INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING LEGALITY OF USE OF FORCE

(Yugoslavia *v.* Portugal)

PRELIMINARY OBJECTIONS OF THE PORTUGUESE REPUBLIC

5 JULY 2000

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Introduction

I - Background and preliminary questions

1. On 29 April 1999, the Federal Republic of Yugoslavia (FRY) brought an action against the Portuguese Republic ("Portugal"), by means of a Application dated 26 April, in which Portugal, jointly with other members of the North Atlantic Treaty Organisation ("NATO"), was alleged to be responsible for various acts arising from the crisis in Kosovo which in FRY's opinion were in violation of international law[1].

2. On the same date FRY submitted a *Request for the indication of provisional measures*, essentially applying to the Court for an injunction on Portugal to refrain from the acts of which it was accused.

3. Portugal requested that the Court reject that application, arguing in particular that, *prima facie*, the Court had no jurisdiction. The Court, by an Order dated 2 June 1999, accepted Portugal's contention regarding that stage of the process, and rejected FRY's submission[2].

4. By an Order dated 30 June 1999, the Court set a time limit of 5 January 2000 for FRY's Memorial and 5 July 2000 for Portugal's Counter-Memorial.

5. The FRY formally respected that time limit, although the Memorial in its action against Portugal was identical to that submitted in respect of the now seven other

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[1] The subject-matter of the dispute was thus determined: "The subject-matter of the dispute are acts of Portugal 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" (cfr. *Application of The Federal Republic of Yugoslavia against Portugal for Violation of the Obligation Not to Use Force*, p. 1-2).

[2] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Request for

NATO member states cited in other cases of the same date and substance, namely the Federal Republic of Germany, Belgium, Canada, France, the Netherlands, Italy and the United Kingdom. By this approach, FRY unilaterally joined the proceedings for the purposes of its allegations, referring to it as "*Memorial, Case Concerning Legality of Use of Force* (Yugoslavia v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom)".

6. Portugal is of the opinion that this unilateral initiative falls short of the respect due to the Court's exclusive competence in the issue under Article 47 of its Rules of Procedure. The amendment of a symbolic aspect, determined by the Court, such as the official title of the proceedings, implying its merger with seven other proceedings, cannot be dissociated from FRY's claim of the existence of a joint defence by the respondent States restated in its Memorial[3].

7. Portugal has already had the opportunity to comment on this matter. After the appointment of Prof. J. Sérvulo Correia as *ad hoc* Judge on 25 April 2000, FRY has objected to this appointment maintaining that Portugal had the same interest as the other respondent States in the actions initiated by it on the same date. In response, in a separate document bearing the date of the present Preliminary Objections and to which the Court is referred, Portugal has refuted the existence of a joint case.

8. Portugal contends, as it has already done during the phase of the procedure relating to FRY's *Request for the indication of provisional measures*, that FRY is not entitled to *locus standi* before the Court. Additionally, the Court lacks jurisdiction to judge the present case on any grounds, and the submissions formulated by the FRY are inadmissible for more than one reason.

9. Accordingly Portugal intends to avail itself of Article 79 (1) of the Court's Rules of Procedure, submitting Preliminary Objections within the time limit for submission of the Counter-Memorial. In consequence, the following Preliminary Objections are limited to the issues which prevent the Court's hearing the submissions by FRY, and do not discuss the merits of the case. Therefore, they possess an

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the Indication of Provisional Measures, Order of 2 June 1999, para. 50.

[3] Cfr. *Memorial, Case Concerning Legality of Use of Force* (Yugoslavia v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom), 5 January 2000.

exclusively preliminary character. Should the procedure advance to the merit stage, Portugal will respond to FRY's claims within the time-limit decided by the Court under Article 79 (7) of its Rules of Procedure.

10. In view of the number and weight of the procedural objections to the merits of the case raised by the present Preliminary Objections, Portugal does not accept that the Court should consider the present Preliminary Objections during the merits phase of the case, since the conditions for applicability of Article 79 (8) of the Rules of Procedure are not met. Portugal accordingly applies for the hearings on the merits to be suspended with a view to the Court deciding specifically on the present preliminary questions in accordance with Article 79 (3) and (7) of its Rules of Procedure.

11. Portugal is in no doubt that the Court will not regard any of the arguments in the present Preliminary Objections as recognition in whatsoever form of its jurisdiction in the present case *(Forum prorogatum)* pursuant to Article 38 (5) of its Rules[4]. But it must nevertheless make the point that it cannot accept the Court's jurisdiction. This rejection not only derives from the fact that the exercise of such jurisdiction would necessarily affect third States and Organisations vis-à-vis the case, but is also because Portugal contends that since FRY's substantive case is not well-founded, it would be a waste of the valuable time of the Court.

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[4] And with due attention to the care with which it wisely approached the issue. Thus "The Court does not find that the Respondent has given in this case a "voluntary and indisputable" consent (see *Corfu Channel, Preliminary Objection, Judgement, I.C.J. Reports 1947-1948*, p. 27)" (cfr. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case*, Preliminary Objections, Judgement, 11 July 1996, *I.C.J. Reports* 1996, para. 40).

II – Presentation of these objections

12. The present Preliminary Objections relate to three major issues.

13. The first arises from FRY's *Locus standi*. Portugal contends that the FRY has no right to apply to the Court.

14. A second relates to the Court's jurisdiction in the strict sense. Portugal is of the view that the Court does not have jurisdiction for the present case.

15. Finally, the application by FRY is inadmissible in as much as Portugal is not responsible for the alleged acts, and the hypothetical exercise of jurisdiction by the Court in the present case would directly affect the rights and duties of States and organisations not present in these proceedings, since their actions constitute their very subject-matter. In addition, all applications by FRY relating to events subsequent to 10 June 1999 are similarly inadmissible since they would transform the nature of the dispute.

Part I

Objections concerning the FRY's *Locus standi*

I – *Locus standi* and Jurisdiction

16. The Court has repeatedly affirmed in its rulings that its jurisdiction extends only to States which, being party to its Statute, have voluntarily accepted it by a subsequent act[5].

17. However, an essential precondition of the Court's jurisdiction is that the entity claiming access to it is entitled to do so. The Court itself has held "whereas the Court can therefore exercise jurisdiction only between States parties to a dispute **who not only have access to the Court** but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned"[6].

18. This means that for an entity which does not enjoy the right of access to the Court, the question of jurisdiction does not even arise. It simply cannot appear before the Court as either Applicant or Respondent. In consequence, the application must be rejected *in limine*. This right of access is therefore a *sine qua non* condition of the Court's jurisdiction.

19. The Court's Statute limits that right of access to those States which are party to the Statute [Article 35 (1)], or to States which, though not members, have complied with the requirements defined by the UN Security Council for access [Article 35 (2)].

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[5] Thus only a few years ago it held 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" [cfr. *Case Concerning East Timor (Portugal v. Australia)*, Judgement, *I.C.J. Reports* 1995, p. 101, para. 26].

[6] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, para. 19. The same view can be concluded from the Court's Orders of the same date in the proceedings brought by FRY against other NATO member countries.

20. Those requirements are set out in Security Council Resolution 9 (1946) of 15 October 1946[7], which states that it shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the condition that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the terms and subject to the conditions of the Statute and the Rules of the Court, and all the obligations under Article 94 of the Charter of the United Nations, namely, the powers of the Security Council to enforce a decision of the Court. This requirement is easily understood: only in this way may the parties meet on equal terms as regards guarantees of compliance with the Court's decisions.

21. The Statute admits only one exception to these cases, which is jurisdiction of the Court in relation to two or more non-member States based on "treaties in force" [Article 35 (2), second sentence]. This notion is, however, unclear. The interpretation that it may cover any treaty in force would open the door to circumventing the requirements of Security Council Resolution 9 (1946), and hence of Article 35 (2) of the Statute. It would suffice for a non-member State to enter into a treaty with another State accepting the jurisdiction of the Court for the Resolution to be inapplicable.

22. Article 35 (2) of the Statute dates back to the Statute of the Permanent Court of International Justice, where this exception to the "treaties in force" was introduced to safeguard clauses in the Peace Treaties, which put an end to the First World War, attributing to the Court jurisdiction, and that were already in force before the Court's Statute had been adopted.

23. The Permanent Court's jurisprudence on the interpretation of this exception is not even. On one occasion it applied the exception with reference to Article 386 of the Treaty of Versailles[8], but on another it gave to understand that the exception was applicable to a treaty which came into force only after the Statute[9].

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[7] Text in *Resolutions and Decisions of The Security Council*, Official Records, 1946, pp. 14-15, [Annex 1].

