Serbia, including places never targeted by NATO air strikes or in which the so-called Kosovo Liberation Army (KLA) has never been present.

15. This last fact strengthens indications that refugees are not fleeing NATO air strikes, as is often alleged by Yugoslav authorities. The deliberateness of the programme to expel ethnic Albanians from Kosovo is further supported by statements made by Serbian authorities and paramilitaries at the time of eviction, such as telling people to go to Albania or to have a last look at their land because they would never see it again. However, in the light of the deteriorating security situation, some persons have apparently decided to flee before being ordered to leave. A number of refugees, particularly intellectuals, fled after receiving threatening phone calls from unidentified persons with detailed knowledge of their activities."[24]

2.30. In a later report of 27 September 1999 the High Commissioner for Human Rights states quite bluntly (para. 7):

"Human rights violation were among the root causes of the mass exodus of more than 1 million ethnic Albanians from Kosovo. Out of 273 refugees interviewed, only 1 reportedly left his village out of fear of North Atlantic Treaty Organization (NATO) bombs, while all the others described how they were compelled, either by direct violence or by intimidation, to leave their homes."[25]

2.31. The Movement of Non-Aligned Countries declared the following in a statement of 9 April 1999:

"The Non-Aligned Movement is deeply concerned by the deteriorating humanitarian situation in Kosovo, and other parts of the Federal Republic of Yugoslavia, and the displacement, both internal and to neighbouring countries, of vast numbers of the Kosovo civilian population."[26]

[24] Report by the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, 31 May 1999, UN doc. E/CN.4/2000/7, paras. 13-15, Annex 20.
[25] Report by the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, 27 September, UN doc. E/CN.4/2000/10, Annex 21.
[26] UN doc. S/1999/451, 21 April 1999, Annex 22.

2.32. It is estimated by the OSCE that over 90 per cent of the Kosovo Albanian population had been displaced by the end of the military operations in June 1999.[27] Such a tremendous dimension of the flow of refugees, inside Kosovo and across its borders, would not have been possible had not the Yugoslav Government beforehand drawn up an elaborate strategy to make Kosovo free of Albanians.

2.33. During NATO's air operations, on 7 April 1999, the UN Secretary-General issued a statement expressing his deep distress at the humanitarian tragedy unfolding in Kosovo and in the region, and called upon the Yugoslav authorities:

> "- to end immediately the campaign of intimidation and expulsion of the civilian population;
> - to cease all activities of military and paramilitary forces in Kosovo and to withdraw these forces;
> - to accept unconditionally the return of all refugees and displaced persons to their homes;
> - to accept the deployment of an international military force to ensure a secure environment for the return of all refugees and the unimpeded delivery of humanitarian aid;
> - to permit the international community to verify compliance with these undertakings."[28]

At the same time, the Secretary-General made it clear that once the Yugoslav authorities had accepted these conditions, NATO should suspend its air strikes.

2.34. There is no need to provide further details of the facts carefully assembled in the OSCE report and the relevant UN reports. These facts, of which here just a summary account is given for the limited purpose of proving the inapplicability of the compromissory clause of Article IX of the Genocide Convention, speak for themselves. They fully confirm that at the beginning of 1999 there existed indeed, as observed and documented by knowledgeable and impartial third-party institutions, a humanitarian emergency, caused by serious crimes deliberately and purposefully committed by the security and military forces of the FRY, and that the criminal strategy gained unprecedented momentum when the KVM Observer Mission was withdrawn, continuing almost to the end of NATO's air operations.

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[27] Kosovo/Kosova. As Seen, As Told, Chapter 14, Forced Expulsion, .p. 1, Annex 16.
[28] Secretary-General offers conditions to end hostilities in Kosovo, Press Release SG/SM/6952 of 9 April 1999, Annex 23.

2.35. These crimes were the tragic climax of more than a decade of systematic violations of the rights of the Albanian population in Kosovo. Amnesty International pointed out in a report of May 1999[29] in which it attempted to establish a provisional balance sheet of the aggravation of the unfortunate chain of events after 23 March 1999:

> "Regretfully, the human tragedy in Kosovo in recent weeks has come as no surprise to Amnesty International. For more than a decade, the organization has been documenting and publicizing its concerns about the systematic violation of human rights in the province. Throughout this period, few of the scores of victims of human rights violations in Kosovo whose names and cases appeared in Amnesty International reports received any form of redress for the crimes which had been committed against them by Yugoslav police and security forces. In providing the international community with a carefully-researched record of the denial of many of the most fundamental human rights of Kosovo's ethnic Albanian population since the 1980s, Amnesty International has consistently warned the international community of a human rights disaster waiting to happen."[30]

2.36. It is highly significant, on the other hand, that in none of the declarations and statements of the supporters of the FRY and critics of NATO the word "genocide" has ever been mentioned. Reference may be made, for instance, to the resolution adopted on 3 April 1999 by the Inter-Parliamentary Assembly of States members of the Commonwealth of Independent States on the Declaration adopted by the Inter-Parliamentary Assembly concerning military operations by the North Atlantic Treaty Organization in the territory of the Federal Republic of Yugoslavia.[31] Although this resolution blames the military action against the FRY, it is far from suggesting that NATO might have engaged in perpetrating the crime of genocide against the Yugoslav/Serb population.

2.37. On the other hand, it should not go unnoticed that the International Criminal Tribunal for the former Yugoslavia announced, on 27 May 1999, that it had indicted for crimes against humanity and violation of the laws and customs of war in Kosovo

[29] Amnesty International, Kosovo Province, Federal Republic of Yugoslavia. Memorandum to UN Security Council, doc. EUR 70/49/99, May 1999
[30] *Loc. cit.*, p. 9 and 10, Annex 24.
[31] UN doc. A/53/920 and S/1999/461, 22 April 1999, Annex 25.

the President of the FRY, R. Milosevic, Serbian President Milutinovic, FRY Vice-President Sainovic, FRY Chief of Defence Staff Ojdanic annd FRY Interior Minister Stojilkovic.

III. The Aftermath of the Armed Conflict

2.38. With the adoption of resolution 1244 by the Security Council on 10 June 1999, the contents of which need not be detailed here, all air operations against the FRY were immediately halted. As from that date, the Security Council has assumed responsibility for the province of Kosovo. It decided to deploy in Kosovo an international civil and an international military presence "under United Nations auspices" (op. para. 5). These two presences (UNMIK and KFOR) have been administering the internal affairs of Kosovo within the boundaries of the mandate delineated by the Security Council. It is true that UNMIK and KFOR have been struggling hard to maintain public order in Kosovo. Although they have not yet completely reached their goals, the general situation has decisively improved. On the one hand, the number of victims has fallen to levels which are still too high, but which can in no way be compared to the tide of death and destruction rolling over Kosovo while Serbian security forces were still present in the province. On the other hand, a quantum leap has occurred: While before 10 June 1999 there existed an official policy of non-respect of the human rights of the Kosovo Albanians, including strategies not to respect the right to life of that ethnic group suffering structural discrimination, UNMIK and KFOR have received a mandate to ensure and protect the human rights of all the inhabitants of Kosovo. All the deaths that have occurred after 10 June 1999 are the result of criminal behaviour, which UNMIK and KFOR are doing their best to forestall and to sanction by appropriate penalties.

2.39. In annex 2 to resolution 1244 (1999) it was specified that the international security presence in Kosovo should be established under unified control and command "with substantial North Atlantic Treaty Organization participation". But NATO countries are not the only ones to provide troops for the purposes of KFOR. Not less than 14 member States of the United Nations which are not members of NATO also participate in the KFOR mission (Argentina, Austria, Azerbaijan,

Finland, Georgia, Ireland, Lithuania, Morocco, the Russian Federation, Slovakia, Sweden, Switzerland, Ukraine, United Arab Emirates). KFOR contingents are organized in five multinational brigades, each of which has its specific sector: Center (led by the UK), North (led by France), South (led by Germany), West (led by Italy), and East (led by the U.S.). All the five brigades are composed of military forces from NATO and non-NATO-member States. Within that structure, operational control is assigned to the responsible KFOR commander. However, nations retain overarching command elements like the right to withdraw or reduce their national troop contingent.

