International Court of Justice

Case concerning Legality
of Use of Force
(Yugoslavia *v.* United Kingdom)

Preliminary Objections of the United Kingdom

June 2000

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PART 1

INTRODUCTION

1.1 The United Kingdom raises the following Preliminary Objections in the proceedings which the Federal Republic of Yugoslavia (hereinafter the "FRY") has purported to institute against the United Kingdom. For the reasons set out herein, the United Kingdom submits that the FRY is not entitled to institute proceedings before the Court, that the Court lacks jurisdiction over the claims brought by the FRY, and that those claims are inadmissible.

Summary of the proceedings

1.2 On 28 April 1999 the FRY filed with the Court an Application purporting to commence proceedings against the United Kingdom. The case was entered in the General List under the title "Legality of Use of Force (Yugoslavia *v.* United Kingdom)".[1] On the same date, the FRY filed identical Applications instituting proceedings against nine other States (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United States of America).

1.3 The Application described the subject-matter of the dispute in the following terms:

> "The subject-matter of the dispute are acts of the United Kingdom of Great Britain and Northern Ireland by which it has violated its international obligations banning the use of force against another State, the obligation

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[1] The term "Yugoslavia" in the title of the case was evidently chosen as an abbreviated reference to the FRY, since it has been made clear throughout the case that the Applicant State is the FRY. That is how the Applicant describes itself in the Application and the Memorial and how its counsel referred to it at the hearings on the request for provisional measures (e.g., Professor Etinski, CR 99/14, p. 19). Since, however, the status of the FRY is one of the issues which arises in these proceedings, the United Kingdom will refer to the Applicant as the FRY to avoid confusion with the former Socialist Federal Republic of Yugoslavia, which is referred to simply as "Yugoslavia" in some of the documents to which reference will be made.

> not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group."

The Application then listed a number of incidents said to have taken place since 24 March 1999. The Application referred to Article 36(2) of the Statute of the Court and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ("the Genocide Convention")[2] as the bases for the jurisdiction of the Court. On the same day, the FRY also filed a request for provisional measures of protection.

1.4 By an Order dated 2 June 1999, the Court rejected the request for provisional measures by twelve votes to three. The Court held that Article 36(2) of the Statute of the Court *manifestly* could not constitute a basis of jurisdiction[3] and that Article IX of the Genocide Convention could not "constitute a basis on which the jurisdiction of the Court could prima facie be founded".[4]

1.5 The Court stated that its findings -

> "...in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention, or any questions relating to the admissibility of the Application, or relating to the merits themselves".

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2 78 UNTS 277 (Annex 1).

3 *Legality of Use of Force (Yugoslavia* v. *United Kingdom)*, Order of 2 June 1999, para. 25.

4 *Ibid.*, para. 36.

The Court further held that its findings left unaffected the right of the Governments of the FRY and the United Kingdom to submit arguments in respect of those questions. [5]

1.6 On the same date the Court rejected the requests for provisional measures in the nine other cases brought by the FRY. The Court ordered that the cases brought against Spain and the United States of America should be removed from the General List because of a manifest absence of jurisdiction.[6]

The FRY Memorial

1.7 In January 2000 the FRY filed its Memorial in the present proceedings. Although the cases against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom are separate proceedings, the FRY has filed a single Memorial in respect of all eight cases. The FRY Memorial makes no attempt whatsoever to distinguish the claims against the respondent States in the eight cases, except as regards jurisdiction.

1.8 Part I of the FRY Memorial (entitled "Facts") first sets out a long list of events which the FRY claims took place between 24 March 1999 and the cessation of military operations on 10 June 1999. The Memorial contains no suggestion as to which State may have carried out the attacks which it alleges took place. No specific allegations are made against the United Kingdom (or, indeed, against the respondent State in any of the other cases).

1.9 Part I of the Memorial then adds an entirely new set of allegations, quite distinct from those contained in the Application, relating to the period after 10 June 1999, when United Kingdom forces, together with those of thirty-eight other

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5 *Ibid.*, para. 38.

6 *Yugoslavia* v. *Spain*, Order of 2 June 1999, para. 35; *Yugoslavia* v. *United States of America*, Order of 2 June 1999, para. 29.

States,[7] deployed as part of the international security presence in Kosovo, known as the Kosovo Force ("KFOR"), authorized by Security Council resolution ("SCR") 1244 (1999).[8] Under the terms of that resolution, KFOR is authorized to cooperate with the international civil presence in Kosovo, the United Nations Interim Administration Mission in Kosovo ("UNMIK"), in ensuring security within Kosovo. The Memorial alleges that the United Kingdom has incurred responsibility for what the Memorial describes as the failure of KFOR to prevent genocide and its alleged violation of the terms of SCR 1244.

The United Kingdom's Preliminary Objections

1.10 The United Kingdom contends that the Court lacks jurisdiction, both *ratione personae* and *ratione materiae*, and contests the admissibility of the Application. While the United Kingdom emphatically rejects the uneven and distorted account of the facts advanced by the FRY in its Application and Memorial, the United Kingdom will address factual matters only in so far as it is useful to do so in the context of these Preliminary Objections. However, the United Kingdom wishes to put on record that it does not accept the description of events set out in the FRY Application and Memorial and considers that they contain numerous inaccuracies, omissions and other misrepresentations of the facts. In contributing to NATO's military operations the United Kingdom and its armed forces were bound by obligations arising under conventional international law (in particular, the Geneva Conventions 1949 and the First Additional Protocol 1977) and customary international law. The United Kingdom's conduct during the NATO air operations was fully in accordance with its obligations under international law. In this context the United Kingdom notes that on 2 June 2000

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7 The number of States contributing to KFOR varies from time to time.

8 Annex 2.

the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") stated in the Security Council:

> "I am now able to announce my conclusion, following a full consideration of my team's assessment of all complaints and allegations, that there is no basis for opening an investigation into any of those allegations or into other incidents related to the NATO bombing. Although some mistakes were made by NATO, I am very satisfied that there was no deliberate targeting of civilians or of unlawful military targets by NATO during the bombing campaign."[9]

1.11 The United Kingdom first submits that the FRY is not qualified to bring these proceedings, because it is not a party to the Statute of the Court, nor is it otherwise entitled to institute proceedings. The Court accordingly lacks jurisdiction *ratione personae*. This matter is dealt with further in Part 3 below.

1.12 The United Kingdom further submits that, in any event, the Court lacks jurisdiction *ratione materiae*. The FRY has persisted in its argument that Article 36(2) of the Statute provides a basis for the Court's jurisdiction. However, in light of the Court's Order of 2 June 1999 this argument is simply not open to the FRY. In that Order the Court held that the declarations made by the FRY and the United Kingdom under Article 36(2) *manifestly* could not provide a basis for the jurisdiction of the Court. That was in contrast to its decision regarding the possibility that jurisdiction might exist under the Genocide Convention. While the Court expressly left unaffected the right of the Parties to submit arguments in respect of the question of jurisdiction under the Genocide Convention, it did not do so with regard to Article 36(2). The case was permitted to remain on the General List only on the basis that jurisdiction might be found to exist under the Genocide Convention, not under Article 36(2) of the Statute. It is not open to the FRY now, at the present state of the proceedings, to seek to reintroduce Article

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[9] UN Doc. S/PV/4150, p. 3 (full statement at Annex 3).

36(2) as a basis for jurisdiction. This matter is dealt with further in paragraphs 4.8 to 4.18 below.

1.13 The United Kingdom further submits that, even if - notwithstanding the clear language of the Order of 2 June 1999 - the FRY were not debarred from attempting to rely upon Article 36(2) of the Statute, Article 36(2) does not confer jurisdiction in the present case. This issue is discussed in paragraphs 4.19 to 4.47 below.

1.14 Nor can Article IX of the Genocide Convention constitute a basis for the jurisdiction of the Court in the present case. The Application does not raise a dispute "relating to the interpretation, application or fulfilment" of that Convention. Most of the Application and Memorial is manifestly concerned with issues which have nothing whatsoever to do with the Genocide Convention and even where the Application and the Memorial refer to that Convention, the case, even as pleaded by the FRY, does not fall within the jurisdictional provisions of the Convention. This issue is further considered in Part 5 below.

1.15 With regard to the question of admissibility, the United Kingdom submits that the attempt to add allegations regarding the activities of the United Kingdom as part of KFOR following the adoption of SCR 1244 is inadmissible in that the FRY is seeking to add matters which would radically transform the nature of the dispute. This matter is considered in paragraphs 6.2 to 6.8 below.

1.16 Moreover, the United Kingdom submits that the entire Application is inadmissible because, in order to rule upon it, the Court would be required to determine the legality of the actions of States not before the Court, and, particularly with regard to the allegations concerning events after 10 June 1999, of others, including the United Nations. This issue of admissibility is considered in paragraphs 6.9 to 6.27 below.

1.17 Finally, the United Kingdom submits that the Application should be declared inadmissible on the ground that the FRY has acted, and is continuing to act, in bad faith. This matter is considered in paragraphs 6.28 to 6.40 below.

PART 2

BACKGROUND TO THE PRESENT PROCEEDINGS

2.1 International concern about the situation in Kosovo pre-dated by several years the events of 1998-1999. In July 1992 the Helsinki summit of the Conference on Security and Co-operation in Europe (CSCE) adopted a declaration "urging the authorities in Belgrade to refrain from further repression". In August 1992 the CSCE established a mission in Kosovo to monitor the situation. A report in December 1992 by the mission expressed deep concern over the increasing violence in the province. In June 1993 the FRY refused to renew the mandate of the CSCE mission. In SCR 855 (1993) of 9 August 1993, the Security Council called on the FRY to reconsider its decision, but the call went unheeded.

2.2 On 31 March 1998 the Security Council adopted, by fourteen votes to none with one abstention, SCR 1160 (1998).[10] SCR 1160 (1998), which was adopted under Chapter VII of the Charter, 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 or any other group". The resolution included a mandatory prohibition on the supply of weapons to the FRY and on arming and training for terrorist activities there.

2.3 Diplomatic efforts to resolve the crisis in Kosovo continued over the summer of 1998. In a Presidential Statement of 24 August 1998 the Security Council expressed its grave concern at the recent intense fighting in Kosovo, particularly the numbers of displaced persons. The Council noted that it "remains

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[10] Annex 4.

essential that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanians accept responsibility for ending the violence in Kosovo".[11]

2.4 A report of 4 September 1998 by the United Nations Secretary-General noted that, as a result of the fighting, there had been a tenfold increase in the number of displaced persons since the first four months of the year. The total in September was estimated at over 230,000, of whom 170,000 were internally displaced within Kosovo. The report noted that deserted "towns and villages, as well as destroyed houses, slaughtered livestock and burned fields, bear witness to the scale of displacement and destruction in Kosovo". It quoted UNHCR estimates that up to 50,000 displaced persons in Kosovo could have been "forced from their homes into the woods and mountains". The report emphasised that "if these people remain in their current locations over the winter, they will be at serious risk of death". The report contrasted the undertakings given by the FRY authorities to facilitate return with the facts on the ground, concluding that "inadequate security conditions and the continued destruction of homes" was making return "virtually impossible". The Secretary-General noted that if the FRY Government continued with its policies, it could "transform what is currently a humanitarian crisis into a humanitarian catastrophe".[12]

2.5 A further report by the Secretary-General on 21 September 1998 noted that the month since the previous report had seen "a sharp escalation of military operations in Kosovo, as a result of an offensive launched by the Serb forces".[13]

2.6 On 23 September, the Security Council adopted, by fourteen votes to none with one abstention, SCR 1199 (1998),[14] also under Chapter VII of the Charter.

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11 Annex 5.

12 UN Doc. S/1998/834, paras. 7, 8, 9 and 11.

13 UN Doc. S/1998/834/Add. 1, para. 1.

14 Annex 6.

The Council, having considered the reports of the Secretary-General referred to above, affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region, and stated that it was -

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

and

> "*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 *emphasising* the need to prevent this from happening".

SCR 1199 demanded a cease-fire and the start of a real dialogue. In particular, in paragraph 4, the Council demanded 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 missions 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".

2.7 In October 1998 a package was negotiated with the FRY, which comprised a FRY/OSCE agreement, signed on 16 October, for an unarmed civilian ground verification mission in Kosovo (the Kosovo Verification Mission)[15] and a FRY/NATO aerial verification agreement,[16] which led to the multinational Aerial Verification Mission overseen by the Verification and Coordination Centre in Skopje.

2.8 The Security Council welcomed this package in SCR 1203 (1998), adopted under Chapter VII on 24 October 1998, by thirteen votes to none with two abstentions.[17] This resolution re-emphasised the need to prevent the impending humanitarian catastrophe from happening. It demanded the full and prompt implementation by the FRY of the agreements reached with the OSCE and NATO and with the requirements of SCRs 1160 and 1199. The resolution demanded, in paragraph 11, that the FRY and the Kosovo Albanian leadership cooperate with international efforts "to improve the humanitarian situation and to avert the impending humanitarian catastrophe".

2.9 SCRs 1160 and 1199 also called upon the FRY and the Kosovo Albanian leadership to cooperate with the ICTY Prosecutor. On 17 November 1998, the Security Council adopted a further resolution, SCR 1207 (1998), condemning the failure of the FRY to cooperate with the ICTY.[18]

2.10 On 15 January 1999 the Kosovo Verification Mission reported that FRY security forces and Serbian special police had been responsible for a massacre of Kosovo Albanian civilians at Racak. In a Presidential Statement on 19 January 1999 the Security Council strongly condemned the massacre, deplored the FRY's

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15 UN Doc. S/1998/978.

16 UN Doc. S/1998/991.

17 Annex 7.

18 Annex 8.

decision to refuse the ICTY Prosecutor access to Kosovo to investigate the massacre, and stated the view of the Council that the recent events were violations of its resolutions.[19]

2.11 Meeting on 29 January 1999 in London, Foreign Ministers of the Contact Group (France, Germany, Italy, Russian Federation, United Kingdom, United States of America and EU Presidency) called upon the FRY/Serbian and Kosovo Albanian parties to attend negotiations, to begin on 6 February 1999, to define the terms of an agreement which would provide for a cease-fire, a peace settlement and the deployment of an international presence to uphold that settlement.[20] This initiative was welcomed by the Security Council.[21]

2.12 Following two and a half weeks of negotiations at Rambouillet, France, there emerged what became known as the Rambouillet accords,[22] the full text of which was endorsed by Contact Group Foreign Ministers at their meeting on 23 February 1999. The FRY/Serbian delegation wrote to the negotiators on that day,[23] emphasizing that "major progress has been achieved ... in defining political solution on substantial self-government" for Kosovo. The FRY "agreed to discuss the scope and character of international presence in Kosmet to implement the agreement to be accepted in Rambouillet".

2.13 As agreed at Rambouillet a second round of talks was held in Paris from 15-19 March. In response to a proposal by the FRY/Serbian delegation for substantial changes to the draft agreement,[24] the Russian, United States and

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19 UN Doc. S/PRST/1999/2 (Annex 9).

20 UN Doc. S/1999/96.

21 UN Doc. S/PRST/1999/5 (Annex 10).

22 UN Doc. S/1999/648.

23 M. Weller (ed.), *The Crisis in Kosovo 1989-1999*, (hereinafter "*The Crisis in Kosovo*"), p. 470 (document 33).

24 *The Crisis in Kosovo*, pp. 480 to 490 (document 2).

European Union negotiators emphasized in a letter to the Belgrade delegation of 16 March that "the unanimous view of the Contact Group" was that only technical adjustments to the agreement endorsed at Rambouillet could be agreed.[25] On 19 March the Co-chairmen of the talks announced that, given the FRY/Serbian delegation's position, there was no purpose in extending the talks any further.[26]

2.14 Also on 19 March the OSCE Chairman-in-Office (the Foreign Minister of Norway) decided to withdraw the Kosovo Verification Mission the next day as the situation in Kosovo had deteriorated to such an extent that it was becoming increasingly difficult for the Mission to carry out its tasks safely.

2.15 The report of the Kosovo Verification Mission, which was published by the OSCE in November 1999, gives a detailed picture of the situation in Kosovo in March 1999. The findings summarized in that report include:

(a) That the intention of the Yugoslav and Serbian forces to use mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998 and was shockingly demonstrated by incidents in and after January 1999 (including the Racak mass killing);

(b) Arbitrary killing of civilians was both a tactic in the campaign to expel Kosovo Albanians, and an objective in itself;

(c) Arbitrary arrest and detention and the violation of the right to a fair trial became increasingly the tools of the law enforcement agencies in the suppression of Kosovo Albanian civil and political rights and – accompanied by torture and ill-treatment – were applied as a means to intimidate the entire Kosovo Albanian society;

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25 *The Crisis in Kosovo*, p. 490 (document 3).

