INTERNATIONAL COURT OF JUSTICE

# CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* NETHERLANDS)

# PRELIMINARY OBJECTIONS OF THE KINGDOM OF THE NETHERLANDS

5 JULY 2000

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## 1. INTRODUCTION

1.1 On 29 April 1999 the Federal Republic of Yugoslavia (hereinafter referred to as "the FRY") filed an Application in the Registry of the Court instituting proceedings against the Kingdom of the Netherlands (hereinafter referred to as "the Netherlands") "for violation of the obligations not to use force". Immediately after filing its Application, the FRY also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of the Court. In its Application the FRY invoked Article 36, paragraph 2, of the Statute of the Court as well as Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as "the Genocide Convention") as a basis for jurisdiction of the Court. The FRY purported to establish jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute of the Court on the basis of a declaration recognizing the compulsory jurisdiction of the Court pursuant to that provision, which was deposited with the Secretary-General of the United Nations only three days earlier, *i.e.* 26 April 1999. In a letter of 12 May 1999 the agent of the FRY submitted to the Court a "Supplement to the Application" of the FRY in which it invoked an additional ground for the Court, *viz.* Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Kingdom of the Netherlands, signed at The Hague on 11 March 1931.

1.2 During the public hearings held by the Court on 10-12 May 1999 on the request of the FRY for the indication of provisional measures, the Netherlands successfully disputed that the Court had *prima facie* jurisdiction on either of the three grounds invoked by the FRY and asked the Court to reject the request of the FRY to indicate provisional measures. The Court decided that the declarations made by the Parties under Article 36, paragraph 2, of the Statute did not constitute a basis on which the jurisdiction of the Court could *prima facie* be founded in this case. Neither could the jurisdiction of the Court *prima facie* be founded on Article IX of the Genocide Convention as the Court was unable to find at that stage of the proceedings that the acts imputed by the FRY to the Netherlands were capable of coming within the provisions of the Genocide Convention. Due to the fact that the FRY had invoked Article 4 of the above-mentioned Treaty of 1931 as an additional basis for jurisdiction only during the second round of the oral argument without giving any explanation of its

reasons for invoking this ground at that late stage of the proceedings, the Court, having taken note of the Netherlands arguments against the use of this alleged ground of jurisdiction, felt unable "for the purpose of deciding whether it may or may not indicate provisional measures in the present case" to take account of the additional basis of jurisdiction invoked by the FRY. In its Order of 2 June 1999 the Court, by eleven votes to four, rejected the request for the indication of provisional measures submitted by the FRY, and, by fourteen votes to one, reserved the subsequent procedure for further decision.

1.3 By its Order dated 30 June 1999 the Court determined the order of filing of memorials and the time-limits within which they must be filed, *i.e.* 5 January 2000 for the Memorial of the FRY and 5 July 2000 for the Counter-Memorial of the Netherlands. The FRY filed its Memorial on 5 January 2000.

1.4 According to Article 79, paragraph 1, of the Rules of the Court "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection to the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial...". According to Article 79, paragraph 3, "Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended."

1.5 The Netherlands wishes to avail itself of the opportunity to raise in the present Memorial preliminary objections to the jurisdiction of the Court and to the admissibility of the claims filed by the FRY in its Application and its Memorial. As will be set forth more fully in the following chapters, the Netherlands persists in its view already expressed during the proceedings on the request of the FRY for the indication of provisional measures that:

(1) The FRY is not entitled to appear before the Court (Chapter 3);

(2) Article 36, paragraph 2, of the Statute of the Court does not provide a basis for jurisdiction of the Court (Chapter 4);

(3) Article IX of the Genocide Convention does not provide a basis for jurisdiction of the Court (Chapter 5);

(4) The 1931 Treaty of Judicial Settlement, Arbitration and Conciliation does not

provide a basis for jurisdiction of the Court (Chapter 6);
(5) The claims presented by the FRY are inadmissible because:
(a) the Applicant has not produced even a beginning of evidence that the alleged breaches have been committed by *the Netherlands*;
(b) a judgment in respect of the Netherlands necessarily involves a decision in a dispute between the FRY and other entities or States not before the Court and/or would in the absence of such entities or States not allow the Court to arrive at a warranted judgment; and/or
(c) the claim of the FRY based on alleged breaches of obligations established by SC Res. 1244 and by the 1948 Genocide Convention related to killings, wounding and expulsion of Serbs and other non-Albanian groups in the area designated by the FRY as "Kosovo and Metohija" (hereinafter: Kosovo and Metohija) after 10 June 1999 is a new claim changing the subject of the dispute originally submitted to the Court in the Application.
Henceforth, the Netherlands in its concluding submissions requests the Court to adjudge and declare that the FRY is not entitled to appear before the Court, that the Court has no jurisdiction over the claims brought against the Netherlands and/or the claims brought by the FRY are inadmissible.

1.6 The Netherlands has taken note of the account of facts advanced by the FRY in its Application and its Memorial. In view of the fact that preliminary objections have been raised against the jurisdiction of the Court and the admissibility of the claims, the Netherlands will henceforth address factual matters in this Memorial only in so far as is necessary in the context of these preliminary objections. It should therefore be put on record that unless the contrary is explicitly indicated by the Netherlands in this Memorial, the Netherlands may not be deemed to have accepted the description of the events set out in the FRY Application and Memorial, whether they relate to events before or after 10 June 1999.

## 2. FACTUAL BACKGROUND

2.1 In this Chapter the Netherlands intends to provide a brief survey of the factual background of the case before the Court. The survey describes the efforts made to persuade the FRY authorities to cease violating on a massive scale the human rights of the civilian population of Kosovo and, when these efforts failed, the inevitable necessity for the NATO to start bombing attacks on the territory of the FRY in order to prevent a humanitarian catastrophe in Kosovo. The Netherlands would like to emphasize again that this survey by no means is to be construed as a recognition that the Court has jurisdiction to entertain the merits of the Application of the FRY. The sole purpose of this survey is to place the Memorial of the Netherlands which is aimed at demonstrating the lack of jurisdiction of the Court and the inadmissibility of the claims of the FRY in a proper factual context.

2.2 In 1989 the authorities of the Republic of Serbia (which formed part of the then Socialist Federal Republic of Yugoslavia (SFRY) and later became part of the Federal Republic of Yugoslavia (FRY) ) deprived Kosovo of the status of autonomous territory which it had enjoyed under the 1974 Constitution of the SFRY. Initially the population of Kosovo which was predominantly of ethnic Albanian origin, offered exclusively peaceful resistance to this measure and its attendant consequences. As of 1996 the Kosovo Liberation Army, UCK, conducted armed resistance actions. The situation escalated in the spring of 1998 when the UCK actions were retaliated by the Serbian police and paramilitary units in cooperation with units of the Yugoslav army. In carrying out these retaliation actions excessive violence was used also against civilians. As a result of this violence by September 1998 an estimated 600-700 civilians had been killed in the fighting in Kosovo since March and the number of refugees and internally displaced persons had reached a level of 230,000 (Report of the Secretary General, UN Doc. S/1998/834, para. 7).

2.3 The international community tried to stem the tide by exercising political pressure, mainly in the framework of the Contact Group (consisting of the United Kingdom, the United States, France, Germany, Italy, Russian Federation and the EU Presidency), the Security Council and the Organization for Security and Cooperation in Europe (OSCE).

2.4 On 31 March 1998 the Security Council adopted Resolution 1160 (Annex 2.1) which condemned, *inter alia*, 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. The Council, acting under Chapter VII of the UN Charter, *inter alia*, called upon the FRY immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue. The Council underlined that the way to defeat violence and terrorism in Kosovo was for the authorities in Belgrado to offer the Kosovar Albanian community a genuine political process.

2.5 On 24 August 1998 the President of the Security Council made a statement (S/PRST/1998/25) (Annex 2.2) on behalf of the Council which showed that the Council remained gravely concerned about the fighting in Kosovo which had had a devastating impact on the civilian population and had greatly increased the number of refugees and displaced persons. The Council called for an immediate cease-fire.

2.6 In its Resolution 1199 of 23 September 1998 the Security Council expressed its grave concern at, *inter alia*, the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which had resulted in numerous civilian casualties (Annex 2.3). The Council expressed its deep concern at the rapid deterioration in the humanitarian situation throughout Kosovo and, again acting under Chapter VII of the Charter, made a number of demands from all parties concerned and expressly demanded that the FRY implement a number of concrete measures towards achieving a political solution to the situation in Kosovo. The demanded measures (such as cessation of all action by the security forces affecting the civilian population) had already been laid down in a statement of the Contact Group of 12 June 1998 and were explicitly enumerated in the Security Council resolution.

2.7 On 16 October 1998 the FRY authorities and the OSCE reached an agreement providing for the OSCE to establish a verification mission in Kosovo. The previous day the FRY military authorities and NATO had concluded an agreement providing for the establishment of an air verification mission over Kosovo, complementing the OSCE Verification Mission. The purpose of the OSCE Mission was to verify the compliance by the FRY and all others concerned in Kosovo with the

requirements of SC Res. 1199. The Security Council in its Resolution 1203 (Annex 2.4) adopted on 24 October 1998 and acting under Chapter VII of the Charter, endorsed both agreements and demanded the FRY as well as the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community to comply fully with Resolutions 1160 and 1199 and to cooperate fully with the OSCE Mission.

2.8 Against the background of the threat of NATO air strikes which had been decided upon in principle by the NATO Council in October 1998, the American Special Envoy who acted on behalf of the Contact Group succeeded in reaching an agreement with the President of the FRY on compliance with Resolution 1199.

2.9 Despite this agreement violence continued and culminated in a massacre of Kosovo Albanians in the village of Racak on 15 January 1999. According to the OSCE Verification Mission, which reported the incident, the victims were civilians and the responsibility lay with FRY security forces. The Security Council through a statement of its President of 19 January 1999 (S/PRST/1999/2) (Annex 2.5) strongly condemned this massacre.
The refugee situation deteriorated. In a briefing given to the Security Council on 5 May 1999 the UN High Commissioner for Refugees stated that, before 24 March, the date of the start of the NATO air campaign, there had already been nearly half a million people who were internally displaced persons or refugees in neighbouring States. (UNHCR website http://srch1.un.org) (Annex 2.6). The report of the human rights findings of the OSCE Kosovo Verification Mission (website http://www.osce.org/ kosovo/reports/HR/part1/Index.HTM) (The executive summary reproduced as Annex 2.7) which was published in December 1999, but covers the period since the creation of the Mission on 16 October 1998 until its dissolution on 9 June 1999, lists crimes perpetrated by Yugoslav and Serb forces such as arbitrary killings of civilians, arbitrary arrests and detention, torture and ill-treatment, rape and other forms of sexual violence, violation of the right to a fair trial, human shields and forced expulsion.

2.10 Under the auspices of the Contact Group a last attempt was made to find a political solution to the problem. The two parties to the conflict were invited to take part in negotiations aimed at reaching a political settlement and establishing a framework and timetable for that purpose. The Security Council welcomed and supported this

initiative (Statement by the President of the Security Council of 29 January 1999; S/PRST/1999/5) (Annex 2.8).

2.11 Two rounds of talks were held, one in February 1999 at Rambouillet and another from 15 until 19 March 1999 in Paris. The negotiations at Rambouillet resulted in the so-called Rambouillet Accords, a draft agreement containing an interim arrangement which provided for far reaching self-government in Kosovo while recognizing the territorial integrity of the FRY. In the second round of talks, in Paris, the FRY delegation refused to sign the agreement because it opposed the envisaged deployment of a NATO-led force to monitor compliance with the agreement. The Kosovo delegation, although initially insisting on a reference in the text to a referendum on the final status of Kosovo after the expiry of the envisaged interim period, finally agreed to sign. However, in view of the position of the FRY delegation the Contact Group saw no other solution than to suspend the negotiations.

2.12 Even during the negotiations at Rambouillet and in Paris the Yugoslav military and police forces were preparing to intensify their operations against ethnic Albanians in Kosovo. After one final attempt by US Special Envoy, Richard Holbrooke, to convince President Milosevic to reverse his policies, NATO Secretary-General Solana gave the order to commence air strikes (Operation Allied Force). (See: Kosovo One Year On. Achievement and Challenge, by Lord Robertson, Secretary-General of NATO; website http://www.nato.int/kosovo/repo2000/index.htm)). Operation Allied Force started at 24 March 1999. In the Security Council which discussed the issue the same day at the request of the Russian Federation, the permanent representative of the Netherlands stated *inter alia*:

> "We have participated in and assumed responsibility for the North Atlantic Treaty Organization (NATO) decision because there was no other solution. As for the Netherlands, this decision was not taken lightly; it was taken with conviction. Responsibility for the NATO action lies squarely with President Milosevic. He is responsible for the large-scale violations of the October agreements with the Organization for Security and Cooperation in Europe (OSCE) and NATO. It is President Milosevic's recourse to violence in Kosovo that has finally convinced us that the impending humanitarian catastrophe, at which the Council expressed its alarm in its resolutions of September and October, could not be averted by peaceful means.
> .....

> [T]he present state of affairs should convince every delegation that with regard to the problem of Kosovo, the diplomatic means of finding a solution are now exhausted. As stated by the Secretary-General, diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time." (UN Doc. S/PV 3988, p. 8) (Annex 2.9)

2.13 At its next meeting on 26 March 1999 the Security Council discussed a draft resolution submitted by Belarus and the Russian Federation and co-sponsored by India. In the draft it was proposed that the Security Council, acting under Chapters VII and VIII of the Charter, demand an immediate cessation of the use of force against the FRY and urgent resumption of negotiations.
The draft resolution was rejected by twelve votes (Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, United Kingdom, and United States of America) to three (China, the Russian Federation and Namibia) (UN Doc. S/PV 3989, p. 6) (Annex 2.10).

