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8 Le PRESIDENT : La Cour entendra maintenant la plaidoirie du Portugal. Je donne la parole à M. Luís Tavares, agent du Portugal.

M. TAVARES :

1. Monsieur le président, Madame et Messieurs de la Cour, c'est un immense honneur pour moi que de me présenter aujourd'hui devant vous en tant qu'agent de la République portugaise.

Tout d'abord, je voudrais vous présenter mes compliments, Monsieur le président, ainsi qu'aux autres Membres de la Cour. Je voudrais également adresser mes salutations à la délégation de la Serbie et Monténégro et aux délégations des autres Etats défendeurs.

2. Monsieur le président, Madame et Messieurs de la Cour, la présente espèce a suivi un cours inhabituel. La République fédérale de Yougoslavie — aujourd'hui la Serbie et Monténégro — a déposé auprès du Greffier de la Cour des requêtes contre plusieurs Etats membres de l'OTAN, dont le Portugal. Dans l'affaire l'opposant à la République portugaise, la Yougoslavie a invoqué, pour fonder la compétence de la Cour, le paragraphe 2 de l'article 36 du Statut et l'article IX de la convention sur le génocide.

Par la suite, la Yougoslavie a déposé son mémoire et le Portugal a soulevé certaines exceptions préliminaires.

3. La Serbie et Monténégro a présenté sa réponse sous forme d'observations et de conclusions écrites; elle n'y a répliqué à aucune des exceptions formulées par le Portugal sauf une, celle relative au défaut de validité de la déclaration d'acceptation de la juridiction de la Cour par la Yougoslavie. La Serbie et Monténégro l'a réfutée en affirmant qu'elle «n'était pas et ne pouvait pas être partie au Statut de la Cour [du fait qu'elle n'était pas] Membre de l'Organisation des Nations Unies». Il s'ensuit que la déclaration d'acceptation de la compétence de la Cour ne pouvait être valide lorsqu'elle a été déposée. La Serbie et Monténégro a de même fait valoir qu'elle n'était pas partie à la convention sur le génocide à l'époque des événements qui font l'objet de la présente instance.

Dans ses conclusions, la Serbie et Monténégro a prié la Cour de statuer sur sa compétence à la lumière des arguments avancés dans ces observations écrites. En d'autres termes, la Serbie et Monténégro a demandé à la Cour de se déclarer incompétente pour trancher l'affaire au fond.

9 4. La République portugaise est d'accord avec la Serbie et Monténégro : la Cour n'a pas compétence pour statuer sur le fond de l'affaire.

Le Portugal respecte la position actuelle de la Serbie et Monténégro. Mais cette position entraîne certaines conséquences au regard du droit : la Serbie et Monténégro n'a plus d'intérêt juridique à voir régler le différend dont elle a saisi la Cour et, partant, la présente instance est devenue sans objet.

5. Monsieur le président, Madame et Messieurs de la Cour, le Portugal n'en débutera pas moins précisément sa plaidoirie par une analyse des conséquences juridiques de la position adoptée par la Serbie et Monténégro dans ses observations et conclusions écrites.

La question de l'incompétence de la Cour n'est plus, aujourd'hui, matière à controverse entre les Parties. Néanmoins, *ex abundanti cautela*, le Portugal précisera à ce stade certains arguments exposés dans le cadre de ses exceptions préliminaires écrites.

Le Portugal ne reviendra pas sur la nullité de la déclaration d'acceptation de la compétence faite par la République fédérale de Yougoslavie, l'acquiescement de la Serbie et Monténégro sur ce point ayant été formulé explicitement. Les écritures portugaises, les observations écrites de la Serbie et Monténégro et les documents soumis par le Portugal aux fins de la présente affaire suffisent à établir ce défaut de validité.

En outre, l'ensemble des arguments développés au sujet des exceptions préliminaires sont subsidiaires par rapport aux questions relatives à la perte par la Serbie et Monténégro de tout intérêt juridique et au défaut d'objet de la présente instance qui en découle.

6. En conclusion, je voudrais ajouter que, si nous nous abstenons de répéter les arguments développés dans nos écritures, ce n'est en aucun cas parce que nous y aurions renoncé.

Je tiens également à souligner que rien de ce qu'avance le Portugal dans la présente phase de l'instance ne devra être considéré comme un assentiment quant au fond.