26 *The Crisis in Kosovo*, p. 493 (document 10).

(d) Rape and other forms of sexual violence were sometimes applied as a weapon of war;

(e) Forced expulsion carried out by Yugoslav and Serbian forces took place on a massive scale, with evident strategic planning and in clear violation of the laws and customs of war. It was often accompanied by deliberate destruction of property and looting. Opportunities for extortion of money were a prime motivation for Yugoslav and Serbian perpetrators of human rights and humanitarian law violations.[27]

2.16 The scale of the humanitarian crisis which existed in Kosovo in March 1999 was confirmed by the briefing given by the United Nations High Commissioner for Refugees to the Security Council on 5 May 1999. In that briefing, Mrs Ogata stated that, before 24 March 1999, there had already been nearly half a million people (out of a total population of only two million) who were internally displaced persons or refugees in neighbouring States.[28]

2.17 It was against this background that the North Atlantic Council concluded that military action was the only way to avert the humanitarian catastrophe which the Security Council had feared and which was then unfolding. The Secretary-General of NATO announced on 23 March that NATO air operations in the FRY were beginning. He noted that NATO was taking this action following the failure of the FRY to meet the international community's demands. He recalled that NATO had warned on 30 January that "failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian

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[27] Annex 11 (Executive summary of the report, *Kosovo/Kosova: As Seen, As Told). The full report* is available at http://www.osce.org/kosovo/reports/hr/index.htm.

[28] Annex 12.

catastrophe" and that NATO's action was intended to support the political aims of the international community.[29]

2.18 The Security Council considered the action being taken by NATO at a meeting on 24 March 1999. Speaking in the Council, the representative of the United Kingdom said:

> "The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.
>
> Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose."[30]

Statements justifying the action were also made by the representatives of the United States of America,[31] Canada,[32] Slovenia,[33] Bahrain,[34] Gambia,[35] the Netherlands,[36] France,[37] Malaysia [38] and Argentina.[39] China,[40] the Russian

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29 Annex 13. See also UN Doc. S/1999/107.

30 UN Doc. S/PV.3988, p. 12 (Annex 14).

31 S/PV.3988, pp. 4-5.

32 S/PV.3988, pp. 5-6.

33 S/PV.3988, pp. 6-7.

34 S/PV.3988, p. 7.

35 S/PV.3988, pp. 7-8.

36 S/PV.3988, p. 8.

37 S/PV.3988, pp. 8-9.

38 S/PV.3988, pp. 9-10.

39 S/PV.3988, p. 11

40 S/PV.3988, pp. 12-13.

Federation [41] and Namibia [42] were critical of the operation.

2.19 On 26 March 1999, the Security Council considered a draft resolution co-sponsored by Belarus, India and the Russian Federation.[43] The draft described the use of force by the NATO States as "a flagrant violation of the United Nations Charter, in particular Articles 2(4), 24 and 53" and demanded an immediate cessation. Speaking in the debate on the draft, Mr Jovanović (on behalf of the FRY) accused the NATO States of aggression and of violating international humanitarian law.[44] These allegations were refuted by the United Kingdom[45] and most of the other States represented on the Council. The Russian draft resolution was rejected by twelve votes (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, United States of America) to three (China, Namibia, Russian Federation).[46]

2.20 On 9 April 1999, the Secretary-General issued a statement expressing his deep distress at the humanitarian tragedy taking place in Kosovo and in the region, and urgently called upon the FRY authorities to end the campaign of intimidation and expulsion of the civilian population and to accept the deployment of an international military force to ensure a secure environment for the return of refugees and the unimpeded delivery of humanitarian aid.[47]

2.21 On 6 May 1999 in Bonn, Foreign Ministers of the Group of Eight countries ("G8"– Canada, France, Germany, Italy, Japan, Russian Federation, United

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41 S/PV.3988, pp. 2-4 and 13.

42 S/PV.3988, p. 10.

43 UN Doc. S/1999/328 (Annex 15).

44 UN Doc. S/PV.3989, p. 11 (Annex 16).

45 S/PV.3989, pp. 6-7.

46 S/PV.3989, p. 6.

47 Annex 17.

Kingdom, United States of America) agreed a set of principles to resolve the crisis:

- Immediate and verifiable end of violence and repression in Kosovo;
- Withdrawal from Kosovo of military, police and paramilitary forces;
- Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;
- Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;
- The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian aid organisations;
- A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarisation of the KLA;
- Comprehensive approach to the economic development and stabilisation of the crisis region. [48]

2.22 On 14 May 1999, the Security Council adopted resolution 1239 (1999) on humanitarian aspects of the crisis.[49] The Council expressed "*grave concern* at the humanitarian catastrophe in and around Kosovo," and emphasised that the humanitarian situation would continue to deteriorate in the absence of a political solution to the crisis consistent with the principles adopted by the G8 Foreign Ministers on 6 May 1999 and urged all concerned to work towards this aim.

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48 UN Doc. S/1999/516.

49 Annex 18.

2.23 On 27 May 1999, the ICTY announced the indictment of FRY President Milosevic, Serbian President Milutinovic, FRY Vice-President Sainovic, FRY Chief of Defence Staff Ojdanic and FRY Interior Minister Stojilkovic for crimes against humanity and violations of the laws and customs of war in Kosovo.

2.24 On 3 June 1999, the FRY President agreed to the proposals presented by European Union special envoy Ahtisaari and Russian envoy Chernomyrdin, which were based on the G8 principles (para. 2.21 above). Following the signature on 9 June of a Military Technical Agreement by the Yugoslav Army Chief of General Staff, Colonel General Marjanovic, Lieutenant-General Stevanovic and the KFOR Commander, Lieutenant-General Sir Michael Jackson, the withdrawal of FRY and Serbian security forces began on 10 June 1999. Air strikes were suspended by NATO on 10 June 1999.

2.25 On the same day, the Security Council, by fourteen votes to none, with one abstention, adopted SCR 1244 (1999).[50] The resolution welcomed the general principles on a settlement laid down by the G8 on 6 May 1999 (para. 2.21 above), which were attached as annex 1 to the resolution. The points of agreement between the FRY and the EU and Russian envoys (para. 2.24 above) were attached as annex 2 to the resolution.

2.26 In SCR 1244, the Security Council authorized Member States and relevant international organizations to establish an international security presence (para. 7), involving substantial NATO participation and under unified command and control (annex 2, point 4). The responsibilities given to the international security presence were:

> "(a) Deterring renewed hostilities, maintaining and where necessary enforcing a cease-fire, and ensuring the withdrawal and preventing the

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50 Annex 2.

return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;

(b) Demilitarising the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups, as required in paragraph 15 below;

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task;

(e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organisations" (para. 9).

2.27 The Security Council also authorized the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo -

> "in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo" (para. 10).

The responsibilities given to the international civil presence were:

> "(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;

(g) Supporting the reconstruction of key infrastructure and other economic reconstruction;

(h) Supporting, in coordination with international humanitarian organisations, humanitarian and disaster relief aid;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo" (para. 11).

The Security Council also requested the Secretary-General to appoint, in consultation with the Security Council, a Special Representative "to control the implementation of the international civil presence" and "to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner" (para. 6).

2.28 The Secretary-General's report of 12 June 1999[51] set out proposed arrangements for the international civil presence, the United Nations Interim Administration Mission in Kosovo ("UNMIK"). UNMIK would have pillars run by the United Nations (interim civil administration), UNHCR (humanitarian affairs), OSCE (human rights, democratisation and institution-building) and the European Union (reconstruction).

2.29 The international security presence, the Kosovo Force ("KFOR"), was deployed to Kosovo on 12 June 1999. The number of States which make up KFOR varies from time to time. As at 31 May 2000 the following thirty-nine States were contributing to KFOR: Argentina, Austria, Azerbaijan, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lithuania, Luxembourg, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates, United Kingdom and United States of America. It was agreed with all participants, including the Russian Federation, that KFOR would have a unified NATO chain of command and that there would be consultations on the conduct of the operation with those non-NATO countries who wished to participate. Such consultations have been held on a regular basis.

2.30 The Secretary-General's report of 12 July 1999 set out the measures UNMIK was taking in cooperation with KFOR "aimed at restraining Kosovo Albanians and reassuring Kosovo Serbs". The report expressed particular concern about the "continued harassment and lack of security of minority groups in Kosovo" and identified the full deployment of UNMIK and KFOR personnel as a major contribution to addressing this problem.[52]

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51 UN Doc. S/1999/672 (Annex 19).

52 UN Doc. S/1999/779, paras. 26 and 120.

2.31 The Secretary-General's report of 16 September 1999 noted that violence against "vulnerable minorities" remained a "major concern".[53] That report also set out UNMIK's efforts to create multi-ethnic governmental structures to include the Kosovo Serbs. These were intended to build on the Kosovo Transitional Council, which brings together all major political parties and ethnic groups in Kosovo.

2.32 The Secretary-General's report of 23 December 1999 set out further steps taken to protect minorities. An inter-agency Ad Hoc Task Force on Minorities was coordinating further steps aimed at protecting and assisting minorities, including steps to reinforce home security and establishment of a hotline between agencies, KFOR and UNMIK police.[54]

2.33 The joint statement by the Special Representative of the Secretary-General and the KFOR Commander of 18 August 1999 set out some of the special measures that KFOR was taking, including: round-the-clock patrolling; soldiers living in apartment blocks to provide protection to those at risk; and escorts to work and to school for minority communities and individuals. It also noted that UNMIK and KFOR were continually reviewing the security situation and seeking ways to improve their response.[55]

2.34 As required in SCR 1244, the NATO Secretary-General has provided regular reports to the United Nations Secretary-General on KFOR's activities. The report circulated by the United Nations Secretary-General on 8 July 1999, covering the period 17 to 30 June 1999, noted that there had been "many reported incidents of reprisal attacks against Serbs and their property. KFOR is taking a firm line against these disturbances within its resources".[56] The next report,

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53 UN Doc. S/1999/987, para. 4.

54 UN Doc. S/1999/1250.

55 The Unofficial Transcript of the UNMIK Press Briefing, 18 August 1999 which includes the text of the joint statement is available at http://www.un.org/peace/kosovo/press/br180899.htm (Annex 20).

56 UN Doc. S/1999/767, para. 3.

circulated on 10 August 1999, covering the period 1 to 27 July 1999, confirmed that since the deployment of KFOR "the initial exodus of Serbs has been reduced as the result of KFOR efforts to provide a secure environment. The main aims of KFOR have been the restoration of law and order and the protection of the Serb and other minorities...".[57]

2.35 The report circulated by the United Nations Secretary-General on 15 October 1999, covering the period 30 August to 27 September 1999, noted that responsibility for police functions was transferred from KFOR to UNMIK at the end of August 1999. It added:

> "...KFOR still conducts security patrols in all major urban areas and in the countryside to deter crime and instill a sense of personal safety in civilians. Approximately half of KFOR's total available manpower is directly committed to current protection tasks".[58]

The next report, circulated on 18 November 1999 and covering the period 27 September to 26 October 1999, confirmed this figure, noting that "KFOR troops provide a permanent presence in Serb towns, villages, neighbourhoods and even individual houses".[59] The report circulated on 20 December 1999 and covering the period 27 October to 23 November 1999, recorded a similar level of activity.[60]

2.36 The first report of 2000, dated 23 January 2000 and covering the period from 24 November to 14 December 1999, noted that:

> "KFOR...continues to attach the highest priority to the protection of ethnic minorities, and approximately 50 per cent of its personnel is assigned to this task.....KFOR is following an overall strategy that aims at reducing the amount of ethnically motivated violence in Kosovo. This includes the establishment of joint security working groups, escorts for individuals and

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57 UN Doc. S/1999/868, para 19.

58 UN Doc. S/1999/1062, para. 9.

59 UN Doc. S/1999/1185, para. 3.

60 UN Doc. S/1999/1266.

groups when necessary, escorts for humanitarian aid convoys, high-profile patrols and static checkpoints in and around ethnic minority pockets...and operations to find and confiscate illegal/unauthorized weapons and munitions throughout Kosovo."

The report also noted that:

> "Since June 1999, the number of murders and other violent acts in the province has decreased gradually and significantly, despite occasional set-backs. KFOR's presence has resulted in a reduction in the number of reported major offences, from over 300 in the last week of June to less than 50 in the last week of November."[61]

2.37 Subsequent reports confirm that KFOR and UNMIK continue to make every effort to protect minorities in Kosovo.[62] While the situation in Kosovo is far from ideal, the United Kingdom contingent does everything that it can to ensure the security of all persons in Kosovo, especially those most at risk.

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61 UN Doc. S/2000/50, paras. 4 and 5.

62 UN Doc. S/2000/152; UN Doc. S/2000/235; UN Doc. S/2000/318; UN Doc. S/2000/489.

PART 3

THE COURT LACKS JURISDICTION *RATIONE PERSONAE*

3.1 The United Kingdom submits that the Court does not have jurisdiction *ratione personae*, because the FRY is not qualified to bring these proceedings. The FRY is a new State that came into existence in 1992 (paras. 3.2 to 3.12 below). The FRY is not a party to the Statute of the Court, since it is neither a Member of the United Nations nor a non-Member State that has become a party to the Statute under Article 93(2) of the Charter (paras. 3.13 to 3.26 below). The FRY has not claimed to be entitled to bring these proceedings by virtue of Article 35(2) of the Statute, nor could it do so (paras. 3.27 to 3.34 below).

(1) The FRY is a new State

3.2 The creation of the FRY was the result of the events of 1991 and 1992. Prior to those events, the territory known as Yugoslavia consisted of a single State, the Socialist Federal Republic of Yugoslavia (SFRY), which comprised six republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia). In 1991 Croatia and Slovenia declared independence. On 29 November 1991, the Arbitration Commission of the Peace Conference on Yugoslavia[63] gave its opinion:

> "- that the Socialist Federal Republic of Yugoslavia is in the process of dissolution;

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[63] The Arbitration Commission was established by a joint statement on Yugoslavia adopted at an extraordinary meeting of Ministers in the context of European Political Cooperation on 27 August 1991, and was accepted by the six Yugoslav Republics at the opening of the Peace Conference on 7 September 1991: see *Interlocutory Decision (Opinions No. 8, 9 and 10)*, 92 ILR 194.

- that it is incumbent upon the Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities;

- that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice."[64]

3.3 The Republics of Croatia and Slovenia were admitted to the United Nations on 22 May 1992.[65] The Republic of Bosnia and Herzegovina was admitted to the United Nations on 22 May 1992.[66] The Republic of Macedonia was admitted to the United Nations on 8 April 1993 (under the provisional designation "the former Yugoslav Republic of Macedonia").[67]

3.4 On 27 April 1992 the Republic of Serbia and the Republic of Montenegro formed the FRY, of which they were the only constituent republics under a federal constitution. In a declaration, of the same date, annexed to a letter to the United Nations Secretary-General, the FRY stated 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 SFR of Yugoslavia assumed internationally".[68]

3.5 On 30 May 1992 the Security Council adopted SCR 757 (1992), in which the Council noted -

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64 *Opinion No. 1*, 92 ILR 162.

65 Security Council resolution 753 (1992) and General Assembly resolution 46/238 (Croatia); Security Council resolution 754 (1992) and General Assembly resolution 46/236 (Slovenia).

66 Security Council resolution 755 (1992) and General Assembly resolution 46/237.

67 Security Council resolution 817 (1993) and General Assembly resolution 47/225.

68 UN Doc. A/46/915 (Annex 21).

"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".[69]

3.6 On 4 July 1992, the Arbitration Commission of the Peace Conference on Yugoslavia gave its opinion that the process of dissolution of the SFRY was now complete and that the SFRY no longer existed.[70] The Arbitration Commission also stated that the FRY was a new State, not the continuation of the old SFRY.[71] In another opinion of the same date, the Arbitration Commission concluded that none of the successor States of the SFRY was entitled to claim for itself alone the membership rights previously enjoyed by the SFRY in international organizations.[72]

3.7 On 19 September 1992, the Security Council adopted SCR 777 (1992), which reads:

"The Security Council,

Reaffirming its resolution 713(1991) of 25 September 1991 and all subsequent relevant resolutions,

Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular its resolution 757(1992) which notes that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal

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69 Annex 22.

70 *Opinion No. 8*, 92 ILR 199.

71 *Ibid.* See also *Opinion No 10*, 92 ILR 206.

72 *Opinion No. 9*, 92 ILR 203.