2.40. German military units which are dispatched to Kosovo, and the police officers and civil servants sent there have clear instructions to act – under KFOR and UNMIK direction – towards reconstruction of the province, to build peace and cooperation between ethnic communities, to protect all groups in Kosovo against criminal or racist acts, oppression, persecution and threat, to reestablish the collapsed public administration and to build democratic structures under the rule of law. Acts harmful to inhabitants of the province, unfortunately mostly of Serbian or minority origin, continue to be committed by criminals. These are carefully investigated. Those who commit them are liable to criminal prosecution and punishment. It is obvious that all of the organizations deployed in Kosovo do their best to re-establish the rule of law and to prevent any kind of discrimination, making Kosovo a home for all of its inhabitants. Acknowledging these efforts, the UN High Commissioner for Human Rights stated in its latest report of 28 March 2000 on the situation of human rights in Kosovo:

> "The High Commissioner wishes to pay tribute to the work carried out under the most difficult circumstances by UNMIK, OSCE, the Office of the United Nations High Commissioner for Refugees and other intergovernmental and non-governmental organizations ..."[32]

2.41. The UN Secretary-General has explained in a number of reports what steps must be taken and were taken to improve the security situation for the benefit of the civilian population, in particular for the benefit of the Serb group, which in Kosovo constitutes a numerical minority. In a report of 12 July 1999, he described the efforts

[32] Report of the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, UN doc. E/CN,4/2000/32, 28 March 2000, Annex 26 (unofficial version at www.unhchr.ch).

deployed by KFOR and UNMIK to restrain violence.[33] In a report of 16 September 1999 he underlined that security for Serbs and truly minority groups remained high on the agenda.[34] In a report of 23 December 1999, further steps were indicated through which effective protection of the Serb population was to be ensured.[35] The latest report of 3 March 2000[36] continues the series of frank and open discussions on the difficult security situation, coupled again with a clear indication of a strategy initiated to combat violence.[37] Thus, there exists a well-defined policy of the United Nations to ensure a safe environment for each and every inhabitant of Kosovo.

2.42. Under these circumstances, it appears absurd to contend that Germany may be responsible for genocidal acts in Kosovo during the period after 10 June 1999. Regarding the post-conflict period, Germany's role has been and is confined to that of a guardian of law and order for the protection of the human rights of all the inhabitants in the sector under its responsibility. In this regard, Germany notes that there is nowhere in the FRY Memorial even the slightest substantiated hint that as one of the countries controlling one of the five sectors it may have conducted an anti-Serb policy. Whoever contends that genocide has been committed after 12 June 1999, the day when KFOR actually assumed its mandate, inevitably charges the United Nations with being accountable for the alleged atrocities inasmuch as the Security Council has vested in the UN Mission authority over the territory and people of Kosovo, including all legislative and executive powers, as well as the administration of the judiciary.

[33] UN doc. S/1999/779, paras. 4-7, 26, 85-90, Annex 27.
[34] UN doc. S/1999/987, paras. 2-6, 45-50, Annex 28.
[35] UN doc. S/1999/1250, paras. 24-28, Annex 29.
[36] UN doc. S/2000/177, paras. 20-25, Annex 30.
[37] *Loc. cit.*, para. 23.

SECTION 3

THE COURT LACKS JURISDICTION TO ENTERTAIN THE APPLICATION BROUGHT BY YUGOSLAVIA

I. The Court is not open to the Federal Republic of Yugoslavia

3.1. To have recourse to the Court constitutes, in principle, a prerogative of parties to its Statute (Article 35 (1)). While according to Article 93 of the Charter all members of the Organization are automatically parties to the Statute, non-members may be authorized to accede to that instrument. In addition, Article 35 (2) of the Statute provides that even States outside of these two groups may be given the opportunity to avail themselves of the services of the Courts. However, the FRY does not fulfil the requirements set forth in Article 93 of the Charter and Article 35 of the Statute. Not being a member of the United Nations, it is not party to the Statute. Furthermore, it cannot invoke paragraph 2 of Article 35 since it has not made the declaration prescribed by Security Council resolution 9 (1946) that would entitle it to make use of the Court. It has limited itself to submitting, on 26 April 1999, a declaration accepting the jurisdiction of the Court. Such a declaration under article 36 (2) of the Statute which its States parties may submit is not the same as the declaration prescribed by Security Council resolution 9 (1946). In paragraph 2 of that resolution, a clear distinction is drawn between the preliminary declaration which a State non-party to the Statute must make before being able to recognize the jurisdiction of the Court under Article 36 (2) of the Statute. Apparently, the FRY proceeded from the assumption that it was still a member of the United Nations and that it was not bound to make a twofold pledge for inserting itself into the community of States enjoying access to the Court. Furthermore, as a non-party to the Statute it could not have brought any application under Article 36 (2) of the Statute. It is explicitly provided in paragraph 2 of Security Council resolution 9 (1946) that such a State may not, "without explicit agreement", rely upon its own acceptance of the jurisdiction of the Court vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36 (2).

3.2. The conclusion formulated above is not contradicted by the relevant passage of the Court in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, where the following was pointed out with regard to the phrase "special provisions contained in treaties in force" as enunciated in Article 35 (2) of the Statute:

> "...the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 ... a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; ... accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court."[38]

3.3. At first glance, it would appear as if there was no need any more to inquire into the status of Yugoslavia as a member of the United Nations and consequently as party to the Statute. This impression seems to be confirmed by the judgment of the Court in the case *Application ...*, referred to above, which examines and rejects all of the preliminary objections raised by Yugoslavia.[39] However, it is also clear that in that proceeding Yugoslavia did not found its defence on the fact that it was not party to the Statute and could therefore not appear before the Court. The seven preliminary objections invoked by it refer to other grounds of alleged lack of jurisdiction of the Court.[40] One understands easily why none of the two parties had an interest in insisting that the Court delve into the issue of the FRY's legal status as member or non-member of the United Nations. The FRY itself has always maintained that it is identical with the former Socialist Federal Republic of Yugoslavia (SFRY). By inviting the Court to evaluate that thesis, it might have undermined its position. On the other hand, It was essential for Bosnia and Herzegovina not to lose the defendant in the case at hand. By claiming before the Court, as it has done in other fora, that a new State had arisen by way of succession, it might have brought to an abrupt end the proceeding initiated by it and in whose passing to the merits stage it has the greatest interest.

[38] *ICJ Reports 1993*, p. 3, at 14 para. 18.
[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports 1996*, p. 595.
[40] *Loc. cit.*, p. 604-606.

3.4. In legal doctrine, it has been rightly observed that the passage quoted, where the Court seems to dismiss the requirements established by Security Council resolution 9 (1946), constitute but a provisional assessment. Shabtai Rosenne notes:

> "That provisional finding is not conclusive of the matter."[41]

He points out that the Court's opinion is to be seen within the context of a proceeding where a party seeks provisional measures for an interim period. Under such circumstances, the Court relies on a prima facie evaluation of the legal position, refraining to pronounce in a definitive manner.

3.5. In fact, in a careful analysis of Article 35 (2) of the Statute Sienho Yee has probed into the drafting history.[42] His conclusion is that the phrase "subject to the special provisions contained in treaties in force" must be understood as a reference to agreements on the settlement of World War Two disputes, in any event to treaties that had already entered into force at the date when the Statute was adopted. But, as a purely personal opinion, intended to give an explanation to the jurisprudence of the Court in the case "*Application*.....", he adds that the clause should also be capable of being invoked in cases concerning *jus cogens*. Such a broad construction would totally undermine Security Council resolution 9 (1946), which lays down the standard clauses governing resort to the Court by non-members of the United Nations, and would distort the meaning of that exception. In fact, one of the main objectives of the resolution is to ensure that States do comply with any decision handed down by the Court. They must be subjected to the same obligations which apply to members of the Organization by virtue of Article 94 of the Charter.