7. Monsieur le président, je voudrais maintenant vous prier de donner la parole à notre coagent, M. l'Ambassadeur Joaõ Salgueiro, puis à notre conseil, M. Miguel Galvaõ Teles, qui présentera et développera l'argumentation orale de la République portugaise.

Je vous remercie, Monsieur le président, Madame et Messieurs de la Cour.

10 Le PRESIDENT : Merci, Monsieur Tavares. Je donne maintenant la parole à S.Exc. M. Salgueiro.

M. SALGUEIRO :

1. Monsieur le président, Madame et Messieurs de la Cour, je commencerai, si vous le permettez, par vous présenter mes respects les plus sincères, vous priant de croire que c'est pour moi un grand privilège que de me présenter aujourd'hui devant vous. En tant qu'ambassadeur du Portugal au Royaume des Pays-Bas, je dirai, si vous le voulez bien, quelques mots au nom de mon gouvernement.

2. Permettez-moi également de saluer la délégation de la Serbie et Monténégro. Le Portugal est très attaché au renforcement des relations bilatérales entre les deux Etats. Ces relations ont récemment connu un regain de par la visite dans notre pays du président de la Serbie et Monténégro, en novembre dernier. La République portugaise se félicite en outre des efforts déployés par la Serbie et Monténégro en faveur de la paix, de la démocratie et d'une intégration progressive au sein des institutions euro-atlantiques, tout comme elle se réjouit à la perspective d'une stabilisation de la situation dans la région.

3. Monsieur le président, Madame et Messieurs de la Cour, comme il a déjà été indiqué, le Portugal n'abordera pas le fond de la présente affaire. Je me contenterai de rappeler que notre pays a participé à l'opération «Force alliée» en 1999 en fournissant trois avions de reconnaissance F-16, ainsi que les pilotes et personnels auxiliaires (soit cinquante-trois personnes au total). Il a ainsi contribué, quelque modestement que ce soit, à une initiative collective destinée à mettre fin à une catastrophe humanitaire qui se prolongeait depuis quelque temps déjà. Le Portugal regrette les pertes humaines qu'a causées cette opération. Nous demeurons toutefois convaincus que ces pertes auraient été bien plus lourdes si le drame humanitaire que connaissait le Kosovo s'était poursuivi.

4. Monsieur le président, Madame et Messieurs de la Cour, le Portugal est un Etat qui respecte pleinement le droit international. Nous avons accepté la compétence de la Cour lorsque nous sommes devenus Membres de l'Organisation des Nations Unies en 1955 et nous demeurons attachés à l'idée que la Cour internationale de Justice a un rôle crucial à jouer en faveur du respect du droit international.

5. Le Portugal soutient toutefois qu'il ne serait pas souhaitable que la Cour connaisse de cette affaire, qu'elle n'a pas compétence en l'espèce et que les demandes sont irrecevables. Je vous prierais donc, Monsieur le président, de bien vouloir donner la parole à notre conseil, M. Miguel Galvaõ Teles, qui, comme l'a annoncé notre agent, présentera et développera les arguments du Portugal sur ces questions.

Le PRESIDENT : Je vous remercie, Excellence. J'appelle maintenant à la barre M. Miguel Teles.

11 Mr. GALVÃO TELES:

Mr. President, Members of the Court, it is an honour for me once again to plead before the International Court of Justice. I wish to present my compliments to you, Mr. President, Mr. Vice-President, and to all Members of the Court.

Mr. President, Members of the Court, I would first like to make two preliminary observations.

Since the events and the written pleadings all pre-date February 2003, when the Applicant adopted a new constitution and a new name, I shall refer to it indiscriminately as Serbia and Montenegro, Yugoslavia or the Federal Republic of Yugoslavia.

I will not reproduce here the references to be found in the written text filed in the Registry of the Court, or not in full at least. I would, however, ask that they be inserted, as usual, in the verbatim record.