Republic of Yugoslavia in the United Nations has not been generally accepted",

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

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly".[73]

3.8 On 22 September 1992, the General Assembly adopted resolution 47/1, in which the Assembly, after noting that it had received the recommendation of the Security Council in SCR 777 (1992), considered –

> "that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly".[74]

Immediately following the adoption of this resolution, the FRY Prime Minister, Mr Milan Panic, announced in the General Assembly:

> "I herewith formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent."[75]

This request was not, however, followed up by the FRY.

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73 Annex 23.

74 Annex 24. The resolution was adopted by vote, with 127 in favour, 6 against and 26 abstentions.

75 UN Doc. A/47/PV.7, pp. 141 to 196 at p. 149 (Annex 25).

3.9 On 28 April 1993, the Security Council adopted SCR 821 (1993), in which, after noting that the SFRY had ceased to exist, it reaffirmed that the FRY could not continue automatically the membership of the SFRY in the United Nations, and therefore recommended to the General Assembly that the FRY should not be allowed to participate in the work of the Economic and Social Council.[76] On 29 April 1993, the General Assembly adopted resolution 47/229, in which, after noting that it had received the recommendation of the Security Council in SCR 821 (1993), the Assembly decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".[77]

3.10 On 9 April 1996, the Presidency of the European Union issued a statement referring to a FRY-Macedonia agreement signed on 8 April and continuing:

> "This development ..... opens the way to recognition by the Member States, in accordance with their respective procedures, of the Federal Republic of Yugoslavia *as one of the successor States* to the Socialist Federal Republic of Yugoslavia".[78]

3.11 The United Kingdom recognized the FRY as an independent State in April 1996.[79] On 10 April 1996 the Secretary of State for Foreign and Commonwealth Affairs sent a message to the FRY President, which commenced as follows:

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[76] Annex 26. The Security Council has consistently declined to treat the FRY representative in the same way as the representative of a Member State. Thus, for example, at the 3988th meeting the President of the Council made a clear distinction between Member States invited "to participate in the discussion, without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure" and Mr Jovanović, who was simply invited "to address the Council in the course of its discussion of the item before it", without mention of the State he represented: UN Doc S/PV. 3988, pp.2 and 13 (Annex 14).

[77] Annex 27. The vote was 107 to 0, with 11 abstentions.

[78] *British Year Book of International Law* 1996, p.707 (emphasis added).

[79] Statement on UK recognition of the Federal Republic of Yugoslavia of 9 April 1996 issued by the Foreign and Commonwealth Office, *British Year Book of International Law* 1996, pp.706-7.

"I am writing to place on record that the British Government formally recognizes the Federal Republic of Yugoslavia as an independent sovereign state".[80]

3.12 As of the date of these Preliminary Objections the FRY has not followed up the announced intention of its Prime Minister (see para. 3.8 above) and submitted an application for membership in the United Nations in due and proper form pursuant to Article 4 of the Charter and rule 134 of the Rules of Procedure of the General Assembly. Nor has the Security Council recommended that the FRY be admitted to United Nations membership.

(2) *The FRY is not a party to the Statute of the Court*

3.13 Article 93 of the Charter reads as follows:

"1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

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

Article 93 is to be read with Article 35(1) and (3) of the Statute:

"1. The Court shall be open to the States parties to the present Statute.

...

3. When a State which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court."

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[80] *British Year Book of International Law* 1996, p.708.

It follows from these provisions that there are only two circumstances in which a State can be a party to the Statute of the Court. It must either be a Member of the United Nations or it must have become a party to the Statute under conditions determined in its case by the General Assembly upon the recommendation of the Security Council. The FRY meets neither of these conditions. The position was accurately stated by the four other successor States (Bosnia and Herzegovina, Croatia, Macedonia, Slovenia) in the communication received by the Secretary-General on 28 May 1999, in which they concluded that the FRY's purported declaration accepting the jurisdiction of the Court under Article 36(2) of the Statute was null and void.[81]

(a) *The FRY is not a party to the Statute under Article 93.1 since it is not a Member of the United Nations*

3.14 As explained in paragraphs 3.2 to 3.12 above, the FRY is a new State which came into being upon the dissolution of the SFRY. As a new State the FRY may become a Member of the United Nations only in accordance with Article 4 of the Charter, that is to say, by a decision of the General Assembly upon the recommendation of the Security Council. The Security Council, in SCR 777(1992), and the General Assembly, in resolution 47/1, invited the FRY to apply for membership. The FRY Prime Minister announced in the General Assembly his State's request for membership (para. 3.8 above). Rule 134 of the Rules of Procedure of the General Assembly provides that an application shall be submitted to the Secretary-General, and shall contain a declaration, made in a formal instrument, that the State in question accepts the obligations contained in the Charter. No application for membership has yet been made by the FRY.

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[81] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999, Volume I,* pp. 30-31, note 73 (Annex 28).

3.15 Instead, the FRY now claims, in its Memorial, to be the continuation of the SFRY. This assertion appears first to have been made in the declaration of 27 April 1992 at the time of the adoption of the FRY Constitution.[82] The claim has not been accepted by any of the other four successor States to the SFRY (Bosnia and Herzegovina, Croatia, Macedonia, Slovenia),[83] or by States generally,[84] or by the political organs of the United Nations,[85] or by the United Kingdom.[86]

3.16 On the contrary, the FRY's claim to be the continuation of the SFRY has been widely rejected within the international community. In particular, the political organs of the United Nations have rejected the FRY's claim to "continue" the SFRY's membership in the United Nations. The true position is that the FRY, despite its assertion, is not the continuation of the SFRY, but is one of five equal successor States. Like the other four successor States, the FRY is not the continuing State of the SFRY (the same international legal person) but is a new State established in part of the territory of the former SFRY.

3.17 As a new State the FRY cannot automatically continue the United Nations membership of the SFRY, but should – if it wishes to become a Member – apply for membership in accordance with the United Nations Charter. This is what the Czech Republic and Slovakia did in early 1993 upon the dissolution of the Czech and Slovak Federal Republic on 31 December 1992.[87] It is also what the political

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82 See para. 3.4 above.

83 See, for example, the communication referred to at note 81 above.

84 See, e.g., the European Union's statement that the FRY is one of the successor States, para.3.10 above, and Opinions Nos. 8 and 10 of the Arbitration Commission of the Peace Conference, notes 70 and 71 above.

85 See paras. 3.5, 3.7, 3.8 and 3.9 above.

86 See para. 3.11 above.

87 UN Docs. S/25046 (Slovak Republic); S/25045 (Czech Republic); see also Security Council resolutions 800(1993) and 801(1993) of 8 January 1993 and General Assembly resolutions 47/220 and 47/222 of 19 January 1993.

organs of the United Nations, which have responsibility under the Charter for determining questions of membership, have called upon the FRY to do.[88]

3.18 The analysis in Part 3.1 of the FRY Memorial proceeds from a false premise. It is not the case that prior to the adoption of SCR 777 (1992) and General Assembly resolution 47/1 the FRY was a United Nations Member, whose membership could be terminated by the General Assembly under Article 6 of the Charter. Nor is it the case, as is suggested in paragraph 3.1.2 of the FRY Memorial, that some States proposed that the FRY "should be excluded, formally or de facto, from membership in the United Nations". The FRY has never been a Member of the United Nations. The predecessor State – the SFRY – was an original Member of the United Nations in accordance with Article 3. None of its five successor States was entitled automatically to continue that membership. The Security Council and the General Assembly made that clear on more than one occasion. Those in power in Belgrade, however, did not want to accept that fact (and, indeed, still set their face against it).

3.19 The language of SCR 777 (1992) and General Assembly resolution 47/1 is consistent only with the position that the FRY is not a United Nations Member. The statements that the FRY "cannot continue automatically the membership of the former SFRY" and "therefore should apply for membership" [89] are incompatible with the assertion in the FRY Memorial that the FRY was and remains a Member of the United Nations throughout.

3.20 Turning to the practice of the Secretariat, the letter from the United Nations Legal Counsel of 29 September 1992[90] in response to a letter from Bosnia and

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88 See paras. 3.7 to 3.8 above.

89 SCR 777 (1992) (Annex 23) and GAR 47/1 (Annex 24) and paras. 3.7 to 3.8 above.

90 UN Doc. A/47/485 (Annex 29).

Herzegovina and Croatia is likewise clear. It correctly states that the only practical consequence drawn by the General Assembly in resolution 47/1 was that the FRY should not participate in the work of the Assembly.[91] Moreover, the Legal Counsel was right to say that resolution 47/1 "neither terminates nor suspends *Yugoslavia's* membership in the Organisation". It is significant, however, that the Legal Counsel here refers to "Yugoslavia", whereas the rest of his letter refers to "the Federal Republic of Yugoslavia." The letter correctly concludes by saying that "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".

3.21 The legal opinion of the Acting Director of the Office of the Legal Counsel, copied to the Permanent Mission of Yugoslavia on 15 December 1997,[92] reiterates the interpretation given by the Legal Counsel of the practical consequences of General Assembly resolution 47/1. Moreover, his opinion notes that the resolution itself was subsequently "recalled by the Security Council, and recalled and reaffirmed by the General Assembly (resolutions 47/229 and 48/88) without any criticism of such interpretation".

3.22 Nevertheless, the practice of the Secretariat (which cannot of course in any event bind the political organs or Member States), and the occasional practice of the Assembly itself, reflects some ambiguity arising not from any United Nations membership of the FRY but from the fact that the SFRY's membership has not unambiguously been declared extinguished. Thus, for example the Secretary-General, in his capacity as depositary of multilateral treaties, continues to list "Yugoslavia" as a member of the United Nations. But it cannot be deduced from

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91 And, later, in resolution 47/229, that it should not participate in the work of ECOSOC.

92 Annex No. 167 to the FRY Memorial.

this practice, as suggested in paragraph 3.1.8 of the FRY Memorial, that "the Secretary-General considers that the Federal Republic of Yugoslavia is a Member State of the United Nations". On the contrary, as the United Nations Legal Counsel rightly stated in a letter of 31 January 1994 to the Permanent Representative of Slovenia, referred to in the Acting Director's legal opinion (para. 3.21 above), the Secretary-General as depositary is not in a position to decide such a question. After reciting this view, the Acting Director explains the practice in the following terms:

> "Consequently, the Secretary-General maintains the status quo with regard to treaty actions and references in publications to Yugoslavia."

3.23 Nor is there any basis on which to conclude that the General Assembly has, in its decisions on budgetary assessments "treated the Federal Republic of Yugoslavia as a Member State", as suggested in paragraph 3.1.7 of the FRY Memorial. The FRY's assertion that the Assembly's assessment of contributions on "Yugoslavia", and its payment, on occasions, of such assessments, are evidence of the FRY's status as a Member of the United Nations has no basis in fact or in law. The assessment of contributions on "Yugoslavia" may be regarded as attributable to the anomalous position of Yugoslavia. There are indeed certain functions, not amounting to UN membership, which are currently exercised by the FRY Mission at the UN (eg personal participation of Mr Jovanović in the work of the Security Council, the receiving and circulation of documents, etc). The General Assembly has, in another context, referred to the "de facto working status of Serbia and Montenegro".[93] The assessment of a contribution on "Yugoslavia", and such payment as the FRY has made, may be understood on that basis. In any event, such decisions can have no legal bearing on the question of FRY

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[93] General Assembly resolution 48/88 of 20 December 1993, para. 19.

membership of the United Nations, which is a matter for formal decision by the Security Council and the General Assembly under Article 4 of the Charter.

3.24 The question of the FRY's non-membership of the United Nations was expressly left open at the Provisional Measures stage of the present proceedings. The Court held that, in view of its finding that the Optional Clause declaration manifestly could not constitute a basis of jurisdiction –

> "the Court need not consider this question [whether the FRY is a member of the United Nations] for the purpose of deciding whether or not it can indicate provisional measures in the present case;".[94]

3.25 The question was addressed in some of the separate opinions at the provisional measures stage of the present proceedings. Judge Oda held, in paragraph 4 of his separate opinion, that –

> "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. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court."

Judge Kooijmans dealt with the question at paragraphs 4 to 29 of his separate opinion, concluding –

> "25. ...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.

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[94] Order of 2 June 1999, para. 28. The Court similarly left the matter open in its Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*), ICJ Reports 1993, p.3 at p. 11 et seq (paras. 14-18).

That means that there is a probability, which is far from negligible, that the Court after a thorough analysis of the legal issues involved will find that is without jurisdiction because of the invalidity of Yugoslavia's declaration of acceptance.

26. The disputed validity of that declaration touches the very basis of the Court's jurisdiction and, therefore, takes precedence over other issues, like eg., limitations *ratione temporis, ratione materiae* and *ratione personae*. In view of the doubts and the controversies with regard to this question the Court would have found itself on safe ground if it had concluded that the uncertainties about the validity of Yugoslavia's declaration prevent it from assuming that it has jurisdiction, even prima facie."

(b) The FRY is not a party to the Statute under Article 93(2) of the Charter

3.26 As a non-Member State, the only route by which the FRY could become a party to the Statute is that referred to in Article 93(2) of the Charter. This would require a specific determination by the General Assembly (upon the recommendation of the Security Council) of the conditions on which the FRY may become a party to the Statute, as was done in the cases of Switzerland,[95] Liechtenstein,[96] Japan,[97] San Marino[98] and Nauru.[99] No such determination has been made in the case of the FRY. Indeed, the FRY does not claim to be a party to the Statute under Article 93(2) and could not do so consistently with its claim to be a Member of the United Nations.

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95 General Assembly resolution 91(I), 11 December 1946.

96 General Assembly resolution 363 (IV), 1 December 1949.

97 General Assembly resolution 805 (VIII), 9 December 1953.

98 General Assembly resolution 806 (VIII), 9 December 1953.

99 General Assembly resolution 42/21, 18 November 1987.

(3) *The FRY has not claimed to be entitled to bring these proceedings by virtue of Article 35(2) of the Statute, nor could it do so*

3.27 When a State is not a party to the Statute of the Court, the only other way in which it could have the capacity to institute legal proceedings before the Court is if the Court is open to it by virtue of Article 35(2) of the Statute of the Court. That is not the case here.

3.28 Article 35(2) of the Statute provides as follows:

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

3.29 The Security Council laid down such conditions in SCR 9 (1946) of 15 October 1946, which provides, in relevant part:

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

jurisdiction of the Court, provided, however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice;".

3.30 The FRY has not deposited a declaration with the Registrar of the Court pursuant to SCR 9 (1946), and does not claim to have done so. The declaration, dated 25 April 1999, by which the FRY purported to accept the jurisdiction of the Court under Article 36(2) of the Statute is not and cannot be treated as such a declaration. Even if the FRY had deposited such a declaration, it could not bring proceedings against the United Kingdom without the latter's "explicit agreement", which has not been given.

3.31 In addition to providing, as a general rule, that the conditions under which the Court shall be open to States not parties to the Statute shall be laid down by the Security Council, Article 35(2) refers to an exceptional case: the general rule is "subject to the special provisions contained in treaties in force" (in the French text, "sous réserve des dispositions particulières des traités en vigueur"). This exception originated in, and is identical to, the corresponding provision in the Statute of the Permanent Court of International Justice.

3.32 An illuminating summary of the background and drafting history of this provision is provided by Rosenne:

> "The expression in paragraph 2 of the Statute of the Permanent Court *subject to the special provisions of treaties in force* apparently was intended to refer to the Peace Treaties after the First World War. They contained several provisions giving the Permanent Court jurisdiction over disputes arising from them, and they were in force before that Statute was adopted. Article 35, paragraph 2, made it possible for litigation to take place with the former enemy Powers despite the fact that at the time the Protocol of Signature was adopted, they were not qualified to become parties to that instrument. Accordingly, '*in force*' meant that the treaty had to be in force

on the date of entry into force of the Statute of the Permanent Court (taken as 1 September 1921)."[100]

That the phrase "treaties in force" was intended to have a limited meaning was confirmed by Judges Anzilotti and Huber at the time the Rules of Court were reviewed in 1926.[101] Such an interpretation also accords better with the system of jurisdiction created by the United Nations Charter and the Statute of the Court, for to allow any treaty in force between two or more States to establish jurisdiction *ratione personae* for the parties to that treaty would be to place them in a privileged position by giving them access to the Court without requiring them to meet the conditions normally imposed as a prerequisite to access to the Court.

3.33 The present Court has not had occasion to determine the meaning of the expression "treaties in force", nor do the Rules of the Court cover the matter. The Court briefly adverted to this question in its Order of 8 April 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*. The Court, citing the *Wimbledon* case, said that -

> "a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by [the applicant] could ... be regarded prima facie as a special provision contained in a treaty in force."[102]

It therefore found that it had *prima facie* jurisdiction *ratione personae* over another party to that treaty sufficient to enable it to indicate provisional measures. However, in that case the Respondent did not question the jurisdiction of the Court

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100 *The Law and Practice of the International Court, 1920-1996* , Vol. II, p. 629.