2.14 The NATO phased air campaign was conducted from 24 March until 10 June. NATO made every effort to limit collateral damage and to observe the rules of international humanitarian law. It is in this connection important to note that the Public Prosecutor of the International Criminal Tribunal for the Former Yugoslavia has decided not to open a criminal investigation into any aspect of the air campaign. Although some mistakes were made by NATO, the Prosecutor was satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign (UN Doc. S/PV/4150 p. 3 (Annex 2.11) and ICTY Press Release PR/P.I.S./510-e of 13 June 2000).
Compared to other NATO Members, the contribution of the Netherlands to the air campaign was relatively small. Netherlands aircraft carried out approximately 5 percent of the total number of air sorties. Responsibility for the conduct of the Operation Allied Force rested with NATO. In the implementation of the operation, operational control over the participating Netherlands units was transferred to NATO commanders.

2.15 While the NATO air campaign continued, the G8 on 6 May 1999 adopted a set of general principles on a political solution to the Kosovo crisis. These principles were reflected in a paper presented by the EU Special Envoy and the Russian Envoy

and accepted by the FRY authorities on 3 June 1999. This paper provided, *inter alia*, for an immediate and verifiable end of violence and repression in Kosovo and a verifiable withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable. On 9 June 1999 NATO established the Kosovo Peace Implementation Force (KFOR). Following the conclusion the same day of a Military Technical Agreement between the FRY Army Chief of Staff and the KFOR commander the withdrawal of FRY and Serbian security forces began on 10 June 1999. NATO air strikes were suspended the same day.

2.16 The Security Council in its Resolution 1244 of 10 June 1999 (Annex 2.12) while welcoming the FRY's agreement to the paper presented by the EU Special Envoy and the Russian Envoy and acting under Chapter VII of the Charter, *inter alia*, affirmed the need for the rapid early deployment of effective international civil and security presences to Kosovo and demanded that the parties cooperate fully in their deployment. The Council decided that the responsibilities of the international security presence to be deployed include deterring renewed hostilities, establishing a secure environment for returning refugees and displaced persons and ensuring public safety and order. The responsibilities of the international civil presence included performing basic civilian administrative functions, the development of provisional institutions, maintaining civil law and order, supporting the reconstruction of key infrastructure and other economic reconstruction, protecting human rights and supporting humanitarian and disaster relief aid. The international security presence, *i.e.* KFOR, was deployed on 12 June 1999. On the same date the UN Secretary-General presented a preliminary concept for the United Nations Interim Administration Mission in Kosovo (UNMIK) which was to constitute the international civil presence. An advance team of UNMIK was deployed in Kosovo within subsequent days.

2.17 As appears from the various reports of the Secretary-General (S/1999/767, S/1999/779, S/1999/982, S/1999/987, S/1999/1062, S/1999/1185, S/1999/1250, S/1999/1266, S/2000/50, S/2000/152, S/2000/177, S/2000/235, S/2000/318, S/2000/538) released since the establishment of the international civil presence (UNMIK) and the international security presence (KFOR), attacks against ethnic minorities remain a major security concern. However, KFOR in close cooperation with UNMIK continues to address these and other issues in order to maintain peace and

stability in Kosovo. The latest report of the Secretary-General on UNMIK (S/2000/538) which covers the period March-June 2000 notes that UNMIK consolidated the central and municipal structures through which the people of Kosovo participate in the interim administration of the province. With the participation of both ethnic Albanian and non-Albanian communities in Kosovo, the composition of these structures became more reflective of the population in the province.

The Netherlands took part in KFOR since the date of its deployment in Kosovo until 1 June 2000. The Netherlands contribution consisted of several units, totaling approximately 1500 men. The Netherlands participation in UNMIK is focussed on the OSCE "pillar" which heads the institution-building component. The Netherlands contributes substantially to the UNMIK Trust Fund.

## 3. THE FRY IS NOT ENTITLED TO APPEAR BEFORE THE COURT

3.1 The Netherlands submits, as will be more fully set forth below, that the FRY is not entitled to appear before the Court as the FRY is not a member of the United Nations and therefore not an *ipso facto* party to the Statute of the Court, has not become a party to the Statute in any other way and has not accepted the jurisdiction of the Court by making a declaration pursuant to SC Res. 9 (1946). The unilateral declaration of the FRY accepting the jurisdiction of the Court is invalid and does in any event not establish jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute *vis-à-vis* the Netherlands.

3.2 The Netherlands maintains its submission made at the stage of the proceedings relating to the Applicant's request for the indication of provisional measures that the FRY as one of the successor States of the former SFRY is at present not a member of the United Nations and is therefore not a party to the Statute of the International Court of Justice by virtue of Article 93, paragraph 1, of the UN Charter which provides that all members of the United Nations are *ipso facto* parties to the Statute.

3.3 The claim of the FRY to be a member of the United Nations (Applicant's Memorial, para. 3.1) is based on the wrong premise that the FRY automatically continues the membership of the SFRY in the United Nations. That the FRY indeed proceeded from this wrong premise may be inferred from the following declaration issued at the date of the proclamation of the new State (27 April 1992) and repeated in a letter the FRY authorities addressed to the Secretary-General of the United Nations:

> "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" (A/46/915, 7 May 1992, Annex II, para.1) (Annex 3.1)

As noted by the Security Council in its Resolution 757 (1992) of 30 May 1992, "the claim by the FRY to automatically continue the membership of the SFRY in the United Nations is not generally accepted" (Annex 3.2). The non-acceptance of the FRY's claim is further illustrated by the legal opinions of the Arbitration Commission which

was established in the framework of the Conference for Peace in Yugoslavia in which participated the European Community and its member States and the six republics of the former SFRY. All six republics of the former SFRY, including the Republic of Serbia and the Republic of Montenegro, which later became the FRY, have accepted the arrangements relating to the establishment of the Commission. When the FRY challenged the Commission's competence to give an opinion on a number of questions submitted to it by the Chairman of the Conference, concerning, *inter alia,* the status of the FRY, the Commission in an interlocutory decision of 4 July 1992 (31 ILM 1992) (Annex 3.3) established its competence to give the requested opinion.

3.4 After having issued the interlocutory decision concerning its own competence the Commission in its Opinion no. 8 of 4 July 1992 (31 ILM 1992) (Annex 3.4) held that:

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

in its Opinion no. 9 (31 ILM 1992) (Annex 3.5) of the same date that:

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

and in its Opinion no. 10, likewise of the same date (31 ILM 1992) (Annex 3.6), that:

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

Also the European Union regards the FRY as one of the successor States to the SFRY. On 20 July 1992 a common statement was issued which, *inter alia*, comprised the following phrase:

> "The Community and its Member States welcome the advice of the Arbitration Commission of the Conference on Yugoslavia, chaired by Mr Badinter. It is for Serbia and Montenegro to decide whether they wish to form a new Federation. But this new Federation cannot be accepted as the sole successor to the former Socialist Federal Republic of Yugoslavia. In the light of this, the Community and its Member States will oppose the participation of

Yugoslavia in international bodies." (Bulletin of the European Communities 7/8-1992, p.108 (Annex 3.7)

3.5 Further to its above mentioned Resolution 757 (1992) of 30 May 1992 the Security Council, in its Resolution 777 (1992) of 19 September 1992 (Annex 3.8) considered that:

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

and that:

> "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations"

and therefore recommended to the General Assembly:

> "that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations.....".

3.6 Acting upon this recommendation the General Assembly in Resolution 47/1 (1992) of 22 September 1992 (Annex 3.9) 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 decided[1]:

> "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".

The resolution was adopted with an overwhelming majority, only six States including "Yugoslavia" itself voting against the resolution giving effect to the Security Council recommendation, while four permanent members of the Security Council voted in favour and China abstained (see: United Nations Yearbook 1992, p. 139). During the General Assembly debate on the draft resolution which was finally adopted as

[1] According to Article 4, paragraph 2, of the UN Charter, a recommendation of the Security Council is required for a decision of the General Assembly to admit a State to membership in the United Nations.

Resolution 47/1 (1992) the then Prime Minister of the FRY made a statement in which he "formally requested membership in the United Nations of the new Yugoslavia..."(UN Doc. A47/PV. 7, p. 149) (Annex 3.10), but the United Nations never received any written document as a follow-up to that statement. Both the decision of the General Assembly and the lack of an adequate response of the FRY authorities confirm the view of the Netherlands that the FRY is at present not a member of the United Nations and, consequently, that the Applicant cannot be considered to be *ipso facto* a party to the Statute of the Court by virtue of Article 93, paragraph 1, of the UN Charter.

3.7 Although the Security Council had concluded that the SFRY had ceased to exist, in the view of the Netherlands this does not mean that the membership of the SFRY in the United Nations was formally terminated. The Charter does not contain provisions for termination of membership in the United Nations as a result of dissolution of a State and neither the Security Council nor the General Assembly have taken a formal decision to terminate the membership of the SFRY. Hence the UN and its organs should base themselves formally on the continued membership of the SFRY.

3.8 The Netherlands further submits that the Applicant has not become a party to the Statute of the Court in any other way, in particular not on the basis of a General Assembly resolution upon recommendation of the Security Council as envisaged in Article 93, paragraph 2, of the UN Charter. In any event the FRY is not mentioned as a party to the Statute of the Court on that basis in Yearbook 1996-1997 of the International Court of Justice, pp. 68-70. The reference in the Yearbook to "Yugoslavia .... Original Member" among the "States Members of the United Nations" entitled to appear before the Court pursuant to Article 35, paragraph 1, of the Statute (ICJ Yearbook 1996-1997, p. 68), is a reference to the SFRY, whose membership of the United Nations, as we have already noted, was never formally terminated.

3.9 The Netherlands is aware that a State which is not a party to the Statute of the International Court of Justice, as is the case with the Applicant, may under certain conditions provided for in SC Res. 9 (1946) of 15 October 1946 (Annex 3.11) adopted by the Security Council by virtue of powers conferred on it by Article 35, paragraph 2, of the Statute, accept the jurisdiction of the Court (see ICJ Yearbook 1996-1997, pp.

70-71).

3.10 The Netherlands submits that the 1999 declaration of the Applicant accepting the jurisdiction of the Court simply refers to Article 36, paragraph 2, of the Statute of the Court, as if the Applicant were a party to the Statute and does not refer to SC Res. 9 (1946) of 15 October 1946 as the basis for its entitlement to appear before the Court and that the Applicant does not in any way provide evidence that it has accepted the conditions for such appearance mentioned in the said Security Council resolution. Also in its Memorial the Applicant restricts itself to repeating its 1999 declaration without making any reference to SC Res. 9 (1946). The Netherlands henceforth submits that as the 1999 declaration of the Applicant accepting the jurisdiction of the Court is not based on SC Res. 9 (1946) and does not meet the crucial conditions mentioned in that resolution, it must be considered invalid.

3.11 The Netherlands further submits that, even if the 1999 declaration of the Applicant were to be considered valid, the acceptance of the jurisdiction of the Court, in accordance with Article 36, paragraph 2, of the Statute, as compulsory *ipso facto* and without special agreement cannot be relied on *vis-à-vis* the Netherlands which is a party to the Statute and has made the declaration in conformity with Article 36, paragraph 2, of the Statute, *as the Netherlands has not explicitly agreed to the acceptance of the jurisdiction of the Court on that basis by the Applicant in respect of itself*, as is clearly required by SC Res. 9 (1946) for the Court to have jurisdiction *ratione personae* on that basis.

3.12 The above mentioned submissions have already to a large extent been presented at the stage of proceedings related to the Applicant's request for the indication of provisional measures. In the following paragraphs while briefly discussing the Court Order of 2 June 2000 and more extensively the Applicant's Memorial of 5 January 2000 the Netherlands will further elaborate its proposition that the FRY is not entitled to appear before the Court.

3.13 In its Order of 2 June 1999 relating to the Applicant's request for the indication of provisional measures the Court stated (para. 33) that in view of its finding with regard to the limitation *ratione temporis* contained in the Applicant's declaration of

acceptance of the Court's jurisdiction it did not need to consider the issue of membership of the FRY in the United Nations for the purpose of deciding whether or not it could indicate provisional measures in the present case. In her separate opinion Judge Higgins observed that the question of the FRY's status was a matter of the greatest complexity and importance (para. 21). Judge Oda in his separate opinion took the view (para. 4) that the FRY, not being a member of the United Nations and thus not a party to the Statute of the Court had no standing before the Court as an applicant State. Judge Kooijmans in his separate opinion expressed doubt as to whether the FRY was 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 (para. 25). Judge Kooijmans added:

> "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 it is without jurisdiction because of the invalidity of Yugoslavia's declaration of acceptance".

3.14 In its Memorial the Applicant submits that SC Res. 777 (1992) "did not include an intention to terminate the membership of the FR of Yugoslavia in the United Nations" (Memorial, Part Three, paragraph 3.1.1). In citing statements of the permanent representatives of two members of the Security Council the Applicant submits that the aim of the resolution was to reach a compromise in that the FRY should not participate in the work of the General Assembly, but that the resolution did not mean the exclusion of the FRY from the United Nations. It should be noted, however, that the permanent representative of China commented that "the resolution just adopted does not mean the expulsion of *Yugoslavia* from the United Nations". (emphasis added by Respondent) (UN Doc. S/PV. 3116 of 19 September 1992) (Annex 3.12)

3.15 The Netherlands wishes to contest the interpretation given by the Applicant to the outcome of the debate in the Security Council. First of all it is a flaw in the reasoning of the Applicant to state that the Security Council resolution dealt with the issue of terminating the membership of the FRY in the United Nations. The FRY has never been a member of the United Nations. The sole issue was whether the FRY was entitled to claim continuation of the membership of the dissolved SFRY. Furthermore,

there was no question of a compromise, even though some members of the Council may have perceived the text of the adopted resolution as a compromise. In light of the Security Council's consideration that the FRY could not automatically continue the membership of the former SFRY, the only logical consequence for the Council was to recommend that the FRY as one of the successor States of the former SFRY should apply for membership and that pending the procedure of admission to membership it shall not participate in the work of the General Assembly. If there was any compromise, the compromise solution was rather the invitation extended to the Government of the FRY to remedy at its earliest convenience the situation that had arisen as a result of the dissolution of the former SFRY by applying for membership in accordance with the procedure set out in Article 4 of the UN Charter. The four other successor States of the SFRY did formally apply for membership. As the position of the FRY is not different from that of the other successor States, the FRY should follow their example. Furthermore the claim of the FRY to automatically continue the membership of the SFRY in the United Nations must be seen in the overall context of a claim to automatically continue the legal personality of the former SFRY. The Netherlands finds it difficult to accept such a claim coming from a State whose territory and population constitute a portion of the territory and population of the predecessor State. Moreover, under its Constitution the constituent parts of the SFRY had equal status. The legal position of the Republic of Serbia and the Republic of Montenegro was by no means superior to that of the other Republics which after the dissolution of the SFRY applied for membership in the United Nations.