[8] Cfr. *Wimbledon*, P.C.I.J., Series A, Judgement of 17 August 1923, No 1, pp. 7 and 20.

[9] Cfr. *German Interests in Polish Upper Silesia*, P.C.I.J., Series A, 1926, No 7, p. 11.

24. However, when the Statute was reviewed in 1926, specific proposals to extend the exception to treaties in force at the time of the Application failed to gain the support of the Permanent Court's members, and were not finally adopted.

25. The Court has only once had the opportunity to consider the question, and that only provisionally, in 1993, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, where citing the *Wimbledon* case it ruled: "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its Resolution 9 of 1946" and "a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force"[10].

26. Portugal's understanding is that this preliminary opinion is not binding on the Court. Indeed, the Court did not restate the position in its 1996 judgement on Yugoslavia's Preliminary Objections[11]. From Portugal's point of view, the interpretation which fits best with the teleology of Article 35 (2), preserving the requirement to meet the conditions of Security Council Resolution 9 (1946) is that the exception should not apply to any case involving Treaties coming into force later than the Statute itself. Only those Treaties of which the States party to the Statute could have been aware at the moment of the adoption of the Statute are thus excluded from the requirement that their States parties comply with the requirements of Security Council Resolution 9 (1946).

27. Furthermore, any other interpretation would result in a breach of the fundamental aim of the norm, which is made clear in the final part of Article 35 (2): that the parties should not be put in a position of inequality. In practice one party, as a

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[10] Cfr. *I.C.J. Reports* 1993, p. 14, para. 18.

[11] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, Preliminary Objections, Judgement, 11 July 1996, *I.C.J. Reports* 1996.

member of the United Nations, would be bound by Article 94 of the Charter whilst the other, a non-member, with which the first had concluded a (for instance) bilateral Treaty, would not. The second would thus benefit from a guarantee as to execution of the Treaty not enjoyed by the first.

28. In short, Portugal contends that the right of access to the Court is limited to the parties to its Statute, the States which have deposited a Declaration in accordance with SCR 9 (1946) and those which have access to the Court by virtue of Treaties which came into force prior to the Court's Statute.

II – FRY's relationship with the United Nations Organisation

29. The allegations made about the right to apply to the Court are relevant to the present case by virtue of the question of the FRY's relationship with the United Nations, since only member States are *ipso facto* parties in the Statute of the Court [Article 93 (1) of the Charter].

30. On 27 April 1992, at the moment of its inception, the FRY adopted a declaration in which it assumed the claim to continue automatically the former Socialist Federal Republic of Yugoslavia (SFRY), which was forwarded to the United Nations Secretary-General.[12] It subsequently claimed the seat of the SFRY in the United Nations.

31. Nevertheless, this claim encountered some hostility from the international community in general and the competent organs of the United Nations.

32. In Resolution 757 (1992) of 30 May 1992[13], the Security Council stated (preamble, Para 10): "Noting that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted". This position would be reaffirmed in Resolution 777 (1992), of 19 September 1992[14], in which, having affirmed in the preamble that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist" and referred to the earlier Resolution, it stated that it "Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and

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[12] "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (cfr. *Application of the Convention* (...) cit., Preliminary Objections, Judgement, 11 July 1996, *I.C.J. Reports* 1996, para. 17).

[13] [Annex 2].

[14] [Annex 3].

therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly".

33. Following this recommendation, the General Assembly affirmed, in its Resolution 47/1, of 22 September 1992, (Para. 1): "*Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly"[15].

34. During the debate which preceded the adoption of the General Assembly Resolution, on 22 September 1992 the then Prime Minister of the FRY acknowledged that his country was not a member of the United Nations when, addressing the Assembly, he announced "I hereby formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent"[16]. This declaration did not, however, result in any further action by FRY, which, in contrast to the all the other Republics of the former SFRY, submitted no formal application for membership.

35. Faced with this situation and in order to put FRY's non-member status beyond doubt, the Security Council decided by Resolution 821 (1993), of 28 April 1993[17], that: "Reaffirms that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that, further to the decisions taken in Resolution 47/1, it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

36. Further to this recommendation, the General Assembly approved Resolution

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[15] Cfr. UN GAOR, 47, Supp. No 49, UN Doc. A/47/49, 1992, p. 12, [Annex 4].

[16] Cfr. UN Doc. A/47/PV.7, 1992, p. 149 [Annex 5].

[17] [Annex 6].

47/229, of 5 May 1993[18], in which it decided that: "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council" and also decided in Resolution 48/88 of 20 December 1993 that Member States and the Secretariat should "end the de facto working status of the Federal Republic of Yugoslavia (Serbia and Montenegro)" (para. 19).

37. The position of the organs competent to decide the admission and expulsion of members (Articles 4 and 6 of the Charter) is thus quite clear. The Socialist Federal Republic of Yugoslavia no longer exists, and none of its component Republics, whether members of a new federation or not, can claim to be its successor for the purposes of membership of the Organisation[19].

38. The Federal Republic of Yugoslavia is, consequently, not a member of the United Nations, since the membership of the SFRY lapsed automatically on the dissolution of that State.

39. Such a situation is not unknown in United Nations practice. The same situation arose on 31 December 1992 with the dissolution of Czechoslovakia, when both the Czech Republic and Slovakia sought admission to the United Nations. In the case of the Former Union of Soviet Socialist Republics, it was broadly accepted by the International Community, including all eleven other members of the new Commonwealth of Independent States, that the Russian Federation should succeed to the Soviet Union. Such recognition, enshrined in Security Council Resolution 757 (1992), was never accorded in the case of FRY. The four other former members of the Socialist Federal Republic of Yugoslavia declined to accept that the FRY should become the Socialist Federal Republic's sole successor State.[20]

40. The same conclusion was reached by the Arbitration Commission of the

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[18] [Annex 7].

[19] Without prejudice, of course, to being able to succeed, along with the other Republics, as regards other treaties which are not constitutive of international organisations, in the general terms of the Law relating to State Succession.

[20] Cfr., in particular, the letter of 28 October 1996 to the Secretary-General from Bosnia and Herzegovina, Croatia, Slovenia and the Former Yugoslav Republic of Macedonia (UN Doc. A/51/564-S/1996/885), [Annex 8].

Peace Conference on Yugoslavia[21] in a series of opinions on the question.

41. Thus, in its first opinion, dated 29 November 1991, para. 3, it concluded "The Socialist Federal Republic of Yugoslavia is in the process of dissolution"[22].

42. Later, in Opinion No. 8 dated 4 July 1992, after upholding that Serbia and Montenegro had constituted a new Federal State on 27 February 1992, at para. 4 it affirmed that: "the process of dissolution of the SFRY (...) is now complete and that the SFRY no longer exists"[23].

43. In its Opinion No. 9, also dated 4 July 1992, it stated clearly: "New States have been created on the territory of the former SFRY and replaced it. All are successor States to the former SFRY" and at para. 4: "the SFRY's membership of international organisations must be terminated according to their statutes and that none of the successor States may thereupon claim for itself alone membership rights previously enjoyed by the former SFRY"[24].

44. Finally, in its Opinion No. 10, again of the same date, at para. 5 it stated: "the FRY (Serbia and Montenegro) is a new State and could not be the sole successor to the SFRY"[25].

45. The Court did not rule on the issue of Yugoslavia's membership of the United Nations: "the question whether or not Yugoslavia is a Member of the United Nations (...) is one which the Court does not need to determine definitively at the

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[21] Set up on 27 August 1991 by a declaration adopted at an extraordinary meeting of Ministers in the framework of European Political Cooperation between the Member States of the European Union and accepted by the seven Yugoslav republics at the opening of the peace conference on 7 September 1991. Serbia itself chose to put questions to the Arbitration Commission.

[22] Cfr. *Revue Générale de Droit International Public*, Vol. 96, 1992, No. 1, pp. 264-266 (in French), [Annex 9].

[23] Cfr. *Revue Générale de Droit International Public*, Vol. 97, 1993, No. 2, pp. 588-590 (in French), [Annex 10].

[24] Cfr. *Revue Générale de Droit International Public*, Vol. 97, 1993, No. 2, pp. 591-593 (in French), [Annex 11].

[25] Cfr. *Revue Générale de Droit International Public*, Vol. 97, 1993, No. 2, p. 594-595 (in French), [Annex 12].

present stage of the proceedings"[26]. It repeated this position on its Order relating to the indication of provisional measures in the present case[27].