101 PCIJ, Series D, No. 2 (Add.), pp. 104-5 and 106.

102 ICJ Reports 1993, p.3, at para. 19.

on this ground. Moreover, as Rosenne rightly observes, "that provisional finding is not conclusive of the matter".[103]

3.34 It is clear that there are no treaties in force, in the sense intended in Article 35(2) of the Statute, between the United Kingdom and the FRY. It follows that that provision cannot give the FRY access to the Court.

* * *

3.35 Since, therefore, the FRY is neither a party to the Statute of the Court, nor a State which is entitled to access to the Court on any other basis, jurisdiction *ratione personae* has not been established in the present case.

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103 *The Law and Practice of the International Court, 1920-1996*, vol. II, p. 630.

PART 4

ARTICLE 36(2) OF THE STATUTE DOES NOT PROVIDE JURISDICTION *RATIONE MATERIAE* IN THE PRESENT CASE

4.1 The principal basis on which the FRY seeks, in its Memorial, to found the jurisdiction of the Court are the declarations made by the FRY and the United Kingdom under Article 36(2) of the Statute.[104]

4.2 The United Kingdom declaration, deposited on 1 January 1969, reads as follows:

> "1. I have the honour, by direction of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, to declare on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland that they accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 24 October 1945, with regard to situations or facts subsequent to the same date, other than:
>
> (i) any dispute which the United Kingdom
>
> (a) has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement; or
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> (b) has already submitted to arbitration by agreement with any State which had not at the time of submission accepted the compulsory jurisdiction of the International Court of Justice;

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104 Memorial, Part 3.2.

(ii) disputes with the government of any other country which is a Member of the Commonwealth with regard to situations or facts existing before 1 January 1969;

(iii) disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

2. The Government of the United Kingdom also reserve the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added."

4.3 On 26 April 1999, the FRY purported to deposit a declaration (signed on 25 April 1999) accepting the jurisdiction of the Court under Article 36(2). This declaration was in the following terms:

"I hereby declare that the Government of the Federal Republic of Yugoslavia recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement. The present Declaration does not apply to disputes relating to questions which, under international law, fall exclusively within the jurisdiction of the Federal Republic of Yugoslavia, as well as to territorial disputes.

The aforesaid obligation is accepted until such time as notice may be given to terminate the acceptance."

4.4 In its Order at the Provisional Measures stage of the present case, the Court held that "the declarations made by the Parties under Article 36, paragraph 2 of the Statute manifestly cannot constitute a basis of jurisdiction in the present case, even prima facie".[105] The Court reached that conclusion because it found that jurisdiction was clearly excluded by the second part of subparagraph (iii) of paragraph 1 of the United Kingdom declaration ("the twelve-month clause").

4.5 It is evident, however, from the Court's reasoning in the Orders in the cases brought by the FRY against Belgium, Canada, the Netherlands and Portugal, that the Court also considered that, prima facie, jurisdiction could not be founded on Article 36(2) of the Statute, because the dispute which the FRY sought to bring before the Court had arisen before 25 April 1999 and was therefore excluded by the terms of the FRY declaration and the operation of the principle of reciprocity.[106]

4.6 Notwithstanding the terms of the Court's decision at the Provisional Measures stage, the FRY has again attempted, in its Memorial, to found the jurisdiction of the Court on the declarations under Article 36(2) of the Statute. The FRY contends that the twelve-month clause in the United Kingdom declaration will not present an obstacle to the jurisdiction of the Court provided that the oral hearings are held after 25 April 2000.[107] It also argues that after the

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[105] Order of 2 June 1999, para. 25.

[106] *Yugoslavia* v. *Belgium*, Order of 2 June 1999, paras. 26-30; *Yugoslavia* v. *Canada*, Order of 2 June 1999, paras. 25-29; *Yugoslavia* v. *Netherlands*, Order of 2 June 1999, paras. 26-30; *Yugoslavia* v. *Portugal*, Order of 2 June 1999, paras. 25-29.

[107] Memorial, paras. 3.2.21-22.

Court gave its Order in the Provisional Measures stage of the case on 2 June 1999, there were a number of developments which – so the FRY submits – mean that a dispute arose between the FRY and the United Kingdom after 25 April 1999.[108]

4.7 The United Kingdom does not accept these arguments. Contrary to what is asserted by the FRY, it is clear that Article 36(2) of the Statute cannot provide a basis for the jurisdiction of the Court in the present case for a number of reasons:

(1) the Court has already dismissed Article 36(2) as a basis for jurisdiction in the present case and the FRY is not, therefore, entitled to rely upon it in the present phase of the proceedings (paras. 4.8 to 4.18 below);

(2) the FRY has not made a valid declaration under Article 36(2) of the Statute (paras. 4.19 to 4.20 below);

(3) the conditions on which the United Kingdom accepted the jurisdiction of the Court under Article 36(2) have not been met (paras. 4.21 to 4.27 below);

(4) the conditions on which the FRY has purported to accept the jurisdiction of the Court under Article 36(2) have not been met (paras. 4.28 to 4.47 below).

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[108] Memorial, paras. 3.2.11-16.

(1) The FRY is not entitled to rely upon Article 36(2) following the Court's Order of 2 June 1999

4.8 In its Order of 2 June 1999, the Court held that the declarations made by the FRY and the United Kingdom under Article 36(2) of the Statute *manifestly* could not constitute a basis for the jurisdiction of the Court. By contrast, when the Court considered Article IX of the Genocide Convention, the Court held that that provision did not provide a *prima facie* basis for jurisdiction in the present case.

4.9 The Court concluded that-

> "...the findings reached by the Court in the present proceedings in no way prejudge *the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention*, or any questions relating to the admissibility of the Application, or relating to the merits themselves; and ... they leave unaffected the right of the Governments of Yugoslavia and the United Kingdom to submit arguments in respect of *those* questions". [109]

It is clear from the italicised words in this passage that the Court regarded the case as being possibly capable of continuing (even to the stage of a hearing on preliminary objections) only under Article IX of the Genocide Convention and that, if the Article 36(2) declarations had been the only basis for jurisdiction advanced by the FRY, the Court would have ordered that the case be removed from the General List.

4.10 That was the course which the Court followed in the case brought by the FRY against Spain. In that case, it was held that Article IX was not a possible basis for jurisdiction because of Spain's reservation to the Genocide

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[109] Order of 2 June 1999, para. 38 (emphasis added).

Convention.[110] Spain's declaration under Article 36(2) of the Statute is substantially the same as that of the United Kingdom. The Court found, in language identical to that used in its Order in the case against the United Kingdom, that the declarations of the FRY and Spain under Article 36(2) of the Statute manifestly could not constitute a basis for the jurisdiction of the Court.[111] The Court therefore concluded, in the case against Spain, that, in these circumstances, "to maintain on the General List a case upon which *it appears certain that the Court will not be able to adjudicate on the merits* would most assuredly not contribute to the sound administration of justice".[112]

4.11 That the Court treated the case against the United Kingdom under Article 36(2) in the same way as the case against Spain is also clear if one compares paragraph 38 of the Order in the United Kingdom case with the relevant passage in the Court's Orders in the cases against Belgium, Canada, the Netherlands and Portugal. In those cases, the Court left open for the next phase of the case the question whether Article 36(2) could provide a basis for the jurisdiction of the Court.[113] That is in sharp contrast to the terms of paragraph 38 of the Order in the case against the United Kingdom,[114] in which the Court expressly left open the question of jurisdiction only under Article IX of the Genocide Convention.

4.12 It follows that the Court clearly considered that it was certain that the declarations made by the FRY and the United Kingdom under Article 36(2) of the

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110 *Yugoslavia* v. *Spain*, Order of 2 June 1992, para. 33.

111 *Yugoslavia* v. *Spain*, Order of 2 June 1992, para. 25.

112 *Yugoslavia* v. *Spain*, Order of 2 June 1992, para. 35 (emphasis added).

113 *Yugoslavia* v. *Belgium*, Order, of 2 June 1999, para. 46; *Yugoslavia* v. *Canada*, Order of 2 June 1999, para. 42; *Yugoslavia* v. *The Netherlands*, Order of 2 June 1999, para. 46; *Yugoslavia* v. *Portugal*, Order of 2 June 1999, para. 45.

114 Quoted in para. 4.9 above.

Statute would not enable the Court to adjudicate on the merits. The only reason why the case against the United Kingdom was not also removed from the General

List was because the Court did not definitively decide that Article IX of the Genocide Convention could not provide a basis for the jurisdiction of the Court. Accordingly, it left open to the Parties the opportunity to submit arguments, in a later phase of the proceedings, on whether Article IX did in fact provide a basis for the jurisdiction of the Court. With effect from 2 June 1999, therefore, the FRY case against the United Kingdom was maintained on the Court's General List only as a case in which jurisdiction was said to be founded upon the Genocide Convention. The legal position was thus exactly the same as if the Application brought by the FRY against the United Kingdom had relied only upon the Genocide Convention as the basis for jurisdiction.

4.13 The FRY maintains, however, that this defect is one only of form, not of substance. It contends that, after 25 April 2000, the FRY could make a fresh Application against the United Kingdom without facing an obstacle based upon the twelve-month clause of the United Kingdom declaration under Article 36(2). It relies upon a passage in the Court's decision in the *Genocide Convention* case between Bosnia and Herzegovina and the FRY, to the effect that the Genocide Convention could constitute a basis for the jurisdiction of the Court even if it had not entered into force between Bosnia and Herzegovina and the FRY until after the date on which Bosnia's Application was submitted to the Court.[115] For the reasons set out in paras. 4.22 to 4.26 below, the argument cannot be sustained. The United

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[115] *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections),* ICJ Reports 1996, p. 595, at paras. 24 to 26.

Kingdom submits, however, that the Court's Order of 2 June 1999 precludes the FRY from reopening the question of whether Article 36(2) applies.

4.14 It is true that the Court has, in certain circumstances, permitted a State to rely in its Memorial upon a ground of jurisdiction which it did not advance in its Application. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court noted that Article 38 of the Rules of the Court required that an Application specify as far as possible the legal grounds on which the jurisdiction of the Court is said to be based, but added:

> "An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis ... and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character."[116]

4.15 That is, of course, quite different from a case in which the alleged basis for jurisdiction was included in the Application but was dismissed by the Court at an earlier stage in the proceedings. Moreover, the passage just quoted makes clear that the Court does not allow an Applicant an unlimited discretion to amend its Application so as to add anything which might be made the subject of a fresh Application to the Court.[117] That an Applicant does not have an unlimited right to amend its Application so as to introduce new grounds of jurisdiction was emphasised by the Court in the *Genocide Convention* case, in which it stated that "the Applicant cannot, simply by reserving 'the right to revise, supplement or amend' its Application ... confer on itself a right to invoke additional grounds of

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[116] *Military and Paramilitary Actions in and against Nicaragua (Nicaragua* v. *United States of America) (Preliminary Objections),* ICJ Reports 1984, p. 392, at para. 80.

[117] Rosenne, *The Law and Practice of the International Court of Justice: 1920-1996*, vol. III, p. 1237.

jurisdiction".[118] The addition of fresh grounds of jurisdiction is permissible only if the effect is not to transform the character of the dispute before the Court.

4.16 In the present case the effect would indeed be to transform the character of the dispute before the Court. Although Article 36(2) of the Statute was mentioned in the FRY's Application, the character of the dispute as it stood after the Order of 2 June 1999 was confined to a possible dispute which might fall within the scope of Article IX of the Genocide Convention, for it was only in respect of that claimed dispute that the Court permitted the case to remain on the General List. The scope of a case in which jurisdiction is founded upon Article IX of the Genocide Convention is strictly confined to "disputes ... relating to the interpretation, application or fulfilment" of *that* Convention. If the FRY were to add, as what would now be a new ground of jurisdiction, Article 36(2) of the Statute, it would transform that dispute into one which embraced allegations of violations of the law on the use of force, the laws of armed conflict, the law relating to navigation on the River Danube and a host of other international agreements and rules of customary international law.

4.17 While it is undoubtedly the case that the Court "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law,"[119] to allow the transformation of the dispute in this way would not be a matter of form. Nor would it, to adopt the language used by the Court in its Order in the case brought against Spain, "contribute to the sound administration of

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[118] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)) (Further requests for the indication of Provisional Measures),* ICJ Reports 1993, p. 325, at para. 28.

[119] *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, p. 34.

international justice".[120] The only distinction between the position of Spain and that of the United Kingdom in the cases brought by the FRY was that the United Kingdom accepted the jurisdiction of the Court under Article IX of the Genocide Convention and Spain did not. To allow the FRY at this stage to reintroduce Article 36(2) as a basis for jurisdiction against the United Kingdom, having dismissed the action against Spain, would be inequitable and contrary to principle. In effect, it would mean that the possibility, however remote, that the Court might have jurisdiction between the FRY and the United Kingdom over a restricted dispute under the Genocide Convention was sufficient to keep alive an action which the FRY could later transform into a dispute of an infinitely broader scope.

4.18 The decision of the Court in the preliminary objections phase of the *Genocide Convention* case,[121] on which the FRY places great reliance, does not suggest a different conclusion. In that case the Court had held, at the Provisional Measures stage, [122] that the Genocide Convention constituted a *prima facie* basis for jurisdiction and the proceedings continued on that basis. This is in marked contrast to the Court's clear rejection of the Article 36(2) declarations as a basis for jurisdiction in the Provisional Measures stage of the present case.

(2) The FRY has not made a valid declaration under Article 36(2) of the Statute

4.19 According to Article 36(2) of the Statute, only "the States parties to the

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120 *Yugoslavia* v. *Spain*, Order of 2 June 1999, para. 35.

121 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections),* ICJ Reports 1996, p. 595 at p. 613.

122 ICJ Reports 1993 p. 3, at p. 16.

present Statute" may make declarations recognizing the jurisdiction of the Court under that provision. For the reasons given in Part 3 above, the FRY is not a party to the Statute.[123] Nor, for the reasons given in paragraph 3.30 above can the FRY rely upon SCR 9 (1946) (quoted in para. 3.29 above). The FRY cannot, therefore, make a valid declaration under Article 36(2). Moreover, even if, contrary to what is argued in Part 3 above, the FRY were able to rely upon SCR 9 (1946) as a basis for establishing its access to the Court, that would not suffice to create jurisdiction *ratione materiae* under Article 36(2) of the Statute as between the United Kingdom and the FRY. Paragraph 2 of SCR 9 (1946) provides that a declaration accepting the jurisdiction of the Court under Article 36(2) made by a State not party to the Statute of the Court:

> "... may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice."

The United Kingdom has given no such agreement, explicit or otherwise.

4.20 It follows that the instrument by which the FRY purported to accept the jurisdiction of the Court under Article 36(2) of the Statute is not a valid declaration and cannot be relied upon against the United Kingdom.

(3) The conditions on which the United Kingdom accepted the jurisdiction of the Court under Article 36(2) have not been met

4.21 Even if, contrary to what has been submitted above, the FRY is considered to have made a valid declaration under Article 36(2) on which it can rely, that fact

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[123] On that basis, Bosnia and Herzegovina, Croatia, Macedonia and Slovenia have formally objected to the declaration which the FRY has purported to make; see para. 3.13 above and Annex 28.

will not confer jurisdiction upon the Court in respect of the present proceedings. As the Court has repeatedly stated, Article 36(2) confers jurisdiction in proceedings between two States only within the limits within which both of those States have accepted the compulsory jurisdiction of the Court.[124] Accordingly, the Court will have jurisdiction under Article 36(2) in the present case only if the requirements of both the United Kingdom and the FRY declarations are satisfied. In fact, neither set of requirements is satisfied.

4.22 As noted above, the United Kingdom's acceptance of the jurisdiction of the Court expressly excludes disputes –

> "...where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court."[125]

It is manifest that, as the Court held in its Order of 2 June 1999, the requirement laid down in this part of the United Kingdom's declaration has not been met in the present case. The FRY declaration, even if it can be treated as a valid instrument, was signed only four days before the Application was filed with the Court.

4.23 In its Memorial, however, the FRY seeks to brush this requirement aside, arguing that the jurisdictional defect (which it now admits) will be cured with effect from the first anniversary of the FRY declaration and suggests that the requirements of the United Kingdom declaration "will be satisfied if the oral

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[124] See, e.g., *Phosphates in Morocco*, PCIJ, Series A/B, No. 74, p. 23 and *Fisheries Jurisdiction (Spain* v. *Canada)*, Judgment of 4 December 1998, para. 44.