I. LACK OF LEGAL INTEREST IN A SETTLEMENT OF THE DISPUTE AND FAILURE TO PURSUE THE OBJECTIVE OF THE PROCEEDINGS

1.1. The position taken by Serbia and Montenegro in its written observations and submissions raises a question related to the integrity of the Court's judicial function — a matter which comes before Portugal's preliminary objections. It is of course incumbent upon the Court itself, and not on the Parties, as it has stated on several occasions, to ensure the integrity of its judicial function (see for example, *Nottebohm, I.C.J. Reports 1953*, p. 122, *Northern Cameroons, I.C.J. Reports 1963*, pp. 29-31 and 37-38, and *Nuclear Tests, I.C.J. Reports 1974*, p. 271,

paras. 57-58). In this respect, Mr. President, Members of the Court, Portugal only seeks to draw your attention to a few points.

1.2. Under Article 40, paragraph 1, of the Statute, the existence of a dispute is an essential prerequisite of the exercise of the Court's jurisdiction in a contentious case. The purpose of proceedings is to settle disputes (*Nuclear Tests, I.C.J. Reports 1974*, p. 270, para. 55) — and to settle them *on the merits*. Incidental issues of jurisdiction may clearly arise during the proceedings
12 and preclude such settlement on the merits. It is nevertheless undeniable that this is the legal purpose of proceedings and that it is for the Applicant to pursue that purpose.

In the present case — and considering the situation in purely objective terms — Serbia and Montenegro, according to its observations and submissions on the preliminary objections, is seeking a decision exclusively on jurisdiction and with negative content, since it acknowledges that the Court lacks jurisdiction to rule on the merits. It is thus no longer pursuing the aim of obtaining a decision on the merits of the case.

1.3. Admittedly, in the case concerning *Monetary Gold Removed from Rome in 1943*, the Court accepted that the Applicant had raised a preliminary question regarding lack of jurisdiction and it was in dealing with that question that the Court decided it could not adjudicate upon Italy's claims. But the circumstances of that case were very specific — as the Court indeed emphasized (*I.C.J. Reports 1954*, pp. 28-29).

Italy had a legal and legitimate interest in seising the Court, even for the purpose of obtaining a negative decision on jurisdiction. The position taken by the United Kingdom during the proceedings shows this clearly (it should, moreover, be noted that the preliminary question or objection raised by Italy only concerned its first claim, although the Court considered that it could not adjudicate upon the second one either).

Pursuant to the Washington Statement of 25 April 1951, the seisin of the Court by Italy represented a *condition* of the upholding of its claim to receive the gold in partial satisfaction for the damage caused to it by the Albanian law of 13 January 1945. The Washington Statement, to which Italy was not a party, laid upon it the *burden* of seising the Court of pre-determined claims.

1.4. There is no similar occurrence in the present case. Serbia and Montenegro does not have a legal interest or a legitimate interest in the seisin of the Court. The issue is not to ascertain

whether preliminary objections raised are admissible. The point is simply that the purpose of the proceedings, the settlement of a dispute on the merits, is no longer being pursued by the Applicant and has simply disappeared.

1.5. Furthermore, the legal grounds on which the Applicant claims to found the Court's jurisdiction of the Court no longer exist (Article 38, paragraph 2, of the Rules): either under
13 paragraph 1, combined with Article IX of the Genocide Convention, or under Article 36, paragraph 2, of the Statute. Serbia and Montenegro has relinquished these grounds of jurisdiction.

1.6. Even if, as the Agent has said, Portugal will, *ex abundanti cautela*, return to some aspects of the preliminary objections it has raised, it relies on Serbia and Montenegro's agreement as to the Court's lack of jurisdiction and on its admission of the preliminary objections not explicitly dealt with in its observations and submissions. By virtue of waiver and estoppel, Serbia and Montenegro is now precluded from changing its position.

Everything that Portugal will say from now on is without prejudice to this point and is therefore asserted in the alternative.

II. THE COURT'S LACK OF JURISDICTION *RATIONE TEMPORIS* UNDER ARTICLE 36, PARAGRAPH 2, OF THE STATUTE

2.1. As the Agent has also pointed out, Portugal will not again address the question of the invalidity of Yugoslavia's declaration accepting the Court's jurisdiction. In this respect, it refers to its written pleadings and to the observations and submissions of Serbia and Montenegro and claims the benefit of what has been said and what has been and will be argued by the other Respondents in the cases parallel to this one.