46. Nevertheless, and despite the clarity of the decisions on this issue, it must be recognised that United Nations practice has not been consistent. As the Court said in the case quoted above, certain Secretariat members seem to have interpreted the Security Council and General Assembly Resolutions restrictively, suggesting that the Resolutions did not end Yugoslavia's membership of the United Nations, referring, however, solely to the SFRY and not to the FRY. The implication was that the membership of the SFRY, in their viewpoint, survives until the question of its succession is definitively solved. Hence, the continued use of the flag of the former SFRY and not the flag of the FRY. And it is also understood that the representatives of the new FRY cannot make claim to the seat of the old Yugoslavia[28].

47. In practice the resolutions of the competent organs could scarcely be clearer. It would not make sense to terminate the membership of an already extinct entity.

48. However, the situation is confused by this interpretation of certain Secretariat members, coupled with FRY's persistent failure to apply for membership of the United Nations, whilst maintaining its representation to the Organisation, although it has naturally remained without any voting rights within the United Nations organs since 1992-93, and remains so today.

49. In fact, in addition to the Secretariat having assessed quotas on the New Yugoslavia, the General Assembly approved Resolution 52/215, of 22 December 1997[29]. This fixed the percentage to be paid to the budget by members and non-members who participate in certain activities of the Organisation, and this list includes amongst the members a State named Yugoslavia.

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[26] Cfr. *Application of the Convention* (...), cit., *I.C.J. Reports* 1993, p. 14, para. 18.

[27] Cfr. *Case Concerning Legality of Use of Force* (Yugoslavia v. Portugal), cit., Order of 2 June 1999, para. 32.

[28] Cfr. *Application of the Convention* (...), cit., *I.C.J. Reports* 1993, p. 13, para. 17. Also the *Memorial*, cit., p. 330, para. 3.1.4, but here arguing, in error, that the Assistant Secretary-General is referring to the FRY.

[29] [Annex 13]

50. These secretariat decisions may be dismissed as mere administrative practice, which cannot on their own change the situation of the FRY. A decision of the General Assembly in which, even for purely financial purposes, a State named Yugoslavia is listed as a member, is deserving of more attention.

51. Nonetheless, Portugal contends that this Resolution, on its own, is insufficient to change FRY's status as a non-member. Even if we admit the possibility of a State's tacit admission to the United Nations, it is clear that the General Assembly would not be competent to do so in the absence of the Security Council's approval. Article 4 of the Charter is quite clear on this. And nothing in the Security Council's practice indicates that such a position has been adopted.

52. It may be added that there is nothing in Resolution 52/215 indicating the intention of modifying the FRY's situation, even if it were held legitimate to refer to it. Had such an intention existed, it is clear that such a Resolution would not have been adopted by consensus. Some, if not most, States would have challenged an act which failed to comply with the UN Charter. A mere arrangement for financial purposes, probably at the behest of the Secretariat, cannot serve as a basis for admission to the United Nations.

53. In view of the foregoing, Portugal contends that the reference in Resolution 52/215 relates to the former Socialist Federal Republic of Yugoslavia and not to the FRY. It appears to be the view of certain Secretariat members that the former Yugoslavia's membership of the United Nations will not be extinguished until the question of its succession is regarded as definitively over and done with, including by the new Yugoslavia. Until that is the case, it is convenient to collect the former State's dues from the only country which is willing to pay them, in simple *de facto* recognition of the situation on the part of the United Nation's administrative organs alone. It is not unreasonable that the staff whose daily task is to cope with the organisation's financial crisis should seek to avoid losing any source of revenue.

54. Portugal therefore contends that the situation of FRY vis-à-vis the United Nations cannot be interpreted as one of membership. In practice, its Permanent Mission to the United Nations enjoys fewer rights than the Observation Mission of a non-member country. The fact of contributing to the budget changes nothing, since observer

States also contribute, in accordance with Para. 3(b) of the same General Assembly resolution 52/215. If FRY were a member, its current situation of being deprived of voting rights in all United Nations organs would represent an extremely serious violation of the Charter.

55. FRY thus appears to be in a *sui generis* situation more resembling that of an observer State than a member State, since it enjoys practically no rights of participation in the work of United Nations organs, and no voting rights whatsoever.

III - FRY is not party to the Statute of the Court

56. If Yugoslavia is not a member of the United Nations, we are forced to conclude that it is not party to the Statute of the Court, since it has not sought to be bound by the Statute pursuant to Article 93 (2), nor has there been any corresponding decision of the Security Council and General Assembly, as there have been in the cases of Switzerland[30] and, until their admission as members, Japan[31], Liechtenstein[32], San Marino[33] and Nauru[34].

57. FRY does not even suggest that this procedure has been accomplished: no claim to this effect is made in the Memorial.

58. Likewise, it is unacceptable that FRY should conclude that from the fact that, under its Statute, the Court took measures against Yugoslavia in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Case *[Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, it has considered FRY as party to its Statute, by arguing that only States parties are bound by the Statute[35]. What is clear is that any State which is not a party to the Statute, but legitimately recognises the jurisdiction of the Court under Article 35 (2), does so on the terms of the Statute. In other words, subject to certain conditions [broadly, acceptance of Security Council Resolution 9 (1946)] the Statute accords rights to non-member States who recognise the jurisdiction of the Court on its terms. In this way a form of

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[30] Cfr. Security Council Resolution 11 (1946), 15 November 1946, and General Assembly Resolution 91 (I), 11 December 1946.

[31] From 2 April 1954 to 18 December 1956 [in accordance with Security Council Resolution 102 (1953), 3 December 1953, General Assembly Resolution 805 (VIII), 9 December 1953].

[32] Liechtenstein, 29 March 1950 to 18 September 1990 [under Security Council Resolution 71 (1949), 27 July 1949, and General Assembly Resolution 363 (IV), 1 December 1949].

[33] 18 February 1954 to 2 March 1992 [under Security Council Resolution 103 (1953), 3 December 1953, and General Assembly Resolution 806 (VIII), 9 December 1953].

[34] 29 January 1988 to 14 September 1999 [under Security Council Resolution 600 (1987), 19 October 1987, and General Assembly Resolution 42/21, 18 November 1987].

[35] As FRY did: cfr. *Memorial*, cit., p. 335, para. 3.1.21. It is even less relevant to rely on the position of other member States which, in bringing cases against FRY, have asserted that they consider FRY to be a party to the Statute (cfr. *Memorial*, cit., p. 335, paras 3.1.19 and 3.1.20). It is for the United Nations to decide its membership, and not any member State in

collateral agreement is made by which the rights and obligations of the Statute are extended to non-members[36], without their formally becoming party to it, i.e. with all the rights of a formal party and without the requirement to make any formal declaration pursuant to Resolution 9 (1946).

isolation.

[36] Cfr. Articles 35 and 36 of the 1969 Convention on the Law of Treaties; the requirement that recognition of obligations should be given in writing should not be regarded as customary although in this case it is respected, since the Declaration required by SCR 9 (1946) must of necessity be in writing.

IV – FRY is not entitled to apply to the court

59. If FRY is not party to the Court's Statute, it could only accede to the Court under the terms of Article 35 (2).

60. On 26 April 1999, Yugoslavia submitted a declaration recognising the Court's jurisdiction[37], but as the declaration clearly states, it is made pursuant to Article 36 (2), and makes no reference to Security Council Resolution 9 (1946) which governs access to the Court by a State which is not party to the Statute, in accordance with Article 41 of its Rules.

61. Neither is possible to interpret this declaration as also being a declaration of acceptance of the obligations deriving from Article 94 of the Charter, since no reference is made to that Article. Therefore, the Court should in any case declare such Declaration as void in accordance with the final section of Article 41 of its Rules.

62. Even if such a reference had been made, a declaration under Article 36 (2) could not be used to enter a case against Portugal. Para. 2 of Security Council Resolution 9 (1946) requires the explicit consent of the respondent State before bringing proceedings against it. Portugal has not given such consent and, for the reasons already outlined, will not do so[38].

63. Portugal can therefore only conclude that the present declaration recognising the jurisdiction by FRY is null and void, and that FRY consequently does not enjoy *locus standi* before the Court.

64. This shortcoming also affects the right to claim Article IX of the 1948

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

[38] Cfr., *supra*, para. 10.

Convention on the Prevention and Punishment of Genocide[39] as the ground of the Court's jurisdiction.

65. Portugal has already had occasion to state that the exceptional right to apply to the Court without complying with Security Council Resolution 9 (1946) on the basis of "the treaties in force" [Article 35 (2) of the Statute] should relate only to treaties already in force when the Court's Statute came into force. This is a teleological requirement, without which it would be possible to circumvent the requirements of the said Resolution. This would result in a breach of the fundamental aim of the principle, i.e. that the parties should be on equal terms, since one would then be bound by Article 94 and the other would not.[40]

66. However, this does not apply in the case of the 1948 Genocide Convention, which came into force only on 12 January 1951.