[125] United Kingdom Declaration, para. 1(iii); para. 4.2 above.

hearings on the merits starts after 25 April 2000, which is very likely."[126] This argument is fatally flawed in two respects.

4.24 First, the FRY's argument ignores the importance of the principle that the jurisdiction of the Court must normally be established at the date on which the Application is filed.[127] The *Genocide Convention* case,[128] on which the FRY relies, qualifies that principle only in circumstances which are very different from those of the present case. The treaty on which the Applicant relied in that case – the Genocide Convention – is a treaty of a special character for the obligations which it creates are obligations *erga omnes*. The Court had held that the Convention was in force for both Bosnia and Herzegovina and the FRY. The passage in the Court's judgment on which the FRY relies deals only with the possibility that the Convention *might* (the Court found it unnecessary to decide the issue) not have been in force as between Bosnia and Herzegovina and the FRY until a later date, because at the time the Application was lodged the FRY did not recognize Bosnia and Herzegovina as a State, notwithstanding that Bosnia and Herzegovina was a Member of the United Nations by that date.

4.25 By contrast, in the present case the instrument on which the FRY seeks to establish jurisdiction – Article 36(2) of the Statute – is not concerned with the creation of obligations *erga omnes* but provides the means by which one State, by making a declaration, may incur obligations regarding the jurisdiction of the Court

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126 Memorial, para. 3.2.22.

127 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Preliminary Objections)*, ICJ Reports 1998, p.9, at para. 38.

128 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections)*, ICJ Reports 1996, p. 595, at p. 613.

towards another State which makes a similar declaration. There was, as the Court has held, manifestly no bilateral basis for jurisdiction as between the FRY and the United Kingdom at the date on which the Application was lodged. Moreover, unlike the position in the *Genocide Convention* case, where the Court had treated the Convention as providing a prima facie basis for jurisdiction at the Provisional Measures stage, the Court had reached the opposite conclusion in the present case.

4.26 Secondly, the FRY's argument ignores the clear language and effect of the United Kingdom declaration. Paragraph 1 (iii) of that declaration unambiguously states that the United Kingdom does not accept the jurisdiction of the Court under Article 36(2) of the Statute vis-à-vis another State if "the acceptance of the Court's compulsory jurisdiction [by that other State] was deposited or ratified less than twelve months *prior to the filing of the application* bringing the dispute before the Court" (emphasis added). It follows, as the Court recognized in its Order of 2 June 1999, that Article 36(2) manifestly cannot constitute a basis for exercising jurisdiction over the United Kingdom unless the Applicant's declaration under Article 36(2) had been in force for at least twelve months before that State filed its Application. Either this requirement is satisfied when the Application is filed or it cannot be satisfied at all. The passage of time after the Application has been filed cannot make any difference.

4.27 Moreover, the United Kingdom declaration expressly excludes from its acceptance of jurisdiction "disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute". Although it is ostensibly couched in general terms, the FRY declaration was in reality deposited for the purpose of the present dispute. That is clear from the attempt to accept the

jurisdiction of the Court with regard to the military action by the United Kingdom and other Respondents while excluding from the jurisdiction of the Court the FRY actions to which that was a response, as well as from the delay of only three days between the deposit of the declaration and the filing of the Application in the present case. Furthermore, counsel for the FRY expressly stated at the Provisional Measures stage that the purpose of the FRY was to accept the jurisdiction of the Court for the present dispute.[129]

(4) The conditions on which the FRY accepted the jurisdiction of the Court under Article 36(2) have not been met

4.28 It is also well established in the jurisprudence of both the present Court and its predecessor that declarations under Article 36(2) of the Statute are subject to the principle of reciprocity, with the result that the Court will not have jurisdiction unless the conditions on which the Applicant accepted the jurisdiction of the Court, as well as those contained in the Respondent's declaration, have been satisfied.[130] In the present case, the FRY accepted the jurisdiction of the Court only subject to certain conditions. Those conditions have not been satisfied.

4.29 According to the terms of its declaration, the FRY accepted the jurisdiction of the Court only in respect of "all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts

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[129] M. Corten, CR 99/25, p. 18.

[130] *Interhandel* case, ICJ Reports 1959, p. 5, at p. 23; *Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 77, p. 81.

subsequent to this signature."[131] The FRY's acceptance of the jurisdiction is expressly confined to a dispute which meets two conditions:

(a) the dispute must arise after 25 April 1999; and

(b) the dispute must be with regard to situations or facts subsequent to 25 April 1999.

These conditions are cumulative, not alternative. The effect of the formula is, therefore, that a dispute falls outside the scope of the FRY's acceptance of the jurisdiction of the Court if the dispute has arisen prior to 25 April 1999 or, even though the dispute arises after 25 April 1999, if it is a dispute with regard to situations or facts before that date.

4.30 It is well established that States may limit their acceptance of the jurisdiction of the Court under Article 36(2) in this way and the formula has been considered by the Court on previous occasions.[132] The limitations which the formula imposes are thus well known. For the FRY to found the jurisdiction of the Court, as between itself and the United Kingdom, upon Article 36(2), therefore, it must show, first, that the dispute which it seeks to bring before the Court did not arise until after 25 April 1999 and, secondly, that it is a dispute with regard to situations or facts after that date. The FRY has failed to satisfy either of these requirements.

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[131] This is often referred to as the "double exclusion formula". Rosenne has termed it the "double formula type (ii)": *The Law and Practice of the International Court of Justice 1920-1996,* vol. II, p. 786.

[132] *Phosphates in Morocco*, PCIJ, Series A/B, No. 74, p. 22; *Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 77, p. 81.

4.31 The first limb of the double exclusion formula has not been satisfied, because the dispute which the FRY seeks to bring before the Court arose well before 25 April 1999. According to the well known definition of a dispute in the *Mavrommatis Palestine Concessions* case, a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[133] This definition has been applied in numerous subsequent cases by this Court and the Permanent Court of International Justice.[134] In the *Right of Passage* case, the Court held that a dispute arose when "all its constituent elements had come into existence".[135]

4.32 In the present case, which has the title of "Legality of Use of Force", the Application accuses the United Kingdom of violating Article 2(4) of the United Nations Charter and other norms relating to the use of force, the principle of non-intervention and various rules relating to the conduct of hostilities and the protection of the environment by embarking upon military operations against the FRY. Those military operations began on 24 March 1999, over one month before the FRY purported to deposit its declaration. The disagreement between the FRY and the United Kingdom regarding the legality of that operation was clear on that date.

4.33 On 24 March 1999, and again on 26 March 1999, the operation was the subject of debate in the United Nations Security Council. The FRY there set out its arguments regarding the facts and strenuously contended that the operation was

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133 PCIJ, Series A, No. 2, p. 11.

134 Amongst the more recent cases, see, e.g., *East Timor (Portugal* v. *Australia),* ICJ Reports 1995, p. 89 at p. 99, and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom),* ICJ Reports 1998, p. 9, at p. 17.

135 *Right of Passage over Indian Territory (Portugal v. India),* ICJ Reports 1960, p. 6, at p. 34.

illegal. The United Kingdom made clear its disagreement, as did other members of the Council. Thus, in the debate on 24 March 1999, Mr Jovanović, representing the FRY, stated that -

> "The decision to attack an independent country has been taken outside the Security Council, the sole body responsible, under the Charter of the United Nations, for maintaining international peace and security. This blatant aggression is a flagrant violation of the basic principles of the Charter of the United Nations ...
>
> By bombing massively and indiscriminately the cities and towns of the Federal Republic of Yugoslavia, NATO has become the air force and mercenary of the terrorist Kosovo Liberation Army (KLA)."[136]

The United Kingdom representative was equally explicit in rejecting the charges of illegality –

> "The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions."[137]

4.34 The debate held on 26 March 1999 also clearly demonstrated the legal positions taken by the FRY and the NATO States. The Council had before it a draft resolution sponsored by Belarus, India and the Russian Federation.[138] That draft resolution invited the Council to express its deep concern at the NATO action and to affirm "that such unilateral use of force constitutes a flagrant violation of

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136 S/PV.3988, pp. 14-15 (Annex 14).

137 S/PV.3988, p. 12 (Annex 14): see para. 2.18 above.

138 UN Doc. S/1999/328 (Annex 15).

the United Nations Charter, in particular Articles 2(4), 24 and 53" and demanded an immediate cessation of operations. The draft resolution was rejected by twelve votes (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, United States of America) to three (China, Namibia, Russian Federation).

4.35 In the course of the debate, Mr Jovanović complained that the FRY "has been a victim of the brutal unlawful aggression of the North Atlantic Treaty Organization (NATO)" and stated that -

> "Tramping upon each and every principle of international relations, defying the authority of the Security Council of the United Nations and its resolutions and outperforming even the Nazis in its animosity towards and hatred of the Serbian and Montenegrin people, NATO, led by the United States of America, has engaged in a mad orgy of destruction and havoc against one small and peace-loving country. ...
>
> The aggression and the massive and reckless bombing campaign is not limited to the so-called military targets alone, but brings death to hundreds of civilians and destroys property. ...
>
> Their aggression is unjust, illegal, indecent and unscrupulous. The aggressor displays arrogant contempt for the United Nations and its Charter and arrogates the prerogatives of the Security Council as the only organ in charge of maintaining international peace and security."[139]

4.36 Speaking in the same debate, the representative of the United Kingdom again rejected the accusation of illegality and repeated the view of the United Kingdom that "military intervention is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe." [140] Other Respondents spoke

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139 S/PV.3989, p. 11 (Annex 16).

140 S/PV.3989, p. 7 (Annex 16).

in similar terms.[141] The two debates thus manifested the clearest possible instance of "a disagreement on a point of law or fact, a conflict of legal views" of the kind envisaged by the Permanent Court in the *Mavrommatis* case.[142] It is clear, therefore, that the dispute had arisen by this date. Indeed, the FRY itself states, in its Memorial, that –

> "The dispute arose in the discussions at the Security Council meetings of 24 and 26 March 1999 between Yugoslavia and the Respondents before 25 April 1999 concerning the legality of those bombings as such, taken as a whole."[143]

4.37 By the time, therefore, that the FRY signed its declaration under Article 36(2) on 25 April 1999, the conflicting views of the Parties on the military operations had been made abundantly clear both within the Security Council and outside. All the constituent elements of the dispute had come into existence and the inescapable conclusion was that the dispute which the FRY then sought to put before the Court had already arisen well before the date of the declaration. That is in marked contrast to the *Right of Passage* case, where the Court held that, prior to the critical date "certain incidents had occurred, but they did not lead the parties to adopt clearly-defined legal positions as against each other".[144] The military campaign continued, of course, after 25 April 1999 but no new dispute arose, only a continuation of the dispute which had already arisen.

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141 See, e.g., Canada (pp. 2-3), Netherlands (p. 4), United States of America (pp. 4-5) and France (p. 7).

142 PCIJ, Series A, No. 2, p. 11.

143 Memorial, para. 3.2.16.

144 *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports 1960, p. 6 at p. 34.

4.38 Indeed, the FRY Memorial itself confirms this conclusion by making no attempt to distinguish between the military operations occurring before 25 April 1999 and those which occurred after that date. On the contrary, the "Facts" section of the Memorial simply covers the whole period, despite the fact that the terms of the FRY declaration make clear that the FRY's purported acceptance of the jurisdiction of the Court excludes disputes regarding any "situations or facts" before that date.

4.39 The second limb of the "double exclusion formula" employed in the FRY declaration [145] also operates to exclude the present case. This second limb plainly excludes from the FRY's acceptance of the jurisdiction of the Court any dispute regarding situations or facts before 25 April 1999. It is clear, however, from the consistent jurisprudence of both the present Court and the Permanent Court of International Justice that the second limb of the formula goes further than that. The mere fact that situations or facts also occur after the critical date is not enough to satisfy the requirements of the "double exclusion formula". According to the Permanent Court, only if those situations or facts constitute "the source of the dispute", its "real cause" [146] and are not "merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute" [147] will the second limb of the formula be satisfied and jurisdiction be established.[148] In the present case, the events which occurred after 25 April 1999 were clearly not the

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145 See para. 4.29 above.

146 *Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 77, p. 82.

147 *Phosphates in Morocco*, PCIJ, Series A/B, No. 74, p. 24.

148 See also *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports 1960, p.6 at p. 35.

"source" or "real cause" of the dispute which the FRY seeks to bring before the Court.

4.40 The use by the FRY of the double exclusion formula means that the case is different from the human rights cases in which jurisdiction was accepted only with regard to facts occurring after a particular date (see, e.g., the decisions of the European Court of Human Rights in *Yagci and Sargin* v. *Turkey* [149] and *Loizidou* v. *Turkey* [150] and the United Nations Human Rights Committee in *Gueye* v. *France*[151] and *Simunck* v. *Czech Republic*[152]). The terms of the instruments of acceptance in those cases excluded jurisdiction only in respect of facts occurring prior to a particular date, with the result that jurisdiction existed in respect of that part of a continuing violation occurring after the date of acceptance. The double exclusion formula in declarations under Article 36(2) of the Statute, as has been seen, goes further and means that jurisdiction is excluded unless the dispute itself has arisen since the date of the declaration and has its source in facts or situations occurring after that date.

4.41 It was for that reason that the Court concluded at the Provisional Measures phase that the dispute fell outside the scope of the FRY declaration and that that declaration could not afford a *prima facie* basis for the jurisdiction of the Court in the cases against Belgium, Canada, the Netherlands and Portugal. As the Court explained in its Order of 2 June 1999 in *Yugoslavia* v. *Belgium*:

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149 Judgment of 8 June 1995, Series A, No. 319, at para. 40.

150 Judgment of 23 March 1995, Series A, No. 310, paras. 102-5 and Judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2216, at paras. 34-47.

151 Communication No. 196/1985, 114 ILR 312.

152 Communication No. 516/1992, UN Doc. A/50/40, p. 89.

"28. Whereas it is an established fact that the bombings in question began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999; and whereas the Court has no doubt, in the light, *inter alia*, of the discussions at the Security Council meetings of 24 and 26 March 1999 (S/PV.3988 and 3989), that a "legal dispute" (*East Timor (Portugal* v. *Australia), I.C.J. Reports 1995,* p. 100, para. 22) "arose" between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April concerning the legality of those bombings as such, taken as a whole;

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

30. ... and whereas it follows from the foregoing that the declarations made by the Parties under Article 36, paragraph 2, of the Statute do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case."

4.42 In its Memorial, the FRY has not sought to challenge the reasoning of the Court, which it must therefore be considered to have accepted. Instead it has attempted to argue that:

"After the Orders of the Court, dated 2 June 1999, the dispute aggravated and extended. It got new elements concerning failures of the Respondents to fulfill their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. New elements are related to killings, wounding and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija, after 10 June 1999."[153]

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153 Memorial, para. 3.2.11.

The FRY does not therefore base its case on events in the military campaign which continued until 10 June 1999. That is not surprising, since nothing occurred in that campaign between the date of the Court's Orders on 2 June 1999 and the adoption of SCR 1244 (1999) on 10 June 1999 which was qualitatively different from what had occurred before and which might be regarded as giving rise to a new dispute.

4.43 Instead the FRY relies solely on developments after 10 June 1999. It accuses the United Kingdom, as one of the contributor States of KFOR, of failing to prevent attacks by the KLA on Serbs and others in Kosovo and of various violations of the mandate conferred by the Security Council in SCR 1244. The FRY therefore concludes that:

> "Whereas some of the elements of the dispute appeared after 10 June 1999 [the date on which SCR 1244 was adopted], the dispute, which started to arise before 25 April 1999 has arisen in full after 10 June 1999. So, it is within the compulsory jurisdiction of the Court, established by the Yugoslav declaration of 25 April 1999."[154]

4.44 It is noticeable that the FRY does not attempt to argue that the events since 10 June 1999 have given rise to a new dispute but that they have "aggravated and extended" *the* dispute described in the FRY's Application of 28 April 1999. By taking this approach, the FRY seeks to persuade the Court that events since the suspension of operations on 10 June 1999 have somehow had the effect that the entire dispute regarding the use of force prior to that date now falls within the jurisdiction of the Court. The FRY even appears to say that this dispute did not in fact arise until these events after 10 June 1999 occurred.

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[154] Memorial, para. 3.2.14.

4.45 That is an extraordinary argument. Taken at face value it means that no dispute had actually arisen at all at the time that the FRY filed its Application or even at the date of the Court's Order of 2 June 1999. That is in marked contrast to what is said in the Application and to what the FRY submitted at the provisional measures stage.[155] It also means that a dispute which is described by the FRY in the Application and the Memorial (and by the Court in the title of the case) as concerning "legality of use of force" is now said by the FRY to have come into existence only when the use of force ceased.

