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CR 2006/11 (translation)

CR 2006/11 (traduction)

Tuesday 7 March 2006 at 10 a.m.

Mardi 7 mars 2006 à 10 heures

10 Le PRÉSIDENT: Veuillez vous asseoir. Monsieur Condorelli, on ne vous a pas entendu hier soir, vous avez maintenant la parole.

Mr. CONDORELLI: Thank you very much, Madam President. Madam President, Members of the Court:

THE RESPONDENT HAS ACKNOWLEDGED ITS INTERNATIONAL RESPONSIBILITY FOR GENOCIDE

1. Last week the Deputy Agent of Bosnia and Herzegovina, Phon van den Biesen, presented some terrible images, showing several members of the paramilitary unit of the Serb police, the Scorpions, as, with revolting cynicism, they murdered Bosnian Muslim prisoners near Srebrenica. I would remind you that the Scorpions were a special unit of the Serbian police, under the authority of the Serbian Ministry of Internal Affairs, created, trained and armed by the latter: in brief, undeniably organs of the State. When these images were transmitted by a Belgrade television channel on 2 June 2005, they provoked huge emotion among the public within the country, as well as various statements by a number of leading political figures. From all sides there was a call for proper punishment of those concerned; and indeed the murderers were rapidly identified and arrested (though not, incredibly, their commander): they are currently awaiting trial.

2. On 15 June 2005, the Council of Ministers of Serbia and Montenegro, supreme government organ of the federal State, adopted an official declaration which made headlines in all the country's media. The Council of Ministers, expressing popular feeling, solemnly condemned the "crimes committed against Bosnian prisoners of war and civilians in Srebrenica in 1995". That document, Members of the Court, is in your folder for today.

3. The statement contains an important paragraph; so much so that I am going to cite it word for word and carefully comment on it. Here is what it says [in a French translation which I regard as faithful]:

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> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the great majority of citizens of Serbia and Montenegro put up the strongest resistance.
>
> Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

> Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

4. Madam President, those are fine words. Those are noble words: they do honour to the country represented by our distinguished colleagues on the other side of the Bar. Those words go in the right direction: that is to say, towards the full recognition of the Respondent's responsibility for genocide so needed by the martyred people of Bosnia and Herzegovina. As the Agent of Bosnia and Herzegovina told you a week ago, the future of relations between the two countries before you today can never be a peaceful and friendly one unless it is based on truth. However, those words are not sufficient — and indeed come very late — in light of the enormity of the crime of genocide perpetrated by the "undemocratic régime of terror and death" which then governed Serbia and Montenegro. It is for that reason, in order that those "sufficient words" be said, and that actions from now on effectively match those words, that we appear before this Court in the firm belief that you will be able to find the right words.

5. Madam President, Members of the Court, the statement from which I have just quoted is not only of great importance in moral and political terms. It also has clear legal consequences, which I wish to highlight now, using it to complete what we have said regarding attributibility of the genocide to the Respondent.

6. What the Council of Ministers of Serbia and Montenegro forcefully condemns is, as you have just heard, the "massacre" (that is the word used) of Srebrenica. Those condemned are not just the "perpetrators", the killers, but above all those who "ordered and organized" that massacre: those who represented (again I quote) the "undemocratic régime of terror and death" which then governed the State, a régime which is explicitly described as not representing the citizens of Serbia and Montenegro.

7. Clearly, the fact that the then Government is criticized as non-representative is central to a

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firm condemnation in political and ideological terms, but cannot imply — how indeed could it? — any denial of the fact that this was the Government in power in the FRY at the time of the offences, a Government enjoying international recognition, a Government whose actions, under the universally recognized principle of State continuity notwithstanding changes of régime, remain acts of the State which continue to engage its international responsibility. Do I need to remind you of

that *locus classicus* in international law, the *Tinoco* Award[1], and of the doctrinal source from which the Arbitrator drew his inspiration, namely those well-chosen and still very pertinent words of the celebrated authority, John Basset Moore, who 100 years ago wrote the following:

> "Changes in the government or the internal policy of a state do not as a rule affect his position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired . . ."[2]

8. In brief, to recognize the responsibility of the government in power in Belgrade during the first half of the 1980s for the Srebrenica massacre means recognizing the responsibility of the Yugoslav State, just as today's democratic Germany and Italy continue to bear international responsibility for the extremely serious crimes committed before and during the Second World War by the Nazi and fascist régimes then in power in those countries.

9. It is necessary, Madam President, to analyse carefully the legal force and effects of that recognition for purposes of settlement of the present dispute. The first observation called for is that Bosnia and Herzegovina is not relying in any sense in this regard on the principle enshrined by the International Law Commission in Article 11 of its Articles on international responsibility of States. That Article deals with conduct which, under the principles governing attribution, was not attributable to the State when it occurred, but becomes subsequently so attributable because, *ex post facto*, the State "acknowledges and adopts" (this is the phrase used) that conduct "as its own". That has nothing to do with the present situation before us: Bosnia and Herzegovina attaches weight to

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the statement cited not as a "cause" of attribution of the acts to which it refers, but as evidence, decisive evidence, of such attribution.

10. In its Judgment of 19 December last in the case between the Congo and Uganda, this Court considered the probative value of statements emanating from the organs of a State. You told us that the Court "will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them . . ."[3].

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[1]Aguilar-Armory and Royal Bank of Canada Claims (*Tinoco* case), Award of 12 January 1922, *RIAA* Vol. 1, p. 376.

[2]*Digest of International Law*, Vol. I, Washington, 1908, p. 249.

[3]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 61

11. That is a classic proposition, restated by the Court with express reference by way of precedent to its 1986 Judgment in the *Nicaragua* case, where it had indeed further developed its reasoning regarding the probative force of "statements by representatives of States, sometimes at the highest political level" (which is, incidentally, certainly so in our case). In that case this Court held that:

> "statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."[4]

12. A little further, still in the same 1986 Judgment, the Court stated, in even more explicit terms, what statements of this kind can show:

> "Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the State the authorities of which are the authors of these declarations, and, to a lesser degree, as evidence for the legal qualification of these facts."[5]

13. The Court then applied these propositions to the case before it. It found that the declaration by the United States in question (invoking self-defence as alleged justification for its acts involving use of force against Nicaragua) did not state or list the precise facts and thus could

14 not be taken as a form of "general admission", although it was certainly "a recognition as to the imputability of some of the activities complained of"[6].

14. Members of the Court, in the present case the declaration by the Council of Ministers of Serbia and Montenegro on which I am in process of commenting is certainly, in view of its terms, too general to be regarded as acknowledgment of the attributability to the respondent State of all the crimes committed against the non-Serbs of Bosnia and Herzegovina during the years of the genocide, even if it does indeed mention crimes other than those committed at Srebrenica: it cannot therefore be regarded as a "general admission" in the matter, and Bosnia and Herzegovina does not so claim. On the other hand, the declaration is quite precise regarding the Srebrenica massacre of 1995, which it expressly admits to have been an act of the State, since it recognizes

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[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Merits, Judgment, I.C.J. Reports 1986,* p. 41, para. 64.

[5] *Ibid*., p. 43, para. 71.

[6] *Ibid.*, p. 45, para. 74.

that it was the Government of the Yugoslav State at that time which organized it, ordered it and had it executed. We are therefore justified, Members of the Court, in requesting this Court to adjudge and declare that the 2005 declaration by the Council of Ministers of Serbia and Montenegro can be regarded, in the Court's words, as a "form of admission" and — again in your words — as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre.

15. I would, however, make a further observation. The Srebrenica massacre cannot be correctly assessed out of the context in which it occurred, and in light of which its true significance becomes apparent. Thus the systematic liquidation over just a few days of thousand upon thousand of prisoners, carried out by means of a large-scale military operation which undoubtedly required the most complex planning and organization, represents, as it were, the culmination of the genocidal campaign aimed at ethnically "purifying" part of the territory of Bosnia and Herzegovina. Srebrenica is in fact the final episode, and certainly one of the most terrifying: the climax of a single criminal enterprise, product of a single design and carried out by means of a series of actions of various organs, structures and groups spread over time. Acknowledgment of

15 the Federal Republic of Yugoslavia's responsibility for Srebrenica, final link in the chain, thus inevitably implies acknowledgment of responsibility for the genocide of which Srebrenica constituted an integral element.