67. Portugal is consequently of the opinion that the proceedings filed by Yugoslavia should be rejected on the grounds that Yugoslavia is not qualified to bring an action before the Court.

68. Portugal contends that the present objection, although it does not technically concern a question of jurisdiction *strictu senso* or of admissibility, is manifestly preliminary in nature, falling within the meaning of Article 79 of the Rules of the Court. Since the right of access is a *sine qua non* condition of the jurisdiction of the Court, it should be considered as an "other objection the decision upon which is requested before any further proceedings on the merits" under Article 79 (1). This is the conclusion implicit in the Court's distinction, followed by Portugal, between right of access and jurisdiction[41].

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[39] Text in U.N.T.S., No. 1021, vol. 78, 1951, pp. 277 *et seq.*

[40] Cfr., *supra*, para. 26-28.

[41] "Whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned" (cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 19).

Part II – Objections relating to the Court's Jurisdiction

I - In the light of the optional Declaration deposited by FRY

69. Portugal has already had the occasion to refute the validity of the optional Declaration deposited by FRY, in the light of both Article 36 (2) and Article 35 (2) of the Statute. Had it in fact been deposited pursuant to Article 35 (2), it would still not be opposable to Portugal without explicit consent [cfr. the final words of Para. 2 of Security Council Resolution 9 (1946)][42].

70. However, even without these failings, the Declaration would not allow the Court's jurisdiction in the present case, *ratione temporis*, by reason of its own wording.

71. The Declaration deposited by Portugal[43] contains no explicit reference to reciprocity, but refers back to the terms of Article 36 (2) of the Statute which renders reciprocity a condition of each declaration when it affirms "in relation to any other state accepting the same obligation".

72. As the Court has consistently stressed in its jurisprudence, the principle of reciprocity "forms part of the system of the Optional Clause by virtue of the express terms both of Article 36 of the Statute and of most Declarations of Acceptance"[44] and

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[42] Cfr., *supra*, para. 60-63.

[43] Portugal's declaration reads as follows: "Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognises the jurisdiction of this Court as compulsory *ipso facto* and without special agreement, as provided for in the said paragraph 2 of Article 36 and under the following conditions: (1) the present declaration covers disputes arising out of events both prior and subsequent to the declaration of acceptance of the "optional clause" which Portugal made on 16 December 1920 as a party to the Statute of the Permanent Court of International Justice; (2) the present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General; (3) the Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification".

[44] Cfr. *Case Concerning Right of Passage over Indian Territory* (Portugal v. India), Preliminary Objections, *I.C.J. Reports* 1957, p. 145.

"Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a party to invoke a reservation to that acceptance which it has not expressed in its own Declaration"[45]. Further "it is recognised that, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of the Court", any limitation *ratione temporis* attached by one of the Parties to its declaration of acceptance of the Court's jurisdiction "holds good as between the Parties" (*Phosphates in Morocco, Judgement, 1938, P.C.I.J., Series A/B, No. 74,* p. 10)"[46].

73. Portugal may consequently invoke the terms and conditions of FRY's Declaration — which furthermore explicitly calls for reciprocity — in as much as there will be jurisdiction only in the exact terms of the coinciding Declarations. In the Court's own words, "jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it"[47].

74. Furthermore, since on a question of jurisdiction the Court must decide *proprio motu*, Portugal's right to draw the Court's attention to the limits of its jurisdiction[48] cannot be challenged even though the principle of reciprocity is not applicable.

75. Portugal maintains the view, presented to the Court during the hearings on Yugoslavia's application requesting the indication of provisional measures, that the Declaration deposited by Yugoslavia[49] contains a time limitation precluding the Court's

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[45] Cfr. *Interhandel Case* (Switzerland v. USA), Preliminary Objections, *I.C.J. Reports* 1959, p. 23.

[46] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 29.

[47] Cfr. *Case of Certain Norwegian Loans* (France v. Norway), *I.C.J. Reports* 1957, p. 23.

[48] The Court thus held: "the Court, in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction" and "Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court [cfr. *Fisheries Jurisdiction Case* (U.K. v. Iceland), Preliminary Objections, *I.C.J. Reports* 1973, para. 12]. Also "The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself" and "That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties" (cfr. *Fisheries Jurisdiction Case* (Spain *v.* Canada), jurisdiction, 4 December 1998, paras 37 and 38).

[49] Text cites *supra*, para. 60.

jurisdiction in the present case.

76. The Declaration confers jurisdiction on the Court only in "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations of facts subsequent to this signature". FRY thus uses the so-called "Belgian" formulation which is structured as a double exclusion. Jurisdiction is conferred only on disputes arising after the date of the Declaration and, of those, only the disputes arising in relation to events occurring after 26 April 1999.

77. However, the dispute underlying the present case arose well before 26 April 1999. It first surfaced on 30 April 1998 when the North Atlantic Council condemned the military action of the Yugoslavia authorities in Kosovo as disproportionate and in violation of the Humanitarian Law of Armed Conflicts not of an international nature[50], and reached its climax in the days immediately before and after the onset of NATO military action against FRY on 24 March 1999, with Yugoslavia's accusations, which were immediately refuted.

78. This reading of events was confirmed by the Court in the phase of the proceedings relating to the request for the indication of provisional measures, in apparently conclusive terms: "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 FRY 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"[51].

79. Thus when at the 3988th meeting of the Security Council on 24 March 1999 the representative of the FRY asserted that "That blatant aggression was a flagrant

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[50] Cfr. North Atlantic Council on the Situation in Kosovo, 30 April 1998, NATO Press Release 98/51, [Annex 14].

[51] *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 27.

violation of the basic principles of the Charter"[52] and NATO members disputed that assertion, a dispute clearly already existed as regards the central issue underlying Yugoslavia's present action, i.e. the lawfulness of the bombing.

80. Portugal consequently accepts that a legal dispute exists between itself and FRY. Evidently, Portugal denies certain facts which appear to be alleged, albeit vaguely, in FRY's Memorial, and also the allegation that such facts were in breach of international law.[53] A dispute does indeed therefore exist, as the Court has found.[54] Portugal contends simply that it arose well before 26 April 1999, and is therefore not covered by FRY's Optional Declaration. As the Court has already held, it is clear that, by the time of the Security Council Meeting of 24 and 26 March 1999, all the facts of the dispute which led FRY to bring the present proceedings were already in place.

81. It may be added that the underlying events began in 1998, being related to Yugoslav repression in Kosovo.[55] They were thus clearly outside the time limits of the FRY Declaration, which excludes not only disputes arising before 26 April 1999, but also those arising from earlier facts or situations.

82. Of those facts or situations, the Court has said, "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'"[56].

83. The facts relating to the repression in Kosovo clearly fall into that category,

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[52] Cfr. UN Press Release SC/6657, 3988th Meeting (PM), 24 March 1999, p. 11, [Annex 15].

[53] But for reasons already set out will not develop the issue here, though reserving the right to do so should it become necessary at a later stage. See *supra*, para. 9.

[54] Following the traditional definition of the PCIJ, which the Court has quoted more than once: "in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties" [cfr. *East Timor Case (Portugal v. Australia)*, cit., p. 90, para. 22].

[55] Condemned by the Security Council in SCR 1160 (1998), 31 March 1998, para. 3 of the preamble ["Condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo (...)],[Annex 16]".

[56] Cfr. *Case concerning Right of Passage over Indian Territory* (Portugal v. India), Merits, 12 April, 1960, *I.C.J. Reports* 1960, p. 35.

as do those relating to NATO's action begun on 24 March 1999, all being earlier than 26 April 1999.

84. During the phase of its application relating to the indication of provisional measures, FRY alleged *inter alia* that each military action by NATO between 26 April and 29 April, the date of its application, as well as those actions prior to 10 June 1999 was in itself a breach of international law giving rise to a dispute. In its Memorial, FRY appears to have abandoned that position.[57]

85. The Court was clear on this question, rejecting the allegation: "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"[58].

86. The Court's position is clear and Portugal fully supports it. Unable to convince the Court that this was not a single dispute extending over time[59], as it is, FRY has formulated its Declaration with a view to achieving its aims in bad faith: obtaining a judgement from the Court on the NATO action whilst remaining beyond the Court's jurisdiction as regards the repression against its own citizens prior to 26 April 1999. By this means, it would be protected from any counter-claim by Portugal under Article 80 (1) of the Rules of the Court, or any other form of action based on that repression. This would require splitting a dispute into two, favouring the party which gave rise to the dispute with its initial illegal action. The Court has already ruled on other occasions that this is not acceptable.[60]

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[57] Cfr. *Memorial*, cit., p. 339, paras 3.2.11 and 3.2.12.

[58] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 27.