4.46 Moreover, this argument completely ignores the effect of SCR 1244 (1999). The United Kingdom action before the adoption of that resolution was taken as part of a NATO operation. The operations of KFOR since 10 June 1999 have been conducted under a specific mandate from the Security Council. KFOR currently has thirty-nine contributing States.[156] KFOR is present in Kosovo on the basis of a mandatory Chapter VII decision of the Security Council. Its presence has also been accepted by the FRY Government. The complaints raised in the FRY Memorial about KFOR are separate and distinct from the dispute regarding the operations which occurred between 24 March and 10 June 1999. Accordingly, if they were to give rise to a dispute between the FRY and the United Kingdom at all, it would be an entirely separate dispute from the one described in the Application and could not have the effect of altering the date at which the former dispute arose.

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155 The Memorial itself makes contradictory statements on this point. In paragraph 3.2.16 it is stated that the "dispute arose in the discussions at the Security Council meetings of 24 and 26 March 1999 ... But, after 10 June 1999, new disputed matters appeared which originated from illegal use of force, and so they became new elements in the dispute." The passage concludes that the dispute therefore arose after 25 April 1999. This conclusion is a *non sequitur* and no attempt is made in the Memorial to explain it.

156 See paragraph 2.29 above.

4.47 For reasons which are developed in Part 6 below, the FRY cannot add what is in substance a wholly new dispute which would transform the nature of the issues before the Court. Moreover, an Application against the United Kingdom in respect of the activities of KFOR and UNMIK would be inadmissible because the rights and obligations of other States not before the Court and of the United Nations would form the very subject-matter of the dispute.

* * *

4.48 For all the above reasons, the United Kingdom submits that the declaration made by the United Kingdom under Article 36(2) and the declaration which the FRY has purported to make under that provision cannot provide a basis for the jurisdiction of the Court in the present case.

PART 5

ARTICLE IX OF THE GENOCIDE CONVENTION DOES NOT PROVIDE JURISDICTION *RATIONE MATERIAE* IN THE PRESENT CASE

5.01 Other than Article 36(2) of the Statute, the only basis for jurisdiction advanced in the Application and the Memorial is Article IX of the Genocide Convention, which provides that:

> "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."

5.02 Even if, contrary to what is maintained in Part 3 above, the Court possessed jurisdiction *ratione personae*, its jurisdiction *ratione materiae* under Article IX would be limited to disputes "relating to the interpretation, application or fulfilment of the [Genocide] Convention" which might exist between the United Kingdom and the FRY. Jurisdiction under Article IX would not extend to disputes regarding alleged violation of other rules of international law, such as the provisions of the United Nations Charter relating to the use of force and the Geneva Conventions and Additional Protocols of 1997 relating to the conduct of armed conflict.[157]

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[157] See the Order of the Court of 13 September 1993 on the Request for Further Provisional Measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, ICJ Reports 1993, p. 325 at para. 36 et seq. and the decision of the Court at the Preliminary Objections stage of that case, ICJ Reports 1996, p. 595 at para. 37 et seq.. See also the separate opinion of Judge *ad hoc* Sir Elihu Lauterpacht:

> "The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent. ... Whatever form the consent may take, the

5.03 Yet it is plain from the Application and the Memorial that the Genocide Convention is not what this case is about. In the letter from the Federal Minister for Foreign Affairs of the FRY to the President of the Court, which is attached to the Application, the case is described as one "concerning Breach of the Obligation Not to Use Force".[158] The Application then goes on to ask the Court to adjudge and declare that the United Kingdom is in violation of the obligation not to use force, the obligation not to intervene in the affairs of another State, various obligations arising under the laws of armed conflict, the law relating to the environment, the law of human and economic and social rights and the obligation to respect freedom of navigation on international rivers. An allegation that the United Kingdom has violated the Genocide Convention is added almost as an afterthought.[159] The Memorial likewise concentrates on allegations of violation of rules other than those laid down in the Genocide Convention.[160]

5.04 It follows that most of the complaints made by the FRY in its Application and Memorial cannot, on any basis, be brought within any jurisdiction which might be derived from Article IX of the Genocide Convention. Only a very small part of the FRY's claim is even potentially capable of coming within any jurisdiction which might be derived from Article IX.

5.05 In reality, however, none of the claim falls within the scope of Article IX. For the Court to have jurisdiction under that provision in respect of any part of the present case it is not sufficient for the FRY to note that the Genocide Convention

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range of matters that the Court can then deal with is limited to the matters covered by that consent." (ICJ Reports 1993, p. 412).

158 Letter dated 26 April 1999; Part II of the documents comprising the Application.

159 Application, Part III, "Claim"; see also "Legal Grounds on which the claim is based".

160 See, e.g., the Submissions at pp. 351-352.

is in force between itself and the United Kingdom and to make allegations that the United Kingdom has violated the Convention.

5.06 As the Court held in the *Oil Platforms* case, where a claimant State seeks to found the jurisdiction of the Court on a treaty provision which confers jurisdiction only in respect of disputes concerning the interpretation or application of that treaty, the Court "cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it." Instead, the Court must, even at the preliminary objections stage, "ascertain whether the violations of the [treaty] pleaded ... do or do not fall within the provisions of the [treaty] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" pursuant to the relevant provision of that treaty.[161] The Court applied the same principle in the *Genocide Convention* case.[162]

5.07 In its Order of 2 June 1999 in the present case, the Court held that:

> "...in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and ... in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX."[163]

5.08 The Court concluded that, *prima facie*, the conduct to which the FRY referred did not satisfy this test because it did not entail the element of intent

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161 *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Preliminary Objections, ICJ Reports 1996, p. 803, para. 16.

162 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections*, ICJ Reports 1996, p.595, para. 30.

163 Order of 2 June 1999, para. 33.

required by the Genocide Convention,[164] and that Article IX did not, therefore, provide a *prima facie* basis for the jurisdiction of the Court.

5.09 While the test at the Provisional Measures stage of a case is whether there is a *prima facie* basis for jurisdiction, the jurisprudence of the Court and, in particular, the decision in the *Oil Platforms* case, makes clear that this standard is not sufficient at the stage of preliminary objections. At this stage the Applicant must demonstrate that the Court has – not that it might have – jurisdiction. A detailed analysis of the claims and the treaty on which the Applicant seeks to found jurisdiction is required.[165]

5.10 Although the provisions in question are well known, it is worthwhile recalling exactly what must exist for conduct to fall within the scope of the Genocide Convention. Article II of the Convention provides that:

> "In the present Convention, genocide means any of the following acts committed *with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;

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164 *Ibid.*, para. 35.

165 Separate Opinion of Judge Higgins in the *Oil Platforms* case, ICJ Reports 1996, at p. 855, para. 29.

(e) forcibly transferring children of the group to another group."[166]

5.11 It is manifest that the Convention addresses conduct of a character wholly different from that which is necessarily involved in the conduct of military operations and that, as the Court held in the present case, "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."[167] That limitation follows inevitably from the origins and purpose of the Convention. As the Court stated in its Advisory Opinion on *Reservations*:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly)."[168]

5.12 Accordingly, what distinguishes genocide from all other instances of the use of force, which is an inevitable feature of armed conflict, is the requirement of a specific, or special, intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. It is the presence of this intent which the Court has described, in the *Genocide Convention* case, as "the essential characteristic" of genocide under the Convention.[169]

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166 Annex 1; emphasis added.

167 Order of 2 June 1999, para. 35.

168 ICJ Reports 1951, p. 15 at p. 23.

169 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures*, ICJ Reports 1993, p. 325 at para. 42.

5.13 The importance of this element of special intention has also been stressed in the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia (the Statutes of which incorporate the provisions of Article II of the Genocide Convention).[170] Thus, the International Criminal Tribunal for Rwanda held in *Prosecutor* v. *Akayesu* that -

> "Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly 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'". [171]

As the Tribunal explained in another part of the judgment:

> "In concrete terms, for any of the acts charged under Article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group targeted as such; hence the victim of the crime of genocide is the group itself and not the individual alone.
>
> The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realization of an ulterior motive, which is to destroy in whole or part, the group of which the individual is just one element."[172]

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[170] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 4 (UN Doc. S/25704 (1993)); Statute of the International Criminal Tribunal for Rwanda, Article 2 (SCR 955 (1994)).

[171] *Prosecutor* v. *Akayesu*, Case ICTR-96-4 (2 September 1998), para. 498. See also *Prosecutor* v. *Kambanda*, Case ICTR-97-23 (4 September 1998), para. 16.

[172] *Ibid.*, paras. 521-522.

5.14 Similarly, in the case of *Prosecutor* v. *Kayishema*, the International Criminal Tribunal for Rwanda held that:

> "A distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part. ... It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder."[173]

5.15 The International Criminal Tribunal for the Former Yugoslavia has adopted the same approach. In acquitting Goran Jelisic of genocide, the Trial Chamber held that:

> "It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law. The underlying crime or crimes must be characterized as genocide when committed with intent to destroy , in whole or in part, a national, ethnical, racial or religious group as such. Stated otherwise, 'the prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group'. Two elements which may therefore be drawn from the special intent are:
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> - that the victims belonged to an identified group;
> - that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such."[174]

and:

> "Apart from its discriminatory character, the underlying crime is also characterised by the fact that it is part of a wider plan to *destroy*, in whole or in part, the group, *as such*. As indicated by the ILC, 'the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a

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173 *Prosecutor* v. *Kayishema and Ruzindana*, Case ICTR-95-1 and 96-10 (21 May 1999), para. 91.

174 *Prosecutor* v. *Jelisic,* Case IT-95-10 (14 December 1999), para. 66, quoting the International Law Commission Draft Code of Crimes, UN Doc. A/51/10 (1996), p. 88.

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 his act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member."[175]

5.16 It is the existence of such an intention which the FRY must demonstrate if it is to bring any part of its case within the scope of the Convention and thus establish the jurisdiction of the Court under Article IX. In its Order of 2 June 1999, the Court found that the FRY had failed, even *prima facie*, to meet this requirement. In its Memorial, the FRY claims that it has now submitted sufficient evidence of that intent to bring the case within the scope of Article IX and thus establish the jurisdiction of the Court.[176] In fact, it has signally failed to do so.

5.17 The reality is that the FRY Memorial scarcely addresses the question at all. In a pleading of over 350 pages, the FRY devotes two pages to what it describes as "facts related to the existence of an intent to commit genocide".[177] In its treatment of the law, there is less than a page on the Convention and that does nothing more than quote the texts of Articles I, II and IX.[178] In its treatment of jurisdiction questions, the FRY gives over two and one half pages to quotation from the Court's Order of 2 June 1999 in the case of *Yugoslavia* v. *Belgium* and then makes the bald assertion that it has now provided the necessary evidence.

5.18 The FRY fails consistently to identify the "national, ethnical, racial or religious group" which it accuses the United Kingdom of intending to destroy. In

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175 *Ibid.*, para. 79.

176 Memorial, para. 3.4.3.

177 Memorial, pp. 282-284.

178 Memorial, p. 326.

places, the FRY appears to be suggesting that the relevant group was the inhabitants of the FRY as a whole.[179] Elsewhere, however, it appears to be suggesting that the relevant group was the Serb ethnic or racial group.[180]

5.19 Most importantly, the FRY Memorial comes nowhere near even identifying the possible existence of the constituent elements of the crime of genocide. Neither in the Application, nor in the Memorial, nor in its oral presentations to the Court on the request for provisional measures, has the FRY produced any shred of evidence of an intent to commit genocide on the part of the United Kingdom. The United Kingdom never had any intention to destroy any "national, ethnical, racial or religious group, as such" in the FRY. On the contrary, the United Kingdom repeatedly made clear that it did not intend to attack, let alone to destroy, the civilian population of any part of the FRY but intended to use only the minimum force necessary to avert an overwhelming humanitarian catastrophe.

5.20 The FRY adduces no statement of any kind which gives even a hint that the United Kingdom had the intent necessary to found a charge of genocide. Instead, the FRY relies, in its Memorial, on inferences which it invites the Court to draw from certain actions, which it makes no attempt to link to the United Kingdom. The decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Jelisic* makes clear that "the intention necessary for the commission of a crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened".[181] Where intent has been inferred, it has

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179 Memorial, p. 352. See also Professor Brownlie, QC, at CR 99/25, p. 14.

180 Memorial, para. 1.6.1.3.

181 *Prosecutor* v. *Jelisic,* Case IT-95-10 (14 December 1999), para. 78.

been from clear evidence of "a pattern of purposeful action",[182] which clearly pointed to the existence of such an intention.[183]

5.21 The only basis on which the FRY suggests that such an intent can be inferred in the present case is the use of depleted uranium ammunition and the attacks on chemical industry plants, especially at Pancevo.[184] Apart from these two allegations, nothing is offered at all as a basis on which the Court can infer that the United Kingdom intended to commit the most heinous crime known to international law. Neither element, however, comes anywhere near sustaining the inference which the FRY invites the Court to draw from it.

5.22 With regard to the use of depleted uranium ammunition during the air campaign, the FRY Memorial makes no specific allegation regarding the use of this ammunition against any of the Respondents and, so far as the United Kingdom is concerned, no such allegation would be credible. The United Kingdom did not use depleted uranium ammunition during the conflict.

5.23 The FRY argues that the characteristics of this ammunition are such that the intent to destroy a group as such can be inferred from the mere fact that it was used at all.[185] The FRY relies, in particular, on what it alleges to be the longer term effects of such ammunition.

5.24 This argument cannot be sustained. Depleted uranium ammunition is not a weapon of mass destruction. It is employed because of the ability of a depleted

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182 *Prosecutor* v. *Kayishema and Ruzindana*, Case ICTR-95-1 and 96-10 (21 May 1999), para. 93.

183 See *Prosecutor* v. *Akayesu*, Case ICTR-96-4 (2 September 1999). The comments of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Nikolic (Rule 61)*, 108 ILR 21, para. 34, and *Prosecutor* v. *Karadzic and Mladic (Rule 61)*, 108 ILR 85, para. 94, adopt a similar approach.

184 Memorial, Section 1.6.

185 Memorial, para. 1.6.1.4.

uranium round of ammunition to pierce armour and other protective shields. Depleted uranium has a level of chemical toxicity that is similar to that of other heavy metals, such as lead, and the health risks from exposure to it are assessed as very low. Its use is not prohibited under any international agreements and the International Committee on Radiation Protection does not list depleted uranium ammunition as a health hazard. It is absurd to suggest that an intention to commit genocide can be inferred from the mere fact that such ammunition has been used.

5.25 The Court rejected a similar argument to the effect that the intent necessary for genocide can be inferred from the fact that a State uses a particular weapon in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. The Court there stated:

> "It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons."[186]

The Court, however, rejected the notion that the intent to destroy such a group could be inferred from the mere fact that a nuclear weapon was used and considered that:

> "the prohibition of genocide would be pertinent in this case *if* the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case."[187]

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186 ICJ Reports 1996, p. 226 at para. 26.

187 *Ibid.*, para. 26 (emphasis added).

5.26 Since, as the Court has stated, the use of nuclear weapons does not necessitate the inference that the user intends to destroy a group as such, then the same is true *a fortiori* for the use of depleted uranium ammunition. Even on the basis of the very limited material advanced by the FRY, it is clear that depleted uranium ammunition is far less destructive than nuclear weapons.

5.27 With regard to the attacks on the chemical plants, the FRY Memorial contends that:

> "1.6.1.2 Genocidal intention of the responsible individuals for the strikes against chemical industry facilities in Yugoslavia is clearly implied by destruction of this industry in Pancevo. In this town, not only is there a high concentration of chemical plants, which, if destroyed or damaged, pose a great danger in themselves, but also all the three factories were in the first strikes completely incapacitated for any further productive activity. The responsible individuals were certainly aware of this, since their first attacks had been directed towards vital parts of the factories, thus incapacitating their production.
>
> 1.6.1.3 Therefore, if the aim was to disrupt production in those factories, that aim was completely achieved during the first attacks. *Why did new devastating strikes follow afterwards?* The only possible explanation can be found that the responsible individuals had *genocidal intention*, and in order to perpetrate genocide, they continued with air strikes against chemical industry plants intending to expose a large number of inhabitants of Yugoslavia to extensive destruction. As we have already argumentatively explained, it was the Serbs that were primarily meant under the term "population of Yugoslavia."[188]

5.28 The argument advanced in the Memorial is, to say the least, tenuous. No indication is given, here or elsewhere in the Memorial, of large-scale casualties

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[188] Emphasis in the original.

resulting from the later attacks on the plants at Pancevo. The military utility of industrial chemicals is such that they can be a legitimate military target under international humanitarian law and they have in fact regularly been attacked in modern conflicts. The Memorial confines itself to the assertion that "the responsible individuals of the Respondents *should have known* that strikes against such facilities may incur an additional risk to the population."[189] The allegation that someone should have known that a particular attack carried a risk of collateral casualties is far removed from evidence that that person, or anyone else, intended to destroy a national or racial group as such. There is no basis for drawing an inference that an attack upon such a target must have been intended to destroy such a group.