What the Portuguese Republic will argue further on is thus in the alternative on two counts, in respect, first, of the lack of legal interest on the part of Serbia and Montenegro and the failure to pursue the objective of the proceedings and, second, in respect of the invalidity of Yugoslavia's declaration accepting the jurisdiction of the Court.

2.2. Under Article 36, paragraph 2, of the Statute of the Court, "[t]he States parties . . . may . . . declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State *accepting the same obligation*, the jurisdiction of the Court in all legal proceedings . . .".

Paragraph 2 of Article 36 itself lays down a requirement of reciprocity: recognition of the jurisdiction of the Court is valid only in relation to those States accepting the same obligation (*Phosphates in Morocco, Preliminary Objections, P.C.I.J., Series A/B, No. 74,* p. 22; *Electricity Company of Sofia and Bulgaria, Preliminary Objections, P.C.I.J., Series A/B, No. 77,* pp. 80-81;
14 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, I.C.J. Reports 1998,* p. 300, para. 45). As the Court stated in the case concerning the *Anglo-Iranian Oil Co. (Preliminary Objection),* "[b]y these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it" (*I.C.J. Reports 1952,* p. 103; see also *Certain Norwegian Loans, I.C.J. Reports 1957,* p. 23).

2.3. The declaration of the Federal Republic of Yugoslavia, signed on 25 April 1999, contains a reservation *ratione temporis*. It states that Yugoslavia recognizes the jurisdiction of the Court "in all disputes arising or which may arise ["*surgissant ou pouvant surgir*", in the French translation] after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature . . .".

In laying down a temporal limitation in its declaration, the Federal Republic of Yugoslavia obviously sought to protect itself, in respect of Article 36, paragraph 2, of the Statute, against any claims which might be brought by other States and which dealt with its conduct in connection with the dismemberment of the Socialist Federal Republic of Yugoslavia and its aftermath.

Since the jurisdiction of the Court depends on the declarations of Portugal and of Serbia and Montenegro coinciding, the conditions laid down in the declaration of Serbia and Montenegro must be fulfilled to enable the Court to rule on the merits.

2.4. In its Order on the request for the indication of provisional measures in the present case, the Court stated: "a 'legal dispute' . . . 'arose' between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999, concerning the legality of those bombings as such, taken as a whole", and "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; . . . each individual air attack could not have given rise to a separate subsequent dispute . . .".

As the Court observed, it is clear that the dispute crystallized during the Security Council meetings on 24 and 26 March 1999.

15 2.5 In respect of the question whether or not the dispute existed before the "critical date" (25 April 1999), the Federal Republic of Yugoslavia propounds two lines of argument.

The first appeared during the oral argument in the incidental proceedings concerning provisional measures. According to counsel for the Federal Republic of Yugoslavia, Mr. Corten, each NATO act was an *instantaneous wrongful act*; and each of those acts gave rise to a separate dispute (CR 99/25, 12 May 1999, pp. 18-19).

The other line of argument is found in the Memorial, in which the Federal Republic of Yugoslavia alleges:

> "After the Orders of the Court, dated 2 June 1999, the dispute aggravated and extended. It got new elements concerning failures of the Respondents to fulfill their obligations established by Security Council resolution 1244 and by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide." (Para. 3.2.11.)

And then:

> "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 related to responsibility of the Respondents for the crime of genocide committed to Serbs and other non-Albanian groups in the area under control of KFOR." (Para. 3.2.12.)

After quoting the Court's Judgment in the case concerning *Right of Passage (Merits)*, according to which a dispute cannot arise "until all its constituent elements [have] come into existence" (*I.C.J. Reports 1960,* p. 34), Serbia and Montenegro alleges that "after 10 June 1999, new disputed matters appeared which originated from illegal use of force, and so they became new elements of the dispute" (para. 3.2.16).

2.6 These two lines of argument are contradictory. The first breaks the dispute down into a multiplicity of mini-disputes. The second maintains the unity of the dispute, transforming it into a dispute which was inchoate at the time the Application instituting proceedings was filed.

2.7 Portugal will not revisit the "instantaneous wrongful acts" argument, which the Court rejected in its Order on the request for the indication of provisional measures and Serbia and Montenegro abandoned in the Memorial (para. 3.2.16). Suffice it to say that, as Serbia and

16 Montenegro itself has recognized by virtue of its declaration accepting the jurisdiction of the Court, a dispute is not to be confused with the facts underlying it.