3.16 The same conclusion, *i.e.* that the FRY is not a member of the United Nations, can be inferred from the adoption by the General Assembly of Resolution 47/1 (1992) in which the Assembly acted upon the recommendation of the Council. The non-participation of the FRY in the work of the General Assembly (and for that matter in the Economic and Social Council, as was decided by the Assembly in its Resolution 47/229 (1993) of 28 April 1993 (Annex 3.13) is a logical corollary of the Assembly's decision that the FRY should apply for membership in the United Nations. The use of the subjunctive mood "should" is apparently dictated by the need to leave it to the discretion of the FRY authorities whether or not to apply for membership, but it is clear that in the situation in which the FRY found itself, formal application was and still is a *conditio sine qua non* for obtaining membership in the United Nations. Any conclusion

that the FRY would already be a member of the United Nations would be untenable. The General Assembly has decided that the FRY shall not participate in the work of the General Assembly and the Economic and Social Council. However, the sole ground for suspending a member State from the exercise of the rights and privileges of membership, such as participation in the work of the mentioned organs and subsidiary bodies thereof, is contained in Article 5 of the Charter, which is clearly not applicable in the present case. Therefore, the Assembly's decision that the FRY shall not participate in the work of the General Assembly can only be interpreted as an addition *ex abundanti cautela* to its decision that the FRY is not a UN member and, hence, that the FRY should apply for membership in the United Nations.

3.17 With regard to the above mentioned GA Res. 47/229 (1993) in which the General Assembly upon recommendation of the Security Council (SC Res. 821 (1993) of the same date (Annex 3.14) decided that the FRY shall not participate in the work of the Economic and Social Council, the Applicant states that "If Yugoslavia's membership in the Organization was terminated or suspended by resolution 47/1, there would be no need for a new resolution excluding Yugoslavia from the work of the Economic and Social Council". (Memorial, para. 3.1.5). In the view of the Netherlands GA Res. 47/229 (1993) (and for that matter SC Res. 821 (1993)) was indeed redundant, but it goes too far to call into question the basis for the adoption of this resolution, *i.e.* the impossibility for the FRY to automatically continue the membership of the former SFRY, which was explicitly reaffirmed in SC Res. 821 (1993).

3.18 In its Memorial (para. 3.1.7) the Applicant states that the General Assembly confirmed by its Resolution 52/215 (1997) of 22 December 1997 (Annex 3.15) that the FRY is a member State of the United Nations. This resolution establishes the scale of assessments for the apportionment of the contributions of member States to the regular budget of the United Nations over a three year period. The list of member States annexed to the resolution includes "Yugoslavia". The Netherlands, however, cannot concur with the view of the Applicant. As already pointed out above (para. 3.7) although the SFRY had ceased to exist, this does not mean that the membership of the SFRY has been formally terminated. In the apparent expectation that the FRY would make every effort to remedy its lack of legal status *vis-à-vis* the United Nations by presenting a formal written application for membership, the General Assembly in

Resolution 47/1 (1993) has not taken a formal decision to terminate the membership of the SFRY. Resolution 52/215 (1997) (and for that matter GA Res. 49/19 (1994) of 23 December 1994 establishing the scale of assessments for the previous three year period) (Annex 3.16) must be seen as a consequence thereof. The reference to "Yugoslavia" in the Annex to this resolution can only be interpreted as a reference to the SFRY and not to the FRY. Upon recommendation of the Committee on Contributions (UN Doc. A 47/11, paras. 63 and 64) (Annex 3.17) the General Assembly had already at its 47th session, in December 1992, decided that the rates of assessment of Bosnia and Herzegovina, Croatia and Slovenia, being new members of the United Nations, should be deducted from that of "Yugoslavia" (GA Decision 47/456 of 23 December 1992) (Annex 3.18). A similar decision was taken at its 48th session (23 December 1993) with regard to the new member "The former Yugoslav Republic of Macedonia" (GA Res. 48/223A of 23 December 1993) (Annex 3.19). In the view of the Netherlands this is correct, as it would have been unjustifiable to determine the rate of assessment of the SFRY, as if the territory of the SFRY had not been considerably reduced due to the separation of a number of successor States who had become members of the United Nations in their own right and must accordingly be assessed separately.

3.19 In support of the same argument, namely the continuation of its membership in the United Nations, the Applicant in its Memorial (para. 3.1.8 *et seq.*) cites a number of letters on the part of the Secretary-General and certain UN practices with regard to the legal status of "Yugoslavia":

(1) In the first place the Applicant cites numerous letters reminding the authorities of the FRY of its arrears in the payment of its contributions to the Organisation as well as the Note of the Secretary-General of 8 January 1993 informing the FRY authorities of the assessment of the Yugoslav contribution to the financing of the United Nations Angola Verification Mission (UNAVEM II). Both the Note and the letters are reproduced in the Annexes 169 until inclusive 174 to the Applicant's Memorial.

(2) Furthermore reference is made to a letter of the UN Legal Counsel of 29 September 1992, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia and a letter of the Acting Director of the Office of the Legal Counsel of 15 December 1997 (reproduced in Annex 167 to the Applicant's Memorial), both dealing, *inter alia,* with the practical consequences of the adoption by the General

Assembly of Resolution 47/1 (1992) such as the continued arrangement of seat and nameplate of "Yugoslavia" in General Assembly bodies, the continued display of the flag of the former SFRY in front of the United Nations headquarters and the continued functioning of the Yugoslav Permanent Mission to the United Nations.
(3) Finally, the Applicant refers to the listing of "Yugoslavia" as "an original Member" of the United Nations in the annual reports of the Secretary-General published after 1992 on the status of multilateral treaties deposited with him.

3.20 The Netherlands submits that the letters cited by the Applicant in the Annexes 169 until inclusive 174 to its Memorial and relating to arrears in the payment of contributions to the regular UN budget and to the financing of other activities in the framework of the United Nations should have been in conformity with the decision of the competent organs of the United Nations not to terminate the membership of the former SFRY and not to recognise the claim of the FRY to automatically continue the membership of the SFRY in the United Nations. In other words, the fact that these letters have been mistakenly and in any event unjustifiably addressed by or on behalf of the Secretary-General to the Permanent Representative or Chargé d'Affaires *a.i.* of the Federal Republic of Yugoslavia cannot lead to the conclusion that the FRY has become a member of the United Nations. Under the Charter it is the exclusive responsibility of the General Assembly to admit new members or to expel members upon the recommendation of the Security Council. Therefore in the view of the Netherlands it is the exclusive competence of these organs to determine which States are member States of the United Nations.

3.21 The practice of keeping the attributes of sovereignty such as the nameplate "Yugoslavia" and flag relate to the former SFRY and not to the FRY. This is confirmed in the above mentioned letters of the Legal Counsel and Acting Director of the Office of the Legal Counsel cited by the Applicant. In the absence of a formal decision by the General Assembly to terminate the membership of the SFRY both the Legal Counsel and the Acting Director of the Office of the Legal Counsel based themselves upon the continued membership of the SFRY in the United Nations. They point out that Resolution 47/1 (1992) of the General Assembly neither terminated nor suspended "Yugoslavia's" membership in the Organization and they make a careful distinction between the Federal Republic of Yugoslavia on the one hand and "Yugoslavia" *tout*

*court* on the other.

Illuminating is also the practice in the Security Council, whenever the issue of the situation in Yugoslavia is on the agenda, to invite the Permanent Representative of the FRY or the Chargé d'Affaires *a.i. in his personal capacity*, "to be seated at the side of the Council Chamber", without reference to Rule 37 of the Council's Provisional Rules of Procedure (which refers to "Any Member of the United Nations which is not a member of the Security Council") and without reference to his representing any State (see *e.g.* the Official Communiqué of the 4102nd meeting of the Security Council held in private in the Security Council Chamber at Headquarters on 16 February 2000, UN Doc. S/PV.4102 of 16 February 2000) (Annex 3.20).

3.22 The relevant practices in the Security Council and in General Assembly bodies as well as the references to "Yugoslavia" in the above mentioned letters of the Legal Counsel and the Acting Director of the Office of the Legal Counsel and in the annual reports of the Secretary-General on the status of multilateral treaties also explain why the Registrar of the International Court of Justice continues to list "Yugoslavia" as an "original member" among the States, members of the United Nations, entitled to appear before the Court pursuant to Article 35, paragraph 1, of the Statute and Article 93, paragraph 1, of the Charter. It is obvious that "Yugoslavia" refers to the SFRY.

Similarly, the latest website of the International Court of Justice lists "Yugoslavia" as an "original member" among the States, members of the United Nations, entitled to appear before the Court. The Netherlands objects to the fact that the declaration of the FRY of 26 April 1999 under Article 36, paragraph 2, of the Statute has been placed next to the name "Yugoslavia". However, this website is prepared by the Registry and in no way involves the responsibility of the Court itself.

3.23 At the latest session of the General Assembly initial steps haven been taken to find a solution to the anomaly of maintaining the attributes of the former SFRY, but a decision could not be reached. This failure to set the record straight does not affect the validity of GA Res. 47/1 (1992), in which the General Assembly with the backing and upon the recommendation of the Security Council in unequivocal terms denies the FRY the right to automatically continue the membership of the SFRY in the United Nations.

3.24 In his letter of 15 December 1997, cited in the Annexes to the Applicant's Memorial, the Acting Director of the Office of the Legal Counsel refers to GA Res. 48/88 (1993) of 20 December 1993 (Annex 3.21), in which the General Assembly, *inter alia,* reaffirms its Resolution 47/1 (1992) and urges member States and the Secretariat in fulfilling the spirit of that resolution to end the *de facto* working status of the FRY. From the context of the Applicant's Memorial it may be inferred that the Applicant takes the position that the quoted paragraph of GA Res. 48/88 (1993) constitutes an argument in support of its thesis that the FRY is a member of the United Nations. The Netherlands does not agree with this view. First of all, the General Assembly qualifies the "working status" of the FRY as a "*de facto* working status", not as a "*de jure* working status". However, in the view of the Netherlands this call of the General Assembly to put an end to the current uncertainty with regard to the status of the FRY *vis-à-vis* the United Nations Organisation can only be seen as an invitation to the FRY to formally apply for membership in the United Nations in accordance with Article 4 of the Charter.

3.25 Finally, in order to support its claim that the FRY is a party to the Statute of the International Court of Justice, the Applicant refers to a number of proceedings before the Court itself (Memorial, para. 3.1.18 *et seq.*)
In the first place reference is made to the Application filed by the Government of the Republic of Croatia on 2 July 1999 (para. 28), in which Croatia states "that the Court has jurisdiction in this case pursuant to Article 36, paragraph 1, of its Statute". Secondly, the Applicant refers to the Memorial of the Government of the Republic of Bosnia and Herzegovina (Memorial, 15 April 1994, p. 170) in the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996* (hereinafter: *Genocide 1996* Case), in which Bosnia and Herzegovina confirmed that "Yugoslavia is a Party to the Court's Statute". Thirdly, the Applicant states that by applying the rules of the Statute in the *Genocide 1996* Case the Court confirmed that the FRY is a State party to the Statute. In the view of the Applicant the Statute of the Court is an international treaty which is in force only among State parties (Memorial, paras. 3.1.19, 3.1.20 and 3.1.21).

3.26 The Netherlands holds the view that the references to the above-mentioned Application of the Republic of Croatia and Memorial of the Republic of Bosnia and Herzegovina do not provide any evidence that the FRY is a party to the Statute of the Court. It is the exclusive competence of the General Assembly and the Security Council and not of individual UN member States to determine whether a particular State is a member of the United Nations and thus *ipso facto* a party to the Statute. Both Croatia and Bosnia and Herzegovina had a political interest in instituting proceedings before the Court against the FRY and therefore in persuading the Court that it had jurisdiction to entertain their respective Applications. From their perspective it would clearly have been counterproductive to deny that the FRY is a party to the Statute of Court. The fact that Croatia and Bosnia and Herzegovina apparently believed (or had an interest to believe) that the FRY is entitled to appear before the Court is in stark contrast with the position both States adopted on 28 May 1999 when they sent a communication to the Secretary-General in his capacity as depositary of multilateral treaties in which they challenged the validity of the declaration of the FRY accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, on the grounds that the FRY is not a member of the United Nations and not a party to the Statute (Traités Multilatéraux déposés auprès du Secrétaire Général; Etat au 31 Décembre 1999, UN Doc. ST/LEG/SER.E18 (Vol. 10, pp. 32-33)(Annex 3.22).

3.27 The Netherlands does not share the view of the FRY that "by application of rules of the Statute in the *[Genocide 1996]* Case, the International Court of Justice confirmed that the FR of Yugoslavia is a State Party to the Statute" (Memorial, para. 3.1.21).

At the provisional measures stage of this Case the Court stated that *at that stage of the proceedings* there was no need to determine definitively the question whether or not Yugoslavia was a member of the United Nations and as such a party to the Statute of the Court (Order of 8 April 1993, I.C.J. Reports 1993, para. 18). The Netherlands further notes that the Court did not return to the issue, neither in its subsequent Order on the occasion of further requests of Bosnia and Herzegovina for the indication of provisional measures (13 September 1993) nor in its Judgment at the preliminary objections stage of the case (11 July 1996). It should be stressed again that this may be explained by the fact that neither of the two Parties involved, the Applicant: Bosnia

and Herzegovina and the Respondent: the FRY, had a political interest in pressing the issue.