16. However, let us return to the text of the declaration. It is true that it describes the 1995 massacre as a "war crime", and not as genocide. But that in no way weakens the probative force of this document: the Court had indeed indicated in 1986 that statements of this kind can be regarded, "to a lesser degree, as evidence for the legal qualification" of the facts[7]. That is self-evident: *jura novit curia*. In other words, the facts must be proved to the International Court whereas the Court's task is to state the law. "Tell me the facts, and I will tell you the law," as the Romans used to say: this classic adage is particularly applicable, as we all know, to international proceedings. The facts of Srebrenica, the cold-blooded massacre of some 8,000 men guilty of not being Serbs, have been established before this Court by conclusive evidence: evidence which

[7] *Ibid.*, p. 43, para. 71.

indeed has already persuaded the Criminal Tribunal for the former Yugoslavia to characterize it as genocide[8]. The attributability of these crimes to the FRY has already been conclusively established, confirming and rendering irrefutable their acknowledgment by the State and engaging its responsibility. It is now for the Court to decide whether or not these acts attributable to the Respondent are to be legally characterized — on the basis of the 1948 Convention — as elements of the crime of genocide, as the Applicant believes it has shown.

17. Madam President, that concludes the first part of my presentation. With your permission I shall now continue on a quite different subject, namely the Respondent's breach of its obligations to prevent and punish the crime of genocide. Thank you.

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THE RESPONDENT'S BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH THE CRIME OF GENOCIDE

1. Introduction

1. Madam President, Members of the Court, the first of the obligations imposed on all States, including of course both Serbia and Montenegro and Bosnia and Herzegovina, by the 1948 Convention is the obligation to prevent and punish genocide, a "crime under international law". This obligation is expressed in very general and, as it were, introductory terms in Article I, which closely follows the wording of the title of the Convention. Later provisions, in Articles IV to VIII, add a whole series of specific details and clarifications essential to its implementation. However, these further provisions focus primarily on punishment, while rules on prevention are scantly developed.

2. It is true, however, that no precise boundary can be established between prevention and punishment. First, it is well known that a well-organized system of enforcement, capable of imposing penalties proportionate to the seriousness of offences, plays a very important preventive role; and secondly, effective prevention calls for the punishment of any acts preparatory to

[8] ICTY, *Prosecutor* v. *Krstić*, case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, pp. 3-17, paras. 5-38 and Trial Chamber I, Judgement, 2 August 2001, paras. 539-599; ICTY, *Prosecutor* v. *Blagojević*, case No. IT-02-60-T, Trial Chamber I, Sec. A, 17 January 2005, pp. 235-248, paras. 638-677. See also, ICTY, *Prosecutor* v. *Karadžić and Mladić*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Review of Indictments Pursuant to Article 61 of the Rules of Procedure and Evidence, Trial Chamber, Decision of 11 July 1996, pp. 59-61, paras. 92-95 and case No. IT-02-54-T, Trial Chamber, Decision on the Application for Judgement of Acquittal, 16 June 2004, paras. 246 and 288.

genocide (such as conspiracy to commit genocide or attempted genocide, etc.), or again acts constituting incitement to commit genocide. In other words, the punishment of most of the so-called "ancillary" acts identified in Article III of the Convention, which were addressed yesterday by my friend and colleague Alain Pellet, plays a definite, though obviously non-exhaustive, role in the area of prevention.

3. Thus, prevention means that every State must adopt "appropriate and necessary means" (I would prefer to say: *all* appropriate and necessary means) to "protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity": I am using the language in which the World Summit of last September couched what it proclaimed as the "responsibility to protect"[9]. A responsibility which — as the document I am citing indicates — is borne by each State but also by

17 the "international community, through the United Nations". I would point out that, by proclaiming the responsibility to protect, it was intended to provide a solemn response — albeit one which quite clearly was inherently inadequate, though nonetheless significant — to the concerns forcefully expressed by the Secretary-General in his millennium report[10], regarding the international community's capacity to prevent future grave and massive violations of human rights of the kind committed in Rwanda and Srebrenica. In other words, the genocide against the non-Serbs of Bosnia and Herzegovina is one of the major tragic events which continue to drive the international community to find more suitable ways of preventing the repetition of extremely serious crimes of this kind.

4. All — I repeat, *all* — the obligations in respect of prevention and punishment of the crime of genocide laid down in the 1948 Convention have been seriously breached by the Respondent and, as regards punishment, continue to be breached even today: my purpose in this address will be to demonstrate that point. On the other hand, I shall be analysing neither the role envisaged for the United Nations by Article VIII of the 1948 Convention, in connection with the prevention and punishment of genocide, nor the role actually played and still played by the United Nations in relation to the genocide perpetrated in Bosnia and Herzegovina. I shall, of course, also be careful

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[9]Final document of the meeting of Heads of State and Government at the United Nations General Assembly, September 2005, United Nations doc. A/60/L.1, 20 September 2005, paras. 138 and 139.

[10]Report of the Secretary-General on the work of the Organization, doc. A/54/1, 1999.

not to broach the vexed question of humanitarian intervention as a means of halting — where necessary, by force — a genocide already under way. The reason for this choice is obvious: whatever the response may be to the question whether or not the United Nations (and the international community in general) adequately fulfilled its "responsibility to protect" the martyred people of Bosnia and Herzegovina in the present case, and how it should react in the future to possible new cases of genocide, the international responsibility of Serbia and Montenegro remains fully engaged, following the violation of the obligations set out in the 1948 Convention, including the obligation to prevent and punish.

5. Closing this parenthesis, I shall now address the violations of Article I of the Convention. Madam President, we have reached the final day of the first round of oral argument by Bosnia and Herzegovina; you might therefore find it surprising that the Applicant should wait until this late
18 hour to come forward with its point of view on a subject of such pivotal importance under the Convention. However, it is of course the scale of gravity of the wrongful acts committed by Serbia and Montenegro which has dictated the sequence in which we have laid out our arguments, since it goes without saying that the violations of Article I, though obviously serious, are considerably less so in relation to the actual crime of genocide perpetrated by the FRY. But it is now time to complete our argument by dealing with the actual obligation of prevention and punishment.

2. The scope *ratione loci* of the obligations to prevent and punish genocide

6. At the outset, however, Madam President, mention should be made of the conclusion drawn by your Court in its 1996 Judgment (on the preliminary objections) in the instant case, concerning the scope *ratione loci* of the obligations set forth in the 1948 Convention. In response to one of the preliminary objections raised by the Respondent, the Court began by noting that only one provision of the Convention contains a territorial reference, namely Article VI, which confines itself to providing that persons charged with any of the acts prohibited by the Convention "shall be tried by a competent tribunal of the State in the territory of which the act was committed . . .". Your Court went on once again to emphasize forcefully the particular nature of the rights and obligations enshrined in the Convention, characterizing them as rights and obligations *erga omnes*

(the time was not yet ripe for you to use the words *"jus cogens"*, as you did a month ago)[11]; and relying on this argument, the Court noted "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention"[12].

7. Allow me, Madam President, to make some brief comments, based on your own case law, concerning the significance and effects of the principle that the Court thus recognized: this is essential to the further train of my remarks.

8. The first precedent, a very classical one, which I should like to invoke is the 1971 Advisory Opinion on the *Continued Presence of South Africa in Namibia*, in which your Court held:

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> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[13]

9. The proposition that any State, when it has under its jurisdiction — whether legally or illegally — a territory which is not its own and exercises State functions there, is required to comply with the international rules relevant to the functions exercised, is confirmed by copious jurisprudence concerning human rights in particular. Thus, in the Advisory Opinion of 9 July 2004 *(Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, your Court concerned itself with the instruments with which Israel must comply beyond its frontiers, specifically in occupied territory; and it observed, in connection with the 1966 International Covenant on Civil and Political Rights, that

> "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the . . . Covenant . . . it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[14]

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[11] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 64.

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31.

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para.118.

[14] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, p. 179, para. 109.

10. And the Court, after noting the practice of the Human Rights Committee on the question, draws the following conclusion: "the . . . Covenant . . . is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"[15]. According to the Court, the same rule applies to the International Covenant on Economic, Social and Cultural Rights[16] [17], and the 1989 Convention on the Rights of the Child.

11. As was already mentioned by Professor Pellet, the rich jurisprudence of the European Court of Human Rights has developed along similar lines. In this connection, I shall confine myself to citing the summary of that Court's jurisprudence set out in the *Banković* Judgment of

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2001[18]; the European Court held that the European Convention on Human Rights has extraterritorial effect when a State

> "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".