5.29 The Memorial suggests, however, that the later attacks upon these facilities were motivated by such an intention, on the ground that no military advantage could be gained by such attacks. The accounts in the Memorial of the later air attacks on Pancevo, however, do not support the assertion that there was no longer anything of military value to be attacked, let alone that those who ordered the attacks knew that that was the case, still less that, by ordering the attacks, they intended to destroy a national or racial group as such. The suggestion that the special intent which is an essential element of genocide can be inferred from the use of depleted uranium ammunition or the attacks on Pancevo is simply fanciful.

5.30 Moreover, the evaluation of the FRY's assertion that an intent to commit genocide can be inferred from the use of depleted uranium ammunition and the attacks on Pancevo – even if that assertion had any credibility taken by itself – has to take account of other evidence regarding the intentions of those who ordered the

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189 Memorial, para. 1.6.1.1, (emphasis added).

attacks upon the FRY. As stated above, so far from there being an intent on the part of the United Kingdom or the other NATO States to destroy the Yugoslav nation or the Serbs, the intention, often repeated, was to achieve a limited set of goals in relation to ending the atrocities being committed by the FRY in Kosovo and ensuring the safe return of refugees while causing as little damage as possible to the civilian population of the FRY. These statements, the care taken to avoid civilian casualties and even the numbers of dead and wounded suggested in the Memorial (which have not been verified) are all inconsistent with the allegation that the United Kingdom had the special intent necessary for the crime of genocide.[190]

5.31 Although paragraph 3.4.3 of the Memorial suggests that the FRY has now produced evidence of an intent to commit genocide during the air campaign which was not before the Court at the Provisional Measures stage, the reality is that the FRY had made exactly the same assertion that the intent required by the Genocide Convention can be inferred from the attacks on chemical plants and the use of depleted uranium ammunition in the oral hearings in May 1999.[191] The argument is as weak now as the Court found it to be then.

5.32 The only new element in the FRY's arguments regarding the Genocide Convention is the assertion in the Memorial that the United Kingdom is responsible for a violation of the Convention which the FRY claims occurred after the entry of KFOR troops into Kosovo under the terms of SCR 1244 (1999). The Memorial alleges that the United Kingdom is responsible, either as accomplice of

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[190] It is notable, that the ICTY Prosecutor concluded that there was no basis for opening an investigation into any of the allegations or into other incidents related to the NATO bombing concerning crimes within the jurisdiction of the Tribunal (see para. 1.10 above, and Annex 3). Those crimes include genocide (Article 4 of the Statute of the Tribunal, UN Doc. S/25704).

[191] CR 99/14, p. 30, para. 4.1 et seq.

the KLA or for failing to take adequate steps to prevent attacks on the non-Albanian population in Kosovo since 10 June 1999.

5.33 For the reasons set out in Part 6 of these Preliminary Objections, the United Kingdom maintains that this new claim is inadmissible. However, even if that is not the case, the United Kingdom submits that this claim does not fall within the jurisdiction of the Court under Article IX of the Genocide Convention.

5.34 The allegations in the Memorial are a travesty of the truth. The violence which has been directed against Serbs and other non-Albanians in Kosovo is a direct result of the atrocities perpetrated by the FRY against the Albanian majority in Kosovo prior to the adoption of SCR 1244 (1999). KFOR and UNMIK, whose activities cannot be separated in respect of this question,[192] have consistently condemned *all* ethnic violence in Kosovo and have done everything they could to prevent it since entering Kosovo pursuant to SCR 1244 (1999).

5.35 Far from "conniving" at attacks by the KLA on Serb inhabitants of Kosovo, KFOR and UNMIK have repeatedly called on all groups to halt acts of violence.[193] Steps have been taken to disarm the KLA and all other groups.[194]

5.36 In addition, KFOR military personnel and UNMIK civil police have taken extensive measures to protect the Serb and other non-Albanian minorities in Kosovo, including, for example, putting soldiers in apartment blocks to provide round-the-clock protection.[195] These are not the acts of persons conniving at

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192 See paras. 2.25-2.37 above, and paras. 6.23-6.27 below.

193 See Annex 20 and UN Doc. S/1999/767; UN Doc. S/1999/779; and UN Doc S/1999/868;

194 See paras. 2.25-2.36 above.

195 See, e.g., the Joint Statement by the Special Representative of the Secretary-General and the KFOR Commander (Annex 20) and the other Reports considered at paras. 2.31-2.37 above.

ethnic violence, let alone actively participating in or encouraging it. The contrast with the behaviour of the FRY military, paramilitary and police forces in Kosovo up to 10 June 1999 (in respect of which the ICTY Prosecutor has indicted President Milosevic and other FRY leaders [196]) could not be more marked.

5.37 It is true that these measures have not prevented all attacks on the Serb inhabitants of Kosovo. The United Kingdom greatly regrets that its attempts to protect non-Albanians in those parts of Kosovo where its forces have been stationed have not always been successful. There are, however, clear signs that the security and law and order position in the province has improved and the United Kingdom is doing everything possible to ensure the safety of all inhabitants of Kosovo.

5.38 Moreover, even if for the sake of argument it were to be assumed that the attacks perpetrated against non-Albanians since 10 June 1999 constitute genocide by those carrying them out (which is not admitted), the fact that KFOR and UNMIK were unable to prevent those attacks despite their endeavours to do so does not even begin to amount to a case that the United Kingdom or any other KFOR contributor State has violated the Genocide Convention.

5.39 Genocide is the most serious crime known to international law, or indeed to any other law. It is clearly distinguished from violations of the law on the use of force or violations of the law of armed conflict. The attempt by the FRY to rely upon the Genocide Convention as a basis for jurisdiction in the present case is wholly unfounded and a cynical abuse of the process of the Court. In reality, the FRY is trying to use the Genocide Convention as a convenient means of bringing before the Court allegations which have no real connection with that Convention.

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196 See para. 2.23 above.

In doing so, it trivializes a treaty the importance of which the Court and the international community as a whole have always emphasised.

PART 6

THE CLAIMS ARE INADMISSIBLE

6.1 In addition to its objections to the jurisdiction of the Court, which have been set out in Parts 3 to 5 above, the United Kingdom also submits that the claims advanced by the FRY in its Memorial are inadmissible. This inadmissibility derives from the following considerations:

(1) the claim advanced by the FRY in its Memorial regarding the period since the adoption of SCR 1244 (1999) on 10 June 1999 is inadmissible because it is an entirely new claim which, if the Court were to entertain it, would transform the nature of the dispute before the Court (paras. 6.2 to 6.8);

(2) the claim relating to the period from 24 March to 10 June 1999 is inadmissible because the legal interests of other States which are not before the Court (either in the present case or in the other proceedings brought by the FRY) would form the very subject-matter of the decision requested by the FRY (paras. 6.9 to 6.22);

(3) the claim advanced by the FRY in its Memorial regarding the period since the adoption of SCR 1244 (1999) on 10 June 1999 is inadmissible because the legal interests of other States and of the United Nations would form the very subject-matter of the decision requested by the FRY (paras. 6.23 to 6.27); and

(4) the FRY has not acted in good faith (paras. 6.28 to 6.40).

Each of these points will be considered in turn.

(1) The claim advanced by the FRY in its Memorial regarding the period since the adoption of SCR 1244 (1999) on 10 June 1999 is inadmissible because it is an entirely new claim which, if the Court were to entertain it, would transform the nature of the dispute before the Court

6.2 Article 40(1) of the Statute of the Court provides that the "subject of the dispute" must be indicated in the Application. Article 38(2) of the Rules requires that the Application specify "the precise nature of the claim". These requirements are not mere matters of form but, as the Court has emphasised, provisions "essential from the point of view of legal security and the good administration of justice."[197] It is for these reasons that a State is not permitted to add wholly new claims which would transform the subject of the dispute originally brought before the Court.

6.3 Both the Permanent Court of International Justice and the present Court have consistently and repeatedly insisted upon this principle. In the *Société commerciale de Belgique* case, the Permanent Court held that:

> "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32 paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. ... The Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character."[198]

Similarly, in the *Prince von Pless* case, the Permanent Court held that an Applicant may, in its Memorial and subsequent pleadings, "elucidate the terms of

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[197] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, ICJ Reports 1992, p. 267, para. 69.

[198] PCIJ, Series A/B, No. 78, p. 173.

the Application" but insisted that an Applicant was not entitled to "go beyond the limits of the claim" as set out in the Application.[199]

6.4 The same principle was applied by the present Court in the *Nauru* case, when it held that "an additional claim must have been implicit in the application ... or must arise 'directly out of the question which is the subject-matter of that Application.'"[200] It was not enough that the new claim was connected with the claims in the Application. The Court therefore held that Nauru's additional claim regarding the overseas assets of the former British Phosphate Commissioners, which was introduced for the first time in the Memorial, was inadmissible since "the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application."[201] Even more recently, the Court has said, in the *Fisheries Jurisdiction (Spain* v. *Canada)* case, that:

> "Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as "essential from the point of view of legal security and the good administration of justice" and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, ICJ Reports 1992, pp. 266-267;* see also *Prince von Pless Administration, Order of 4 February 1933, PCIJ, Series A/B, No. 52,* p. 14 and *Société commerciale de Belgique, Judgment, 1939, PCIJ, Series A/B, No. 78,* p. 173)."[202]

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199 *Prince von Pless Administration,* PCIJ, Series A/B, No. 52, p. 14.

200 ICJ Reports 1992, p. 266, para. 67.

201 ICJ Reports 1992, p. 266, para. 68.

202 Judgment, 4 December 1998, para. 29.

6.5 In the case brought by the FRY against Belgium, the Court itself identified the subject of the dispute indicated in the Application in the following terms:

> "Whereas Yugoslavia's Application is entitled "Application of the Federal Republic of Yugoslavia against the Kingdom of Belgium for Violation of the Obligation Not to Use Force"; whereas in the Application the "subject of the dispute" ... is described in general terms ... but whereas it can be seen both from the statement of "facts upon which the claim is based" and from the manner in which the "claims" themselves are formulated ... that the Application is directed, in essence, against the "bombing of the territory of the Federal Republic of Yugoslavia", to which the Court is asked to put an end."[203]

The Application in the present case is identical in this respect.

6.6 The FRY's claims regarding events in Kosovo since 10 June 1999 are radically different in character from those in the Application. As demonstrated in Part 2 above, the new claims involve the activity of the United Nations and of a far wider group of States (currently thirty-nine) than those involved in the military action. The new claims are based upon an alleged failure to maintain law and order in parts of Kosovo. Law and order in Kosovo since 10 June 1999 has been the responsibility of bodies created by, or under the authority of, the Security Council. The new claims thus entail a challenge to the authority of the Security Council and the way in which UNMIK and KFOR are discharging their mandates from the Council (a matter further considered in paragraphs 6.23 to 6.27 below). By contrast, the Application is concerned exclusively with the use of force against the FRY by the United Kingdom and other NATO States.

6.7 Although there are "links of a general nature" between the new claims and the claims made in the Application, the new claims cannot be said to have been

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[203] *Yugoslavia* v. *Belgium*, Order of 2 June 1999, para. 27. Substantially identical paragraphs appear in the Orders in the cases brought against Canada, Netherlands and Portugal. The reason why no similar passage appears in the Order in *Yugoslavia* v. *United Kingdom* is that the Court found a manifest lack of jurisdiction under Article 36(2) of the Statute; see paras. 4.8-4.12 above.

implicit in those made in the Application, nor do they arise directly out of the questions which were the subject-matter of the Application.[204] A dispute regarding peace-keeping in the aftermath of a conflict is of an entirely different character from a dispute regarding the initiation or conduct of the conflict itself. If the new claims were to be entertained, the Court would be required to consider matters which *ratione temporis* and *ratione materiae* are entirely different from those raised in the Application. The result would be to transform the nature of the dispute before the Court.

6.8 Quite apart from any other ground on which a preliminary objection may be taken, therefore, it is submitted that the claims relating to the period after the adoption of SCR 1244 (1999) are inadmissible because they infringe this well-established principle regarding the administration of justice.

> (2) *The claim relating to the period from 24 March to 10 June 1999 is inadmissible because the legal interests of other States which are not before the Court (either in the present case or in the other proceedings brought by the FRY) would form the very subject-matter of the decision requested by the FRY*

6.9 In the *Monetary Gold* case,[205] the Court laid down for the first time a principle which has subsequently become well-established, namely that it cannot exercise jurisdiction in a case if the legal interests of a State which was not a party to the proceedings would form the very subject-matter of the decision. That case concerned proceedings instituted by Italy against France, the United Kingdom and the United States of America with regard to title to a quantity of gold held by the three Respondents and to which both Italy and Albania laid claim. Albania was not a party to the proceedings.

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[204] *Certain Phosphate Lands in Nauru,* ICJ Reports 1992, p. 266, para. 67.

6.10 The Court held that it could not –

> "...decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[206]

The Court continued:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[207]

The Court therefore concluded that it could not exercise the jurisdiction which the Parties had sought to confer upon it.

6.11 This principle has recently been applied in a different context in the *East Timor* case.[208] In that case, the Court held that, notwithstanding the existence of a jurisdictional link between the Applicant, Portugal, and the Respondent, Australia, by virtue of the declarations of the two States under Article 36(2) of the Statute, the Court could not exercise jurisdiction because –

> "... the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia."[209]

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205 ICJ Reports 1954, p. 19.

206 ICJ Reports 1954, p. 32.

207 ICJ Reports 1954, p. 32.

208 ICJ Reports 1995, p. 90.

209 ICJ Reports 1995, p. 102, para. 28.

6.12 There are three different rationales for this principle. First, as the passages quoted above make clear, it is a necessary corollary of the principle that the Court cannot determine the rights and obligations of a State unless that State has consented to the jurisdiction of the Court. In that respect, the principle protects the rights of the State or States not before the Court.

6.13 Secondly, the principle serves to protect the judicial function of the Court.[210] The integrity of the judicial function would be impaired if the Court were to exercise jurisdiction in a case between two States when that necessarily involved it in determining the rights or obligations of a State which was not before the Court.

6.14 Finally, the principle is necessary in some cases to protect the rights of the States which are parties to the proceedings. This rationale is particularly important where the State which is the Respondent cannot adequately defend the case against it because it is the State not before the Court, rather than the Respondent, which has the evidence necessary to mount that defence.

6.15 It is, of course, the case that the *Monetary Gold* principle has been qualified in other cases. Thus, in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court rejected an argument advanced by the United States of America that the *Monetary Gold* principle barred the Court from considering a case in which the legal interests of a State not before the Court were affected.[211]

6.16 Similarly, in the *Phosphate Lands in Nauru* case, the Court held that it could exercise jurisdiction in proceedings between Nauru and Australia regarding phosphate mining on Nauru during the time when it was administered as a trust territory by Australia, New Zealand and the United Kingdom, notwithstanding that

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[210] See, e.g., Thirlway, *British Year Book of International Law* 1996, at p. 52.

[211] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility),* ICJ Reports 1984, p. 431, para. 88.

New Zealand and the United Kingdom were not before the Court. The Court held that –

> "... the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application ... [T]he determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claims."[212]

Neither in *Nicaragua* nor in *Nauru*, however, did the Court question the principle in *Monetary Gold.* On the contrary, in both cases, the Court upheld the continuing importance of that principle.

6.17 It appears, therefore, that the fact that a judgment would necessarily affect the legal interests of States not before the Court does not, in and of itself, preclude the exercise of jurisdiction (although there may be circumstances in which to exercise jurisdiction in such a case would involve such a manifest injustice that the Court would decide, as a matter of discretion, not to exercise its jurisdiction). If, however, the legal interests of a State not before the Court would form the very subject-matter of the judgment, or if, to adopt the formulation in the *Nauru* case, a determination of the responsibility of such a State would be a prerequisite to the determination of the responsibility of one of the parties to the proceedings, then the Court cannot exercise jurisdiction.

6.18 The United Kingdom submits that the present case falls squarely within the *Monetary Gold* principle. The FRY has made no attempt to show that the United Kingdom itself carried out the military operations on which it bases any aspect of its case. Instead, it maintains that each and every NATO State is responsible for each and every aspect of the military operations which occurred. The only basis for responsibility advanced against the United Kingdom is that it is jointly liable

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212 ICJ Reports 1992, p. 261, para. 55.

for what occurred. Yet eleven of the nineteen NATO States are not before the Court.