[59] As stated by the International Law Commission, in its draft on the International Responsibility of States, approved on first reading in 1996, at Article 25, No 1: "The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins" (cfr. Report of the International Law Comission, 1996, Chapter III), [Annex 17].

[60] Thus "if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-

87. FRY is now alleging that there was indeed only one dispute, which deteriorated and reached its nadir after 10 June 1999, accusing KFOR, the multinational force authorised by Paras. 7 and 9 of Security Council Resolution 1244 (1999) of 10 June 1999[61], of violating the terms of the said Resolution and of acts against the Serbian population of Kosovo. FRY asserts "No doubt that these new disputed elements are part and parcel of the dispute related to the bombing of the territory of the Applicant. The dispute arising from the bombing matured throughout the new disputed elements (...)[62].

88. But, further ahead, FRY already accepts that "The dispute arose in the discussions at the Security Council meetings of 24 and 26 March 1999", but that new factors in the dispute emerged after 10 June 1999.[63]. In support, it quotes the *Case concerning Right of Passage over Indian Territory*, where the Court held that "The dispute before the Court having these three-fold subject, could not arise until all its constituent elements had come into existence"[64].

89. FRY has yet to state exactly when and why it contends that the dispute arose. It has done no more than quote the case-law of the Court it considers applicable, with no justification. From FRY's point of view, the dispute arose after 26 April 1999 and crystallised after 10 June. When and why, FRY has not said.

90. This conduct appears to indicate that when, on 29 April 1999, FRY filed its action, the dispute was about to begin but had not yet done so. Initially, in fact, it was begun with no specific legal scope. This is an extraordinary conclusion, when in its application FRY submitted a long list of accusations, most of which had already been presented to the United Nations and rejected.

91. Portugal feels compelled to observe that it is bizarre that a dispute which arose as a result of the use of force, whether by FRY against its own people or by NATO, appears in FRY's view not to have existed until an agreement was concluded between the parties in conflict, confirmed by the Security Council, ending it partly. On

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claim" [cfr. *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, *I.C.J. Reports* 1980, para. 36].

[61] [Annex 18]

[62] Cfr. *Memorial*, cit., p. 339, para. 3.2.12 and also p. 8, para. 12.

[63] Cfr. *Memorial*, cit., p. 340, para. 3.2.16.

the other hand, subsequent acts occurring in a radically different context of peace, gave rise to the "dispute".

92. Portugal is thus unable to accept that the dispute arose only after 10 June 1999. However, for this purpose, Portugal does not propose to deny that the new facts arising since that date form part of an earlier dispute, since its contention is that the dispute emerged fully on 24-26 March 1999, i.e. at a time outside the Court's jurisdiction under the terms of the Declaration deposited by FRY.[65]

93. To this reasoning may be added that even if the dispute were to have arisen only after 10 June 1999, it would still have its origins in facts and situations dating back to 1998 and to 24 March 1999, i.e. it would still be outside the Court's jurisdiction by virtue of being based on facts prior to 26 April 1999.

94. Failing this interpretation, FRY would be able to exclude from the Court's jurisdiction facts and situations which were the direct cause of the present dispute, thus abusively depriving Portugal of the means of defence against the explicit terms of FRY's own Declaration.

95. Portugal is therefore bound to conclude that the Declaration deposited by FRY does not provide a basis for the Court's jurisdiction to decide on the present dispute in any of its aspects.

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[64] Cfr. *I.C.J. Reports* 1960, pp. 34-35.

[65] Were it to be maintained that these constituted a new dispute (which FRY does not contend) then they would have to be held inadmissible as radically altering the subject of the proceedings. See *infra*, paras 149-159.

II – In the light of Article IX of the 1948 Genocide Convention

A - Portugal was not party to the Convention

96. Further to the terms of its application and its allegations made orally during the phase relating to the request for the indication of provisional measures, FRY has maintained in its Memorial the allegation that the Court's jurisdiction is also based on Article IX of the 1948 Genocide Convention and has apparently maintained that allegation against Portugal.[66]

97. Portugal has already contended that FRY cannot invoke Article IX of the 1948 Genocide Convention since FRY is not Party to the Statute of the Court and has submitted no declaration pursuant to SCR 9 (1946), and the Convention is not a "treaty in force" for the purposes of the exception in Article 35 (2) of the Statute.[67]

98. This attempt to attribute Jurisdiction to the Court by virtue of the 1948 Genocide Convention encounters a further obstacle. At the moment of FRY's application to the Court, on 29 April 1999, Portugal was not party to the Convention[68], as the Court was informed during the phase of the proceedings relating to the request for the indication of provisional measures. In accordance with Article 13 (3) of the Convention, Portugal became party to it only on 10 May 1999, its instrument of accession having been deposited on 9 February of that year.[69]

99. Portugal evidently does not dispute that it is bound by the underlying material principles set out in the Convention. As early as 1951 the Court held that "the principles underlying the Convention are principles which are recognised by civilised

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[66] Cfr. *Memorial*, cit., p. 349, para. 3.4.3.

[67] Cfr., *supra*, para. 64-66.

[68] "Party" for the purposes of the 1969 Vienna Convention on the Law of Treaties, Article 2, (1) (g), and Customary International Law, is "a State which has consented to be bound by the treaty and for which the treaty is in force".

[69] Cfr. Note verbale from the Secretary-General of the United Nations, [Annex 19].

nations as binding on States, even without any conventional obligation"[70]. However, only the substantive, material principles form part of Customary Universal International Law, and not Article IX on the Jurisdiction of the Court.

100. By the same token it is not possible to invoke Article 18 (b) of the Vienna Convention on the Law of Treaties of 23 May 1969.[71] Firstly, because Portugal is not party to that Convention. Secondly, because even though the precept may be held to be customary,[72] it would relate only to those principles of the convention the breach of which might threaten that convention's purpose and objects, i.e. its material principles. A clause attributing jurisdiction cannot in practice be breached. A State may deny jurisdiction, but the final word on the subject is with the Court. This is not an issue which can be included in the notion of provisions whose breach would deprive the Treaty of its object and purpose. The object and purpose of the Genocide Convention is the prevention and punishment of crimes of genocide, and not the safeguarding of the Court's jurisdiction.

101. Accordingly, since on 29 April 1999 Portugal had not recognised the jurisdiction of the Court pursuant to Article IX of the 1948 Genocide Convention, FRY cannot invoke the Convention as grounds for jurisdiction.

102. However, in the phase relating to the indication of provisional measures, FRY cited in support of its application the Court's jurisprudence relating to "the principle according to which it should not penalise a defect in a procedural act which the applicant could easily remedy"[73]. In other words, the fact that Portugal became

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[70] Cfr. *Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide*, Advisory Opinion, *I.C.J. Reports* 1951, p. 23. The Court confirmed this view in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, Preliminary Objections, cit., para. 31.

[71] Text in UNT.S, vol. 1155, 1980, No 18232, pp 331-512.

[72] There is case law to support this, cfr. *German Interests in Polish Upper Silesia, P.C.I.J., Series A*, No 7, 1926, p. 30.

[73] Cfr. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, Preliminary Objections, cit., para. 26 and already in *Northern Cameroons* (Cameroon v. UK), *I.C.J. Reports*, 1963, p. 28 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports* 1984, p. 428-429, para. 83. The principle also appears in

bound by the Convention only a few days after the application was lodged, should not be considered as grounds for rejecting the Court's jurisdiction.

103. Portugal accepts that the principle claimed by FRY is well rooted in the Court's jurisprudence, but contends that in practical terms it is irrelevant to the present case.

104. Invoking this practice does nothing to change the conclusion that by the force of circumstances Portugal became bound to the Convention only on 10 May 1999, whilst the continuing and complex fact giving rise to the present claim arose before that date. A mere formal act on the part of FRY will do nothing to change that fact. And, should FRY file a new action, nothing will have changed in this respect, the Court having found that it has no jurisdiction. The purported dispute relating to application of the Convention, whose existence Portugal denies,[74] will continue to relate to a continuing fact which first arose prior to 10 May 1999[75], as Portugal has already demonstrated and as the Court upheld in its Decision of 2 June 1999[76].

105. Furthermore, the principle governing the temporal application of Treaties is the customary principle of non-retroactivity, enshrined in Article 28 of the 1969 Convention on the Law of Treaties [77] and upheld by the Court when it declared: "To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the

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jurisprudence of the PCIJ, in *Mavrommatis Palestine Concessions*, *P.C.I.J., Series A*, No 2, 1924, p. 34 e *Certain German Interests in Polish Upper Silesia*, cit., p. 14.

[74] Cfr, *infra*, para. 112-126.