12. Madam President, I see not the slightest impediment to considering that such a conclusion is all the more necessarily applicable to the Genocide Convention, in view of that Convention's object and purpose, on which the Court has laid such great stress. The lack of territorial limitations on the obligation to prevent and punish the crime of genocide, which you highlighted in 1996, means therefore that a State party to the Convention must discharge this obligation even outside its sphere of territorial sovereignty, when it exercises — whether legally or illegally — effective control over a territory outside its borders by assuming prerogatives of public authority in that territory. The genocide against the non-Serbs of Bosnia and Herzegovina was perpetrated while the Respondent undeniably exercised its authority over the territory concerned, first legally by way of territorial sovereignty, and subsequently illegally following Bosnia and Herzegovina's accession to independence. As we have seen, the degree of this control, whether exercised directly (by means of its own *de jure* institutional apparatus) or in some respects

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[15] *Ibid.*, p. 180, para. 111.

[16] *Ibid.*, para. 112.

[17] *Ibid.*, p. 181, para. 113.

[18] Case concerning *Banković and others* v. *Belgium and 16 Other Contracting States*, Application No. 52207/99, Decision, 12 December 2001, para. 71.

indirectly (by means of entities totally dependent on it), was certainly sufficient throughout the years of genocide to trigger the application of Article I of the 1948 Convention.

3. The Respondent's breach of the obligation of prevention

13. Madam President, Members of the Court, following these necessary preliminary points, I now turn to the obligation of prevention. As Alain Pellet noted on Friday of last week, it is extremely easy to demonstrate Serbia and Montenegro's breaches of this obligation: the very fact that genocide was perpetrated, and that it engages the international responsibility of the Respondent, logically proves by the same token that the latter did not discharge its obligation of prevention. However, this finding is supported not only by logic. By that I mean that an examination of the facts reveals clear evidence of the total failure to take preventive measures on

21 the part of the competent authorities, whether the FRY or Republika Srpska, and this despite urgent appeals from all quarters, despite the resolutions of the Security Council and the General Assembly, despite your Court's Orders of 8 April and 13 September 1993.

14. It is true that the domestic legislation required by Article V of the Convention for the implementation at national level of the rules of the Convention does exist in the respondent State and does — it has to be acknowledged — certainly provide *in abstracto* for effective criminal penalties capable of being applied against persons guilty of genocide or preparatory acts, acts of incitement, etc. The same could even be said also of measures aimed at bringing the domestic law of the Respondent into line with the principles and rules of international humanitarian law: Serbia and Montenegro uses this argument in its written pleadings[19], and it is in no way contested by Bosnia and Herzegovina. On the other hand, the argument strongly emphasized by Bosnia is that nothing was done to implement this legislation, and that no serious measure of prevention was adopted by the competent public authorities. Madam President, the Respondent's persistent silence on these matters is impressive: our opponents have been unable to cite a single significant document to show that the chain of command was concerned about compliance with the principles of humanitarian law and that it demanded such compliance from its subordinates, whether in the

[19]Rejoinder, p. 568, para. 3.2.2.3.

highest reaches of civilian and military leadership or at the grass roots of units operating on the ground.

15. The absence of serious measures of prevention could only inspire in the rank and file perpetrators of genocide a feeling that crimes against the non-Serbs of Bosnia and Herzegovina would not be punished, as was noted by a number of international reports and certain judgments of the International Criminal Tribunal for the former Yugoslavia[20]. In reality, far from being prevented, perpetration of the crimes in question was on the contrary advocated and encouraged as an instrument of ethnic cleansing. The indirect, but highly revealing, evidence of this includes the promotion within the Yugoslav army of officers in the army of Republika Srpska who were responsible for military operations culminating in massacres like that of Srebrenica in 1995: the oral pleadings of Bosnia and Herzegovina have provided well documented information on this subject[21].

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16. As we know, the lack of punishment encourages crime. This is clearly shown by certain episodes that have already been described in these pleadings. For example, we have already referred more than once to the confession by a senior official of Republika Srpska, Biljana Plasvić, who testified to the ICTY that although she had indeed been aware of allegations of inhuman and cruel treatment inflicted on non-Serbs, she had refused to believe them and to pursue enquiries: "I refused to accept them or even to investigate", she admitted[22]. It goes without saying that such an attitude is the direct opposite of that which should be cultivated by the authorities in order to prevent the commission of crimes.

17. Another highly significant example was cited by my colleague, Laura Dauban, last week[23]. This was the massacre of 7 May 1992, perpetrated at Crkvina by State security operatives of the FRY, who had murdered 16 civilians held in detention. In the *Simić* Judgment of 2003, the ICTY found it proven that a meeting had been held in Belgrade two days later, in the offices of the Federal Secretariat for National Defence, at which high-level officers had been informed of this

[20]CR 2006/7, p. 41, para. 112.

[21]CR 2006/8, p. 39.

[22]See above, footnote 11.

[23]CR 2006/6, p. 10.

massacre; but no measures were taken, no reprimands addressed to the perpetrators. From then on, therefore, all concerned knew very well that no risk of punishment would be incurred in the event that extremely serious crimes of the same nature were committed in the future.

18. Members of the Court, a long list of similar episodes could be compiled, demonstrating a total lack of preventive measures. I think, though, that it will be enough if I conclude by dwelling for a moment on the episode which best exemplifies the climate of total impunity which prevailed at all levels, with regard to the genocide against the non-Serbs of Bosnia and Herzegovina. This is the testimony of General Clark in the Milošović case, which the Deputy Agent of Bosnia and
23 Herzegovina, Phon van den Biesen, referred to last Friday[24]. General Clark explained to the International Criminal Tribunal for the former Yugoslavia that he had had a conversation with Slobodan Milošović, during which he had asked why the latter had allowed General Mladić to kill so many people at Srebrenica. The reply, as you heard, Members of the Court, was: "Well, General Clark, I told him not to do it but he didn't listen to me." This is a reply which throws light on at least three things: first, at the very least the President of Serbia knew in advance what was going to happen at Srebrenica; secondly, he took no steps to prevent General Mladić from perpetrating one of the most terrible massacres of the post-Second World War era, other — if it is to be believed — than giving vague advice; thirdly, once the massacre had been carried out, neither President Milošović nor any other authority took any steps whatsoever to censure the conduct of General Mladić or to punish him. On the contrary, General Mladić's career was not jeopardized in any way by the events at Srebrenica.

4. The Respondent's breach of the obligation to punish

19. Article VI of the Convention stipulates that persons accused of genocide or ancillary acts must be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". There is, therefore, under the 1948 Convention, a two-tiered system of punishment: national and international. Relative to the latter, it is clear that the creation in 1993 of the International Criminal Tribunal for the former Yugoslavia marked the

[24]CR 2006/8, p. 48, para. 33.

realization, as far as the territory of the former Yugoslavia was concerned, of what in 1948 had been a mere hypothesis, or even a wish. Consequently, the punishment of genocide through the ICTY must be regarded as being fully in line with the provisions of Article VI of the Convention.

20. Nevertheless, one point needs to be made in this respect. The existence of this Tribunal and its jurisdiction for the punishment of genocide in no way absolves the States resulting from the break-up of the former Yugoslavia of their duty under the 1948 Convention to punish persons who committed genocide or other acts proscribed by Article III through their national legal systems. In other words, the ICTY cannot be used by Serbia and Montenegro as an alibi or an attenuating

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circumstance for its breaches of the obligation to punish as stipulated by the 1948 Convention.

21. However, Madam President, Members of the Court, sadly enough, we are bound to note that no prosecutions have ever been brought in Serbia and Montenegro against anyone responsible for the crime of genocide or ancillary acts against the non-Serbs of Bosnia and Herzegovina[25]. Yet this genocide most definitely took place, it is certainly not a fabrication by Bosnia and Herzegovina! The ICTY has, moreover, already established this a number of times, at least as far as the events of 1995 in Srebrenica are concerned. The fact that there have been no prosecutions for genocide in the Respondent's courts is therefore in itself evidence of a serious breach of the 1948 Convention.

22. As for the argument that the Respondent seeks to draw from the language of Article VI, namely that the obligation to prosecute those responsible for genocide falls exclusively upon the State in whose territory the genocide was committed — and hence on Bosnia and Herzegovina but not on Serbia — it is without merit, for at least two reasons.