On the basis of Article 35, paragraph 2, of the Statute, the Court considered in its Order of 8 April 1993 (para. 19) that proceedings may validly be instituted by a State against a State which is a party to a special provision in a treaty in force (such as the compromissory clause in the Genocide Convention) but is not a party to the Statute, and independently of the conditions laid down in SC Res. 9 (1946); and that a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention could be regarded *prima facie* as a special provision contained in a treaty in force and that, if Bosnia and Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event *prima facie* within the jurisdiction *ratione personae* of the Court.

In this context the Netherlands would like to refer to the following analysis of Article 35, paragraph 2, of the Statute by Rosenne (The Law and Practice of the International Court, 1920-1996, Vol. II, p. 629):

> "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)"

The Netherlands submits that this restrictive interpretation of the phrase "subject to the special provisions of treaties in force" is the correct one. A broader interpretation would place parties to such treaties which are not parties to the Statute in a privileged position as they would have access to the Court without assuming the obligations required from States which accept the jurisdiction of the Court. Moreover, the above mentioned finding of the Court that it had *prima facie* jurisdiction in the provisional measures phase of the *Genocide 1996* Case was not challenged by the Respondent (the FRY). Finally, as Rosenne rightly observes (p. 630) : "That provisional finding is not conclusive of the matter".

3.28 In summary, the Netherlands holds the view that on the grounds set forth above it must be concluded that the FRY is not a member of the United Nations and therefore not *ipso facto* a party to the Statute; that the FRY has not become a party to the Statute in accordance with the procedure laid down in Article 93, paragraph 2, of the Charter; nor has it accepted the jurisdiction of the Court by making a declaration pursuant to SC Res. 9 (1946).

3.29 The unilateral declaration of the FRY accepting the jurisdiction of the Court is invalid and does in any event not establish jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute of the Court *vis-à-vis* the Netherlands. In conclusion the FRY is not entitled to appear before the Court.

## 4. ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT DOES NOT PROVIDE A BASIS FOR JURISDICTION OF THE COURT

4.1 The Netherlands submits that the Court lacks jurisdiction in the present case on the basis of Article 36, paragraph 2, of the Statute of the Court. It points out that the unilateral declaration of the FRY accepting on that basis the jurisdiction of the Court (Annex 1.1, for the Netherlands unilateral declaration, see Annex 1.2), the validity of which and/or applicability *vis-à-vis* the Netherlands is disputed (see this Memorial, para. 3.11), in any event limits *ratione temporis* its acceptance of the compulsory jurisdiction of the Court to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". The Netherlands maintains that the dispute between the FRY and the Netherlands clearly arose before the date of signature of the Yugoslav declaration and therefore falls outside the scope of the jurisdiction of the Court.

4.2 In this connection the Netherlands would like to quote paras. 27-29 of the Order of the Court of 2 June 1999 concerning Yugoslavia's request for the indication of provisional measures in the case concerning *Legality of Use of Force (Yugoslavia* v. *Netherlands*):

> "27. Whereas Yugoslavia's Application is entitled "Application of the Federal Republic of Yugoslavia against the Kingdom of the Netherlands for Violation of the Obligation Not to Use Force"; whereas in the Application the "subject of the dispute" (emphasis added) is described in general terms [see para. 1 (of the Order) above]; 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 (see paras. 3 and 4 of the Order above) that the Application is directed, in essence, against the "bombing of the territory of the Federal Republic of Yugoslavia", to which the Court is asked to put an end;
>
> 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 1999 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 the Netherlands;"

4.3 What is it one may infer from this?

(1) That a "legal dispute" "arose" between Yugoslavia and the Netherlands, a fact not disputed by either of the Parties and confirmed by the Court.

(2)That the "subject of the dispute" as described by the FRY in its Application is as follows:

> "The subject-matter of the dispute are acts of the Kingdom of the Netherlands by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group;"

(3) That according to the Court it could be seen both from the statement of "facts upon which the claim is based" and from the manner in which the "claims" themselves were formulated that the Application was directed, in essence, against "the bombing of the territory of the Federal Republic of Yugoslavia", to which the Court was asked to put an end.

(4) That, according to the Court, 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, *i.e.* well before 25 April 1999, and that each individual air attack could not have given rise to a separate subsequent dispute.

(5) That, according to the Court, "at this stage of the proceedings" Yugoslavia had not established that new disputes, distinct from the initial one had arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to the Netherlands.

4.4 In its Memorial the FRY now maintains that "since the Orders of the Court, dated 2 June 1999, the dispute aggravated and extended. It got new elements concerning failures of the Respondents to fulfil their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Negating the alleged humanitarian motives of the Respondents, the new elements are of crucial importance for the substance of the dispute". (Memorial, Introduction, para. 12; see also para. 3.2.11 *et seq.*) and that "Due to the fact that the dispute matured, through the new elements, the Applicant considers that the circumstances related to the jurisdiction of the Court have changed so that the Court has the jurisdiction to resolve the dispute." (Memorial, Introduction, para. 16).

4.5 The Netherlands disputes that by simply adding some "[disputed] new [disputed] elements", called "constituent elements of the dispute" by the Applicant (Memorial, para. 3.2.14), the original dispute which, according to the Court, arose *before* 25 April 1999, now suddenly has been transformed into one which has arisen *after* that date. The Netherlands submits that the "[disputed] new [disputed] elements" must be considered as a *continuation and extension* of the original dispute or a *reasonably to expect follow-up or consequence* be regarded as part of the aggravated and/or extended original dispute and not as a new and separate dispute. As will be set forth below (para. 7.3) the Netherlands submits, in the alternative, that the claim of the FRY relating to the "[disputed] new [disputed] elements" must be deemed inadmissible because it constitutes a new claim changing the subject of the dispute originally submitted to the Court in the Application.

4.6 According to the Netherlands, it is out of the question that the "new elements concerning failures of the Respondents to fulfil their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" now suddenly have created jurisdiction for the Court on the basis of Article 36, paragraph 2, of the Statute of the Court, on disputed matters where it did not have such jurisdiction, according to the Court, in its Order of 2 June 1999.

4.7 The Netherlands does not believe that by simply adding a new disputed element to the already existing ones and earmarking it as a constituent element of the dispute, matters in dispute which arose before the critical date of 25 April 1999 can be carried over that date, *a fortiori* not when the Court has already decided that such matters arose before the critical date.

4.8 By suggesting that the new element consisting in the alleged failure of the Netherlands to fulfil its obligations established by the SC Res. 1244 and by the 1948 Genocide Convention constitutes a constituent element of the dispute between the Netherlands and the FRY, which dispute could only arise when *all* its constituent elements have come into existence, the FRY in fact now seems to claim that all the disputed matters raised by the FRY in its Application of 29 April 1999 did not and could not amount to a dispute.

4.9 Such a claimed situation is, of course, wholly at variance with Yugoslavia's own Application stating the subject-matter of the dispute as quoted above (para. 4.3 of this Memorial), its own conduct during the proceedings before the Court on Yugoslavia's request for the indication of provisional measures and the conclusion of the Court in para. 28 of its Order of 2 June 1999 "that a "legal dispute" ... "arose" between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999".

4.10 The suggestion implied by the FRY in its Memorial that the disputed matters described in its Application of 29 April 1999 cannot or no longer be considered as a dispute between the FRY and the Netherlands is at variance with what the FRY states in its own Memorial. *E.g.*, in para. 3.2.11 of its Memorial it states: "After the Orders of the Court, dated 2 June 1999, the dispute *aggravated and extended.* It got new elements..." (emphasis added by Respondent), which clearly suggests that there was already question of a previously existing dispute; or in para. 3.2.12: "no doubt that these new disputed elements *related to the bombing of the territory of the Applicant are part and parcel of the dispute*" (emphasis added); or in para. 3.2.14: "the dispute *which started to arise before 25 April 1999*" (emphasis added); or in para. 3.2.16.: "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" (emphasis added).
It is clear that even according to the FRY's own statements the alleged "events or breaches after 10 June 1999" must be regarded as an aggravation and extension of an existing dispute which had already arisen before 25 April 1999 and not as a new and separate dispute.

4.11 In this connection the Netherlands also submits that the reference made by the FRY in its Memorial (para. 3.2.13) to the pronouncements of the Court in the case concerning *Right of Passage over Indian Territory, Merits, Judgment of 12 April 1960, I.C.J Reports 1960,* pp. 33, 34) on the question when a dispute arises is not convincing in the present case.

4.12 In that case the Court apparently based itself on the fact that the various elements of the dispute presented together by Portugal to the Court constituted constituent elements which must all have come into existence before the dispute could be deemed to have at all arisen. That is a completely different situation from the one at present before the Court. New elements which *aggravate* and *extend* an already existing dispute and which theoretically could give rise to a dispute in itself when occurring alone cannot be regarded as *constituent* elements of a dispute without which the dispute could not have arisen at all.

4.13 The Netherlands concludes that even taking into account the "[disputed] new [disputed] elements" added by the FRY to the dispute in its Memorial, the dispute must still be regarded as one which has arisen before 25 April 1999. Accordingly the Court must be deemed to have no jurisdiction in respect of the dispute on the basis of Article 36, paragraph 2, of the Statute of the Court.

## 5. ARTICLE IX OF THE GENOCIDE CONVENTION DOES NOT PROVIDE A BASIS FOR JURISDICTION OF THE COURT

5.1 In the Memorial of the FRY two separate submissions are presented, requesting the Court to adjudge and declare that the Netherlands is responsible for violations of its obligations under the 1948 Genocide Convention (Annex 5.1).
The first submission relates to the bombing of the territory of the FRY, the causing of enormous environmental damage and the use of depleted uranium. This submission is identical to the one, submitted by the FRY to the Court in its Request for the indication of Provisional Measures of 29 April 1999.
The second submission relates to a failure to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija and thereby to prevent genocide and other acts enumerated in Article III of the Genocide Convention. This submission did not form part of the Application filed by the FRY on 29 April 1999.

5.2 As has been set forth elsewhere in this Memorial (para. 7.3) this second submission must, according to the Netherlands, be either considered to be wholly inadmissible because it involves a new claim and submission changing the subject of the dispute originally submitted to the Court in the Application or else be considered as a continuation and extension of the original dispute or a reasonably to expect follow-up or consequence of the original dispute which should be regarded as part of the aggravated and/or extended original dispute (para. 4.5 *et seq.*) and hence part of a dispute which had already arisen before 25 April 1999 in respect of which the Court will not have jurisdiction on the basis of Article 36, paragraph 2, of the Statute.

5.3 In the following paragraphs, the Netherlands will further comment on the submissions of the FRY as to the responsibility of the Netherlands under the Genocide Convention. Before entering into this discussion, however, the Netherlands would like to stress in the first place, that the submissions of the FRY in this respect are largely based on unsubstantiated and often vaguely formulated "facts". As indicated before (para. 1.6) the Netherlands would like to reiterate that all these "facts" are considered merely as allegations, to which the Netherlands, unless explicitly indicated otherwise, does not agree. Furthermore, the Netherlands will in its comments in relation to the

allegations under the Genocide Convention make a distinction between the arguments as they are related to the Application of the FRY of 29 April 1999 and the arguments relating to the new elements arising after 10 June 1999.
Finally, the Netherlands would like to stress here, that from the mere fact that the Netherlands provides a reaction to the allegations from the FRY in relation to the Genocide Convention, it may not be concluded in itself that a dispute exists between the FRY and the Netherlands within the meaning of Article IX of the Genocide Convention. The reaction of the Netherlands here serves exclusively to show that the allegations from the FRY in this respect are totally unsubstantiated and that no such a dispute can reasonably be inferred from the Memorial of the FRY and the reaction thereto from the Netherlands.

5.4 The first submission of the FRY on responsibility under the Genocide Convention relates to the obligation "not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group" (Memorial, Introduction, para. 4).
This obligation is violated, so the argument goes, because of the fact that the Netherlands has taken part in, *inter alia*, the bombing of the territory of the FRY, the destruction of monuments, oil refineries, etc. and "in particular by causing enormous environmental damage and by using depleted uranium" (Memorial, Introduction, para. 5). The Memorial, however, fails to provide any evidence for this allegation. It merely sometimes refers to a genocidal intent, but never substantiates such allegations.

5.5 As to the bombing, the Memorial provides an extensive overview of "facts", which are allegedly the result of the bombing on Yugoslav territory. These facts, however, fail to provide even a beginning of proof of a genocidal intent from the parties involved in the conflict, let alone in particular the Netherlands. As to the causing of environmental damage, the Memorial tries to set up a genocidal intent theory in relation to the continued attacks on the Pancevo chemical industry plants, because these plants were installed with western participation and because the attacks were allegedly aimed at creating bad environmental conditions for the population. The Memorial, however, merely suggests this intent, without substantiating this allegation with any sort of evidence. And as to the use of depleted uranium shells, the Memorial again falls short of providing any genocidal intent theory. It merely states that depleted

uranium has been used, but fails to indicate when, where and by whom.

5.6 The second submission relating to the responsibilities of the Netherlands under the Genocide Convention relates to the "failure to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija". According to this submission, the Netherlands has acted in breach of its obligation "to prevent genocide and other acts enumerated in article III of the Genocide Convention". In the Memorial, mention is repeatedly made of the killing and wounding of Serbs and other non-Albanian groups "by Albanian terrorists". The facts are, however, regularly unclear and the Memorial merely states that such acts took place "in the area under control of KFOR".

5.7 In order to determine the responsibility of a State for violation of its obligations under the Genocide Convention, a number of criteria have to be fulfilled:
(a) an intent to destroy;
(b) a destruction in whole or in part of a group;
(c) a group that is protected under the Genocide Convention and which is the object of the genocide as such;
(d) genocidal acts, as defined in Article II, (a) - (e), of the 1948 Genocide Convention.