3.6. The Court did not point out why it abstained from elucidating the issue, which had been touched upon by it in the order concerning provisional measures.[43] One has to assume that it did so because neither of the two parties wished to see the dispute come to an end on that ground. In the instant case, the position is entirely different. It is recalled that Germany formally requests the Court to dismiss the

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[41] *The Law and Practice of the International Court, 1920-1996*, Vol. III, The Hague *et al*., Martinus Nijhoff Publishers, 1997, p. 630.
[42] The Interpretation of "Treaties in Force' in Article 35 (2) of the Statute of the ICJ, 47 *ICLQ* (1998), p. 884-904, at 902-903, Annex 31.
[43] See also Yee, *loc. cit*., p. 887.

FRY's application because of lack of jurisdiction. With regard to the question of U.N. membership of the FRY, it can by no means be said that the issue has been settled once and for all by the case law in "*Application* ...". In her separate opinion regarding *Legality of Use of Force* judge Rosalyn Higgins has pointed out (para. 21):

> "In the present case the Court has also not made any final determination upon the question of the Federal Republic of Yugoslavia's status or otherwise as a member of the United Nations and thus as a party to the Statute having the right to make a declaration under Article 36, paragraph 2, thereof. This is clearly a matter of the greatest complexity and importance and was, understandably, not the subject of comprehensive and systematic submissions in the recent oral hearings on provisional measures."

Even more categorical was judge Kooijmans in his separate opinion. He wrote (para. 25):

> "... I come to the conclusion that there are strong reasons for doubt as to whether the Federal Republic of Yugoslavia is a full-fledged, fully qualified Member of the United Nations and as such capable of accepting the compulsory jurisdiction of the Court as a party to the Statute."

Lastly, judge Oda flatly stated (para. 4):

> "...the Federal Republic of Yugoslavia, not being a Member of the United Nations and thus not a State party to the Statute of the Court, has no standing before the Court as an applicant State."

It is hence indispensable to proceed to an examination of those matters "of the greatest complexity and importance".

3.7. It was already mentioned that the current State of Yugoslavia, the Federal Republic of Yugoslavia (FRY), considers itself to be identical with the former Socialist Federal Republic of Yugoslavia (SFRY). When the new State was proclaimed on 27 April 1992, a formal declaration was adopted to the effect that:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."[44]

[44] Reproduced in: *ICJ Reports 1996*, p. 610.

3.8. In 1992, a high government official, Vladislav Jovanovic, who more recently took part in the debate of the Security Council on 26 March 1999 when the Russian draft resolution on Kosovo contained in document S/1999/328 was discussed – and rejected -, sought to justify this legal thesis as follows:

> "The basic criteria for the continuity and personality of a State are: significant portions of the territory which continues its existence; a major portion of the population; an independent government and organization of authority operating in accordance with the country's constitution. The nucleus of Yugoslavia was formed by Serbia and Montenegro, which invested their statehood into the State of Yugoslavia together with all their rights and obligations, international treaties and membership in international organizations ... Consequently, we have all the physical and material as well as legal conditions for Yugoslavia's uninterrupted identity and existence. This view of continuity and identity does not prejudice the possibility of the new States acquiring international recognition in accordance with international law".[45]

3.9. The claim to continue the international legal personality – as opposed to an instance of State succession – was not accepted by the Security Council of the United Nations. Shortly after the adoption of the Yugoslav declaration of 27 April 1992, it noted in resolution 757 (1992) of 30 May 1992 (preamb. para. 10) that:

> "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."

While this first statement on the status of "Yugoslavia" was couched in the form of a simple consideration, not reflecting a determination by the Security Council itself, the Council was much more drastic some months later in adopting resolution 777 (1992) of 19 September 1992. In the preamble of this resolution (para. 2) it is stated quite unequivocally that

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

[45] Vladislav Jovanovic, 9 March 1992, Review of International Affairs (Belgrade), 1 April 1992, at p. 14, 15, reproduced by M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 AJIL (1992), p. 569, at 595.

3.10. As far as the consequences of this finding are concerned, the Security Council pursued a fully consistent line in expressing the following view (resolution 777, op. para. 1):

> "*Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations, and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly".

If, in fact, the SFRY has ceased to exist as a State, then its membership in the United Nations has become extinct and the FRY, being a new State, was required to apply for membership in accordance with the procedure set forth by Article 4 of the UN Charter. In the circumstances, it was superfluous to emphasize that the FRY could not participate in the work of the General Assembly. This proviso was added only for the purpose of clarifying the legal position.

3.11. As from 1992, the Security Council has remained totally consistent in its treatment of the FRY. Whenever a representative of the FRY was invited to participate in a debate of the Security Council, he/she was invariably invited in his/her personal capacity and not as a representative of the FRY. An official communiqué covering a meeting of the Security Council on 16 February 2000,[46] for instance, makes this differentiation abundantly clear. While a number of representatives of non-member States of the Security Council are mentioned without their names being indicated, the reverse pattern can be observed with regard to Mr. Jovanovic, the FRY's ambassador. In his case, the name appears in the communiqué, while the name of the country he is representing cannot be found in the text.

3.12. It is certainly true that in the discussion about the draft proposal which eventually materialized as Security Council resolution 777 (1992) the representatives of two permanent members requested that Yugoslavia's UN membership should remain unaffected beyond its nonparticipation in the work of the General Assembly. However, what they actually said was that under the terms of resolution 777

[46] UN doc. S/PV.4102, 16 February 2000, Annex 32.

Yugoslavia was not excluded from the Organization.[47] This in fact did not happen. The propositions set forth in resolution 777 (1992) are no more than the natural consequences of the disappearance of the SFRY.[48] If in the territory of a former member State of the United Nations a successor State has established itself, this new State has to apply for membership as have done all the other successor States of the former SFRY, namely Bosnia and Herzegovina, Croatia, Macedonia and Slovenia. There is no automatic succession as far as membership in the United Nations is concerned.

3.13. In resolution 47/1 of 22 September 1992, the General Assembly faithfully complied with the recommendation of the Security Council. It decided that the FRY cannot continue automatically the membership of the SFRY, that therefore it shall not participate in the work of the General Assembly and that it should apply for membership. It only omitted to state in explicit terms, as the Security Council had done, that the former SFRY had ceased to exist.

3.14. The Office of Legal Affairs of the United Nations, in a legal opinion of 29 September 1992,[49] interpreted the legal position with regard to General Assembly resolution 47/1 as follows:

> "...the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplates remain as before, but in General Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia". Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."

[47] Russia, UN doc. S/PV.3116, 19 September 1992, p. 2-6; China, *ibid*., p. 14; along similar lines India, *ibid*., p. 6, Annex 33.
[48] Rightly observed by the US in the same debate, UN doc. S/PV.3116, 19 September 1992, p. 13, Annex 33.
[49] *United Nations Juridical Yearbook* 1992, p. 428, Annex 34.

3.15. But events did not come to their end with the closing of the gates of the General Assembly to the FRY. It might still have been argued that the ban imposed against the FRY did not affect its participation in other important fields of activity of the United Nations. Any possible remaining loophole, however, was soon closed. By resolution 821 (1993) of 28 April 1993 (op. para. 1), the Security Council recommended that "the FRY (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council". The General Assembly heeded this wish by resolution 47/229 of 5 May 1993, which determines that the FRY "shall not participate in the work of the Economic and Social Council". Through this act, the FRY was definitely kept away from the entire gamut of United Nations activities. UN Member States which are not members of the Security Council can participate in the work of the General Assembly and its subordinated bodies, or in the work of ECOSOC and its subordinated bodies. *Tertium non datur*. A State kept aloof from these two bodies has lost any institutional relationship with the Organization.

3.16. Although the practice of the United Nations has *grosso modo* followed the advice given by the Legal Office – "Yugoslavia" is still listed as a member of the Organization, its nameplate and flag can still be found in the UN premises, "Yugoslavia" is requested to contribute to the budget of the Organization in accordance with the quota fixed in the scale of assessment -, these factual features cannot detract from the true legal position. As already pointed out, decisive grounds militate against the notion that Yugoslavia, at the present juncture, could possibly be characterized as a member of the Organization.

3.17. As is well known, within the framework of the Peace Conference convened by the European Community and Yugoslavia an Arbitration Commission was set up with the mandate to adjudicate all differences between the relevant authorities.[50] The first question submitted to the Arbitration Commission for decision referred precisely to the status of Yugoslavia after Croatia and Slovenia had made declarations of independence. Responding to that question, the Arbitration Commission ruled in Opinion No. 1 of 29 November 1991 that

[50] See A. Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pourla paix en Yougoslavie", *AFDI* 1991, p. 329-348.