23. First, as I indicated earlier, the territory in which the genocide was perpetrated was, at that crucial time, under the effective control of the FRY. For the purposes of punishment, the territory should consequently be assimilated to that of the Respondent, thereby activating Serbia and Montenegro's obligation to bring before its own courts the persons accused of the genocide committed in Bosnia and Herzegovina.

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[25]On the prosecution of international crimes in Serbia and Montenegro since 1995 see OSCE — Mission to Serbia and Montenegro, *War Crimes before Domestic Courts*, Belgrade, 2003, pp. 10-14.

24. Second, the "ancillary" acts, such as the conspiracy to commit genocide, incitement to and complicity in the crime were undoubtedly committed in the Respondent's territory *strictu sensu*. Hence there is an obligation to punish those responsible.

25. Madam President, there can be no doubt that the Respondent has most definitely not fulfilled its obligation to punish, as enshrined in the 1948 Convention. Nor, for that matter — it must be said — has it fulfilled satisfactorily its obligation to punish the other "core crimes", that is to say the war crimes and crimes against humanity committed by its agents in Bosnia and Herzegovina between 1991 and 1995, as has been noted countless times by, for example, the
25 Human Rights Committee, the OSCE, the President and Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, etc. It is true, however, that the issue of the punishment of these other international crimes, that is to say the war crimes and crimes against humanity, does not fall within your Court's jurisdiction, since they are not covered by the 1948 Convention. It is nevertheless worth quoting the assessment made in 2004 by the Human Rights Committee regarding Serbia and Montenegro, because this assessment in fact encompasses all of the serious breaches of human rights, including genocide. The Committee reported:

> "The Committee is concerned at the persistence of impunity for serious human rights violations, both before and after the changes of October 2000. Although the Committee appreciates the declared policy of the State party to carry out investigations and to prosecute perpetrators of past human rights violations, it regrets the scarcity of serious investigations leading to prosecutions and sentences commensurate with the gravity of the crimes committed."[26]

26. As for the other means of fulfilling its obligation to punish genocide, that is to say full co-operation with the ICTY, we only have to read, Madam President, the reports submitted to the Security Council each year by the President and Chief Prosecutor of the ICTY to see that this co-operation, having been practically non-existent up to the end of the millennium, has nonetheless remained reluctant, tardy and incomplete, notably with respect to genocide, despite the appreciable improvement resulting from the Respondent's 11 April 2002 Federal Law on co-operation with the ICTY. Very recent confirmation of this attitude comes from the conclusions of the Council of the European Union, which, at its 27-28 February 2006 meeting on the Western Balkans, "noted with

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[26]Concluding Observations of the Human Rights Committee: Serbia and Montenegro, United Nations, CCPR/CO/81/SEMO (2004).

concern recent comments by ICTY Chief Prosecutor Carla del Ponte about Serbia and Montenegro's unsatisfactory cooperation with ICTY"[27]. Admittedly, Slobodan Milošević was sent for trial: it was a brave act to hand him over to the international criminal justice system. But what I take the liberty of calling the "Mladić scandal" unfortunately continues, as indeed does the

26 "Karadžić scandal": these two individuals enjoy the protection of the leadership of Republika Srpska, which refuses to comply with the justified requests of the international community and of the Government of Bosnia and Herzegovina, but they also enjoy the Respondent's protection. With respect to General Mladić, the Supreme Defence Council of Serbia and Montenegro just recently, on 1 February last, released the findings of an investigation which established that, until January 2002, Ratko Mladić had been able to live in various military establishments in Serbia, and that he continued to benefit from the protection of certain elements within Serbia and Montenegro's military.

27. Madam President, Members of the Court, I believe that I have shown you that the Respondent has, first, seriously breached the obligation to prevent genocide set out in the 1948 Convention and, second, has seriously breached and continues to breach the obligation to punish genocide as required by the same Convention.

28. Madam President, Members of the Court, I have finished my presentation. I respectfully ask you, Madam President, to give the floor now to Professor Pellet.

The PRESIDENT: Thank you, Professor Condorelli. I now call Professor Pellet.

Mr. PELLET: Madam President, Members of the Court,

THE CONSEQUENCES OF THE RESPONDENT'S INTERNATIONAL RESPONSIBILITY

1. The days these hearings opened, on 27 February, the Vice-Prime Minister of Serbia and Montenegro declared: "This is not about the truth, this is about $100 billion of war reparations. I think that this is all playing with fire."[28] Mr. Labus, with all due respect, is doubly wrong. The case before you concerns first and foremost a question of truth — the truth owed to the victims of

[27] Council of the European Union, Council conclusions on the Western Balkans, 2712th External Relations council meeting, Brussels, 27 and 28 February 2006.

[28] *International Herald Tribune*, 28 February 2006, p. 3.

the genocide perpetrated against the non-Serb populations of Bosnia and Herzegovina and, in particular, but not exclusively, against the Muslims who were unfortunate enough to have lived, for generations in many cases, in areas which the Serb leadership had decided to "cleanse" and render

27 ethnically pure; an incontrovertible truth, in judicial terms, which is owed to the survivors whose parents, children, sisters or brothers have disappeared, to those who were tortured, to the women who were raped, to the men who were victims of sexual abuse, to the hundreds of thousands — the millions — of those forced into exile, traumatized by the brutality of their expulsion, the confiscation of their property, and who do not dare return to their homes in spite of the Dayton-Paris Agreements and the demands of the international community[29].

2. Mr. Labus is wrong also because what Bosnia and Herzegovina is demanding is not war reparations but reparation for the injury to the victims of the genocide and to the Applicant, strictly commensurate with the link that can be established between the violation — or violations — of the Convention and the injury in question. This injury has not been quantified and we, on this side of the Court at least, are unable to assess it and have never attempted to do so. For this reason, Madam President, Bosnia and Herzegovina has consistently requested the Court, in accordance with its customary practice[30], to determine the amount of compensation due in this regard in a subsequent phase of the proceedings[31].

3. Moreover, Bosnia and Herzegovina will not approach the Court again on this matter unless it proves necessary to do so. And it is by no means inevitable that this will be the case. As our Agent will explain to you with more authority than myself when he concludes our second round of argument, in April, the Bosnian side, which is motivated by no spirit of revenge or profit,

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[29]Cf. S/RES/1016 (1995), 21 September 1995, para. 7; S/RES/1031 (1995), 15 December 1995, para. 8; S/RES/1034 (1995), 21 December 1995, paras. 4-5; S/RES/1088 (1996), 12 December 1996, para. 11; S/RES/1174 (1998), 15 June 1998, Preamble; S/RES/1247 (1999), 12 June 1999, *id.*; S/RES/1423 (2002), 12 July 2002, *id.*; S/RES/1491 (2003), 11 July 2003, *id.*; S/RES/1575 (2004), 22 November 2004, *id.*; S/RES/1639 (2005), 21 November 2005, *id.*; see also A/RES/57/10, 16 December 2002; A/RES/55/24, 15 January 2001; A/RES/53/35, 30 November 1998; A/RES/50/193, 11 March 1996.

[30]See for example, *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949,* p. 26; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 204; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 46; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, pp. 142-143 and 149; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, paras. 260-261 and 344. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 81, para. 151.

[31]See Memorial, p. 294, para. 7; Reply, p. 972, para. 2.7.

has the intention, once the legal principles have been accepted, to begin constructive negotiations with its neighbour, Serbia and Montenegro, with a view to determining what further action (including financial action) should be taken on the judgment you are to render. It is only if these

28 negotiations fail within a reasonable period of time, which could be set at one year, that Bosnia and Herzegovina would return to the Court with a request that it determine the amount of appropriate compensation, in accordance with the principles of international law.

4. This could only be done on two conditions. First, such future negotiations have no serious chance of succeeding unless the two Parties undertake them in a spirit of open-mindedness and good faith[32]. And without wishing to reopen disputes that we hope lie in the past, it has to be said that the persistent delaying tactics of our opponents in the present proceedings constitute an unfortunate precedent[33]. I am thinking in particular, Madam President, of the unkept promises made in the letter from the Minister for Foreign Affairs of Serbia and Montenegro to the President of the Court, dated 18 January 2001, holding out hope of "the way for finding an amicable solution to all outstanding controversies" after "a careful review of Yugoslavia's position in our cases pending before the International Court of Justice". As you know, nothing, strictly nothing, has happened that could lead Croatia or Bosnia and Herzegovina to discontinue their proceedings. We can only hope that the situation will change in the future — our opponents' oral pleadings, starting on Wednesday, will perhaps provide signs of hope along these lines — and the effect of your judgment, Members of the Court, can greatly contribute to that objective.