2.8 In respect of the second line of argument, it should first be noted that the events occurring after 10 June 1999 have given rise to a dispute which is clearly separate from the earlier dispute, concerning the NATO bombing and its consequences.

It is public knowledge that NATO's military action in the Federal Republic of Yugoslavia had in fact ended before 10 June 1999. It was on that day that the Security Council, acting pursuant to Chapter VII of the Charter, adopted resolution 1244 (1999). That resolution provided for effective international civil and security presences (para. 7; Annex 2, para. 3). The international security presence was to have "substantial [NATO] participation".

The accusations levelled by the Federal Republic of Yugoslavia in its Memorial in respect of events having occurred before 10 June 1999 relate to aerial attacks launched by NATO. Those relating to events after 10 June concern actions by local people of Albanian descent and the alleged omissions by KFOR. The two disputes have entirely different objects. Portugal will return to this point.

2.9 If, conversely, it were to be supposed solely for purposes of argument that the dispute dealing with the events after 10 June 1999 is not a new one, it can only be the *continuation* of the earlier dispute. Indeed, it is one thing to ascertain the existence of elements providing the groundwork for a dispute without that dispute being established, but it is another to say that a dispute has arisen and is maturing.

Now, the Federal Republic of Yugoslavia has itself acknowledged that the dispute existed at the time the Application instituting proceedings was submitted, because it stated the object of the dispute in the Application. Even in the Memorial, while on the one hand asserting that all the elements making up the dispute were not present at 25 April 1999, on the other it states: "The dispute arose in the discussions at the Security Council meetings of 24 and 26 March 1999 between Yugoslavia and the Respondents before 25 April 1999 concerning the legality of those bombings as such, taken as a whole" (para. 3.2.16).

Moreover, assuming *arguendo* that events subsequent to 10 June 1999 amounted to the culmination of a single dispute, then no dispute characterized by all the necessary elements existed

17 at the time the Application instituting proceedings was submitted. However, as the Permanent Court stated in the case concerning *Electricity Company of Sofia and Bulgaria (Preliminary Objections)* in respect of the Belgian claim respecting Bulgarian law, "it rested with the Belgian Government to prove that, before the filing of the Application, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd, 1936" (*P.C.I.J., Series A/B, No. 77*, p. 83; see also *Certain Phosphate Lands in Nauru, Preliminary Objections, I.C.J. Reports 1992*, p. 266, para. 68, and *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, p. 322, para. 110).

III. THE COURT'S LACK OF JURISDICTION UNDER ARTICLE IX OF THE GENOCIDE CONVENTION

3.1 Serbia and Montenegro no longer founds the jurisdiction of the Court on Article IX of the Genocide Convention; it has relinquished this argument. In this respect, the Portuguese Republic will state its desire to benefit from what has been and will be said by other Respondents in the cases parallel to this one. Once again, Portugal's arguments to follow will be in the alternative.

A. Lack of jurisdiction *ratione materiae*

3.2. In its Order concerning the Request for the Indication of Provisional Measures, the Court took the view that "the essential characteristic of genocide is the intended destruction of a 'national, ethnical, racial or religious group'" and that "it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above'" [Article 2 of the Genocide Convention] (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 240, para. 26).

A *dolus specialis* is required for genocide: to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (Article 2 of the Genocide Convention); *The Prosecutor* v. *Goran Jelisic, ICTY, Judgment Trial Chamber I, 14 December 1999, Case No. IT-95-10*, para. 78; *The Prosecutor* v. *Jean Paul Akayesu, ICT, judgment Trial Chamber I, 2 September 1998, Case No. ICTR-96-4*, paras. 498, 517-522; *The Prosecutor* v. *Georges Andersen*

18 *Rutanganda, ICTR, Judgment Trial Chamber I, 6 December 1999, Case No. ICTR-96-3-T*, para. 59; *The Prosecutor* v. *Alfred Musema, ICTR, judgment Trial Chamber I, 27 January 2000, Case No. ICTR-96-13*, para. 164.