> "the Socialist Federal Republic of Yugoslavia is in the process of dissolution".[51]

Opinion No. 8, handed down seven months later on 4 July 1992,[52] noted that the disintegration had continued and that new sovereign States had emerged. It therefore concluded:

> "that the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists."

On the same day, Opinion No. 9[53] stated accordingly:

> "New states have been created on the territory of the former SFRY and replaced it. All are successor states to the former SFRY,"[54]

adding in its conclusions that:

> "the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY."[55]

Lastly in Opinion No. 10, also of 4 July 1992, the Arbitration Commission held that

> "the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY."[56]

3.18. Although the conclusions reached by the Arbitration Commission produce no binding legal effects for all of the old and new States in the territory of the former Yugoslavia, they carry considerable weight as they portray the legal position from an objective third-party viewpoint. The Commission was brought into being by a joint statement on Yugoslavia adopted at an extraordinary meeting of ministers in the context of European Political Cooperation on 27 August 1991, and this arrangement

[51] 31 *ILM* (1992), p. 1494, at 1497.
[52] 31 *ILM* (1992), p. 1521, at 1523, Annex 35.
[53] *Loc.cit.*, at 1523
[54] *Loc. cit.*, at 1524.
[55] *Loc. cit.*, at 1525.
[56] *Loc. cit.*, at 1525,1526

was accepted by the six Yugoslav Republics at the opening of the Peace Conference on 7 September 1991. Through that act, Serbia and Montenegro, which later became the FRY, submitted to the jurisdiction of the Arbitration Commission.[57]

3.19. It is not only the persuasive argumentation of the Arbitration Commission which must lead to the conclusion that the FRY is a new State, in no different position from that of the other successor States of the former SFRY. Yugoslavia came into being after the First World War as the Kingdom of the Croats, Serbs and Slovenes. The three nations were based on a footing of equality. Even the 1974 Constitution of the SFRY maintained that structure of equality among its different component units. Article 2 provided:

> "The Socialist Federal Republic of Yugoslavia consists of the Socialist Republic of Bosnia-Herzegovina, the Socialist Republic of Croatia, the Socialist Republic of Macedonia, the Socialist Republic of Montenegro, the Socialist Republic of Serbia ..., and the Socialist Republic of Slovenia."

3.20. Apparently, there existed no classification scheme giving the Republic of Serbia any kind of precedence in law. Hence, there is no good reason to maintain that Serbia and Montenegro constituted some kind of "core Yugoslavia". If a State falls apart by disintegration, its constituent units all attaining independent statehood, the relevant process cannot be appropriately termed "secession". As correctly described by the Arbitration Commission in Opinion No. 1, Yugoslavia went through a process of dissolution.

3.21. The listing of "Yugoslavia" as a member State of the United Nations, the keeping of its nameplate and flag are practices unable to modify the requisite legal assessment of the legal position. When considering these factual elements, it must be realized in particular that every member State has an absolute right to participate in the deliberations of the General Assembly, subject only to a decision under Article 5 of the Charter. Such a decision has never been taken against "Yugoslavia". Regular membership without any presence in the General Assembly would be devoid of any real meaning.

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[57] See Interlocutory Decision by the Arbitration Commission of 4 July 1992, 31 *ILM* (1992), p. 1518, at 1520, Annex 35.

3.22. In the case of South Africa, which was also deprived for many years of any participation in the plenary of the Organization, the General Assembly was motivated by the desire to sanction South Africa on account of its racist policies: the only-white government was not recognized as the legitimate representation of a country with a large black majority. On 12 November 1974, the President of the General Assembly made a ruling to the effect that the rejection of the credentials of the South African delegation was tantamount to saying that

> "the General Assembly refuses to allow the delegation of South Africa to participate in its work."[58]

3.23. It is well known that the lawfulness of this exclusion was disputed.[59] In any event, it was founded on a plausible ground of justification. Under no circumstances, however, may a State be arbitrarily deprived of its membership rights by the political organs which, on their part, too, are required to comply with the provisions of the Charter. Neither the Security Council nor the General Assembly is the master of the Charter. The Charter is an instrument drafted and put into force by the States members of the Organization. It is in their hands only to change, if appropriate, the legal regime established by the Charter. All of the institutions established under the Charter derive their powers from the constitutive instrument. One of the basic principles of the United Nations is sovereign equality. All States members have the same rights of participation, as explicitly set forth in Article 9. Any kind of discriminatory treatment is incompatible with the philosophy of the Charter.

3.24. Resolution 777 (1992) of the Security Council and General Assembly resolution 47/1 as well as Security Council resolution 821 (1993) and General Assembly resolution 47/229 remain totally silent as to any possible ground of legitimate discrimination against "Yugoslavia". In 1992 or 1993, the notion that the new State might forfeit its membership rights was totally alien to the competent organs of the United Nations, leaving aside the fact that such forfeiture is not provided for by the UN Charter. Thus, the Security Council and the General

[58] See Memorandum of the UN Office of Legal Affairs, 27 August 1975, *United Nations Juridical Yearbook* 1975, p. 167, at 168, Annex 36.
[59] See, for instance, S. Magiera, commentary on Article 9 of the UN Charter, in: B. Simma (ed.), The Charter of the United Nations, Oxford, Oxford University Press, 1994, p. 225 para. 35.

Assembly, by recommending or determining that the FRY would not be allowed to participate in the work of the General Assembly, would have committed a grave breach of their duties vis-à-vis that State – if it had been a member of the Organization. It cannot be assumed that the main political bodies of the United Nations have embarked on such a slippery path. In fact, as expounded above, the Security Council indicated quite accurately why it considered that the FRY was unable to exercise the membership rights of the SFRY: because that State had ceased to exist and the FRY, as one of the five successor States, had to go through the normal admission procedure laid down in article 4 of the Charter. However, to contend, on one hand, that "Yugoslavia" under its new name is a member State, but to deny it, on the other hand, any right of participation in the main body of the Organization where all members are represented, is totally contradictory and makes a mockery of the rule of law, which is a basic feature of the United Nations as the organized embodiment of the international community. No State may be kept away from its legitimate seat in the General Assembly. The only possible explanation for the two relevant resolutions lies in the simple fact that, up to the present time, the FRY is not a member State of the Organization.

3.25. In legal doctrine, most authors have taken the view that this is indeed the right conclusion to be drawn on the basis of Security Council resolution 777 (1992) and General Assembly resolution 47/1.[60] It is true that, as has already been noted, some anomalies persist. The fact, in particular, that "Yugoslavia" is counted as a member State for the purposes of Article 17 of the Charter flies in the face of its being outside the Organization. Yet, the General Assembly, by fixing the scale of assessments for the apportionment of the expenses of the United Nations (resolution 52/215, 22 December 1997 and earlier resolutions),[61] cannot, in a veiled manner, confer a status of membership. One may certainly speak of a special relationship or status *sui generis*, as suggested by M. Kelly Malone.[62] If the FRY makes from time to time contributions to the budget of the United Nations, such payment can bring into being

[60] See, in particular, Correspondents' Agora: UN Membership of the Former Yugoslavia: V.-D. Degan, 87 AJIL (1993), p. 240-244, at 244; O.E. Bring, *ibid*., p. 244-246, at 245; M. Kelly Malone, *ibid*., p. 246-248, at 247; K. Ginther, commentary on Article 4 of the UN Charter, in: Simma, *op. cit*. (note 50), p. 174 para. 64; contra: Blum, UN Membership of the "New" Yugoslavia, 86 *AJIL* (1992), p. 830-833; *id*., 87 *AJIL* (1993), p. 248-251.
[61] FRY Annexes, p. 474.
[62] *Loc. cit. (supra* note 51), at p. 249.

some form of *de facto* relationship, at best. In fact, there exists an authoritative statement to the effect that after the disintegration of the SFRY the FRY enjoyed no more than a factual position within the UN system. In resolution 48/88 of 20 December 1993 the General Assembly urged Member States and the Secretariat (op. para. 19)

> "to end the de facto working status of the Federal Republic of Yugoslavia (Serbia and Montenegro)".