5.8 According to the Court in its Order of 2 June 1999, "the essential characteristic [of genocide] is the intended destruction of "a national, ethnical, racial or religious group" (para. 40). For the question of whether the Court has *prima facie* jurisdiction over a dispute, falling under Article IX of the Genocide Convention, the Netherlands will focus in particular on the elements enunciated under (a) and (c) above.

5.9 Ad (a): *an intent to destroy*
This intent to destroy relates to a "specific intent". This "specific intent" is as such recognised in the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). For example, according to both the *Akayesu* case and the *Kambanda* case, it is the "specific intent", which makes the crime of genocide a special crime, a unique crime, different from other crimes. (ICTR, *Akayesu* Judgment, Case no. ICTR-96-4-T, 2

September 1998, para. 498 and ICTR, *Kambanda* Judgment, Case no. ICTR-97-23-S, 4 September 1998, para. 16. Along similar lines: ICTR, *Jelisic* Judgment, ICTY Case no. IT-95-10, 14 December 1999, at para. 66 *et seq.* Cf. along similar lines the commentary of the International Law Commission on Article 17 on Genocide in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Crime of Genocide, para. 5, ILC Report 1996, UN Doc. A/51/10, pp. 85-88 (Annex 5.2).
The requirement of such a specific intent creates in practice a very high level of evidence (cf. ICTY, *Jelisic* Judgment, para. 78 *et seq.*). In this case-law, as well as in the Elements of Crimes, as elaborated in draft by the Preparatory Commission on the establishment of the International Criminal Court (ICC), it is recognised that the perpetrator not only committed specifically enumerated crimes, but that such crimes have been committed as part of a wider plan to destroy a group as such. (Cf. ICTY, *Jelisic* Judgment, para. 66 and the draft Elements of Crimes, UN Doc. PCNICC/2000/WGEC/RT.1, 24 March 2000) (Annex 5.3).

5.10 Ad (c): *a group that is protected under the Genocide Convention and which is the object of the genocide as such*
The Genocide Convention contains a limitative list of groups, protected under that convention. It relates to national, ethnical, racial or religious groups. The word "as such" means that the genocidal acts have to be aimed at persons, because of the fact that these persons belonged to such a group. This approach is confirmed by, *inter alia*, the ILC in its Commentary to Article 17 on Genocide in the Draft Code of Crimes of 1996, where it is stated that "the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group." (ILC, Draft Code of Crimes 1996, ILC Report 1996, UN Doc. A/51/10, p. 88).

5.11 Taking into account the criteria mentioned, the Netherlands makes the following observations on the Memorial of the FRY, in relation to the alleged violations of its obligations under the Genocide Convention. It would like to emphasize here again that, in the light of the special character of the crime of genocide, a very high level of evidence is required in order even to establish *prima facie* jurisdiction for the Court. The burden of proof lies entirely with the Applicant in the present case.

5.12 Ad (a): *an intent to destroy*

The Memorial of the FRY merely states that the Netherlands had a genocidal intent, but fails whatsoever to substantiate this allegation. In relation to the participation of the Netherlands in the bombing of the territory of the FRY, the Court in its Order of 2 June 1999, already indicated, that "the threat or use of force against a State cannot itself constitute an act of genocide". The Memorial of the FRY does not provide any additional information, compared to the information submitted to the Court in relation to its request for the indication of provisional measures. The same applies for the alleged responsibility of the Netherlands for the attacks on the Pancevo chemical industry plants and for the alleged use of depleted uranium bullets.

In relation to these allegations, the Netherlands would like to observe the following:

- the allegations in themselves are insufficiently substantiated in order to be considered as facts, relevant for the alleged dispute between the FRY and the Netherlands;
- the Memorial of the FRY does not provide any relevant piece of information which would relate the Netherlands to the allegations enunciated;
- even if these allegations would be correct, they do not amount to a beginning of proof that the Netherlands would have had a genocidal intent when participating in the military actions against the FRY;
- the allegations confuse the law of genocide with the law of armed conflict. The allegations relate to possible violations of the norms relating to collateral damage and to norms protecting specific objects, laid down in, *inter alia*, Additional Protocol I of 1977 to the Geneva Conventions of 1949 (UN Doc. A/32/144, 15 August 1977). It goes without saying that any alleged violations of such norms may not form the basis of jurisdiction for the Court under Article IX of the Genocide Convention;
- as far as the attacks on the Pancevo chemical industry plants are concerned, the Netherlands likes to observe that it is neither stated nor proven that the Netherlands has participated in such attacks. Furthermore, from those attacks, no genocidal intent can reasonably be inferred;
- as far as the alleged use of depleted uranium bullets is concerned, again it is neither stated nor proven that the Netherlands has made use of such bullets. The Netherlands would like to stress here, however, that the Netherlands does not make use of such ammunition and has not made use of that ammunition in any military action against the FRY (Annex 5.4). Furthermore, also here, from the possible use of such bullets, no

relationship can reasonably be established between such use and a genocidal intent. In relation to the participation of the Netherlands in the actions against the territory of the FRY, the Memorial fails therefore to provide even a beginning of proof of a genocidal intent.

5.13 As far as the second submission relating to the responsibilities of the Netherlands under the Genocide Convention is concerned - the "failure to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija" - the Memorial again merely states that a genocidal intent existed, but fails to substantiate this statement in whatever way. The Memorial mentions the killing and wounding of Serbs and other non-Albanian groups "by Albanian terrorists" and simply states that such acts took place "in the area under control of KFOR". The Memorial, here again, completely fails to substantiate these allegations and in particular fails to create a relationship between these allegations and a genocidal intent of the Netherlands or to create another possible ground for responsibility for the Netherlands under the Genocide Convention. The Netherlands cannot avoid the impression that this part of the submission is based on a totally erroneous interpretation of the obligations for the Netherlands following from Article I *et seq.* of the Genocide Convention.

5.14 Ad (c): *a group that is protected under the Genocide Convention and which is the object of the genocide as such*

The FRY argues that the acts were aimed at "a national group". At the same time, the Memorial of the FRY normally does not provide any indication as to which national group the alleged victims belonged. In a number of cases, it is even indicated that persons that were attacked did not belong to the national Yugoslav group, but belonged, for example, to Albanian refugees or refugees from the Republic of Croatia. Also here, the Netherlands would like to observe, that the allegations of the FRY, submitted in its Memorial, totally ignore the fundamental difference between obligations under international humanitarian law and obligations under the Genocide Convention. From the mere fact that FRY territory has been the object of military actions, one may obviously not assume any genocidal intent. The Court already made this observation in its Order of 2 June 1999 (para. 40). As becomes clear from its Memorial, the FRY has abstained from trying to provide any further information which

could form a basis for proof of such a genocidal intent.

5.15 Also in relation to the other criteria, applicable to the crime of genocide - a destruction in whole or in part of a group and specifically enumerated genocidal acts - the Netherlands needs to observe, that the FRY has failed to provide a substantiation to any of the allegations included in its Memorial. For example, no clear numbers of persons killed are submitted, no indications are given as to the part of the population which has been allegedly victimised by the actions, no indications are given as to the possible effects of, for example, the depleted uranium bullets (apart from the fact that the Netherlands has not even used such bullets) and no indications are given as to how specific military actions and actions by "Albanian terrorists" may be attributed to the Netherlands or KFOR.

5.16 By way of conclusion, the Netherlands would like to state the following. Already in its Order of 2 June 1999 on the Request for the Indication of Provisional Measures, para. 40, the Court observed that "it does not appear at the present stage of the proceedings that the bombings ... indeed entail the element of intent, towards a group as such" required by the Genocide Convention. And in para. 41 of its Order the Court continued:

> "Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by Yugoslavia, cannot, accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case;"

The Netherlands observes that the Memorial of the FRY presents a large amount of facts that are allegedly the result of the military actions against the FRY and facts that have allegedly been committed "under the authority of KFOR". The Memorial, however, does not provide any substantiation of a genocidal intent by either NATO or the Netherlands in its participation in those military actions or in the Netherlands contribution to KFOR. Neither does it provide any beginning of proof that such a genocidal intent existed with the Netherlands in relation to acts against Serbs and other non-Albanians in Kosovo and Metohija, undertaken by what is called "Albanian terrorists".

5.17 The Netherlands likes to recall para. 38 of the Order of the Court of 2 June 1999, in which the Court stated 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". More substantiated information is needed "to 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." Like in its Request for the Indication of Provisional Measures, the FRY, in its Memorial, clearly fails to meet this test. It simply alleges that a genocidal intent exists, but fails to substantiate such allegations. It also fails to provide a basis for the assessment of all other criteria mentioned and thereby fails to present an arguable case under Article IX of the Genocide Convention. The Memorial further seems to blur the distinction between international humanitarian law and the law of genocide. It is obvious that such an approach does not create jurisdiction for the Court under Article IX of the Genocide Convention.

The Netherlands must therefore conclude that Article IX of the Genocide Convention can not constitute a basis on which the jurisdiction of the Court could be founded.

## 6. THE 1931 TREATY OF JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION DOES NOT PROVIDE A BASIS FOR JURISDICTION OF THE COURT

6.1 In a letter of 12 May 1999 the Agent of the FRY submitted to the Court a "Supplement to the Application" of his Government, in which the FRY invoked as an additional basis for the jurisdiction of the Court, Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of the Netherlands and the Kingdom of Yugoslavia, which was signed at The Hague on 11 March 1931 and entered into force on 2 April 1932 (hereinafter referred to as "the 1931 Treaty") (Annex 6.1).

6.2 In its Order of 2 June 1999 (para. 44) the Court stated that it could not take into consideration this new title of jurisdiction, as the invocation at such a late state of the proceedings *seriously jeopardised the principle of procedural fairness and the sound administration of justice.* The Netherlands will now further elaborate and add to the arguments already put forward during the proceedings on the request of the FRY for the indication of provisional measures.

6.3 The FRY bases the alleged jurisdiction on Article 4 of the 1931 Treaty which reads as follows:

> Article 4
> Si, dans le cas d'un des litiges visés à l'article 2, les deux Parties, n'ont pas eu recours à la Commission permanente de conciliation ou si celle-ci n 'a pas réussi à concilier les Parties, le litige sera soumis d'un commun accord par voie de compromis soit à la Cour permanente de Justice internationale qui statuera dans les conditions et suivant la procédure prévues par son statut, soit à un Tribunal arbitral qui statuera dans les conditions et suivant la procédure prévues par la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux. A défaut d'accord entre les Parties sur le choix de la juridiction, sur les termes du compromis ou, en cas de procédure arbitrale, sur la désignation des arbitres, l'une ou l'autre d'entre elles, après un préavis d'un mois, aura la faculté de porter directement, par voie de requête, le litige devant la Cour permanente de Justice internationale.

Article 2 to which reference is made in Article 4 reads in part:

> Article 2
> Tous les litiges, de quelque nature qu'ils soient, ayant pour objet un droit allégué par une des Hautes Parties contractantes et contesté par l'autre, et qui n'auraient pu être réglés à l'amiable par les procédés diplomatiques ordinaires, seront soumis pour jugement soit à la Cour permanente de Justice internationale, soit à un Tribunal arbitral, ainsi qu'il est prévu ci-après. ...

6.4 According to the Netherlands, the 1931 Treaty cannot, however, provide an adequate basis for jurisdiction of the Court.
First, the 1931 Treaty must be deemed not to be in force after the succession of the FRY to the SFRY, so that the FRY cannot validly rely on the 1931 Treaty as a ground for jurisdiction.
Moreover, the FRY cannot claim jurisdiction on the basis of the 1931 Treaty, as according to Article 37 of the Statute of the Court, *a treaty or convention in force* referring to the Permanent Court of International Justice may only be deemed to refer to the International Court of Justice *as between parties to the present Statute.*
Further, even if the 1931 Treaty could be invoked by the FRY, the FRY should have observed the procedure explicitly described in Article 4 of that treaty, before bringing a case before the Court. We will now further elaborate on these submissions.

6.5 By invoking the 1931 Treaty as a basis for jurisdiction, the FRY implies that the 1931 Treaty, concluded between the Kingdom of the Netherlands and the Kingdom of Yugoslavia and subsequently in force between the Kingdom of the Netherlands and the SFRY, is still in force between the Kingdom of the Netherlands and the FRY.

6.6 The Netherlands does not recognise the FRY as the continuation of the SFRY, so that there can be no question of simple continuity of treaties between the FRY and the Netherlands. Neither can the FRY claim *ipso jure* continuity as a successor State of the SFRY.

6.7 The Netherlands is not a party to the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, in force only as of 6 November 1996 (hereinafter referred to as "the Vienna Convention") (Annex 6.2), so that Article 34,

paragraph 1(a), of this convention does not apply between the Netherlands and the FRY. Nor can, in the view of the Netherlands, Article 34, paragraph 1(a), be deemed to incorporate a generally accepted rule or principle of general international law. Article 34, paragraph 1(a), of the convention reads in part:

> "When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
> any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;"

6.8 The Vienna Convention makes a distinction between treaty continuity with regard to, on the one hand, State succession of "newly independent States" (States emerging from former colonies) and, on the other hand, State succession of other States. At the date of conclusion of the Vienna Convention, the overwhelming majority of cases of State succession concerned "newly independent States". Article 16 of the Vienna Convention, based on State practice among "newly independent States", formulates the general rule with regard to State succession for newly independent States. It reads:

> "A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of succession of States the Treaty was in force in respect of the territory to which the succession of States relates."

This principle is generally referred to as the "clean slate rule".