3.3. In its Memorial, Serbia and Montenegro did not shed any light on this *dolus specialis*.

While not even establishing genocidal intent as a fact, it tries vaguely to prove it by inference on the basis of the bombing of chemical plants in Pancevo and the use of depleted uranium. Allegation by inference means that Serbia and Montenegro does not propose to prove intent directly. However, reasoning by inference is justifiable only when the facts are conclusive. In the present case, however, they are not conclusive at all. The chemical plants were targets in themselves, and the explanation for the use of depleted uranium lies in its armour-piercing capabilities; I use the term 'explanation', not 'justification'. Moreover, the Federal Republic of Yugoslavia makes no allegation of fact that would link Portugal with the choice of these targets and the use of these weapons, in particular that Portugal approved the bombing of the chemical plants and the use of depleted uranium – which would be untrue.

In paragraph 1.6.1.1 of the Memorial, Serbia and Montenegro asserts with regard to the bombing of the chemical plants in Pancevo that "the responsible individuals of the Respondents should have known that strikes against such facilities may incur an additional risk to the population . . .". But "should have known" amounts to an accusation of negligence, not to say unthinking negligence, not of intent.

Moreover, Serbia and Montenegro itself acknowledges that there was no genocide at all before 10 June. We read in paragraph 3.2.16 of the Memorial that before 25 April 1999 "The disputed matter . . . was breach of the obligation not to use force against another State". In paragraph 3.2.12, referring to events subsequent to 10 June 1999, Serbia and Montenegro states that "[t]he dispute arising from the bombing matured throughout the new disputed elements related to responsibility of the Respondents for the crime of genocide committed to Serbs and other non-Albanian groups in the area under control of KFOR"; so "new", not "previous".

19 Thus, according to Serbia and Montenegro, genocide existed only after 10 June — an allegation which, let us be clear, is at the very least far-fetched and even offensive.

3.4. Further, we find no reference to alleged acts by Portugal. Serbia and Montenegro never says that a Portuguese aircraft has bombed any target, or that a member of the Portuguese armed forces has used depleted uranium or done anything whatever. This would not be possible anyway when, as the Co-Agent has said, Portugal's contribution to NATO forces was limited to three reconnaissance aircraft and their supporting personnel.

3.5. Serbia and Montenegro attributes the events after 10 June 1999 to Albanian separatists. Even if these events were not the subject of a fresh dispute, for the dispute to fall within the provisions of Article 9 of the Genocide Convention, Serbia and Montenegro would have to show, cumulatively and with supporting facts:

(a) that these Albanian separatists were acting with intent to destroy, in whole or in part, the Serb national group (which, incidentally, does not square with the constant reference in paragraph 1.5.6 of the Memorial to Serbs and other non-Albanian groups); and

(b) what Portugal's omissions were and what it could have done to prevent the Albanian separatists' activities.

And yet Serbia and Montenegro makes neither allegation.

3.6. The allegations by Serbia and Montenegro, even if true – which they are not – and if proved would never bear any relation to a genocide situation.

As regards their connection with Article 9 of the Genocide Convention, the claims by Serbia and Montenegro do not stand the *test* in the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1996*, pp. 615-616, paras. 30 and 32) and *Oil Platforms (I.C.J. Reports 1996*, p. 810, para. 16). They do not even stand the *tests* in *Ambatielos* (*I.C.J. Reports 1953*, p. 18) and in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America* (*I.C.J. Reports 1984*, p. 427, para. 81). The arguments of Serbia and Montenegro are not *plausible* enough to bring them within the ambit of Article 9 of the Genocide Convention; there is no *reasonable connection* between the claims and the Convention.

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B. Lack of jurisdiction *ratione personae* and *ratione temporis*

3.7. It is apparent from the records that Portugal did not become a party to the Genocide Convention until 10 May 1999. The Portuguese Republic acquired the status of party by accession. Contrary to what would happen in the event of a declaration of succession, accession has no retroactive effect whatever.

3.8. If the essentials of a dispute between the Federal Republic of Yugoslavia and Portugal that could be regarded *in abstracto* as a dispute as to genocide were present (which is not the case) before 10 May 1999, that dispute could only be a matter of customary law. There could never be a dispute between *Contracting Parties,* to which Article 9 of the Convention refers, because Portugal was not such a party.