For the purposes of Article 35 of the Statute such an amorphous extra-legal status is simply not enough. In order to enjoy a full right of standing *ratione personae* before the Court, as claimed by the FRY, a State must be a member of the United Nations.

3.26. Summing up, it can be noted that, as shown above, the FRY lacks the capacity of a member of the United Nations. Not being identical with the former SFRY, it could not take over the membership status of its predecessor. Since the time of the breakup of the SFRY, it has refrained from making an application for admission and, hence, could not be admitted. An apocryphal status *sui generis*, lastly, which the FRY currently enjoys, is not a valid basis for claiming rights under the Statute of the Court.

3.27. It follows from the considerations set out above that the application must be dismissed *a limine* because of the FRY's lack of personal standing before the Court.

II. The Compromissory Clause of the Genocide Convention

3.28. With regard to Germany, the FRY can base the claim that it is entitled to refer the current dispute to the Court solely on the compromissory clause of Article IX of the Genocide Convention. There is no other legal foundation for the alleged jurisdiction of the Court. Article IX provides:

> "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."

Even a short glance at the FRY's Memorial reveals instantly that this clause is referred to in a last-ditch effort to find a basis for submitting the case to the Court. At p. 5 of its Memorial (para. 2), the FRY sums up in a nutshell the charges which it wishes to see adjudicated by the ICJ. By enunciating in a long list all the breaches of rules of international law which all the ten NATO member States impleaded before the Court have allegedly committed, it openly admits that even according to its own judgment the bulk of the dispute lies outside the confines of the Genocide Convention. On the other hand, as far as in particular the principle of non-use of force, the principle of non-intervention and the duty not to harm the environment are concerned, the jurisdiction of the Court has never been established either in the Charter or "in treaties and conventions in force" (Article 36 (1) of the Statute).

3.29. Germany ratified the Genocide Convention on 24 November 1954; it is bound by it since 22 February 1955. According to the judgement of the Court in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, "Yugoslavia" was bound by the Convention in any event as from 27 April 1992, when the coming into being of the new State was proclaimed and when on the same day the Permanent Mission of "Yugoslavia" confirmed in an official note to the Secretary-General of the United Nations that its country would remain bound by the international treaties to which the former Yugoslavia was party.[63] Thus, a reciprocal relationship, as required by Article IX of the Genocide Convention, exists between the two parties to the dispute.

3.30. It should be emphasized at the very outset that consent is the basis of the Court's jurisdiction.[64] Although the Court is characterized by Article 92 of the UN Charter as the "principal judicial organ" of the United Nations, it has not been endowed with automatic jurisdiction vis-à-vis all the member States of the world organization. Strict rules have been laid down in Article 36 of its Statute. Only if a

[63] *ICJ Reports 1996*, p. 595, at 610, para. 17.
[64] See *East Timor (Portugal v. Australia)* case, *ICJ Reports 1995*, p. 90, at 101.

State has given its consent in any of the forms indicated therein, can it be impleaded before the Court. Utmost care is required in interpreting the clauses under which a State has submitted to its jurisdiction. It must be clearly established that indeed the consent given covers *ratione personae* or *ratione materiae* the actual dispute. In the instant case, the relevant issue is jurisdiction *ratione materiae*.

3.31. The specificity of the case under consideration resides in the fact that no dispute has arisen between the parties as to the proper interpretation of the Genocide Convention. At p. 326 of its Memorial, the FRY confines itself to reproducing the text of Article II and Article IX of the Convention. No attempt has been made to interpret those provisions, suggesting that they may have to be understood in a specific way in view of the facts of the case. Just the plain wording is given. Obviously, the respondent party cannot disagree with that purely factual account. The Genocide Convention exists, it is in force, and its text does not differ from the version suggested by the FRY.

3.32. The same pattern can be observed at pp. 346 to 349 of the Memorial where the FRY purports to demonstrate that Article IX of the Genocide Convention provides a basis for its claim. Again the reader is faced with extreme poverty of legal reasoning. The FRY reproduces large sections of the Orders of the Court of 2 June 1999, adding no comment whatever to what the Court had to say. It does not even find it necessary to dwell on the passage in which the Court points out that genocide is characterized by an element of intent, which is not automatically inherent in use of force against another State. In the last paragraph before its submissions (para. 3.4.3., p. 349), it simply claims that in its Memorial it has submitted the evidence on the intent to commit genocide. In sum, there is a total lack of interpretive efforts with regard to the Genocide Convention. As it appears, the FRY is of the opinion that the words of the Convention speak for themselves and that the alleged breach of its provisions derives from the plain words of the text.

3.33. It needs no lengthy elaboration to demonstrate that the scarcity of factual submission and legal exposition does not meet the minimum level of substantiation

prescribed by the relevant clauses in Article 38 (1 and 2) of the Rules of the Court. What the FRY has totally failed to do is to relate its submissions to the criteria defining the crime of genocide (in Spanish: la tipificación). There exists a complete hiatus between its factual allegations and its conclusion that a charge of genocide deserving consideration by the Court may be brought against Germany. The gap is unbridgeable, it is so wide that in the circumstances the objection resulting therefrom, which under normal circumstances would pertain to admissibility, affects the jurisdiction of the Court.

3.34. It need not be stressed that Germany does not share the conclusions drawn by the FRY from its presentation of the facts. But it should be noted that there can be no dispute as to the correct interpretation or construction of the Genocide Convention because the FRY has totally refrained from embarking upon any exegetic exercise and obviously felt unable to suggest any specific results as to the meaning of the provisions of the Convention within the context of the instant case.

3.35. At the current stage of the proceedings, where no more than the jurisdiction of the Court to entertain the dispute as to its merits is at stake, the Respondent chooses not to comment on the facts alleged by the FRY to have occurred. Essentially, the facts remain contested. The Respondent reserves the right, should the case pass on to the merits stage, to examine and rebut each and every one of the allegations put forward by the FRY. One thing is certain only: An armed conflict took place between NATO members and the FRY, and this conflict led to destruction as well as, most regrettably, loss of life. Concerning this minimum level, agreement between the two parties can be deemed to exist.

3.36. The facts as presented by the FRY do not disclose, however, any trace of the crime of genocide. Genocide contains two different components. On the one hand, there must be an objective element, which is carefully listed in Article II of the Convention. On the other hand, as explicitly stated in the chapeau of this provision, genocide requires a specific intent:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group ..."

3.37. The Court itself drew attention to this ingredient of the offence in 1996 in connection with its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons:*

> "...the prohibition of genocide would be pertinent ... 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."[65]

3.38. Also in 1996, the International Law Commission (ILC) particularized the constitutive elements of genocide when adopting the Draft Code of Crimes against the Peace and Security of Mankind. It listed four components of the requisite intent.[66] First, the will must be directed to destroying a group and not merely one or more individuals who are coincidentally members of a particular group. Second, 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. Third, the intention must be to destroy a group "in whole or in part". Lastly, the intention must be to destroy one of the types of groups covered by the Genocide Convention, namely, a national, ethnic, racial or religious group.

3.39. Likewise, in the jurisprudence of the international criminal tribunals for the former Yugoslavia and for Rwanda this constitutive feature of the crime of genocide has been duly taken into account. In *The Prosecutor v. Goran Jelesic* the International Criminal Tribunal for the former Yugoslavia noted:

> "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 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."[67]

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[65] *ICJ Reports 1996*, p. 226, at 240 para. 26.
[66] Report of the ILC on the work of its 48th session, 6 May – 26 July 1996, GAOR, 51st Session, Supp. No. 10 (A/51/10), p. 88-89, Yearbook of the International Law Commission 1996, Vol.II/2, p. 45 para. 6.
[67] Judgment of 14 December 1999, para. 79, Annex 37.

3.40. Exactly along the same lines, the International Criminal Tribunal for Rwanda held in *Prosecutor v. Akayesu*:[68]

> "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 requires that the perpetrator clearly seek to produce the act charged. 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'".