6.9 Article 34 (draft Article 33) refers to cases of State succession other than those concerning "newly independent States". In its Commentary on the Draft Articles on Succession of States in Respect to Treaties (ILC Commentary on the Draft Articles on Succession of States in Respect of Treaties, adopted by the International Law Commission at its 26th Session, Doc. A/Conf.80/4, hereinafter referred to as: "ILC Commentary") (Annex 6.3), the International Law Commission discussed fourteen cases of State succession, other than those concerning "newly independent States". Nine cases concern State succession where the predecessor State continued to exist (Belgium/Netherlands; Cuba/Spain; Panama/Colombia; Finland/Russia; Czechoslovakia/Austro-Hungarian Empire; Poland/Austro-Hungarian Empire; Irish

Free State/United Kingdom; Pakistan/India; Singapore/Malaysia). In all these cases, the clean slate was applied with regard to bilateral treaties concluded by the predecessor State. The five other cases relate primarily to the dissolution of unions (Great Colombia; Norway/Sweden; Austria/Hungary; Denmark/Iceland; United Arab Republic). Within this category, the rule of *ipso jure* continuity was, for instance, not applied by the United Kingdom in the case of the separation of Norway and Sweden (ILC Commentary p. 89). The United Kingdom declared that:

> "the separation undoubtedly afforded [its Government] the right to examine, *de novo*, the treaty engagements by which Great Britain was bound to the Union".

6.10 In the case of the termination of the Austro-Hungarian Empire, Austria, as one of the seceding parts, was not prepared to accept treaty continuity unless it was obliged to do so on the basis of peace treaties (ILC Commentary, p. 88).

6.11 The Netherlands submits that the practice preceding the conclusion of the Vienna Convention does not support the view that Article 34, paragraph 1(a), of the Vienna Convention contains a generally accepted rule or principle of general international law. It submits that Article 34, paragraph 1(a), was a matter of progressive development of international law, rather than of codification, and that the "clean slate rule", as embodied in Article 15 of the Vienna Convention (see para. 6.8) contains the generally accepted rule or principle of general international law.

6.12 While not implying that the FRY is a "newly independent State" as defined in the Vienna Convention, the findings and conclusions of the International Law Commission concerning "newly independent States" are, in the opinion of the Netherlands, relevant.

6.13 With respect to "newly independent States", the Vienna Convention distinguishes between the continuation of multilateral and bilateral treaties. Whereas a successor State is entitled to consider itself a party to its predecessor's multilateral treaties (Article 16 of the Vienna Convention), this is not the case in respect of bilateral treaties. Article 24, paragraph 1, embodies the rule or principle with respect to the continuation of bilateral treaties. It reads:

" A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which the succession of States relates, is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:
(a) They expressly so agree; or
(b) By reason of their conduct they are to be considered as having so agreed."

6.14 In its comments on Article 24 (draft Article 23), the International Law Commission stated that:

"The evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the newly independent State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the newly independent State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the newly independent State to establish itself as a party or a contracting State, *this does not appear to be so in the case of bilateral treaties.*(emphasis by Respondent)

The reasons are twofold. First, the personal equation – the identity of the other contracting party – although an element also in multilateral treaties, necessarily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral Treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the newly independent State and its predecessor,* as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue in force bilaterally as between it and the other party to the treaty. But should the treaty become applicable as between that other party and the newly independent State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. (p.65)

The Commission is therefore aware that State practice shows a tendency towards continuity in the case of certain categories of treaties. It does not believe, however, that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the newly independent State and the other Party to its predecessor's treaty). At any rate, practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after

> independence *regardless of the wishes of the other party to the treaty.* This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declarations by newly independent States examined in the commentary to Article 9 have unmistakably been based on the assumption that, as a general rule, *the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty.* (emphasis added by Respondent) The Commission is aware that those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions *they clearly contemplate bilateral treaties as continuing in force only by mutual consent."*(p.67) (emphasis added by Respondent)

6.15 On the bases of what has been stated in paras. 6.8 to 6.14 above, the Netherlands repeats that, at the time of the conclusion of the Vienna Treaty, the "clean slate rule" was the generally accepted rule or principle of general international law in respect of bilateral treaties whether involving "newly independent States" or other successor States (except in cases of treaties establishing boundary or other territorial regimes) and that henceforth the consent of the other party was required for the continuation of a bilateral treaty. State practice following the conclusion of the Vienna Convention gives further support to this view, as will be elaborated upon in the following paragraphs.

6.16.In its Memorial in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina* v. *Yugoslavia, Preliminary Objections, June 1995, (*p. 117 *et seq.)* (Annex 6.4), the FRY sets forth extensively that the "clean slate principle" should be applied to the Genocide Convention with the object to prove that Bosnia and Herzegovina was not a party to that convention. The argumentation of the FRY to that effect reads - for the relevant part - as follows:

> "B.1.3.1 - As the 1978 Vienna Convention on the Succession of States in Respect of Treaties has not entered into force, the succession of States to international treaties is regulated by the customary rules of international law.
>
> B.1.3.2. - As only a few states have ratified the 1978 Vienna Convention ..., the treaty rules set forth in the Convention have not been transformed into rules of customary law. ...
>
> B.1.4. - Relevant rules of customary international law
>
> B.1.4. Para. 4.2.1.44 of the Memorial [of Bosnia and Herzegovina] (p. 151)

says: "These special features strengthen the general principle exposed in Article 34 of the 1978 Convention ... which, as seen above, purely codifies the contemporary practice of States. According to this provision:

"When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;".

In the preceding paragraphs of the Memorial (pp. 149-151) the Applicant has mentioned some of the opinions of the authors which do not corroborate the Applicants own claim. In any case, such opinions are held by a minority of international legal scholars... The Applicant has not referred to the practice codified by this Article. And it could not do so, because the case in point, i.e. Art. 34, indicates to the contrary.

Article 34 of the 1978 Vienna Convention ... is not applicable as rule of customary international law. It has been introduced in the Convention not as the result of codification but as a result of progressive development. (Statement by the Swiss representative Ritter at the United Nations Conference on Succession of States in respect of Treaties, Vienna 31 July - 23 August, 1978, pp. 52-55; Statement of the Spanish representative at the Vienna Conference, *ibid.* p.59; Statement of the U.K. representative Sir Ian Sinclair, *ibid.* pp. 59, 60; Statement by Turkish representative Dogan, *ibid.* p. 66, Annex pp. 920-926).
...

B.1.4.3. - The new states established in the territory of the former USSR - Azerbaijan, Estonia, Georgia, Armenia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Uzbekistan - have not acted in line with the rule set out in Article 34 of the 1978 Vienna Convention...

B.1.4.6. - The new states which were created in the territory of the SFRY did not act in line with the rule set forth in Article 34 of the 1978 Vienna Convention... They acted in accordance with the "clean slate" rule and chose the treaties of the SFRY which they wished to enter into. ...

B.1.4.7 - ...Clearly, in view of the above considerations, the notes on the succession by the Applicant State were no formal proof of the continuity of the treaties, but an actual choice made to enter into treaties, which proves that the Applicant State considered itself free from all treaties to which the SFRY had been a party, i.e. that like all other new States concerned it proceeded from the "clean slate" rule. ...

B.1.4.10 - The "clean slate" rule has been and remains in force as a rule of customary international law for new states. The new States freely choose which treaties of the predecessor state they will enter into, with the exception, of course, of the treaties pertaining to borders and territorial regimes."

6.17 The Netherlands can confirm from its own practice, that several States, previously forming part of the USSR, have not acted in line with Article 34, paragraph 1(a), of the Vienna Convention (Annex 6.5).

6.18 It should be noted that the FRY - only four years ago - stated that the "clean slate rule" should apply to the *multilateral* Genocide Convention. It is clear that in the view of the FRY a *bilateral* Treaty in the nature of the 1931 Treaty would certainly not automatically remain in force for a successor State.

6.19 It is Netherlands practice to reserve the right to negotiate the continuity of bilateral treaties with successor States. Such negotiations may eventually result in an Exchange of Notes between the Government of the Kingdom of the Netherlands and the Government of the successor State, which establishes the agreement between the two States on those treaties concluded with the predecessor State which will or will not continue to be in force (see *e.g.* the Exchange of Notes between the Ministry of Foreign Affairs of the Kingdom of the Netherlands and the Embassy of the Republic of Croatia ( Annex 6.6).

6.20 In this connection it should be noted that this practice is also accepted and followed by the FRY. In fact, the FRY - after the Netherlands recognized it as an independent, sovereign State and as one of the successor States to the former SFRY - proposed consultations on treaty continuation by Note of 4 July 1996. This invitation was extended notwithstanding the claim of the FRY that it is the *continuation* of the SFRY and not one of its successor States (Annex 6.7). The Netherlands accepted the invitation by Note of 15 July 1996, indicating that this claim of the FRY was not shared (Annex 6.8). On 24 July 1996 consultations took place between legal experts of the Ministries of Foreign Affairs of both countries, which will be further elaborated upon in para. 6.22.

6.21 In its Memorial (para. 3.3.7) the FRY stated, apparently referring to the observations made by the Netherlands during the hearings before the Court on 12 May 1999, that:

> "The Netherlands observed ... that in contrast with a number of other bilateral treaties concluded with the former Socialist Federal Republic of Yugoslavia, no provisional mutual agreement has been reached on the continued validity of the 1931 Treaty."

This quotation creates a false impression in that it suggests that already an agreement had been reached between the Government of the Netherlands and the Government of the FRY to the effect that certain treaties in force between the Netherlands and the SFRY would continue to apply in the relation between the Netherlands and the FRY.

6.22 The Note referred to in the Memorial of the Applicant (para. 3.3.10) and annexed thereto (No. 178, pp. 528-531) is merely a report of the consultations, which took place on 24 July 1996 between legal experts of the Ministries of Foreign Affairs of the Netherlands and the FRY. During these consultations the Yugoslav delegation assented to the continuity of seven bilateral treaties. It was furthermore concluded that the Yugoslav delegation would contact the authorities concerned in Belgrade regarding another six bilateral treaties, among which the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of the Netherlands and the Kingdom of Yugoslavia. This Note has remained unanswered. As already noted, it did not contain an agreement between the Government of the Kingdom of the Netherlands and the Government of the FRY to the extent that the treaties represented therein would constitute treaties between the Kingdom of the Netherlands and the FRY. Neither can the sudden and unexpected invocation by the FRY of the 1931 Treaty at the end of the proceedings on its request for provisional measures in May 1999 mean, that there was agreement between the Government of the Netherlands and the Government of the FRY that the 1931 Treaty had remained in force in the bilateral relation, as the FRY cannot unilaterally decide on its remaining in force. It should moreover be kept in mind that the 1931 Treaty constituted only one of a whole set of agreements on the continued application of which the legal experts of the Netherlands and the FRY were still in discussion and that as yet no final agreement has been reached between the Government of the Netherlands and the Government of the Federal Republic of Yugoslavia on which bilateral agreements should remain in force. There can be no question of singling out certain agreements unilaterally and assuming their remaining in force without a final agreement between the two Governments on the status of all bilateral agreements.

6.23 The Netherlands refers in this respect to the fundamental principle often recalled by the Court (see, *inter alia,* the statement of the Court quoted hereafter (this Memorial, para. 7.2.15)), that it cannot decide a dispute between States without the consent of those States to its jurisdiction.
In the present case, the Netherlands maintains that the continuation of the 1931 Treaty after the disappearance of the SFRY required the consent of both the Netherlands and the FRY. Since no agreement has been reached to that effect, the 1931 Treaty does not provide a basis for jurisdiction of the Court.

6.24 As already stated in para. 6.4, the FRY cannot rely on Article 37 of the Statute in respect of a treaty which is not in force between it and the Netherlands. Moreover, as has already been set forth extensively above (this Memorial, para. 3.1 *et seq.* ), the FRY is not a party to the Statute. The Netherlands henceforth submits that two conditions explicitly stated in Article 37 of the Statute, *i.e.* that the dispute should be *between States which are parties to the Statute* and should relate to *a treaty or convention in force* are not fulfilled, so that the FRY cannot claim the application of Article 37 of the Statute to the 1931 Treaty. Already on those grounds it can be said that the 1931 Treaty does not provide a basis for jurisdiction of the Court.

6.25 Even if the 1931 Treaty could be invoked by the FRY, the FRY should have observed the procedure explicitly prescribed in Article 4 of that treaty, before bringing a case unilaterally before the Court. On 6 August 1921 the Netherlands submitted a declaration accepting compulsory jurisdiction under Article 36 of the Statute of the Permanent Court of International Justice, which applied only to disputes for which the parties had not agreed to have recourse to some other method of pacific settlement (Annex 6.9). The Kingdom of Yugoslavia submitted a similar declaration on 16 May 1930 (Annex 6.10). When concluding the 1931 Treaty, it was clearly the intention of the two States, that the 1931 Treaty would prevail. The difference between the jurisdiction based on the two declarations pursuant to Article 36 of the Statute of the Permanent Court of International Justice on the one hand, and the 1931 Treaty on the other hand, lies in the fact that in the 1931 Treaty the right to take a matter to the Court can only be exercised if certain conditions have been fulfilled.

6.26 Article 2 of the 1931 Treaty states that *"Tous les litiges…. seront soumis pour jugement soit à la Cour permanente de Justice internationale, soit à un Tribunal arbitral, ainsi qu'il est prévu ci-après".* Subsequently, Article 3 refers to the (optional) conciliation procedure. Article 4 states that, if this procedure has not been used or has failed.

> "[L]e litige sera soumis *d'un commun accord* par voie de compromis *soit à la Cour permanente de Justice internationale…., soit à un Tribunal arbitral… A défaut d'accord* entre les Parties sur le choix de la juridiction,…l'une ou l'autre d'entre elles, *après un préavis d'un mois* aura la faculté de porter directement, par voie de requête, le litige devant la Court permanente de Justice internationale." (emphasis added by Respondent)

The Netherlands claims that the procedure of the 1931 Treaty as summarised above formed an essential basis for the consent of the Netherlands to be bound by the 1931 Treaty and that the FRY should not be allowed to simply ignore this procedure, as it did in the present case.