5. The second condition, Madam President, as I said before, is that your judgment should clearly lay down both the principle of the Respondent's responsibility and the legal consequences to be drawn therefrom, so that the negotiations between the Parties regarding implementation of the judgment may be based on solid and unequivocal foundations. It is for that reason that we thought it helpful to return to the subject of the consequences of Serbia and Montenegro's responsibility, which will be declared in your judgment. I shall do so relatively briefly, since Bosnia and Herzegovina has set out those consequences with some precision in its written pleadings[34] and the

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[32]Cf. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 261.

[33]See the summary of the proceedings in CR 2006/2 (27 Feb. 2006), pp. 22-26, paras. 17-30.

[34]See Memorial, p. 294, Submissions, paras. 5-7; Reply, Part IV, pp. 867-889.

Respondent did not see fit to respond thereto — no doubt because it does not dispute them on principle since, *mutatis mutandis*, the submissions it had itself presented to the Court in its
29 counter-claims, which it has now abandoned, were very similar, in terms of principle, to those of Bosnia and Herzegovina[35].

6. However, three general observations can be made:

1. genocide, defined as a "crime" by the 1948 Convention, constitutes a serious violation of an obligation arising from a peremptory norm of general international law, and this could have implications for the consequences of its perpetration;
2. in concrete terms, this doubtless raises more difficult issues — the violations of the Convention attributable to the Respondent, which we have attempted to recapitulate and document as fully as possible, are varied and, in some cases, have specific consequences; lastly,
3. I wish to draw particular attention to an "incidental" violation, if I may use that term, from which Bosnia and Herzegovina also asks the Court to draw consequences: the Respondent's failure to implement the provisional measures ordered on two occasions in 1993.

7. That will be my final point. Before that, I shall go back over the question of the reparation due to Bosnia and Herzegovina and the other consequences of the judgment you are to render, Members of the Court.

I. The reparation due to Bosnia and Herzegovina

8. It is doubtless unnecessary, Madam President, to dwell on the general principles applicable — especially since, let me repeat, the Respondent did not challenge them when they were set out in some detail in the written pleadings of Bosnia and Herzegovina. Besides, they are well known and uncontroversial. It is therefore sufficient to recall that:

1. the basic principle, enunciated by the PCIJ in the *Factory at Chorzów* case, "is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act has not been committed"[36];

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[35]See Counter-Memorial, p. 1085, paras. 4-6; Rejoinder, p. 665, paras. 4-6.

[36]*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

this basic principle is incorporated in Article 31 of the 2001 Articles of the International Law Commission;

30 2. pursuant to the provisions of Article 34 of those same Articles, "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction . . .";

3. inasmuch as making restitution means "to re-establish the situation which existed before the wrongful act was committed"[37] — this being a quotation from the ILC — it constitutes a prime means of reparation, since it is, by definition, the one best suited to effectively ensuring full redress for the injury sustained[38];

4. however, to the extent that *restitutio in integrum* proves materially impossible or "out of all proportion to the benefit deriving from restitution instead of compensation"[39], reparation may take the form of compensation involving "payment of a sum corresponding to the value which a restitution in kind would bear"[40];

5. and lastly, "[t]he State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation"[41].

1. *Restitutio in integrum*

9. In principle, as the ILC stresses in its commentaries to the Articles on State Responsibility, "[r]estitution, as the first of the forms of reparation, is of particular importance where the obligation breached . . . arises under a peremptory norm of international law"[42]. And

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[37]Article 35 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

[38]Cf. para. (3) of the Commentary to Article 35 of the above-mentioned ILC Articles, report of the International Law Commission on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, A/56/10, p. 257 (and James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, January 2002).

[39]Articles of the International Law Commission, Art. 35 *(b)*.

[40]*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[41]Articles of the International Law Commission, Article 37, para. 1.

[42]Commentary on Article 35 of the International Law Commission's articles, para. (6), (ILC Report on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, A/56/10, p. 241 and J. Crawford, *op. cit.*). See also para. (3) of the Commentary, *ibid.*, pp. 238-239 and J. Crawford, *op. cit.*).

genocide, as well as the other acts enumerated in Article III of the 1948 Convention, undoubtedly falls within this category.

31 10. In the present case, however, recourse to this form of redress is precluded by apparently insurmountable objections:

— in the first place, the physical injury and psychological trauma caused to the victims are not — except, perhaps, in very rare instances as regards the former — amenable to *restitutio in integrum*: the dead cannot be resuscitated, the limbs of amputees and the dignity of male and female rape victims cannot be restored; human pain and suffering cannot be effaced by legal awards;

— secondly, as regards damage to property, some property could no doubt be returned: movable property stolen by the Serbian armed forces and paramilitaries, for example; but it is virtually impossible to prove that such property is in their possession; as regards the rehabilitation of immovable property, whether religious or cultural, public or private, that has been systematically damaged in the context of the policy of terror devised by the authorities of the FRY and implemented by their organs or under their control, two factors militate against their restitution: on the one hand, the facts date back more than ten years now and, fortunately, the rehabilitation of these properties has largely been effected under the auspices of the Government of Bosnia and Herzegovina; moreover, the properties are situated in Bosnian territory and the Applicant does not wish its territorial sovereignty to be violated, even in execution of a judgment of the International Court of Justice.

11. Hence, out of necessity — essentially — Bosnia and Herzegovina has narrowly opted[43] not to ask you, Members of the Court, to decide that Serbia and Montenegro is under an obligation to provide *restitutio in integrum*.

12. For want of restitution, we must therefore turn to compensation.

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[43]See Article 43 *(b)* of the ILC Articles and the Commentary on that provision (para. 6) (ILC Report on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, A/56/10, pp. 304-305, and J. Crawford, *op. cit.*; see also para. (11) of the Commentary on Article 35 (*ibid.*, p. 243, and J. Crawford, *ibid.*).

2. Compensation

13. As I said earlier, Bosnia and Herzegovina is not asking the Court to set the amount of compensation. Indeed, neither this august body, Members of the Court, nor we ourselves have the necessary information for that purpose, not even for the purpose of putting forward some idea of
32 the amount. Bosnia and Herzegovina is convinced that this task lends itself more readily to diplomatic negotiation in good faith, rather than judicial debate, if only because this is undoubtedly a matter for experts rather than jurists — provided, however (though these are important conditions), as I also said before, that the negotiation is not too protracted and that it can be based on a judgment which clearly establishes the applicable legal principles.

14. It seems to us that these should consist, on the one hand, of an enumeration of compensable injuries and, on the other, of an indication of the principles applicable to the calculation of compensation. Bosnia and Herzegovina, for its part, considers that, for both purposes, the rules contained in the relevant provisions of the ILC articles on State Responsibility for Internationally Wrongful Acts, although they have not been incorporated in any formal convention, reflect the generally applicable rules on the subject and certainly constitute a necessary starting point.

15. As far as compensable injuries are concerned, these comprise both material and moral damage suffered by nationals of Bosnia and Herzegovina having been victims of genocide[44], which, in both cases, is "financially assessable . . . including [in the case of the former] loss of profits insofar as it is established"[45] and material injury suffered by territorial and other public entities as well to the State of Bosnia and Herzegovina itself as a result of acts of genocide. Without being exhaustive, the list includes:

— injury to natural persons caused by the acts enumerated in Article II of the Convention, including the *pretium doloris* for survivors and dependants of those who were murdered;

— material losses sustained by natural or legal persons, whether public or private, as a result of the genocidal acts to which they were subjected (destruction or confiscation of their assets under the policy of terror which constituted an essential component of the genocide for which

[44]Cf. ILC Articles, Art. 31, para. 2.

[45]ILC Articles, Art. 36, para. 2.

Serbia and Montenegro is responsible, systematic destruction of public, cultural or religious
33 buildings belonging to the groups targeted by the Respondent's genocidal policy, particularly mosques and Catholic churches, etc.); and

— the collective injury suffered as a result of the genocide (costs arising from the flow of Muslim and Croatian refugees fleeing "ethnically cleansed" areas and from the provision of facilities for them, costs incurred by the Government of Bosnia and Herzegovina in receiving them and attempting to ease their suffering, including maintenance grants, and the costs of efforts to oppose the policy of ethnic cleansing conducted by the Respondent on Bosnian territory).