[75] Once again Article 25 (1) of the International Law Commission draft on the International Responsibility of States: "The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins" (cfr. *Report of the International Law Comission*, 1996, Chapter III), [Annex 17].

[76] See *supra*, para. 77-83.

[77] "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier[78]".

106. This does not mean that Portugal defends that the principle of non-retroactivity should result in the Convention not being applicable to subsequent facts [79], simply because those facts include one continuing fact which arose at an earlier date.

107. What it does signify is that, whilst it is necessary to split a continuing fact for the purposes of the applicability of a Convention and of its Jurisdiction clause, the Court should refrain from extending its jurisdiction over those parts of the continuing fact where such a split would prevent one of the parties from exercising its right to defend itself, because the split barred it from invoking aspects of the same fact essential to its own defence. Were this to happen, the result would be irremediable prejudice to the right upheld by the Court when it declared: "if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim"[80].

108. Clearly, the Court has already avoided this situation by simply ruling that it has jurisdiction not just concerning the facts subsequent to the date one of the parties became bound, but to all the constituent facts of the dispute, including for the purposes of Article IX of the 1948 Genocide Convention, in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*[81].

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[78] Cfr. *Ambatielos Case (Greece v. United Kingdom)*, Preliminary Objections, 1 July 1952, I.C.J Reports 1952, p. 40.

[79] Admitting its applicability for the sake of argument, although Portugal considers there are no grounds even *prima facie* for applicability, see, *infra*, para. 112-126.

[80] Cfr. *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, *I.C.J. Reports* 1980, p. 36.

[81] "The Court held: "the Genocide Convention - and in particular Article IX - does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning

109. However, the Court's ruling in that case cannot be dissociated from the manner in which both FRY and above all Bosnia and Herzegovina became parties to the 1948 Genocide Convention, i.e. succession.[82] This retroactive applicability of its jurisdiction can only be understood, given the non-retroactive nature of treaties, if it is recalled that the parties assumed by succession the rights and obligations of the SFRY as party to the Convention from the date of its entry into force, which thus bound the citizens of the SFRY before they were to become citizens of the future States.

110. Practically speaking, any retroactive application of the 1948 Genocide Convention must be carefully tempered by the principle of non-retroactivity of International Criminal Law, which forms an integral part of Customary International Law *juris cogentis* and conventional Human Rights Law[83]. It is consequently only by succession to a State whose citizens were bound by the Convention that retroactivity can be held to apply. It would be insufficient to conclude that the Convention applied retroactively to States but not to their citizens, since in normal practice it would be impossible to disentangle the Convention's effects on the former from its effects, even indirect, on the latter.

111. However, Portugal did not become bound to the Convention by succession, with the result that retroactive application must be rejected, including the retroactive application of its Jurisdiction clause. From the point of view of Portugal, the Court should rule that it has no jurisdiction over any fact underlying the present dispute, even arising after 10 May 1999. Were the Convention applicable to the present dispute, and were the Court to consider it applicable to facts arising after that date which in practice involved a continuing fact of earlier origin, invoking "the principle according to which it should not penalise a defect in a procedural act which the applicant could easily

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of the conflict which took place in Bosnia-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above (see paragraph 31 above)" (cfr. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, Preliminary Objections, cit., para. 34).

[82] As the Court has held, cfr. *Case Concerning Application* (...), cit., paras 17, 20 and 23.

[83] Cfr., at universal level, Article 11 (2) of the Universal Declaration of Human Rights, adopted by GA Resolution 217 A (III), 10 December 1948, and Article 15 (1) of the International Covenant on Civil and Political Rights (text in UNT.S. No. 14668, vol 999 (1976),

remedy", it would (in a hypothetical phase relating to the merits) bar Portugal from any adequate defence, by prohibiting reference to parallel acts by FRY committed on an earlier date. The principle of equality of the parties before the Court would be threatened.

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pp. 171 et seq).

B - *There is no dispute within the meaning of Article IX*

112. However, a further obstacle arises to FRY's claim, quite apart from the lack of grounds for the Court's jurisdiction under Article IX, resulting from Portugal not being party to the Convention at the time FRY filed its application. The acts of which FRY accuses Portugal, even were they true, manifestly do not fall within Articles II and III of the 1948 Genocide Convention and are thus not subject to the jurisdiction attributed by Article IX.

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

114. But as the Court stressed, "in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX"[84].

115. In other words, the existence of a dispute between FRY and Portugal, and FRY's assertion that it falls within the meaning of Article IX, is not on its own sufficient for the Court to assert that it has jurisdiction under that Article.

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[84] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 37; also in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)]*, Preliminary Objections, cit., para. 29 ("To found its jurisdiction, the Court must, however, still ensure that the dispute in question does indeed fall within the provisions of Article IX of the Genocide Convention"); and in *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, *I.C.J. Reports* 1996, para. 16.

116. In practice FRY has done little more than make that assertion. It broadly accuses Portugal and the other respondent States of genocide. But the somewhat casual way in which it seeks to ground these accusations suggests that FRY itself holds few expectations as to their credibility. Faced with the problem of finding grounds for the Court's jurisdiction, FRY appears to have sought to bend both the law and the facts in an attempt to make the latter fit the former.

117. On the question of the Court's jurisdiction on the grounds of Article IX of the 1948 Convention, the Memorial has a single relevant paragraph of six lines, para. 3.4.3 (p. 349). This proposes as grounds for the Court's jurisdiction the NATO bombing and the events in Kosovo since 10 June 1999 under KFOR occupation. Relating to the specific intent to commit genocide, pages 282-284 list as "proofs" the alleged bombing of chemical industry targets and the alleged use of depleted uranium shells. It also refers to acts against Serbs in Kosovo, subsequent to 10 June 1999, but without alleging them to be the responsibility of the KFOR. It makes no attempt to fit the alleged facts to the 1948 Genocide Convention, which is only quoted, without comment, in mid-page (p. 326).

118. Genocide presupposes both a material and a psychological element. The first requires the practice of acts to destroy "in whole or in part, a national, ethnical, racial or religious group" by acts such as "Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group" (Convention, Article II[85]). Thus, to constitute genocide, the acts must be practised in such a way that they may result in the destruction of the group.

119. In addition, there must be a specific intent, clearly stated in Article II of the

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[85] The same notion can be found in Article 17 in the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (cfr. RILC, 1996, Chapter 2) [Annex 20]. Also Articles 4 (2) of the Statute of the International Criminal Tribunal for ex-Yugoslavia (approved by Security Council Resolution 827 (1993), 25 May 1993, reported in the Secretary-General's Report UN Doc. S/25704 and Add.1), [Annex 21] and Articles 2 (2) for Rwanda (approved by Security Council Resolution 955 (1994), 8 November 1994, in its annex), [Annex 22] and Article 6 of the Statute of the International Criminal Tribunal (text in UN Doc.

Convention: "the intended destruction of 'a national, ethnical, racial or religious group", as the Court[86] and the International Criminal Tribunals for the former Yugoslavia[87] have ruled.

120. It is not sufficient that there is the murder of one or more individuals who happen to be members of a particular group, or even that the acts are committed because the victims are members of that group. The acts must form part of a broader plan to destroy a group or a substantial part of it[88]. For this reason, even widespread acts of murder, although they clearly constitute a crime against humanity, are not in themselves genocide unless accompanied by such a specific intention to destroy a group as a whole.

121. FRY's allegations, by seeking to presume this intent in acts of war aimed exclusively at targets of military significance and which employ all the means of modern technology to save civilian lives and property, clearly fail to support its claims. The alleged violations of international humanitarian law, which Portugal rejects, cannot be brought as evidence of any genocidal intent. Violations of Humanitarian Law may, in abstract, be the origin of war crimes, but not of the crime of genocide. Besides, all acts of bombing were directed at targets of military significance and not to any group of individuals, Serbs or other. Unfortunately, even the Chinese Embassy was by accident

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A/CONF.183/9, 17 July 1998), [Annex 23].

[86] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 39; also in *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, *I.C.J. Reports* 1996, p. 240, para. 26.

[87] The Court held that "It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law. The underlying crime or crimes must be characterised as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Stated otherwise, "[t]he 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" [cfr. *Prosecutor v. Goran Jelisic*, (Case No IT-95-10), Judgment, 14 December 1999, para. 66], [Annex 24].

[88] As was confirmed by the International Law Commission, in its commentary on Article 17 of its draft Code of Crimes against the Peace and Security of Mankind: "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" and "The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group" and "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group" (cfr. RILC, 1996, Chapter 2, paras 6 and 8 of the

targeted.