6.27 In the *Case concerning the Barcelona Traction, Light and Power Company, Limited, New Application: 1962, Belgium* v. *Spain, Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964* p.38 (Annex 6.11), the Court, addressed its jurisdiction *qua* forum as a result of the disappearance of the Permanent Court of International Justice with regard to the *Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain*, signed on 19 July 1927. This treaty contains in Article 2 and Article 17, paragraph 1, similar rights and obligations as Articles 2 and 4 of the 1931 Treaty. The Court concludes that:

> "[the Permanent Court of International Justice] *was never the substantive "object" of the clause. The substantive object was compulsory adjudication*, and the Permanent Court was merely a means for achieving that object." (emphasis added by Respondent)

6.28 In the present case it should likewise be concluded, that the object of the 1931 Treaty was compulsory adjudication *as such*, and not compulsory adjudication by the Permanent Court of International Justice or its successor. In other words, the possible adjudication by an arbitral tribunal forms part of the object and purpose of the 1931 Treaty.

The fact that the FRY did not endeavour to reach *"un commun accord par voie de compromis"* should therefore be considered as a material breach of the 1931 Treaty.

6.29 The FRY has put its case before the Court without offering the Netherlands the opportunity to choose, by common agreement (*par voie de compromis*) between a case before the Court or before an arbitral tribunal, as Article 2 in conjunction with Article 4 of the 1931 Treaty explicitly requires. Moreover, the FRY has not observed the period of one month's notice before bringing its case unilaterally before the Court.

6.30 The Netherlands furthermore stresses that the FRY, after invoking the 1931 Treaty as a basis of jurisdiction on 12 May 1999, has not attempted to remedy its breach of the 1931 Treaty, and has in its Memorial not in any way addressed the fact that it did not observe the 1931 Treaty.

6.31 The Netherlands submits that having regard to the requirement of consultations on the choice of jurisdiction provided for in the 1931 Treaty, the equivalence of the adjudication by a Court or by an arbitral tribunal, and the one month notice requirement - conditions in the 1931 Treaty essential for the consent of the Netherlands to be bound by the 1931 Treaty - it is unacceptable that the FRY directly brought the present case before the International Court of Justice. Consequently, even if the Court would upheld that the 1931 Treaty is in force and that Article 37 of the Statute of the Court applies between the Netherlands and the FRY, it should in the view of the Netherlands decline jurisdiction on the ground that essential procedural requirements of the 1931 Treaty have not been observed by the FRY.

## 7. THE CLAIMS PRESENTED BY THE FRY ARE INADMISSIBLE

In the previous paragraphs the Netherlands has submitted that the Court has no jurisdiction in the present case. Should the Court, however, come to the conclusion that it has jurisdiction, the Netherlands submits that the claims presented by the FRY are inadmissible on one or more of the following three grounds.

First, the claims of the FRY are inadmissible because the Applicant has not produced even a beginning of evidence that the alleged breaches have been committed by *the Netherlands*.

Second, the alleged breaches formed part of a collective action. A judgment in respect of the Netherlands necessarily involves a decision in a dispute between the FRY and other entities or States not before the Court and/or would in the absence of such entities or States not allow the Court to arrive at a warranted judgment.

Third, in its Memorial of 5 January 2000, the FRY has introduced a new claim that did not appear in its original Application as presented to the Court on 29 April 1999 and would change the subject of the dispute.

These three grounds will now be discussed more extensively below.

### 7.1 The claims of the FRY are inadmissible because the Applicant has not produced even a beginning of evidence that the alleged breaches have been committed by *the Netherlands*

7.1.1 According to Article 38, paragraph 2, of the Court's Rules an application "shall ... specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". According to Article 49, paragraph 1, of the Rules "a Memorial shall contain a statement of the relevant facts, a statement of law, and submissions". It is obvious that the *rationale* of these requirements is two-fold. Only if these requirements are fulfilled it is possible for the Respondent to defend itself adequately and for the Court to prepare its judgment. As has been observed by Rosenne, one of the three fundamental principles embodied in the Statute and the practice of the Court is the following: "before the Court takes any decision, principal or incidental, it is in possession of what it regards as sufficient information as to the positions of the parties" (S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. III, p. 1080).

7.1.2 The Netherlands submits that although the largest and most detailed part of the FRY Memorial (paras. 1.1 – 1.10.3) contains alleged facts, this part lacks one indispensable element. Nowhere the Applicant gives any specification as to where, when, how and how long any acts *specifically undertaken by the Netherlands* have taken place. Consequently, the Netherlands is prevented from knowing what is the gist of the FRY complaint *against the Netherlands*, and the Court is prevented from possessing sufficient information as to the positions of the Parties.

7.1.3 This fundamental lack of specification concerns both the original elements of the complaint by the FRY (the bombing of the territory of the FRY) and the new elements related to the situation after 10 June 1999 (when KFOR was performing its mission in Kosovo). As to the original elements of the complaint by the FRY (the bombing of the territory of the FRY), the FRY Memorial presents an extensive chronology of persons killed or injured and damage caused by the bombardments. But nowhere in this extensive chronology *the Netherlands* is said to have committed specific facts.

7.1.4 The FRY Memorial has a similar fundamental lack of specification with regard to the situation after 10 June 1999 (when KFOR was performing its mission in Kosovo). In Part One of its Memorial dealing with "Facts" covering some 300 pages, the FRY hardly specifies any alleged breaches of the responsibilities of the international security presence. It is only in para. 1.5 of its Memorial covering some 80 pages entitled "Facts related to killings, wounding and ethnic cleansing of Serbs and other non-Albanian Groups" that mention is made of two instances whereby 4 Serbs were allegedly killed by KFOR troops (3 of whom by a Russian unit) and of some 13 instances in which KFOR troops are explicitly or implicitly alleged to have been negligent in providing adequate protection to persons and property of Serbs and other non-Albanian groups. The FRY, however, has not provided any evidence that in these exceptional instances NATO has violated its obligations. Moreover, nowhere does the FRY specifically refer to *the Netherlands* in this context and claim that *the Netherlands* has violated its obligations.

7.1.5 The FRY has sought to remedy this defect only at the end of its Memorial. At one place (para. 2.8) it is simply asserted that acts of NATO and acts of KFOR "are

imputable to the Respondents". The Netherlands submits that this cannot compensate for the absence of the fundamental lack of specification in the remainder of the Memorial. The FRY essentially submits that since no decision by a NATO organ can be taken without the consent of each member State, NATO acts are under their political and military guidance and control and therefore imputable to each and every member State. The Netherlands submits that this view is erroneous. As will be elaborated in para. 7.2, the actions complained of by the FRY are or have been collective actions. The "imputability thesis" of the FRY wrongly ignores the collective nature of NATO decision-making and the organic nature of NATO decisions, involving both Operation Allied Force and KFOR. NATO and KFOR acts are not simply directly imputable to one or some of the States involved in their preparation and adoption. This is what is presently claimed by the FRY after it decided not to initiate proceedings before the Court against all NATO members and against all States that participate in KFOR, and following the Order of the Court of 2 June 1999 in which the Court removed the Applications against Spain and the United States from its General List.

7.1.6 The Netherlands therefore submits that the claims of the FRY are inadmissible. Although the alleged facts are presented in considerable detail by the FRY, they lack specificity on a fundamental point: it is not indicated which acts are claimed by the FRY to have been undertaken by *the Netherlands* in violation of its international legal obligations.

## 7.2 The claims of the FRY are inadmissible as a judgment in respect of the Netherlands necessarily involves a decision in a dispute between the FRY and other entities or States not before the Court and/or would in the absence of such entities or States not allow the Court to arrive at a warranted judgment

7.2.1 The second ground on which the claims of the FRY must be deemed inadmissible is related to the first. In a way it is the mirror image of the fundamental lack of specificity as elaborated above. The main reason why the claims are not specified is the fact that the alleged breaches formed part of a collective action. Consequently a judgment in respect of the Netherlands necessarily involves a decision in a dispute between the FRY and other entities or States not before the Court and/or would in the absence of such entities or States not allow the Court to arrive at a warranted judgment. This will be elaborated below in some more detail. First (paras.

7.2.2 – 7.2.11) it will be demonstrated to what extent the alleged acts have been collective acts. Next the implications must be established of this vital element of the present case before the Court (paras. 7.2.12 – 7.2.26).

7.2.2 The acts by the Netherlands complained of by the FRY in the present proceedings before the Court do by no means constitute an individual, independent action by the Netherlands, but formed part of an action by an international entity, *viz.* NATO or, of a *joint* and *collective* action by a group of States, *viz.* member States of NATO or member States of NATO and 20 other States in the framework of KFOR, the international security presence in Kosovo authorized by SC Res. 1244 (Annex 7.1).

7.2.3 In its Order of 2 June 1999 the Court did not examine the collective nature of the acts complained of by the FRY. At that stage of the proceedings, dealing with the request by the FRY for the indication of provisional measures, it was not yet necessary to examine this question. As mentioned in the Order, on such a request the Court need not

> "finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established" (*Yugoslavia* v. *Netherlands*, Order of 2 June 1999, para. 21).

The Court concluded that it manifestly lacked jurisdiction to entertain the FRY Applications against Spain and the United States and removed these Applications from its General List. In the proceedings against the other 8 Respondents the Court concluded that it had no *prima facie* jurisdiction to entertain Yugoslavia's Application. It recalled that it cannot decide a dispute between States without the consent of those States to its jurisdiction. For the first time in its history, the Court refused to indicate provisional measures because it had no *prima facie* jurisdiction.

7.2.4 However, at the present stage of the proceedings the Court *must* "finally satisfy itself that it has jurisdiction on the merits of the case". The collective nature of the acts complained of by the FRY is one of the central characteristics of this case. The Court must therefore pay due regard to this central characteristic and to its implications for the admissibility of the present case. Are the relevant NATO Activation Orders and other decisions concerning Operation Allied Force and concerning KFOR

decisions emanating from NATO? Are these decisions taken by all NATO member States in some coordinated way? Or are they decisions taken in some coordinated way by States that are NATO member States participating in Operation Allied Force and by States participating in KFOR?

7.2.5 In practice Operation Allied Force was considered to be a NATO operation. As indicated below, references to the relevant NATO Activation Orders and to other decisions concerning Operation Allied Force as well as references to this dispute, even by the FRY itself, generally mention NATO as the author of these decisions and NATO as one of the parties to the dispute.

For example, in the meetings of the UN Security Council during the period in which Operation Allied Force was carried out, reference was usually made to this Operation as a NATO Operation. On 24 and 26 March 1999, the Security Council met at the request of the Russian Federation to discuss the "military action of NATO" (UN Doc. S/1999/320 (Annex 7.2)). The draft resolution tabled by Belarus, India and the Russian Federation (which was rejected by the Council) referred to "the use of force by NATO" (UN Doc. S/1999/328 (Annex 7.3)). During the Council meetings of 24 and 26 March 1999, the references to the military action undertaken usually were to "NATO's decision to use force", "NATO strikes", "NATO's objectives", etc. (UN Docs. S/PV. 3988 (Annex 7.4) and S/PV. 3989 (Annex 7.5)), and not to action by individual States. During subsequent meetings of the Security Council as well, the military action was usually referred to as "NATO action", "NATO air strikes", etc. (UN Docs. S/PV. 4000 (Annex 7.6), S/PV. 4003 (Annex 7.7), S/PV. 4011 (Annex 7.8)). The observation by the FRY in its Memorial (para. 1.9.1.14) that during the Security Council meetings of 24 and 26 March 1999, "the Respondents considered the acts of NATO as their acts" is simply wrong, as appears even from a cursory reading of the reports of these meetings.

7.2.6 Also the FRY itself has recognized the fact that the acts mentioned are collective acts by NATO. The collective nature of Operation Allied Force first of all appears from the fact that, "due to *substantial* and technical reasons, the Applicant has prepared an identical text of the Memorial in all eight pending cases. The *substance* of dispute in all eight cases is identical" (Memorial, Introduction, para. 11; emphasis added by Respondent).

Furthermore, as far as Part One of the FRY Memorial ("Facts") is concerned, references are almost exclusively to "NATO aviation", "NATO bombs", "NATO air strikes", etc., not to action undertaken by the Netherlands or by other Respondents. In addition, as far as the FRY bases its allegations on external sources of information, use is made almost exclusively of NATO Press Conferences (*e.g.* in its Memorial, paras. 1.2.7 and 1.4).

7.2.7 A similar conclusion must be drawn for KFOR. KFOR is a collective action, not an action by 39 individual States. In practice there is no disagreement whatsoever that KFOR is a NATO operation, authorized by the UN Security Council, in which also a number of States participate that are not members of NATO. For example, the FRY Memorial repeatedly mentions that KFOR has been created by NATO and is under NATO's command and control (Memorial, paras. 1.9.2.7 and 2.8.1.2.1).

7.2.8 In addition, the fact that the Netherlands acts are not to be seen as an individual, independent action was clearly also recognized by the Applicant in its Application (p.10; see also Memorial, Introduction, para. 3), where it states that the claims submitted by it to the Court are based on the following facts:

> "The Government of the Kingdom of the Netherlands, *together with the Governments of other Member States of NATO, took part* in the acts of use of force against the Federal Republic of Yugoslavia ... The Government of the Kingdom of the Netherlands *is taking part* in the training, arming, financing, equipping and supplying the so-called "Kosovo Liberation Army"." (emphasis added by Respondent)

7.2.9 Moreover in the submissions submitted to the Court in its Application (pp. 8, 10; see also Memorial, Introduction, para. 5) the FRY begins each of its submissions with the phrase "- *by taking part in* ..., the Kingdom of the Netherlands has acted against the Federal Republic of Yugoslavia in breach of its obligation..." (emphasis added by Respondent). The fact that in the submissions submitted to the Court in its Memorial (Part Four) this phrase is no longer repeated does not alter the nature of the acts allegedly committed by the Netherlands.