16. There is no need to linger over the principles applicable to compensation in the present case (although Bosnia and Herzegovina respectfully requests you to refer to them formally in your judgment, Members of the Court, so that the Parties may rely on them in their future negotiations or, if those negotiations were to fail, in the phase of the present case which will be devoted to an assessment of injury). Those principles are known and should not really present any particular problems in this case. It is true that a serious violation of a norm of *jus cogens* is involved but, after lengthy deliberations[46], the ILC chose not to hold that this could result in an entitlement to punitive damages and no such provision is made in Articles 40 and 41, which deal with violations of this kind[47]. Bosnia and Herzegovina therefore respectfully requests you, Members of the Court, to indicate the classic basic principles applicable for the guidance of the Parties in the implementation of your Judgment. These need in fact be only very general principles, provided that they enable Bosnia and Herzegovina and Serbia and Montenegro to negotiate on a sound basis, in accordance with the fundamental rules of the law of responsibility. With this in mind, it would be essential for the Court to specify that the compensation owed by the Respondent should cover all financially assessable damage caused by the genocide perpetrated against the non-Serb
34 populations, particularly the Muslims, of Bosnia and Herzegovina. I would add that, if the Parties reach an agreement, Bosnia and Herzegovina would not be opposed to payment on an instalment

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[46] *Yearbook of the International Law Commission*, 2000, Vol. 1, 2650th-2653rd meeting, 2-8 Aug. 2000, pp. 323-340 and 344-363; 2661st meeting, 16 Aug. 2000, pp. 409-410, paras. 55-76.

[47] See para. 4 of the commentary on Art. 4 of the ILC Articles, ILC Report on the work of its Fifty-third Session, 23 Apr.-1 June and 2 July-10 Aug. 2001, doc. A/56/10, p. 85; J. Crawford, *op. cit.* See also the introduction by J. Crawford in the same work.

basis (which should be reasonable in the light of the amount ultimately agreed), provided that these were made subject to some form of guarantee.

17. There remains, however, an ancillary problem, but one which I wish to raise, Madam President, even though we consider it to be marginal and, as Luigi Condorelli and myself stressed yesterday, it only relates to our subsidiary argument, namely the problem of how the compensation is to be calculated if, as we neither hope and nor believe, you should find that the Respondent is not the principal perpetrator, but an accomplice to genocide. As we consider this outcome to be unlikely, I shall confine myself to some brief remarks in "telegraphic" form as it were:

1. it is certainly true that, in principle, a State is responsible under international law only for its own acts;
2. this rule is not, however, absolute and in the *Corfu Channel* case, for example, the United Kingdom succeeded in having Albania ordered to pay it the full amount of the compensation that was due, even though Albania was not responsible for the damage, to which it had contributed only by its negligence[48];
3. in addition, in the instant case, account should certainly be taken of the peremptory nature of the source of the breached obligation; the same fundamental reasons which militate against consideration being given to any circumstance precluding wrongfulness[49] lead to the view that a State cannot take shelter behind the fact that it was "only" the accomplice to a genocide committed by non-State entities in order to absolve itself of a share of responsibility; moreover,
4. as is stated by the author of a well-known work on the international law of responsibility:

> "many strong cases of 'aid and assistance' will be primarily classifiable as instances of joint responsibility and it is only in the more marginal cases that a separate category of delict is called for . . . [T]he supply of combat units, vehicles, equipment, and personnel for assisting an aggressor, would constitute a joint responsibility."[50]

35 The same must certainly be true of genocide.

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[48]See *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949,* pp. 17-18 and 22-23 and *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949,* p. 250.

[49]See CR 2006/8, p. 21-22, paras. 31-35; see also CR 2006/10, para. 55.

[50]Ian Brownlie, *System of the Law of Nations — State Responsibility*, Part 1, OUP, 1983, p. 191.

3. Satisfaction

18. You will perhaps have noticed, Madam President, that I left out two types of injury when I listed the kinds of damage for which reparation can be made via compensation:

— moral injuries caused to the applicant State; and

— injuries under two separate heads of responsibility: incitement to commit genocide and conspiracy to commit genocide, to say nothing of the consequences of the breaches of obligations to prevent and punish genocide.

19. This is because, to tell the truth, none of these lend themselves to pecuniary appraisal. Thus, the reparation sought by Bosnia and Herzegovina in respect of these various breaches of the 1948 Convention attributable to the Respondent does not take the form of compensation. As I said at the beginning of my statement, Bosnia and Herzegovina is not motivated, contrary to the intentions ascribed to it by some in Serbia and Montenegro, by any "lure of gain". Moreover, in accordance with that spirit, and notwithstanding the gravity of the violation of its rights under the 1948 Convention, Bosnia and Herzegovina is forgoing any request that you grant it "damages reflecting the gravity of this infringement", as it suggested in its Reply[51]. And there is a legal reason for this: when the Reply was drafted, in early 1998, the ILC had just commenced the second reading of its draft Articles on State Responsibility. The first draft, adopted in 1996, provided that the injured State could obtain "in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement"[52]. But, in the Articles it adopted on second reading in 2001, the ILC — deliberately[53] — omitted this form of satisfaction and would even appear to have ruled it out, taking the view that it was, in a sense, punitive damages, which, as I said a little while ago, are not acceptable under contemporary international law.

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20. Of course, this does not however mean that Serbia and Montenegro is free of any obligation to provide satisfaction to Bosnia and Herzegovina in other forms. Given the judicial context of the present case, the most natural mode of satisfaction, that which springs to mind

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[51]Pp. 874-875, paras. 11-12.

[52]*Yearbook of the International Law Commission*, 1993, Art. 10, para. 2 *(c)*, of the draft, p. 76.

[53]On this point, see the discussion within the Commission, *Yearbook of the International Law Commission*, 2000, Vol. 1, 2635th meeting, 9 June 2000, p. 180, para. 14; 2638th meeting, 12 July 2000, pp. 201-210. See also para. 8 of the commentary to Art. 37, report of the ILC on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, doc. A/56/10, p. 268.

immediately, also the most common in such circumstances[54], is obviously a formal declaration by this Court that Serbia and Montenegro has breached its obligations under Articles I to V — inclusive — of the Convention. This is also what Bosnia and Herzegovina asked of you in its Reply[55] and what it continues to request you to decide in this regard — yet with a slight nuance. In its submissions, Bosnia and Herzegovina stated that it was asking you to adjudge and declare that the Respondent not only had violated, but also *was continuing* to violate, those provisions. As we have said repeatedly during these hearings, this last request does not correspond with reality today — *except*, but this is an important point, in respect of the obligation to punish, which, as we are sorry to observe — Luigi Condorelli has just spoken to you about this — is still today largely ignored by the Respondent.

21. Members of the Court, in its Reply Bosnia and Herzegovina also asked you, under the heading "satisfaction", to decide that the Respondent must in fact punish the individuals responsible for genocide and the other acts listed in Article III of the Convention, including those at the most senior levels, and to that end must co-operate with the International Criminal Tribunal for the former Yugoslavia. It is still asking this of you as well but — even though this might be nothing more than an academic point, without any real practical significance (although rigorous classifications are always useful for lawyers) — it seems to me that these requests lie more within the ambit of the other consequences of Serbia and Montenegro's responsibility. I wonder, Madam President, if this would not be a good time for the break.

37 The PRESIDENT: Yes, I think it might be, Professor Pellet. The Court will rise for 10 minutes.

The Court adjourned from 11.15 to 11.25 a.m.

The PRESIDENT: Please be seated.

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[54]See para. 6 of the Commentary to Art. 37 of the ILC Articles, report of the ILC on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, doc. A/56/10, pp. 266-267; J. Crawford, *op. cit.*, pp. 280-281.

[55]P. 874, para. 9; Submissions, p. 972, paras. 7.1-7.4.

Mr. PELLET: Madam President, before the break I said that I would, after speaking about reparation in the strict sense, address the other consequences of Serbia and Montenegro's responsibility.

II. Other consequences of Serbia and Montenegro's responsibility

22. Responsibility — that is to say, the whole set of consequences deriving from an internationally wrongful act[56] — is not reflected solely in an obligation to make reparation, even though it is too often reduced to that. Thus, the ILC Articles on State Responsibility, even before referring to reparation, lay down, in two brief Articles, three other principles under which the State responsible for an internationally wrongful act is required:

— to perform the obligation breached[57];

— to cease the internationally wrongful act if it is continuing[58]; and

— "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require"[59] (although I for one am rather tempted to see these as merely a form of satisfaction).