3.9. As a result, even if reference could be made to a dispute relating to genocide and even if it were possible to convert a dispute covered by customary law into a dispute regarding the interpretation, application and implementation of the Convention, the Court could never give a ruling on events prior to 10 May 1999 with regard to Portugal.

Mr. President, I still need about a quarter of an hour if I continue, or is it time for the break?

Le PRESIDENT : Le moment est venu d'observer une pause d'une durée de dix minutes. L'audience reprendra ensuite.

M. TELES : Merci infiniment.

The Court adjourned from 4.40 to 4.50 p.m.

Le PRESIDENT : Veuillez vous asseoir. Monsieur Teles, vous pouvez poursuivre la présentation de votre plaidoirie.

M. GALVÃO-TELES : Merci, Monsieur le président.

IV LACK OF JURISDICTION OF THE COURT OR INADMISSIBILITY OF CLAIMS BECAUSE OF THE MONETARY GOLD RULE

4.1. In its written pleadings, Portugal argued that the Court could not rule on the merits according the *Monetary Gold* rule. Even if, as we have seen, there are other grounds prior to the

latter why the Court is unable to rule on the merits, the Portuguese Republic has a duty to explain the argument set out in the written pleadings in greater detail.

21 4.2. The claims of Serbia and Montenegro in the Application instituting proceedings and reproduced in the Memorial all relate to air attacks on the territory of the Federal Republic of Yugoslavia.

As Serbia and Montenegro have asserted on several occasions, these air attacks were launched and conducted by the North Atlantic Treaty Organization (see in particular para. 2.8.1.1.5 of the Memorial). It was also through NATO that Portugal contributed to KFOR.

4.3. As Portugal observed in its written pleadings (Preliminary Objections of the Portuguese Republic, para. 131), NATO is an international organisation in the strict sense, with its own international legal personality.

It has main bodies, including a supreme body, the North Atlantic Council, and subsidiaries, among them the Secretary General (on whose orders Operation "Allied Force" was launched). It has its own military structures, including the Military Committee and, as regards Europe, SACEUR.

It has the power to enter into treaties. For example NATO, represented by its Secretary General, with its Member States, was a party to the *Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation* of 27 May 1997 (NATO On-line library, Basic Texts, http://www.nato.int).

4.4. Furthermore, the "Agreement on the status of NATO, National Representatives and International Staff", signed in Ottawa on 20 September 1951 (among the easily accessible publications, including the NATO On-line Library), not only grants NATO a legal personality (Art. IV), but also, like its staff and the representatives of the Member States of the Organization, grants it privileges and immunities in similar terms to those granted by the 1946 United Nations Convention on Privileges and Immunities (United Nations, *Treaty Series*, Vol. 1, p. 15 and Vol. 90, p. 327), to its staff and the representatives of the Member States to the United Nations.

22 Particularly noteworthy is Article XXV of the Ottawa Agreement, which states: "The Council acting on behalf of the Organization may conclude with any Member State or States

supplementary agreements modifying the provisions of the present Agreement, so far as that State or those States are concerned".

4.5. As the Court asserted in relation to the "United Nations Convention on Privileges and Immunities", "it is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality" (*Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949,* p. 179).

4.6. As Professor Alain Pellet noted in an article he published,

> "NATO is an international organization and, as such, possesses international legal personality. While it is true that it is a somewhat special organization, whose institutionalization has been empirical and gradual, it nevertheless has permanent organs, has been assigned a mission of its own, and has legal capacity and privileges and immunities, all of which led the International Court of Justice, where the United Nations is concerned, in its Opinion of 11 April 1949 on Reparations for injuries suffered in the Service of the United Nations, to conclude that the latter was an 'international personality'." ("L'imputabilité d'éventuels actes illicites — Responsabilité de l'OTAN ou des Etats membres", *Kosovo and the International Community*, Ed. Christian Tomuschat, Martinus Nijhoff Publishers, 2002, p. 198.)

4.7. International legal personality is a matter of objective reality.

In any event, the United Nations has recognized NATO as an international organization. In this connection, Portugal refers to footnote 99 in its written pleading and to the annexes mentioned therein.

Similarly, the Federal Republic of Yugoslavia recognized NATO by adopting with it, on 15 October 1998, the Kosovo Verification Mission Agreement (Ann. 39 of Portugal's written pleading).