3.41. There is no need to deepen the reasoning expounded here as to the structure and characteristics of the crime of genocide since the current stage of the proceedings is confined to and centers on the issue of jurisdiction of the Court. Suffice it to note that in any event genocide presupposes the specific intent referred to above. Yet, the Memorial of the FRY constitutes no more than an account of the alleged detrimental consequences of the NATO air strikes in the territory of Yugoslavia. There is not even a hint in the Memorial that NATO and its members might have pursued objectives different from those officially declared by them. Even if it were assumed for the sake of argument that the contentions enunciated in the Memorial are true, the charges brought would not fall under the rubric of genocide. The fact that NATO bombed chemical industry plants at Pancevo and that allegedly ammunition was used made up of depleted uranium does not give any evidentiary clues as to a genocidal intent. The fact alone that the FRY, notwithstanding its complaints of long-term effects likely to be produced by the substances released from the damaged plant (Memorial, pp. 183-188), is not able to specify any actual injurious effects to human beings, apart from the alleged immediate death of two workers during the bombing (Memorial, p. 184), rebuts the contention (see Memorial, pp. 282-283). Furthermore, Germany notes that the FRY has not alleged the use of depleted uranium by German units participating in the air strikes. Lastly, the fact that at one point in time a non-governmental organization believes to have heard a reprehensible statement by a high military commander of one of the nations participating in the operation ("L'aviation a reçu l'ordre de détruire la vie en Serbie.")[69] is not a reliable basis for assuming jurisdiction, apart from not proving what the FRY purports to prove.

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[68] Judgment of 2 September 1998, 37 *ILM* (1998), p.1399, at 1406 para. 42, Annex 38.
[69] FRY Annex 162.

3.42. In particular, it does not emerge from the Yugoslav Memorial that Germany targeted a specific group of the population in Yugoslavia which suffered the consequences of NATO's air operation. The population of a country engaged in armed hostilities with an external force does not as such constitute a group under the terms of the Genocide Convention. The consequences of the air strikes were sustained by everyone who, while in FRY territory, found himself/herself incidentally near one of the military objectives hit by bombs. Group membership was totally irrelevant. Even foreigners could become victims of an air strike. In many instances, the factual account given by the FRY lists Albanian refugees as victims of air attacks (for instance: Memorial, p. 137 para. 1.2.1.2., p. 138 para. 1.2.1.3., p. 140 para. 1.2.1.22.), notwithstanding the fact that its central thesis seems to be that "Serbs and other non-Albanian groups" were targeted by NATO (Memorial, p. 352, submission 3). These inconsistencies in the reasoning of the FRY confirm what to any outside observer is clear in any event, namely that armed hostilities took place between NATO and the FRY which, regrettably, in some unfortunate incidents affected also civilians.

3.43. Consequently, the facts as presented do not come within the scope of the compromissory clause of Article IX of the Genocide Convention. The Memorial contains long lists of physical damage and of human deaths which, as it is contended, were caused by NATO's aerial operations. But no facts have been advanced which might show that there existed in fact a genocidal intent and that NATO had launched its air operation with a view to targeting a specific national, ethnic or racial group, as required under Article II of the Genocide Convention.

3.44. It does not fall to the Respondent to explain this obvious lack of conclusiveness of the arguments presented by the FRY, but the reasons are nonetheless clear. The blatant failure of the FRY's Memorial must be attributed to the simple circumstance that there cannot be found anything in the world of facts suitable to show that NATO might have had any intention whatever to strike at a group within the meaning of Genocide Convention. Military operations as such between two States or between an alliance of States and a third State do not automatically amount to genocide. Given this situation, it is of course impossible

even to contend in a substantiated manner that genocide loomed over the operations conducted by NATO. This has recently been confirmed by the ICTY Chief Prosecutor's report of 8 June 2000 on her decision not to open a formal investigation of NATO in light of allegations that NATO violated international law during the Kosovo air campaign:

> "If one accepts the figures in this compilation..... there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity." [70]

3.45. Furthermore, it is clear, on account of the requirement of genocidal intent, that sweeping allegations that do not differentiate between the various respondents do not comply with the minimum requirements of the compromissory clause. Each and every proceeding brings into being a specific legal relationship between the FRY and the respondent concerned. NATO, being an international organization, could not be sued. Given the individuality of the different proceedings, the FRY was required to substantiate in every single case that its allegations, if proven, could amount to a breach of the prohibition of genocide. In no event could a joint responsibility of all NATO countries for an alleged crime of genocide exist. Each one of the respondents must be treated according to its own record.

3.46. Lastly, it may well be that the FRY overlooked the manifold differences which exist between the respondent States as to their having accepted the jurisdiction of the Court. It should therefore be repeated that, as far as Germany is concerned, Article IX of the Genocide Convention could provide the only basis of jurisdiction. However, given the absolute lack of information regarding the subjective ingredient of the crime of genocide, that clause is simply inapplicable. There can be no question of a dispute relating to the "interpretation, application or fulfilment" of the Convention.

3.47. It is not sufficient for a State just to contend that a claim introduced by it before the Court falls within the scope of a compromissory clause that governs its

[70] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (Table of Contents and para. 90), Annex 39.

relationship with the respondent State. As the Court has pointed out in the *Oil Platforms* case:

> "...the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain ..."[71]

3.48. It is true the Court did not focus on the factual specificities of genocide in the case brought by *Bosnia and Herzegovina v. Yugoslavia*. In that case, however, "Yugoslavia" had raised only two preliminary objections, to wit, first, that the conflict occurring in certain parts of its territory was of a domestic nature, and second, that State responsibility, as referred to in the requests of the applicant, was excluded from the scope of application of Article IX. These two objections were rejected by the Court on the basis of a careful – and exhaustive – construction of this provision. As it appears, hence, Yugoslavia did not challenge the allegation that crimes had been committed which well deserved to be measured by the yardstick of genocide. The Court confined itself to observing that the parties held "radically differing viewpoints" as regards the question whether "Yugoslavia" took part – directly or indirectly – in the conflict. Quite obviously, the evidence assembled by Bosnia and Herzegovina in that case was so abundantly rich that it was simply excluded to argue that any reasonable link to that offence was missing.

3.49. It stands to reason that it would be unreasonable to demand that an applicant must prove already at the jurisdictional stage of a proceeding initiated by it that genocide has been committed. Matters of evidence belong to the merits stage. To bring a claim under Article IX would be made impossible if what can be clarified only at the merits stage were a preliminary condition of filing an application. As a minimum, however, the facts advanced must establish a direct link to the compromissory clause.

[71] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, ICJ Reports 1996*, p. 803, at 810 para. 16.

3.50. In a number of decisions, the Court has taken the view that there must exist indeed a close relationship between the facts alleged by the claimant party and the provision invoked as the gate to the jurisdiction of the Court. On closer examination, it emerges that none of the relevant decisions is directly pertinent for the instant case. Invariably, the Court's attention was focused on the meaning to be given to the compromissory clause concerned. It dealt with issues of legal interpretation where now, on the basis of the two judgments referred to above (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections; Oil Platforms, Preliminary Objection*), it applies a rigid standard, proceeding to a full interpretation of the relevant clause. In the instant case, as shown above, the legal position does not give rise to any doubts. Nonetheless, the dicta by the Court can be relied upon for solving the question what kind of proximity the facts advanced must have to the scope *ratione materiae* of the compromissory clause.

3.51. In the *Ambatielos* case, adjudicated in 1953, the Court held:

> "It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886".[72]

In its advisory opinion on *Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO* it stated along similar lines:

> "...it is necessary that the complainant should indicate some genuine relationship between the complaint and the provisions invoked ..."[73]

Lastly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* it set out the following proposition:

> "Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court".[74]

[72] *ICJ Reports 1953*, p. 10, at 18.
[73] *ICJ Reports 1956*, p. 77, at 89.
[74] *ICJ Reports 1984*, p. 392, at 427.

3.52. These judicial pronouncements have been overruled by the two judgments of 1996 as far as issues of legal interpretation are concerned. Yet they may still be deemed to be relevant as far as the establishment of the necessary linkage between the law and the facts is concerned. The facts must be capable of being reasonably appraised according to the yardstick of the legal regime referred to in the compromissory clause concerned. Such possibility does not exist here. At first glance already, the allegations of the FRY prove irrelevant regarding the charge of genocide. Intent to commit persecution against a protected group has neither been proven nor even alleged in a substantiated manner, apart from the blanket affirmation contained in para. 3.4.3. of the Memorial (p. 349). Warfare cannot be equated with genocide.