1. Cessation of the violation of the obligation to punish

23. As I said just a few moments ago, Madam President, Serbia and Montenegro has by now ceased to violate the 1948 Convention and it appears unnecessary to dwell on the obligation to cease the violations giving rise to its responsibility in the present case or to point out that it is still under a duty to perform it — except to note in passing that, while it claimed to accede to the Convention on 6 March 2001[60], it has always been, and continues to be, bound by its conventional obligations.

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24. All the same, as I have said as well, although the Respondent has by now ceased most of its breaches of the Convention, there is one, as Luigi Condorelli has just shown, which it continues

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[56]See Roberto Ago, "Third Report on State Responsibility", *Yearbook of the International Law Commission*, 1971, Vol. II, Part One, p. 208, para. 36; see also *Yearbook of the International Law Commission*, 1975, Vol. II, p. 178.

[57]Art. 29.

[58]Art. 30 *(a)*.

[59]Art. 30 *(b)*.

[60]Note of the Secretary-General, doc. LA 41 TR/221/1 (4-1), 21 March 2001. See also *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, pp. 24-25, para. 52.

to commit: it is failing to perform, or practically failing — in any event its performance is very incomplete — its obligation to punish, despite the formal commitment entered into by it in this respect under Article I and the provisions of Articles IV to VI. Accordingly, Bosnia and Herzegovina continues to request the Court to find that Serbia and Montenegro not only has violated, but continues to violate, the Convention by failing to comply with its obligation to punish the acts of genocide and the other acts listed in Article III *(b)*, *(c)*, *(d)* and *(e)* and to penalize their perpetrators.

25. This judicial declaration is all the more urgent, since, as Professor Condorelli has explained, Serbia and Montenegro has to date proved unreceptive to the pressing, repeated calls made by United Nations organs, the Security Council in particular[61]. As the Court has stated:

> "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end."[62]

2. The guarantees of non-repetition incumbent upon Serbia and Montenegro

26. The second issue which arises, Madam President, in respect of these "other consequences" is that of the assurances and guarantees of non-repetition which it is incumbent

39 upon the Respondent to offer and, in the present circumstances, upon the Court to order. You, Members of the Court, undoubtedly have the jurisdiction to do so. In the *LaGrand* case, you held:

> "that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9*, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[63]

The same is obviously true in the present case.

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[61] See S/PRST/2004/28, 4 July 2004; S/RES/1534 (2004), 26 March 2004, para. 1; S/RES/1503 (2003), 28 August 2003, para. 2; S/PRST/2002/39, 18 December 2002; S/RES/1207 (1998), 17 November 1998; S/PRST/1996/23, 8 May 1996. See also A/RES/57/10, 16 December 2002. See also the most recent report to the Security Council by the ICTY Prosecutor, S/PV.5328 (15 December 2005), p. 12.

[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 117.

[63] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 485, para. 48.

27. As the ILC explains, these assurances and guarantees "serve a preventive function and may be described as a positive reinforcement of future performance"[64]. "They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily"[65]. In the present case, Bosnia and Herzegovina unfortunately has reason so to believe and, given the importance of the obligations in issue and the gravity of their violation, guarantees are most assuredly imperative.

28. Bosnia and Herzegovina does not deny that the current Serbian-Montenegrin régime is democratic in character. It is sensitive to the expressions of partial, belated repentance by the leaders now in power in Belgrade, of which Luigi Condorelli analysed an example early this morning. The fact remains that serious threats still exist and that recent events cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have truly disappeared. Just a few examples, Madam President, if you would allow me:

— the Socialist Party and the Serbian Radical Party together polled some 25 per cent of the vote in the most recent elections; they are led *de facto* by Milošević and Šešelj respectively, from their prison cells;

40 — on 17 May 2005 a well-established student association ("Nomokanon") held a debate at the law faculty of Belgrade on the subject "the truth about Srebrenica"; this so-called debate showed — according to a BBC report — that "no crime at all took place and that the victims were soldiers of the Muslim army sacrificed by Alija Izetbegović to provoke a foreign military intervention"[66] — that, Madam President, is called revisionism;

— one more, final, example, a very recent one (but we could unfortunately provide many more) — I am sorry, that was not the BBC just now —: "About 10,000 Serbian Radical Party (SRS) supporters rallied in the Serb capital chanting slogans and carrying pictures of General Mladić"[67] — that happened on 26 February last; Mladić is wanted by the ICTY for

[64]Para. 1 of the Commentary to Article 30 (Report of the International Law Commission on the work of its Fifty-third Session, 23 April-1 June and 2 July-10 August 2001, A/56/10, p. 216 and J. Crawford, *op. cit.*, p. 235).

[65]Para. 9 of the same Commentary (*ibid.*, p. 219 and J. Crawford, *ibid.*, p. 237).

[66]http://cm.greekhelsinki.gr/index.php?sec=194&cid=684 — website visited on 6 March 2006.

[67]http://www.news.bbc.co.uk/1/hi/world/europe/4749420.stm, website visited on 6 March 2006.

genocide; since 1998 he has lived in Belgrade[68], where he received his military pay in the normal way at least until 2002[69] and his pension until 2005; the Serbian authorities refuse to surrender him to the Tribunal.

29. The fact that the Serbian authorities are not arresting the key players in the atrocities committed in the dark years of genocide hardly augurs well for strict compliance with the Convention in the future.

30. Similarly, the Respondent's delaying tactics before this Court, its haughty disregard of the Orders indicating provisional measures in 1993 — disregard to which I shall return in a moment, its constant denial of your jurisdiction in defiance of the principle of *res judicata*, do not really reassure the Bosnian authorities as to its commitment to the "purely humanitarian and civilizing purpose" of the Convention and to the "high purposes which are [its] *raison d'être*[70].

31. If there is a case in which guarantees of non-repetition are essential, it is surely the one which concerns us, owing both to the importance of the obligations in issue and the persistent risks that they will not be fulfilled by the Respondent.

41 32. That said, Madam President, it has to be recognized that, whenever the subject of assurances and guarantees of non-repetition comes up, lawyers wonder what they really consist of, as they are more a matter, at least in the current case, of a state of mind and a political context — especially since there is no very solid precedent.

— In the *LaGrand* case, the Court considered that the undertaking given by the United States to carry on with its vast educational programme concerning consular rights of foreigners met "Germany's request for a general assurance of non-repetition"[71], but, in respect of the more specific assurances sought by Germany, the Court went no further than rather general considerations, stating: "The choice of means must be left to the United States."[72]

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[68]CR 2006/8 (Pellet), p. 19, para. 26.

[69]See *Le Monde*, 30 December 2005, http://www.lemonde.fr/web/imprimer_element/0,40-0@2-3214,50-725750,0.html, website visited on 5 March 2006.

[70]*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[71]*LaGrand (Germany* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 513, para. 124.

[72]*Ibid.*, p. 514, para. 125.

— In the *Avena* case, the Court confined itself to stating that what it had said in the *LaGrand* Judgment remained applicable and was sufficient to meet a similar request by Mexico[73].

— Finally, in its recent Judgment of 19 December 2005, the Court expressed its view that:

> "the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law."[74]

33. This jurisprudence, sparse though it may be, does nevertheless provide some guidance. If Serbia and Montenegro were, in the course of the coming hearings, to offer formal assurances that it undertakes, for the future, fully to respect the obligations arising under the Convention, Bosnia and Herzegovina would ask you, Members of the Court, to place that on record in very firm terms, of which the Judgment of last December offers a striking example. If such is not the case, Bosnia and Herzegovina will defer to the Court to find the wording apt to encourage the
42 Respondent to fulfil its obligation to offer genuine guarantees of non-repetition of any violation whatsoever of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

III. The Respondent's non-compliance with the Orders indicating provisional measures

34. We have still not completed, Madam President, the long list of obligations incumbent upon Serbia and Montenegro in the present case, and with which it did not comply. There is a further matter: the Respondent did not fulfil the obligations imposed upon it by this Court in the two Orders indicating provisional measures[75], thereby once again engaging its international responsibility.

35. I would like to make it clear, Members of the Court, that in asking you to rule on this matter, Bosnia and Herzegovina is not seeking to extend your jurisdiction beyond that accorded to

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[73] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 69, para. 150.

[74] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 257.