122. In any event, an aspect which Portugal wishes to stress is that, even in the form of conspiracy, the crime of genocide requires an intent to destroy by the accused, not by third parties. FRY has not accused Portugal of any act having that specific intent. The Memorial contains not a single allegation of a specific act by Portugal, far less any which meets both the material and the psychological criteria of genocide.

123. FRY does not attempt to attribute to the KFOR the acts which it alleges to have taken place since 10 June 1999[89], accepting that they were perpetrated by elements of the Kosovo population[90]. But the crime of genocide cannot be committed by negligence[91].

124. It must be added that the acts alleged to have taken place since 10 June 1999, like those committed before that date, and if they occurred at all, were manifestly not the material acts of genocide. Most were clearly outside the scope of Article II (a) to (e). Those relating to murder, reprehensible though they may have been — and Portugal stresses its condemnation of them — and though they have been appropriately repressed, were in no way of a nature to result in the destruction, even partial, of the Serb population of Kosovo. Neither has FRY submitted any evidence that they were committed with such a specific intent. The allegations in this matter go no further than the repetition of unfounded presumptions and the quoting of international reports in which no reference whatsoever is made to genocidal intent[92].

125. In short, not only has FRY failed to provide evidence to substantiate its accusations, an issue which would normally come before the Court only in the merits

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commentary on Article 17), [Annex 25].

[89] Allegations which, if they are held to constitute a new dispute, should be regarded as inadmissible. See *infra*, paras 149-159.

[90] Cfr. *Memorial*, cit., p. 201-282.

[91] As the International Law Commission has said, acts of genocide "are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act" (cfr. RILC, 1996, Chapter 2, para. 5 of the Commentary on Article 17), [Annex 26].

[92] Cfr. *Memorial*, cit., p. 283-284.

phase of the case, it has failed to bring forward the necessary allegations of facts which, **whether true or not**, would have demonstrated the existence of a dispute relating to acts within the meaning of Articles II and III of the 1948 Genocide Convention. A dispute may indeed exist, but it relates to whether or not the international norms on the use of force, International Humanitarian Law and Security Council Resolution 1244 (1999) were respected. It does not relate to acts of genocide, and it is manifest that no such acts occurred.

126. In view of the foregoing, Portugal contends that the Court's provisional conclusions on this question, reached at the provisional measures phase, cannot be challenged: "whereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the object of FRY's Application "indeed entail the element of intent, towards a group as such, required by the provision quoted above""[93].

[93] Cfr. *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Order of 2 June 1999, cit., para. 39.

Part III – Objections relating with admissibility

127. Even without the obstacles represented by the lack of *Locus standi* and of the Court's jurisdiction, as put forward by Portugal and described in the foregoing paragraphs, there would still remain legal constraints to the exercise of the Court's jurisdiction.

128. As the Court has already had occasion to observe "even if the Court, when seized, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore"[94].

129. Portugal contends that FRY's claims submitted in the present action are just such a case, for the following reasons.

I – The claim concerns acts by NATO, not Portugal

130. As FRY recognises throughout its Memorial, and even in the title of one of the annexes thereto[95], the acts which are the subject of the present proceedings are acts of NATO. Hence the references to "NATO aviation"[96] or "acts of Nato".[97] Indeed, all the political and military decisions were taken by NATO bodies, respectively its Council, its Secretary-General and its military authorities.

131. NATO is, however, an international organisation with international legal personality. This is implicit in the North Atlantic Treaty of 4 April 1949 by which the organisation was established, in the creation of the North Atlantic Council, its supreme body, with competence to set up other subsidiary bodies (Article 9), in attributions

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[94] Cfr. *Case concerning Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, *I.C.J. Reports* 1963, p. 29.

[95] "Nato Crimes in Yugoslavia", vols I and II, May/July 1999.

[96] e.g. in the second paragraph of Part I of its *Memorial*, cit., p. 11, para. 1.1.1.2.

[97] Ibid, *Memorial*, cit., p. 299, para. 1.10.

whose performance requires the existence of legal personality and in the distinction between the situation of the organisation and that of its members, deriving from the power of its bodies to issue recommendations to members under to the same Article 9[98].

132. This personality is confirmed by its own practice and by that of other bodies, including the United Nations.[99] Thus, numerous member states and certain non-members have permanent representations to NATO, and the organisation has entered in treaties not only with its own members but also with third countries, including FRY itself. This is the case of the Agreement signed in Belgrade on 15 October 1998 by the Chief of General Staff of the Army of Yugoslavia and the Supreme Allied Commander Europe of NATO, concerning the Aerial Verification Mission in Kosovo,[100] and the Military Technical Agreement signed on 9 June 1999 by the military representatives of NATO, representing KFOR and Yugoslavia on behalf of their government and of

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[98] These are criteria applied by the Court to determine the existence of international legal personality of the United Nations Organisation, cfr. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11April 1949, *I.C.J. Reports* 1949, p. 148-149.

[99] The Security Council has referred both directly and indirectly to NATO as an organisation, and not merely an alliance of its members, implicitly recognising its personality, although its seems hesitant to qualify it as a regional or international organisation *strictu senso*. Thus in Resolution 816 (1993), 31 March 1993 [Annex 27], after referring to Chapter VIII in the preamble (para. 6), the Security Council at para. 4 authorises the member states, individually or through regional bodies and agreements, to use force to impose an air exclusion zone in Bosnia and Herzegovina. In practice, the intervening forces were those of NATO, and the Security Council was fully aware of that fact. This thus represented implicit recognition of NATO as a regional organisation for the purposes of Chapter VIII. The same applied in Resolution 770 (1992), 13 August 1992, in paras 2 and 4 [Annex 28], and although here Chapter VIII is not invoked, the intervention of regional organisations and agreements is permitted. Likewise in Resolution 836 (1993), 4 June 1993, para. 10 [Annex 29]; Resolution 908 (1994), 31 March, para. 8 [Annex 30]; Resolution 958 (1994), 19 November, para. 2 [Annex 31] and Resolution 981 (1995), 31 March, para. 6 [Annex 32]. In Resolution 1031 (1995), 15 December, paras 12, 14 and 25, which established the IFOR multinational force, commanded by NATO in Bosnia and Herzegovina [Annex 33], and in Resolution 1088 (1996), 12 December [Annex 34], by which it was replaced by the SFOR [whose powers are restated in the same terms on Resolution 1174 (1998), 15 June [Annex 35], and Resolution 1247 (1999), of 18 June, [Annex 36]], the Security Council refers to NATO as the organisation referred to in Annex 1 of the Dayton Agreements), thus explicitly referring to it as an organisation. Resolution 1203 (1998), 24 October, para. 4 of the preamble and paras 1 and 3 [Annex 37], refer directly to NATO for the first time, describing it as an international organisation. The President of the Council was to do the same in the Declaration No. 12 of 14 May 1999 [Annex 38]. In Resolution 1244 (1999), 10 June, setting up KFOR, the Council refers to NATO by implication as an international organisation (paras 7 and 10) [Annex 18].

[100] Cfr. UN Doc. S/1998/991, annex [Annex 39]. This agreement was endorsed by the Security Council in Resolution 1203 (1998) of 24 October 1998, which also demanded that it be

Serbia[101].

133. By these treaties, FRY has recognised *de jure* NATO's legal personality. Accordingly, it has recognised that within the scope of its competences, NATO acts in place of its member states, in its own name and on its own authority, notably as regards the questions covered by the agreements referred to, i.e. those relating to the crisis in Kosovo.

134. The same principles were adopted by the United Nations as regards the acts of its forces. Once under United Nations command,[102] those forces act under its responsibility, even though the forces may have been supplied by member states[103].

135. But as has already been stated, all the operations which took place in Kosovo were decided by NATO bodies, the forces of its member states having been placed under NATO command, and it is to NATO that responsibility for the military operations falls. FRY itself has recognised this fact.[104]

136. It is consequently NATO as a legal person which assumes full responsibility under international law for its actions in Kosovo, and not its member States. Having recognised NATO's responsibility in the agreements cited, it is with NATO that FRY must resolve the disputes arising from its alleged failure to comply with those agreements and acts associated with the subject of those agreements, i.e.

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respected (para. 4 of the recital and paras. 1 and 3) [Annex 37].

[101] [Annex 40]

[102] Thus, Article 1 (c) of the Convention on the Safety of United Nations and Associated Personnel adopted by the General Assembly in Resolution 49/59 of 9 December 1994 [Annex 41], states: ""United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control".

[103] Cfr. Secretary-General's Report (UN Doc. A/51/389 October 1996), para. 6 and 7 [Annex 42] ("The United Nations has, since the inception of peace-keeping missions, assumed its liability for damage caused by members of its forces in the performance of their duties" and "The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations").