3.53. Rightly, the Court has pointed out in the order of 2 June 1999 (para. 27):

> "...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; ... in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision ..'"

3.54. The FRY should have regarded this comment as an indication for the necessity to supplement its allegations with the missing elements as required. Notwithstanding a period of seven months which it had at its disposal for preparing its Memorial, it has not been able to present even the slightest piece of evidence that might show that NATO and its members pursued genocidal aims when they started their aerial attacks against Yugoslavia. It must therefore be repeated that the minimum requirements as set forth in Article 38 of the Rules have not been met.

3.55. In sum, Germany concludes that indeed the wealth of facts assembled in the FRY Memorial has nothing to do with the charge of genocide. It clearly lies outside the scope of Article IX of the Genocide Convention.

3.56. Since the proceedings instituted by the FRY are not encompassed by any jurisdictional clause applicable in the relationship between Germany and the FRY, the application must be dismissed for lack of jurisdiction.

III. Jurisdiction of the Court cannot be founded on *forum prorogatum*

3.57. Jurisdiction of the Court cannot be founded on *forum prorogatum*. Germany states once again quite unequivocally that it denies the jurisdiction of the Court for adjudicating the instant case. It is not prepared, in the absence of any pre-existing jurisdictional clause which the FRY could invoke, to accept an *ad hoc* arrangement either explicitly or implicitly.

3.58. The fact that at the beginning of this Preliminary Objections Submission some factual elements are given must not be interpreted as a discussion of the merits of the case. Germany has deliberately kept aloof from any such attempt. But it could not totally abstain from commenting on the antecedents of the armed conflict, the occurrences in Kosovo during the armed conflict and the aftermath of the confrontation inasmuch as it has been compelled to demonstrate that the clause of Article IX of the Genocide Convention is inapplicable. The massive charge that it committed genocide to the detriment of Yugoslav/Serb citizens and that therefore the current dispute is open to adjudication under Article IX had to be squarely dealt with. For this purpose, a modicum of factual information had to be presented, explaining the motivation underlying the serious decision to take up arms against another State in Europe whose people have maintained excellent relationships of friendship and understanding with the German people for over half a century since the Second World War.

3.59. *Forum prorogatum* has to be handled with extreme care and must not be assumed contrary to the clearly expressed will of the litigant party concerned. In the *Corfu Channe*l case (*Preliminary Objection)*, the Court deemed Albania to be subject to its jurisdiction because a letter written by Albanian authorities constituted

> "a voluntary and indisputable acceptance"

of that jurisdiction.[75] This dictum has kept its validity in the jurisprudence of the Court up to the present day. In the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, the

[75] *ICJ Reports 1947-1948*, p. 15, at 27.

Court explicitly referred to the earlier judgment, quoting it verbatim.[76] It confirmed its cautious stance when in the same proceeding it ruled on the preliminary objections raised by the FRY.[77] An actual example illustrating the prudence required in applying the concept of *forum prorogatum* is provided by the *Anglo-Iranian Oil* case where the Court rejected the contention of the United Kingdom that Iran had, by its conduct, accepted the jurisdiction of the Court. It held:

> "The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court. Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has throughout the proceedings maintained that Objection."[78]

3.60. There is no need for Germany to dwell at length on this issue. All commentators agree that utmost prudence is called for in assessing State conduct as to possible inferences regarding *forum prorogatum*. Thus, Shabtai Rosenne notes approvingly the case law of the Court,[79] and Malcolm Shaw writes succinctly and persuasively:

> "...the doctrine of *forum prorogatum* ...is carefully interpreted to avoid giving the impression of a creeping extension by the Court of its own jurisdiction by means of fictions. Consent has to be clearly present, if inferred, and not merely a technical creation."[80]

3.61. Any other handling of the concept would impair the basic principle that States are subject to international adjudication solely by virtue of consent freely given by them. Germany has not given and will not give its consent to judicial settlement of the current dispute, notwithstanding the fact that individually as well as in conjunction with its EU partners and within the international community as a whole it has engaged its best efforts with a view to leading back the FRY into the midst of the peoples of Europe.

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[76] *ICJ Reports 1993*, p. 325, at 342.
[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports 1996*, p. 595, at 620-621.
[78] *Anglo-Iranian Oil case (jurisdiction), ICJ Reports* 1952, p. 93, at 114.
[79] *Op. cit.* (*supra* note 42), p. 585.
[80] Malcolm N. Shaw, *International Law*, 4th ed., Cambridge, Cambridge University Press, p. 755.

3.62. On the basis of the foregoing, Germany concludes that there is not the slightest element permitting to assume that it has accepted the jurisdiction of the Court by its conduct subsequent to the commencement of the proceedings in the present case.

IV. Charges brought on Account of Events Subsequent to 10 June 1999 lie outside the Jurisdiction of the Court

3.63. What has been pointed out with regard to the events occurring during the period of NATO's air operations applies as well to events subsequent to 10 June 1999, included by the FRY in the scope *ratione materiae* of its submissions. Neither has the basic flaw of the FRY's lack of entitlement to make use of the services of the Court been healed at any point in time, nor are the new charges any closer to the compromissory clause of Article IX of the Genocide Convention. On the contrary, with regard to these later events, further grounds exists which definitely exclude the jurisdiction of the Court. These will be spelled out in the following.

A. The Events Subsequent to 10 June 1999 are not Encompassed by the Original Application

3.64. It results more from the factual account in the FRY's Memorial than from the almost non-existent legal argument expounded therein that the Applicant wishes to extend the scope of its claim to events occurring after 10 June 1999. On p. 8, para. 12, it is stated that after the Court handed down its orders of 2 June 1999 the dispute "aggravated and extended". It is alleged that "the Respondents" did not live up to their obligations established by Security Council resolution 1244 and by the Genocide Convention. One of the submissions seems to reflect that contention. It is worded as follows (p. 352):

> "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 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".

3.65. By attempting to insert occurrences after 10 June 1999 into the scope *ratione materiae* of the dispute, the FRY goes much beyond developing a line of argument already established in its application. With the end of the air strikes, prompted by the adoption of resolution 1244 by the Security Council, a totally new situation came into being, the characteristics of which had nothing in common with the events during the time of the armed hostilities. As already pointed out, KFOR is not a NATO instrumentality. By May 2000, not less than 39 nations were cooperating under its organizational roof. Essentially, therefore, under the cloak of its original application and claiming to confine itself to remaining within the logic of the subject-matter of the dispute, the FRY is attempting to institute new proceedings. Yet, the subject-matter of the dispute is determined by the original application (Article 40 (1) of the Statute; Article 38 (2) of the Rules). It cannot be changed arbitrarily by the claimant or by the respondent.

In the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court stated that to preserve the identity of a dispute was "essential from the point of view of legal security and the good administration of justice".[81] A similar statement was more recently made by it in the *Fisheries Jurisdiction case (Spain v. Canada)*.[82]

B. With Regard to the Post-Conflict Period the UN is a Necessary Party

3.66. As was already pointed out (supra para. 2.39), by virtue of Security Council resolution 1244 Kosovo was placed under the authority of the United Nations which has established there a civil and a military presence. To contend that after the establishment of those two presences genocide was committed amounts to asserting that the United Nations, by not providing sufficient protection, has incurred in grave breaches of its legal duties. Responsibility for this outrageous assertion lies entirely with the Government of the FRY.