6.19 For an Applicant to base its submissions entirely on the alleged joint liability of nineteen States when it is maintaining proceedings against only eight of those States is wholly incompatible with the principle enunciated in *Monetary Gold*. The FRY has chosen to frame its case in the way it has. It cannot now escape the consequences of that decision.

6.20 Moreover, it is common ground that the State which was by far the most heavily engaged in those military operations was the United States of America. The United States of America staged approximately 65% of the air sorties during the period 24 March to 10 June 1999. Moreover, the FRY itself consistently accused the United States of America of taking the leading role. For example in the debate in the Security Council on 26 March 1999, Mr Jovanović speaking on behalf of the FRY referred on more than one occasion to "NATO, led by the United States of America".[213]

6.21 The essence of the present case is the legality of the military actions taken during the period 24 March to 10 June 1999. The majority of those actions were taken by the United States of America, over whom the Court has already held that it has no jurisdiction. The Court cannot decide the present case without determining the legality of those actions – indeed, that is precisely what the FRY is asking it to do. It follows, therefore, that the legality of the actions of the United States of America would form "the very subject-matter" of the judgment and that a determination of the legality or otherwise of those actions would be a logical prerequisite to any ruling on the responsibility of the United Kingdom or any of the Respondents in the other proceedings.

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213 S/PV.3989, p. 12 (Annex 16).

6.22 The case is thus quite different from either the *Nauru* or *Nicaragua* cases. In the present case, the State which carried out the majority of the air operations is not before the Court. In the *Nicaragua* case, on the other hand, it was the Respondent, the United States of America, which had played the leading role throughout the operations which formed the subject of the dispute in that case. In the *Nauru* case, although the trusteeship had been allocated to Australia, New Zealand and the United Kingdom, it was Australia which had actually administered the territory on behalf of the three governments. The importance of this factor was emphasised by the Court in the following passage in the judgment:

> "As a matter of fact, the Administrator was at all times appointed by the Australian Government and was accordingly under the instructions of that Government. His "ordinances, proclamations and regulations" were subject to confirmation or rejection by the Governor-General of Australia. The other Governments, in accordance with the Agreement, received such decisions for information only."[214]

It was the responsibility of Australia which was the subject-matter of the action and the prerequisite to the establishment of any responsibility which might exist on the part of New Zealand and the United Kingdom. Nauru's action was based upon the conduct of Australia; joint responsibility was not raised by Nauru. In the present case, however, the FRY's claim relies entirely on an argument based upon joint responsibility. While the United Kingdom regards that argument as misconceived, the way the FRY has put its case has the inevitable consequence that the Application is inadmissible under the principle enunciated in *Monetary Gold* and the later decisions of the Court referred to above.

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[214] ICJ Reports 1992, p. 257, para. 43.

(3) The claim advanced by the FRY in its Memorial regarding the period since the adoption of SCR 1244 (1999) on 10 June 1999 is inadmissible because the legal interests of other States and of the United Nations would form the very subject-matter of the decision requested by the FRY

6.23 The application of the *Monetary Gold* principle is, if anything, even clearer in relation to the FRY's new claims regarding the period since the adoption of SCR 1244 (1999).

6.24 As described in Part 2 above, SCR 1244 (1999) provided for the establishment in Kosovo of international civil and security presences. The responsibilities given to the international civil presence (UNMIK) and the international military presence (KFOR) are closely related.[215] Although the United Kingdom is a major contributor to KFOR, it is one of thirty-nine States which currently contributes to KFOR.[216] Neither the United Kingdom nor NATO has any control over UNMIK, which is a United Nations subsidiary organ, answerable to the Security Council.

6.25 It follows that the subject-matter of any judgment which the Court might give regarding the FRY's claims concerning the period since 10 June 1999 would be the legal interests of other States and of the United Nations itself.

6.26 Although the FRY has tried to avoid this obvious fact in its submissions to the Court, it has not done so elsewhere. That the FRY is fully cognisant of the true position is evident from its innumerable complaints to the Security Council about what it claims is happening in Kosovo. To take but one example, in a memorandum of 15 May 2000, the FRY complained to the Security Council that -

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215 See paras. 2.26-2.28 above.

216 See para. 2.29 above.

> "KFOR and UNMIK bear sole responsibility for massive violations of human rights in Kosovo and Metohija, lawlessness, chaos and breaches of the provisions of Security Council resolution 1244 (1999) relating to the preservation of the multi-ethnic, multi-religious and multi-cultural character of Kosovo and Metohija by becoming outright accessory to ethnic cleansing and genocide,"[217]

and that –

> "Albanian terror and violence, the ethnic cleansing of, and genocide against non-Albanians, primarily Serbs and Montenegrins, but also the Roma, Muslims, Turks, Goranci and other non-Albanians, the destruction of their homes, usurpation and destruction of private and State property and rampant crime and chaos in Kosovo and Metohija continue unabated despite the presence of several dozen thousand of well-armed members of KFOR and more than 2,000 UNMIK policemen. These provide convincing evidence of the failure of KFOR and UNMIK to fulfil their basic obligations under the mandate, particularly in terms of guaranteeing full personal and property security and safety to all residents of Kosovo and Metohija, Serbs and Montenegrins in particular, the victims of ethnic cleansing, terror, killing and abduction.
>
> The Government of the FR of Yugoslavia demands from KFOR and UNMIK to fulfil without delay all their obligations and to create conditions for a safe return of all expelled persons to Kosovo and Metohija."[218]

Elsewhere in that memorandum, the FRY complains of violations by the Security Council of its obligations.[219]

6.27 In the preliminary objections phase, it would not be appropriate for the United Kingdom to comment on the substance of these allegations. However, the fact that the FRY has made them and has done so in the terms quoted above, demonstrates more clearly than anything that the legal interests and the question of the responsibility of the United Nations, the Security Council and all of the KFOR

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217 UN Doc. S/2000/428, p. 10.

218 *Ibid.*, p. 6.

219 *Ibid.*, p. 2.

States necessarily form the essential subject-matter of this part of the FRY's claims, which is accordingly inadmissible under the *Monetary Gold* principle.

(4) The FRY has not acted in good faith

6.28 It is a well established general principle of law that States must act in good faith. The central position of good faith in international law is manifested in Article 2(2) of the Charter of the United Nations, which states that -

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

As the Court stated in the *Nuclear Tests* cases, "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[220] In the words of one of the leading international law commentaries, "the significance of this principle touches every aspect of international law."[221] In particular, it has an important bearing upon the law of treaties, as is made clear by Article 26 of the Vienna Convention on the Law of Treaties, 1969.

6.29 Respect for the principle of good faith is an essential feature of the interpretation and application of the Statute and of the Charter of which it forms part. This is nowhere more important than in the interpretation and application of Article 36(2) of the Statute. The Court has repeatedly stated that, in the present condition of international law, its jurisdiction is dependent upon the consent, freely expressed, of the parties to a case. A State which makes a declaration under Article 36(2) is giving that consent in advance of a dispute arising, with regard to a

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220 *Nuclear Tests (Australia* v. *France)*, ICJ Reports 1974, p. 268, para. 46. *Nuclear Tests (New Zealand* v. *France)*, ICJ Reports 1974, p. 473, para. 49. See also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras) (Jurisdiction and Admissibility)*, ICJ Reports 1988, p. 105, para. 94.

221 Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992), vol. I, p. 38.

wide range of disputes the content of which it cannot be in a position to foresee and with respect not only to those States which have already made a similar commitment but also those which may make such a commitment in the future. As the Court has recently explained in the *Fisheries Jurisdiction case:*

> "A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute and "makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, ICJ Reports, 1998,* para. 25)."[222]

6.30 A State which makes such a declaration is entitled, therefore, to expect that any other State which purports to accept that "standing offer" will act, and will be required by the Court to act, in good faith. The Court recognized the role which good faith plays in the Optional Clause system when it said, in the jurisdiction phase of the *Nicaragua* case, that -

> "In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role."[223]

As Rosenne has said -

> "It follows from the express wording of Article 36, paragraph 2, of the Statute that by accepting the compulsory jurisdiction, a State takes upon itself an international obligation, and like all international obligations its interpretation and application are governed by the principle of good faith."[224]

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222 *Fisheries Jurisdiction (Spain* v. *Canada),* Judgment of 4 December 1998, para. 46.

223 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (Jurisdiction and Admissibility),* ICJ Reports 1984, p. 418, para. 60.

224 *Law and Practice of the International Court of Justice: 1920-1996,* vol. II, pp. 822-823.

6.31 In the present case, however, the FRY has not acted in good faith in depositing what purports to be its declaration under Article 36(2) of the Statute and then immediately filing its Application. The FRY declaration was signed on 25 April 1999 and deposited the following day. The FRY filed its Application three days later. The FRY has made no secret of the fact that it purported to accept the compulsory jurisdiction of the Court in order to bring proceedings against the United Kingdom and the other Respondents regarding the military actions concerning Kosovo.[225] Yet the FRY declaration is carefully and deliberately worded so as to exclude the Court from any inquiry into the atrocities perpetrated by the FRY in Kosovo before 25 April 1999 in violation of numerous international agreements, rules of customary international law and binding decisions of the Security Council.

6.32 The FRY has sought so to limit its acceptance of the jurisdiction as to enable it to bring a claim in respect of one aspect of what happened in Kosovo while avoiding any judicial inquiry into its own conduct to which the military action by the United Kingdom and her allies was a response. For reasons which have been developed in Part 4 above, the United Kingdom submits that, on any interpretation of the declaration of 25 April 1999, the FRY has failed to establish the jurisdiction of the Court over the dispute which it wishes to make the subject of these proceedings. Nevertheless, the United Kingdom submits that the attempt is itself a clear violation of the principle of good faith and should be condemned as such. As Judge Oda recognized in the Provisional Measures stage of the present case,[226] no State should be permitted to abuse the machinery contained in Article 36(2) – and thereby abuse the process of the Court – in this way.

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225 See the statement by counsel for the FRY, M. Corten, CR 99/25, pp. 17 to 18.

226 Order of 2 June 1999, Separate Opinion of Judge Oda, para. 9.

6.33 Even if, contrary to what is submitted above, the FRY declaration can be regarded as formally valid, the United Kingdom therefore submits that the breach of the fundamental requirements of good faith renders the attempt to use that declaration in the present case inadmissible.

6.34 The lack of good faith on the part of the FRY, however, goes further than the attempt to abuse the system created by Article 36(2) of the Statute of the Court and renders the entire Application inadmissible.

6.35 The Application in the present case concerns a military operation which was undertaken in direct response to the situation in Kosovo. While the FRY has attempted to invoke the jurisdiction of the principal judicial organ of the United Nations in relation to the response, it has flatly refused to comply with its obligations towards the United Nations with respect to the underlying situation in Kosovo.

6.36 Concern for that situation led the Security Council, as long ago as March 1998, to urge the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia "to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction" and to note that the FRY authorities "have an obligation to cooperate with the Tribunal."[227] In September 1998 the Security Council again called upon the authorities in the FRY to cooperate with the Prosecutor.[228] This decision was repeated in October 1998.[229]

6.37 Notwithstanding these decisions of the Council, the FRY refused even to allow the Prosecutor and her staff to enter Kosovo. That refusal was condemned by the Security Council in SCR 1207 (1998) in November 1998[230] and in a

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227 SCR 1160 (1998), para. 17 (Annex 4).

228 SCR 1199 (1998), para. 13 (Annex 6).

229 SCR 1203 (1998), para. 14 (Annex 7).

230 Annex 8.

Presidential Statement issued on 19 January 1999.[231] There was no change in the attitude of the FRY.

6.38 On 22 May 1999 the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia indicted the President of the FRY, Slobodan Milosevic, and a number of other senior FRY officials for war crimes and crimes against humanity which the indictment accused them of having committed in Kosovo in the first part of 1999.[232] That indictment was confirmed by a judge of the Tribunal on 24 May 1999. To date, the FRY has refused to take any steps to execute the orders for the arrest of the accused or to cooperate in any way with the Tribunal in respect of the investigations into war crimes and crimes against humanity in Kosovo.[233]

6.39 The FRY cannot be allowed to defy the authority of the United Nations Security Council and the International Criminal Tribunal established by the Council with regard to the allegations of serious violations of international law committed in Kosovo while, at the same time, seeking the protection of the principal judicial organ of the United Nations with regard to the international response to those violations. Its attempt to do so manifests a complete absence of good faith and is a serious abuse of the process of the Court.

6.40 Consequently, quite apart from the other grounds on which the jurisdiction of the Court and the admissibility of the Application are challenged, the United Kingdom submits that the Application should be declared inadmissible on the ground that the FRY has acted, and is continuing to act, in bad faith.

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231 S/PRST/1999/2 (Annex 9).

232 See para. 2.23 above.

233 See Statement of the Prosecutor, S/PV.4150, p. 3 (Annex 3).

CONCLUDING SUBMISSIONS

For the reasons advanced above, the United Kingdom requests the Court to adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Federal Republic of Yugoslavia

and/or

the claims brought against the United Kingdom by the Federal Republic of Yugoslavia are inadmissible.

20 June 2000

Michael C Wood

Agent of the United Kingdom
of Great Britain
and Northern Ireland

LIST OF ANNEXES

The Annexes to the United Kingdom's Preliminary Objections are set out in a single volume, in the order in which they first appear in the Preliminary Objections.

Annex Number	Title and Reference
1	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series 277.
2	UN Doc. S/RES/1244 (1999): Security Council resolution 1244 (1999).
3	UN Doc. S/PV.4150: Provisional Verbatim record of the 4150th meeting of the Security Council, pp. 1 to 6.
4	UN Doc. S/RES/1160 (1998): Security Council resolution 1160 (1998).
5	UN Doc. S/PRST/1998/25: Statement by the President of the Security Council.
6	UN Doc. S/RES/1199 (1998): Security Council resolution 1199 (1998).
7	UN Doc. S/RES/1203 (1998): Security Council resolution 1203 (1998).
8	UN Doc. S/RES/1207 (1998): Security Council resolution 1207 (1998).

Annex Number	Title and Reference
9	UN Doc. S/PRST/1999/2: Statement by the President of the Security Council.
10	UN Doc. S/PRST/1999/5: Statement by the President of the Security Council.
11	Executive summary of the report *Kosovo/Kosova: As Seen, As Told*, published by the OSCE, November 1999 and available at http://www.osce.org/kosovo/reports/hr/index.htm.
12	Briefing by Mrs Sadako Ogata, United Nations High Commissioner for Refugees, to the Security Council, 5 May 1999.
13	NATO Press Release (1999) 040, 23 March 1999: Press Statement by Dr Javier Solana, Secretary-General of NATO.
14	UN Doc. S/PV.3988: Provisional Verbatim record of the 3988th meeting of the Security Council.
15	UN Doc. S/1999/328: draft Security Council resolution co-sponsored by Belarus, India and the Russian Federation.
16	UN Doc. S/PV.3989: Provisional Verbatim record of the 3989th meeting of the Security Council.
17	Press Release SG/SM/6952 of 9 April 1999: Press Release of the Secretary-General.

Annex Number	Title and Reference
18	UN Doc. S/RES/1239 (1999): Security Council resolution 1239 (1999).
19	UN Doc. S/1999/672, 12 June 1999: report of the Secretary-General pursuant to paragraph 10 of Security Council resolution 1244 (1999).
20	Unofficial Transcript of the UNMIK Press Briefing, including the text of the joint statement by the Special Representative of the Secretary-General and the KFOR Commander, of 18 August 1999, available at http://www.un.org/peace/kosovo/press/br180899.htm.
21	UN Doc. A/46/915: Letter dated 6 May 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia addressed to the Secretary-General.
22	UN Doc. S/RES/757 (1992): Security Council resolution 757 (1992).
23	UN Doc. S/RES/777 (1992): Security Council resolution 777 (1992).
24	UN Doc. A/RES/47/1: General Assembly resolution 47/1 (1992).
25	UN Doc. A/47/PV.7: General Assembly, 47th Session, Provisional Verbatim record of the 7th plenary meeting, pp. 141 to 196.
26	UN Doc. S/RES/821 (1993): Security Council resolution 821 (1993).
27	UN Doc. A/RES/47/229: General Assembly resolution 47/229 (1993).

Annex Number	Title and Reference
28	Communication from the Governments of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia and the former Yugoslav Republic of Macedonia received by the Secretary-General on 28 May 1999, as set out in note 73 on pages 30 to 31 of *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999, Volume I.*
29	UN Doc. A/47/485: Letter from the United Nations Legal Counsel, dated 29 September 1992.