4.8. Bearing in mind this international personality and since, it is claimed, the bombing is attributable to it, *if* that bombing was unlawful (which Portugal does not concede), NATO would have incurred international responsibility.

There is no question of discussing here whether Member States would have concurrent or secondary responsibility if NATO's acts were unlawful. Portugal considers that, under current international law, there is nothing that would make it responsible for NATO's acts, even if they were unlawful. Be this as it may, the problem relates to the merits. What needs to be underlined is that, even if concurrent responsibility of Member States were accepted, that responsibility would

presuppose NATO's conduct being regarded as unlawful. It would be a matter of the responsibility of the Member States by virtue of the acts of an international organization.

This means that the Court could never rule on Portugal's responsibility without first having ruled on the legality of NATO's conduct.

4.9. In 1954, the Court formulated what is known as the *Monetary Gold* rule: it cannot determine the merits when the legal interests of a State which has not accepted jurisdiction "would not only be affected by a decision, but would form the very subject-matter of the decision" (*Monetary Gold removed from Rome in 1943, I.C.J. Reports 1954*, p. 32).

In 1992, the Court emphasized that, in the *Monetary Gold* case, "the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims" (*Certain Phosphate Lands in Nauru, Preliminary Objections, I.C.J. Reports 1992*, p. 261, para. 55). The criterion of the *prerequisite* was applied by the Court in the *East Timor* case: "in order to decide the claims of Portugal, it [the Court] would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent" (*I.C.J. Reports 1995*, p. 105, para. 35).

This has been the position taken by the International Court of Justice. If it upholds this position, *a fortiori*, it cannot rule on the merits in the present case. To rule in the present case on the claims of Serbia and Montenegro, it would *as a prerequisite* have to rule on the lawfulness of NATO's conduct in the absence of the latter's consent. NATO's legal interests would constitute the very object of the decision.

4.10. The fact that NATO is not a State alters nothing. The principle of consent to jurisdiction is just as valid for States as it is for any subject of international law constituted by them. Furthermore, the *Larsen-Hawaiian Kingdom* arbitral award, although referring to a third State, would regard the *Monetary Gold* rule as a general principle of public international law, in a

24 case to which two States were not even parties (Award of 5 February 2001 — www.pca-cpa.org).

The fact that international organizations cannot appear before the Court also alters nothing. The Court is not open to States not parties to its Statute and which have not fulfilled the conditions laid down by Security Council resolution 9 of 1946 and, nevertheless, the Court is not able to rule on the lawfulness of their conduct.

Moreover, there is nothing to prevent an international organization from giving its consent to judgment being passed on a case, even if it is not party to the proceedings (providing the Court, if it so wishes, with information in accordance with Article 34, paragraph 2, of the Statute). In this particular case, NATO has not given its consent.

4.11. Even if it were competent on other counts, the Court could therefore not rule on the claims of Serbia and Montenegro.

V. NON-ADMISSIBILITY OF THE CLAIM RELATING TO EVENTS AFTER 10 JUNE 1999

5.1. In the submissions set out in its Memorial, Serbia and Montenegro added a claim relating to acts subsequent to 10 June 1999 (11th conclusion), which was not included in the Application introducing proceedings.

5.2. This claim was not implicit in the original claims, nor is it a development of them. In order to deal with it, the Court would have to consider aspects completely extraneous to the original claims, both as regards the events — the activity of Albanian separatists, the action of KFOR, etc. — the chronology and the law, for it is the new reliance on obligations which is at stake, specifically that of preventing certain acts and of observing Security Council resolution 1244 (1999).

5.3. Moreover, there could not be any dispute regarding the events after 10 June before the filing of the Application. And, as we have seen, this is a new dispute, not a development of the original dispute.

5.4. In accordance with its case law, expressed *inter alia* in its Judgment in the case concerning *Certain Phosphate Lands in Nauru* (*I.C.J. Reports 1992*, pp. 265-267, paras. 63-71), the Court cannot entertain this new claim of Serbia and Montenegro.

25 Mr. President, Members of the Court, thank you for your attention. This concludes the oral argument of Portugal in the first round. Thank you.

Le PRESIDENT : Merci, Monsieur Teles. Ainsi s'achève ce premier tour de plaidoiries du Portugal.

L'audience est levée à 17 h 15.