3.67. It stands to reason, in any event, that with regard to the post-conflict period no judicial determination could be made on the controversial issues in the absence of the United Nations. Although the FRY has brought its new claims related to events occurring after 10 June 1999 against the original defendants, what it contends in essence is that the United Nations has grossly failed in its efforts to comply with the

[81] *ICJ Reports 1992*, 1992, p. 240, at 267 para. 69.
[82] Judgment of 4 December 1998, para. 29.

mandate imparted to it by Security Council resolution 1244. Such allegations, however, cannot be dealt with in the absence of the entity which allegedly bears the main responsibility for a number of occurrences which, admittedly, are profoundly deplorable. According to the case law of the Court it is clear that a dispute pending before it must deal with issues that concern the litigant parties. If a dispute directly affects the rights and duties of a third party, the Court is prevented from exercising its jurisdiction, as pointed out in the *Monetary Gold* case[83] and in the *East Timor* case.[84] To be sure, the United Nations, as an international organization, does not have a right of standing in adversarial proceedings, given the fact that the Statute limits access to the Court to States (Article 34). However, this is no specific feature which would allow trespassing upon the competences of the United Nations. The legal position is in no way different from a situation where the third State concerned is not subject to the jurisdiction of the Court, as this happened both in the *Monetary Gold* case (Albania) and the *East Timor* case (Indonesia). Given the absence of the main party concerned, the Court lacks jurisdiction on this ground as well.

C. Total Lack of Substantiation of Charges as Bar to Jurisdiction

3.68. The totally artificial character of the attempt to link Germany to alleged atrocities committed in the period after 10 June 1999 is also borne out by the fact that the FRY does not even present the slightest allegation as to a possible involvement of the Respondent in such atrocities. No shred of evidence to that effect has been presented. The Memorial does not contain a single sentence purporting to show that German personnel in the service of the United Nations has intentionally engaged in a conspiracy to harm the Serb population in Kosovo or has failed to live up to its duty to take the necessary protective measures. In that regard, the reader encounters an absolute vacuum. There is no chain of legal reasoning whatsoever. The FRY limits itself to detailing facts which have occurred on the ground, without making the slightest effort to assign responsibility for these facts to the Respondent. There is no trace of substantiation of the charge underlying submission No. 4 on p. 352 of the Memorial ("by failures to prevent ..."). Even at the preliminary stage of adjudicating

[83] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment, ICJ Reports 1954*, p. 19, at 32.
[84] *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, p. 90, at 105 para. 34.

the issues of jurisdiction and admissibility, such rudimentary way of arguing fails to meet the basic requirements as set forth in Article 38 (2) of the Rules. Germany would not even know what it should rebut would it have to draft a counter-memorial.

3.69. In any event, it is just impossible to understand on the basis of what reasoning Germany could be made accountable for deplorable incidents which by no stretch of imagination can be attributed to it. Germany has contributed a contingent to KFOR, which obviously is subject to orders imparted by KFOR, and KFOR on its part was invited to assume military functions in Kosovo by virtue of Security Council resolution 1244. Hence, KFOR is required to implement the policies determined by the Security Council. As already pointed out, Germany is the lead nation in one of the areas of operation of KFOR (South) and to that extent bears responsibility, but its troops fall under a chain of command under the authority of Commander KFOR. All German KFOR and UNMIK personnel work for the fulfilment of the objectives determined by the Security Council.

3.70. Given the total and irremediable lack of substantiation of the FRY's contention that Germany is responsible for acts of genocide in the post-conflict period, this procedural flaw does not only fall within the rubric of inadmissibility, but affects the issue of jurisdiction. The absence of factual allegations permitting to draw albeit provisional inferences as to any breach by Germany of the ban on genocide necessarily leads to the conclusion that the FRY's submissions are not capable of being assessed through the looking-glass of genocide.

3.71. For a State which has been accused by the competent representative bodies of the organized international community of committing the most serious crimes against a specific ethnic group of its own population, it is certainly particularly delicate to throw around indiscriminate charges of genocide against other States. The strange nature of these accusations is compounded by the fact that by setting 25 April 1999 as the cut-off date concerning events of the past, the FRY has quite obviously attempted to forestall any counter-claim. In the circumstances, one is certainly entitled to qualify the filing of the application as an act of bad faith.

3.72. In the circumstances, it is clear that the FRY's submissions relating to the post-conflict period do not come under Article IX of the Genocide Convention, even less so than its submissions regarding the period of air operations.

V. The Objections Raised Possess an Exclusively Preliminary Character

3.73. Almost entirely, the objections which have been raised above possess an exclusively preliminary character (Article 79 (7) of the Rules). It is clear in the circumstances that they must be upheld at the present stage of jurisdiction. No State may be lightly drawn into a proceeding in which it could arbitrarily be made accountable for allegations of acts of genocide. It is incumbent upon the Court to examine with the greatest care whether such allegations meet the criteria of the crime as determined by the Convention of 1948. It would mean imposing an intolerable burden on the defendant to require it to respond on the merits to the charges brought while, as in the instant case, the facts advanced do not even correspond to the definition of genocide underlying the jurisdictional clause of Article IX. Genocide, the crime of crimes, must not be trivialized. A charge of genocide is the most serious accusation which can ever be brought against a State. The principle of due process demands that any allegations containing an indictment for genocide be scrupulously examined before being admitted for an examination as to their well-foundedness. Obviously, the drafters of the Genocide Convention deemed it necessary to confer jurisdiction on the Court for any cases where the shadow of genocide was looming over a violent conflict. But Article IX must not degenerate into a weapon for the purpose of frivolously discrediting an adversary. The jurisdictional requirements of Article 36 have precisely as one of their main objectives to protect a respondent from utterly baseless claims. Whether they are fulfilled must therefore be considered with the utmost care. This is necessary in particular with a view to shielding the authority of the Genocide Convention from being abused in instances where any other attempts to find a foundation for the Court's jurisdiction have failed.

3.74. Although Article 79 of the Rules does not differentiate, in Article 79 (7), between issues of jurisdiction and issues of admissibility, the case law of the Court has clearly established that on principle all issues of jurisdiction must be exhaustively dealt with before the merits of a pending case can be touched upon. In *Military and Paramilitary Activities in and against Nicaragua (Merits*), the Court pointed out:

> "While the variety of issues raised by preliminary objections cannot possibly be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by the Court at an early stage without examination of the merits. Above all, it is clear that a question of jurisdiction is one which requires decision at the preliminary stage of the proceedings."[85]

3.75. Thus, only issues of admissibility are suited to be dealt with at the phase of merits if and to the extent that they are not exclusively of a preliminary nature. All of the objections raised by Germany relate to the jurisdiction of the Court, also in so far as Germany challenges the lack of substantiation of the charge of genocide. In fact, the lack of substantiation makes clear that the proceedings instituted by the FRY do not come within the purview of the compromissory clause of Article IX of the Genocide Convention. Hence, the Court must rule on the issues before it could possibly pass on to the merits stage. As demonstrated in this memorandum, there is no basis of jurisdiction for Yugoslavia's claims. Consequently, the application must be rejected *a limine* without any examination of its merits.

3.76. Additional grounds of inadmissibility exist with regard to the attempt by the FRY to extend the scope of its application beyond the date of 10 June 2000. As expounded above (paras. 3.64 and 3.65), the later events now dwelt upon by the FRY were not covered by the original application.

[85] *ICJ Reports 1986*, 14, at 30-31.

SECTION 4

REQUESTS

On the basis of the foregoing observations, Germany requests the Court to decide that it cannot adjudicate upon the dispute referred to it by the Application of the Federal Republic of Yugoslavia on 29 April 1999, taking into account the following preliminary objections:

First Preliminary Objection:

Not being a party to the Statute of the Court either by membership in the United Nations or by special admission, the Federal Republic of Yugoslavia has no right to institute proceedings before the Court, given that the specific requirements applying to States not parties to the Statute are not met by the Federal Republic of Yugoslavia.

Second Preliminary Objection:

The dispute lies outside the scope of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. It is not even contended by the Federal Republic of Yugoslavia that Germany acted with intent to commit genocide to the detriment of a specific group of its population. The unsubstantiated allegations charging Germany with a breach of its commitments under the Genocide Convention do not meet the requirements of Article 38 (1, 2) of the Rules of the Court and, hence, do not come within the scope of Article IX of the Convention.

Third Preliminary Objection:

Concerning the post-conflict period, in the absence of the United Nations, the Court is additionally precluded from assuming jurisdiction inasmuch as at the merits stage it would by necessity have to make determinations on the rights and duties of the Organization. Furthermore, concerning the same period, the new claims brought by the FRY are inadmissible as they would create a new dispute not covered by the original application.

5 July 2000

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