7.2.10 If the actions complained of by the FRY are analyzed in more detail, it is clear that these qualifications in practice of Operation Allied Force and KFOR are not

mistaken. These operations have rightly been considered as collective actions. All core decisions concerning Operation Allied Force were taken by NATO. In 1998 the NATO Council decided that different options for a possible military Kosovo operation had to be developed. Of these options the NATO Council chose an air campaign consisting of five phases (phases 0, 1, 2, 3 and 4) in which the intensity and geographical scope of the military action would be gradually increased. This choice was made to put a *crescendo* of pressure on the FRY to accept five NATO conditions for a political solution of the Kosovo crisis. All decisions to move to the next phase of the air campaign were taken by the NATO Council.
On 27 March 1999, at the proposal of the Supreme Allied Commander Europe (SACEUR) and supported by NATO's Secretary-General, the NATO Council decided to move to "phase 2" of the operation. On 30 March 1999 the NATO Council decided not to move to "phase 3" (in which the military authorities would have the exclusive power to carry out the operation), but to expand this phase into "phase 2-plus". In this "phase 2-plus" the implementation was not fully left to the military authorities; the decision to attack certain targets of "phase 3" was delegated to NATO's Secretary-General.
A distinction must be made between the main political decisions and the military implementation of the operation. The main political decisions were all taken by the NATO Council. Implementation covered the decisions where, when and how targets were attacked and was left to the NATO military authorities. In the implementation of the operation, command and control over the participating Netherlands units was transferred to NATO commanders (Annex 7.9).

7.2.11 As far as KFOR is concerned, the authorization for this operation was given in SC Res. 1244. The Security Council has authorized "Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of Annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below" (SC Res. 1244, para. 7). Point 4 of Annex 2 to SC Res. 1244 provides the following:

> "The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."

The international security presence was only authorized by the Security Council. The implementation was done by NATO. On 9 June 1999 the North Atlantic Council (NAC) - NATO's main policy-making organ - agreed to "Operation JOINT GUARDIAN". The operation plan for "JOINT GUARDIAN" contains the basic rules for the functioning of KFOR, including rules on command and control. According to this plan, it is also the NAC that will decide when to authorize the redeployment of KFOR forces. KFOR is a NATO-led international force. It is under the full political direction of the NAC, and NATO's Supreme Allied Commander Europe (SACEUR) has overall authority and operational command or control of all designated forces, including forces of non NATO member States. Therefore, operation "JOINT GUARDIAN" is clearly a collective action, firmly anchored in NATO.

7.2.12 Now it has been analyzed in greater detail that the relevant actions have been collective actions, it is necessary to look at the legal implication of this for the present case.

7.2.13 The fact that the alleged acts of the Netherlands formed part of the action of an international organization, *viz.* NATO or, of a *joint* and *collective* action of a group of states, *viz.* member States of NATO or member States of NATO together with 20 other States in the framework of KFOR will necessarily, unavoidably and logically involve a determination by the Court of the alleged unlawfulness of the action of an international organization or of States which are not present before the Court.

7.2.14 It is clear that international organizations cannot be a party in contentious cases before the Court (Article 35, paragraph 1, of the Statute) and that the Court does not have jurisdiction and may not, even if it could possibly have jurisdiction in respect of such organizations, exercise jurisdiction against them without their consent.
In contentious cases not involving international organizations the situation is not different with regard to States - in respect of which the Court may in principle have jurisdiction - when the States concerned have not given their consent to that jurisdiction.

7.2.15 The following statement of the Court in the case concerning *East Timor, Judgment, (Portugal* v. *Australia), I.C.J. Reports 1995*, p.15, para. 26, may be quoted here:

> " 26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984,* p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 431, para. 88; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 579,* para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990,* pp. 114-116, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp. 259-262, paras. 50-55)."

7.2.16 According to the Court the principle even applies with regard to States not a party to cases before the Court. *E.g.*, in its Judgment of 15 June 1954 in the case concerning the *Monetary Gold Removed from Rome in 1943, (Italy* v. *France, United Kingdom, United States of America) (Preliminary Question), I.C.J. Reports 1954*, the Court, noting that only France, Italy, the United Kingdom and the United States were parties to the proceedings, found that:

> "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." (*Ibid.*, p. 32.)

Noting that Albania had chosen not to intervene, the Court stated:

> "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." (*Ibid.*)

7.2.17 It is clear that in the present case which concerns the Netherlands participation in an action of an international organization or a joint or collective action of a group of

States in which, according to the FRY, "the substance of the dispute in all eight cases is identical" and "all Respondents are in the same interest" (Memorial, Introduction, para. 11), the legal interests of all States participating in that action "would not only be affected by a decision [of the Court], *but would form the very subject-matter of the decision"* (emphasis added by Respondent).

7.2.18 From the proceedings in the present case before the Court, whether in the present stage of the case or in the earlier stage of the request of the FRY for the indication of provisional measures, it is abundantly clear that none of the States called before the Court by the Applicant has recognized that the Court has jurisdiction in the present case and wanted the Court to deal with the case. In the Order of the Court of 2 June 1999 concerning the Request of the Federal Republic of Yugoslavia for the Indication of Provisional Measures, the Court, moreover, definitively recognized that it had no jurisdiction with regard to Spain and the United States of America, while with regard to the other States called before the Court, the Court concluded that there was no *prima facie* jurisdiction. One must further take into account, that the eight States presently before the Court continue to dispute the jurisdiction of the Court in the present case.

7.2.19 In case the Court would decide that it has jurisdiction in the present case with regard to the Netherlands, but not to (most of) the other Respondents, and would proceed to deal with the merits of the case, the Court would be clearly faced with a situation where not only the legal interests of all or most other States participating in the action would be affected by the decision, but would form the very subject-matter of the decision.

7.2.20 It would mean that *after having explicitly decided* that the Court has no jurisdiction in respect of those other States, which *also explicitly in proceedings before the Court expressed their wish that their action would not be judged by the Court*, the Court would nevertheless proceed to in fact decide their case.

7.2.21 The present situation differs materially from *e.g.* the situation in the case concerning *Certain Phosphate Lands in Nauru, (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992* (hereinafter "*Nauru* case"), where New

Zealand and the United Kingdom were not called before the Court.

7.2.22 From the point of view of the States concerned it will make no difference whether the Court decided their case as a *prerequisite* for a decision against the Netherlands or as an *unavoidable and logical consequence* of the decision against the Netherlands as a participant in an action in which they participated as well. In both situations they will not be formally bound by the decision against the Netherlands in view of Article 59 of the Statute of the Court, but in both situations their case will have been materially decided by the Court in spite of their express wishes and in spite of the express acknowledgement by the Court in proceedings before the Court to which they were a party that the Court has no jurisdiction *vis-à-vis* those States. A more striking example of in fact exercising jurisdiction over States without their consent is hardly imaginable.

7.2.23 The present case against the Netherlands may also be distinguished from the situation in the *Nauru* case referred to above in this Memorial in another respect. In the *Nauru* case, the Respondent, Australia, played a dominant role, and the role of the absent States was minor or incidental. The Administrator of the Island was at all times appointed by Australia, and was accordingly under the instruction of that Government (*Nauru* case, para. 43). His "ordonnances, proclamations and regulations" were subject to confirmation or rejection by the Governor-General of Australia. The other Governments (of the United Kingdom and New Zealand), in accordance with the Agreement of 2 July 1919 and amended on 30 May 1923, received such decisions for information only (*Nauru* case, para. 43). The system of administration applied in Nauru at the time of the League of Nations was maintained in essence when the Mandate was replaced by a Trusteeship. Under the régime thus established, the Agreement of 2 July 1919 and 30 May 1923 remained in force and the Administrator continued to be appointed by Australia. Moreover, under the new Agreement of 26 November 1965 the "administration of the Territory" was to be vested in "an Administrator appointed by the Government of the Commonwealth of Australia" (Article 3). It provided that the Administrator, the Governor-General of Australia and the Parliament of Australia were to have certain powers. The agreement to establish these new arrangements was implemented by appropriate legislation and other steps taken by Australia. The arrangements continued to apply until Nauru attained independence (*Nauru* case,

paras. 45-46). There was reason for the Court to conclude that among the three States, *i.e.* the United Kingdom, New Zealand and Australia, "Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice" (*Nauru* case, para. 47).

7.2.24 The Netherlands submits that the situation in the present case differs considerably from the one dealt with by the Court in the *Nauru* case, in that, far from playing a dominant role contrary to Australia in the *Nauru* case, the Netherlands has in the present case taken only a relatively small share in the NATO action, *viz.* only approximately 5 percent of all the sorties undertaken during Operation Allied Force were carried out by Netherlands aircraft (Annex 7.10). Probably most, and in any event the dominant, participants in that operation will not be before the Court.

7.2.25 Hence, in conclusion, the Netherlands believes that the claims and submissions of the FRY are inadmissible as a judgment in the present case in respect of the Netherlands would necessarily involve a decision in a dispute between the FRY and other entities or States not before the Court.

7.2.26 There is another aspect to this situation to which the Court should give serious consideration. When most, and in any event the major, participants in Operation Allied Force are not before the Court, the Court will, due to the lack of cooperation on the part of those participants, be confronted with great difficulties in obtaining the necessary material, evidence and other information in order to allow it to arrive at a warranted judicial conclusion as to what Operation Allied Force actually amounted to and what its true objective was as well as what the relative share of the Netherlands in that action was. The Netherlands in its turn would also be unduly handicapped in defending its case without the presence before the Court of most, and in any event major, participants in Operation Allied Force. *Mutatis mutandis* the same arguments must be deemed to apply to the activities within the framework of KFOR and the Netherlands participation therein.

## 7.3 The claim of the FRY based on alleged breaches of obligations established by SC Res. 1244 and by the 1948 Genocide Convention related to killings, wounding and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija after 10 June 1999 is inadmissible, because it is a new claim changing the subject of the dispute originally submitted to the Court in the Application

7.3.1 The Netherlands would like to refer to para. 3.2.11 of the Yugoslav Memorial which reads as follows:

> "3.2.11 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."

and to the corresponding submission of the FRY in Part Four of its Memorial which with the introductory phrase reads as follows:

> "The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:
>
> ....
>
> - by failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligations to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in article III of the Genocide Convention;"

7.3.2 The Netherlands submits that the above-quoted claim presented by the FRY based on alleged breaches by the Netherlands of obligations established by SC Res. 1244 and by the 1948 Genocide Convention related to killings, wounding and expulsion of Serbs and other non-Albanian groups in Kosovo and Metohija after 10 June 1999 (hereinafter referred to as "the events or breaches after 10 June 1999") is inadmissible.

7.3.3 It is true that the FRY has in its Application reserved the right to amend the Application, but the Netherlands submits that this right is not unlimited. In particular, the result of such an amendment may not be such as to transform the dispute brought

before the Court by the Application into another dispute which is different in character. This limitation was reaffirmed by the Court in no ambiguous terms in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, as follows:

> "69. Article 40, paragraph 1, of the Statute of the Court provides that the "subject of the dispute" must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:
>
> "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein ..." (*P.C.I.J., Series A/B, No. 52,* p. 14).
>
> In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:
>
> "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute . . . it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute." *(P.C.I.J., Series A/B, No. 78,* p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 427, para. 80.)

7.3.4 In the light of the foregoing the Court concluded that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners was inadmissible as it constituted, both in form and in substance, a new claim and the subject of the dispute originally submitted to the Court would be transformed if it entertained the claim.

7.3.5 Relevant in this connection is also the view expressed by the Court in para. 67 of its Judgment in the above-quoted case concerning *Certain Phosphate Lands in Nauru.*

> "67. The Court, however, is of the view that, for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962,* p. 36) or must arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, I.C.J. Reports 1974,* p. 203, para. 72)."

7.3.6 It is clear that the "new elements" related to the alleged events or breaches after 10 June 1999, introduced without formal amendment of the Application in the Yugoslav Memorial (para. 3.2.11 *et seq.* and in the newly added submission in Part Four of the Memorial), differ considerably from the dispute brought before the Court in the Application. Whereas in the Application the Netherlands was accused of "acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia", in the Memorial the Netherlands is accused - after the bombings came to an end - as constituent part of KFOR to have after 10 June 1999 "acted against the Federal Republic of Yugoslavia in breach of its obligations [under SC Res. 1244] to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in article III of the Genocide Convention". While the Application concerns the use of force against the FRY, the new claims relate to the alleged failure to maintain law and order in Kosovo after this use of force against the FRY had come to an end.

7.3.7 The Netherlands submits that the nature, basis and context of the claim and therefore also the dispute described in the Application differ considerably from the nature, basis and context of the claim contained in the newly added submission in the Yugoslav Memorial related to the alleged events or breaches after 10 June 1999. It is difficult to see how the new claim could be held to have been, as a matter of substance, included in the original claim (see the criterion stated by the Court in the above-mentioned *Certain Phosphate Lands in Nauru, Preliminary Objections* case), it not being sufficient that there should be links between those claims of a general nature. Further it is difficult to see how the additional claim could have been implicit in

the Application (a criterion also stated by the Court in the above-quoted *Temple of Preah Vihear, Merits* case), or could be deemed to arise *directly* out of the question which is the subject-matter of the Application (a criterion also stated by the Court in the above-mentioned *Fisheries Jurisdiction (F.R. of Germany* v. *Iceland), Merits* case).

7.3.8 Henceforth the Netherlands believes that the claim of the FRY based on alleged breaches of obligations established by SC Res. 1244 and by the 1948 Genocide Convention related to killings, wounding and expulsion of Serbs and other non- Albanian groups in Kosovo and Metohija after 10 June 1999 is inadmissible because it is a new claim changing the subject of the dispute originally submitted to the Court in the Application.

## 8. CONCLUDING SUBMISSIONS

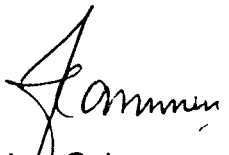
For the reasons advanced, the Netherlands requests the Court to adjudge and declare that:

- the FRY is not entitled to appear before the Court
- the Court has no jurisdiction over the claims brought against the Netherlands by the FRY

and/ or

- the claims brought against the Netherlands by the FRY are inadmissible.

Signed:



Johan G. Lammers
Agent of the Kingdom of the Netherlands

The Hague, 3 July 2000