[104] e.g. "KFOR is created by NATO. It is under command and control of NATO" (Cfr. *Memorial*, cit., p. 299, para. 1.9.2.7).

Kosovo. The agreements were between FRY and NATO.

137. By seeking to impute NATO's acts to its member states, FRY acknowledges that they were acts of NATO. In an attempt to escape this reality, FRY has taken as grounds for imputation such weak allegations as an apology,[105] tendered for diplomatic reasons and *Comitas Gentium*.

138. FRY also contends that, because there exists a procedure of unanimous adoption of political decisions in the NATO Council it is implied that each member State holds political and military control over NATO action, and NATO actions can be imputed to them. Decisions are in fact taken by consensus, and an abstention does not therefore invalidate them. Principally, though, FRY ignores the fact that, because each member State has a seat on the NATO Council, NATO's legal personality vis-à-vis international law does not diminish. It continues to hold responsibility for all practical purposes. To deny this is also to maintain that the Permanent Members of the Security Council are directly responsible for the unlawful acts of the United Nations even when they have abstained from voting a policy whose implementation is claimed to have resulted in an unlawful act.

139. This state of affairs is confirmed elsewhere in FRY's own Memorial. None of the facts or allegations relate to an act by Portugal. FRY does no more than accuse NATO of certain acts and vaguely assert that Portugal and the other respondent States are responsible by virtue of being members of NATO. There is not a single specific allegation of a political act by Portugal within NATO, or of an act of war by Portuguese forces against FRY. The only explanation of this breach of the requirements underlying Article 49 (1) of the Rules of the Court is that FRY has nothing relevant to say on the matter.

140. In conclusion, FRY has filed proceedings against Portugal in respect of acts which were the responsibility of another body, alleging no specific act by Portugal, and basing its action solely on the fact that Portugal is a member of NATO.

141. In Portugal's view, all the claims by FRY should, consequently, be deemed inadmissible on the grounds that in accordance with the principles of international

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[105] Cfr. *Memorial*, cit., p. 299-300, para. 1.10.

responsibility, they are not addressed to the entity responsible.

II – The exercise of jurisdiction would directly affect the rights and duties of third parties

142. Even if that was not the Court's view, Portugal contends that the Court should decline jurisdiction in the present case, on the grounds that the international organisation which adopted the acts resulting in FRY's action is not party to the proceedings.

143. The same applies to other major members of the organisation which are not parties to the proceedings filed by the FRY. Of the 19 NATO members, 14 had a greater or lesser role in the NATO action. FRY has brought actions against only ten, two of which the Court has already rejected.

144. It may also be noted that as regards the actions relating to KFOR and events subsequent to 10 June 1999, a further 34 States, including non-NATO members, were involved[106]. In this matter, even the United Nations is directly involved, since it was the Security Council that authorised the intervention of KFOR, and UNMIK, a subsidiary organ of the United Nations, has major responsibilities in Kosovo[107].

145. The rights and duties of other States and of two international organisations, all third parties to the present proceedings, consequently lie at the very heart of its subject-matter. As the Court has already held, it cannot exercise jurisdiction when to do so would imply that, without its consent, a third party's "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision"[108].

146. The Court applied the same principle again: "the effects of the judgement requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not

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[106] Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Spain, Turkey, United Kingdom, United States (Nato Member States), Argentina, Austria, Azerbaijan, Finland, Georgia, Ireland, Jordan, Lithuania, Morocco, Russia, Slovakia, Slovenia, Sweden, Switzerland, Ukraine, United Arab Emirates (Non-Nato States) [Annex 43].

[107] Cfr. Resolution 1244 (1999), 10 June 1999, para. 5-7 and 9-11.

[108] Cfr. *Monetary Gold Removed from Rome in 1943* (Italy v. France, UK and USA),

have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgement made in the absence of that State's consent. Such a judgement would run directly counter to the "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""[109].

147. Only in cases where the third party's action was of minor significance in the situation under consideration, and where its interests were consequently secondary, has the Court refused to apply this principle.[110]

148. By the force of the circumstances of the present case, where the actions are those of NATO (or of KFOR, in which NATO has a decisive participation) and other major States, whether or not NATO members, it will clearly be a *sine qua non* condition of the Court's decision on FRY's claims that the legal situation is analysed in detail. The same can be said of the United Nations. The Court would be obliged to exercise its jurisdiction over issues whose central subject-matter was the rights and responsibilities of third parties, without their consent.

149. Portugal contends, therefore, that the Court should decline to exercise its jurisdiction in this case, holding all FRY's claims to be inadmissible.

I.C.J. Reports 1954, p. 32.

[109] Cfr. *East Timor Case (Portugal v. Australia)*, cit., para. 34.

[110] "In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction" [cfr. *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, *I.C.J. Reports* 1992, p. 261-262, para. 55]. Also in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* para. 88.

III – The submissions relating to facts subsequent to 10 June 1999 radically change the nature of the dispute

150. In the Memorial submitted by FRY, the initial claims are supplemented by a series of claims relating to events subsequent to 10 June 1999 alleged to have occurred in Kosovo during the period when UNMIK and KFOR were on the territory.[111] FRY justifies this broadening of the nature of the proceedings with the claim that these new elements likewise form part of the initial dispute.

151. Portugal has already claimed that the Court should reject FRY's applications relating to events subsequent to 10 June 1999, if considered to be part of the same dispute, on the grounds that it has no jurisdiction, given that, *inter alia*, the dispute arose well before 26 April 1999, the date on which Yugoslavia accepted the Court's jurisdiction in relation to disputes arising after that date, based on events subsequent to the same date.[112]

152. However, should the Court reject FRY's claim that these are elements of the same dispute, finding that it has jurisdiction in relation to this new dispute, Portugal will contend that these are elements which radically change the nature of the proceedings, and that the corresponding claims should be held to be inadmissible.

153. For the Court has found that, notwithstanding any reservation in the original claim regarding its future extension,[113] there is a limit to the right to formulate new claims. Thus it held: "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, ICJ 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, ICJ Reports*

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[111] Cfr. *Memorial*, cit., p. 8, para. 12 and pp. 339-340, paras 3.2.11-3.2.12 and 3.2.16.

[112] See, *supra*, para. 92.

[113] Which FRY effectively did; cfr. *Application of The Federal Republic of Yugoslavia*

1974, p. 203, para. 72)."[114].

154. But the new claims by FRY change the respondent entities, which are no longer exclusively members of NATO, but another 34 States, and also involve the United Nations by virtue of the allegations regarding violation of Security Council Resolution 1244 (1999), and also of the fact that the said Resolution authorises KFOR to intervene on the ground and creates UNMIK.

155. They also change the situation under consideration, no longer that of open armed conflict, but merely of peace-keeping, after the signature of an agreement between the parties endorsed by the Security Council. A more complete change is difficult to imagine. In the light of traditional International Law, the shift from wartime to peacetime was so profound that it implied a change in the applicable law, from the Law of War to the Law of Peace. Today, a change of this magnitude cannot be accepted, but the change remains substantial.

156. It also affects the period of time the Court must take into account. Seen in this light, FRY has done little more than attempt once again to postpone the starting date of the dispute with the aim of escaping the limitations *ratione temporis* of its own optional Declaration.

157. It changes the cause of the claim, in so far as an allegation of responsibility for the breach of the rules on the use of force and of Humanitarian Law becomes, in essence, a responsibility flowing from the breach of United Nations acts.

158. It changes, finally, the nature of the responsibility, which in the first period would derive from intentional acts, and in the second, apparently, from negligence.

(...), cit., p. 5.

[114] Cfr. *Certain Phosphate Lands in Nauru* (Nauru v. Australia), cit., para. 69. Also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, cit., para. 80). The Permanent Court of International Justice also ruled on the question: "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." (cfr. *Société Commerciale de Belgique*, Judgement, 1939, P.C.I.J., Series A/B, No 78, p. 173).

159. Claims less connected with the initial subject of the dispute, and more radically amending it, can be imagined only with difficulty. All the evidence suggests that, rather than wishing to bring new claims, FRY is in fact seeking to bring a new procedure, since there is clearly no basis on which it can hope to succeed in the first.

160. This being the case, and in the interests of its defence and of the good administration of justice, Portugal contends that there is every reason to avoid the further artificial complicating of the case by converting its nature to another whilst maintaining earlier claims. Portugal consequently requests the Court to hold the new claims brought by FRY to be inadmissible.

SUBMISSIONS

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

1 – That the Federal Republic of Yugoslavia has no *Locus Standi* before the Court.

2 – That the Court lacks jurisdiction over the claims filed against Portugal by the Federal Republic of Yugoslavia.

3 – That the claims filed against Portugal by the Federal Republic of Yugoslavia are inadmissible.

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