[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Request for the Indication of Provisional Measures, Order of 8 April 1993*, *I.C.J Reports 1993*, p. 3 and *ibid., Order of 13 September 1993*, *I.C.J Reports 1993*, p. 325.

you by the 1948 Convention, or to obtain more than its due pursuant to the general principles of State responsibility in international law that I have shown to apply to breaches of the Convention[76].

36. This request is in line with the Court's approach in its Judgment in the *LaGrand* case, where it held that the submissions relative to non-compliance with provisional measures concerned "the issues arising directly out of the dispute between the two parties before the Court"[77]. At the time, the Court reaffirmed:

> "what it said in its Judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in all its aspects, it may also deal with a submission that "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction . . ." (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72.) Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with."[78]

43 37. In the present instance, the Respondent failed to comply with its obligations under the 1993 Orders, whose measures were undoubtedly of a binding nature. The issue of the legal consequences of those breaches must therefore be addressed.

1. The breach by the Respondent of the binding measures indicated by the 1993 Orders

38. Madam President, as we know, since the *LaGrand* Judgment of 2001[79] in any event, provisional measures indicated by the Court pursuant to Article 41 of its Statute are binding — or in any case can be — on the party or parties to which they are addressed. In the present case, the Court indicated such measures on two occasions in 1993. In both instances, the Court adopted or reiterated a measure addressed to both Parties and two others specifically intended for the Government of the Federal Republic of Yugoslavia alone.

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[76]CR 2006/8, p. 27, para. 48.

[77]*LaGrand (Germany* v. *United States of America), Judgment, I.C.J Reports 2001*, p. 483, para. 45.

[78]*Ibid.*, p. 484, para 46.

[79]*Ibid*., p. 466.

39. Those measures were legally binding. In the *LaGrand* case, the Court categorically stated, in paragraph 109 of its Judgment, that "orders on provisional measures under Article 41 have binding effect"[80]. Those indicated in 1993 were no exception.

40. In its initial Order, of 8 April 1993, the Court, unanimously, decided that

> "[t]he Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) *should* immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide"[81].

More specifically, and by 13 votes to one, the Court further stated that:

> "[t]he Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) *should* in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group"[82].

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The Court further requested both Parties, using more traditional language, to avoid doing anything to aggravate or extend the dispute, or render its solution more difficult.[83]

41. The very firm language used by the Court showed that this was no mere exhortation. The Yugoslav Government "*should immediately* . . . take *all* measures within its power to prevent commission of the crime of genocide"; it "*should* in particular ensure" that none of the acts punishable under Article III of the Convention is committed "against the Muslim population . . . or against any other national, ethnical, racial or religious group". These were, Madam President, very specific measures, as to which there can be no doubt of their binding effect.

42. The Respondent blithely ignored them — just as it ignored the requests (possibly not *per se* binding) addressed by the President of the Court to the Parties on 5 August 1993, calling

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[80] *LaGrand (Germany* v. *United States of America), Judgment*, *I.C.J. Reports 2001*, p. 506, para. 109. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equitorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 453, para. 321, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 263.

[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Request for the Indication of Provisional Measures, Order of 8 April 1993*, *I.C.J Reports 1993*, p. 24, para. 52 A (1) (emphasis added).

[82] *Ibid*., p. 24, para. 52 A (2) (emphasis added).

[83] *Ibid*., p. 24, paras. 52 A (1) and 52 A (2) (emphasis added).

upon them to comply with the measures indicated in April which, he stressed, "still apply"[84]. This is not simply our assertion, nor a mere inference from the evidence submitted to the Court by Bosnia and Herzegovina in its written and oral pleadings. In effect the second Order made in the same case on 13 September 1993 — the only time this has happened in the history of the Court — simply reaffirmed, by very large majorities (14 votes to one or 13 votes to two), the measures previously indicated[85]; nevertheless, it constitutes, precisely because it was simply a reaffirmation, manifest evidence of the non-compliance of Serbia and Montenegro with the initial Order.

43. Moreover, the reasoning of the 13 September 1993 Order dispels all doubt that the Court
45 was convinced of this fact. After noting that additional provisional measures can be requested only if they apply to "new circumstances such as to justify their being examined", the Court concluded that "this condition should be regarded as satisfied"[86]. However, in the Court's opinion "the present perilous situation demand[ed], not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993 . . . but immediate and effective implementation of those measures"[87]. It explained its position as follows:

> "since the Order of 8 April 1993 was made, and *despite that Order*, and despite many resolutions of the Security Council of the United Nations, great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations"[88].

The Court further stated:

> "*the grave risk* which the Court then apprehended of action being taken which may aggravate or extend the existing dispute over the prevention and punishment of the crime of genocide, or render it more difficult of solution, *has been deepened* by the persistence of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts"[89].

Finally, the Court stressed that:

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[84]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Request for the Indication of Provisional Measures, Order of 13 September 1993, I.C.J Reports 1993*, p. 334, para. 10.

[85]*Ibid*., pp. 349-350, para. 61.

[86]*Ibid*., p. 337, para. 22.

[87]*Ibid*., p. 349, para. 59.

[88]*Ibid*., p. 348, para. 52 (emphasis added).

[89]*Ibid*., p. 348, para. 53, (emphasis added).

> "while taking into account, *inter alia*, the replies of the two Parties to a question put to them at the hearings as to what steps had been taken by them 'to ensure compliance with the Court's Order of 8 April 1993', [it] is not satisfied that all that might have been done has been done to prevent commission of the crime of genocide in the territory of Bosnia-Herzegovina, and to ensure that no action is taken which may aggravate or extend the existing dispute or render it more difficult of solution"[90].

44. The Respondent will undoubtedly object that it is not cited by name in these findings. True, but it was in the measures issued in April. And the Court rejected from the outset a request by the FRY aimed at "a more specific indication of measures addressed to Bosnia-Herzegovina", which it felt was unnecessary, given, it stressed, the circumstances "as they now present themselves"[91]. It was therefore *Yugoslavia*'s non-compliance with its obligations under the April Order that prompted the Court to reiterate the measures that it had instructed the former to take: damning evidence that the initial Order had not been acted upon.

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45. Unfortunately, Madam President, this had no effect. No measures were, of course, taken to ensure compliance with the Court's Orders. The facts that we have presented to you over recent days speak for themselves, and it would be of little purpose for me to list the instances that prove that Serbia and Montenegro never took the Court's "indication seriously into account"[92]. It is up to you, therefore, Members of the Court, to recognize this and to address:

2. The consequences of breaches of the provisional measures

46. There can be no doubt that the Respondent's non-compliance with the measures indicated by the Court on two separate occasions constitutes an internationally wrongful act, distinct from the others that engage its international responsibility in the present case. It gives rise to a sort of "incidental" responsibility, which clearly cannot be subsumed in that resulting from the multiple breaches of the Convention, but is closely bound up with that primary responsibility, thus raising difficult issues as to its precise nature — if nothing else under the principle of *non bis in idem*.

47. Madam President, the cessation or resumption of the violation are not matters which I will address: in any event, the obligations upon the Respondent will have lapsed after your final

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[90] *Ibid*., p. 349, para. 57.

[91] *Ibid*., p. 347, para. 46.

[92] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits Judgment, I.C.J. Reports 1986*, p. 144, para. 289, quoted in the *Order of 13 September 1993, I.C.J Reports 1993*, p. 349, para. 58.

judgment, as is implied by paragraph 2 of Article 41 of the Statute and as you held in your Judgment in the *Avena* case[93]. This applies *a fortiori* to assurances and guarantees of non-repetition.

48. With respect to compensation, in the *LaGrand* case the Court clearly accepted that this possibility existed, since it indicated that it would have taken a number of factors into "consideration had Germany's submission included a claim for indemnification"[94] — which it did not. Moreover, compensation for the responsibility resulting from non-compliance by a party with measures under an Order indicating provisional measures would seem to require that the measures concerned be highly specific and involve something additional to the obligations whose breach is the subject-matter of the dispute. However, this was not what the Court did in its 1993 Orders: rather, the Court firmly reminded the FRY of its obligations under the 1948 Convention. In this respect, the breaches of obligations resulting from the Orders cannot in truth be readily distinguished from the breaches of the Convention itself, and any indemnification for them would be redundant in view of the compensation due to Bosnia and Herzegovina for the breaches of the latter. The *non bis in idem* principle clearly argues against this.

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49. The same considerations apply to restitution: it is difficult to see what possible "restitution" there could be: the harm has been done; even this Court does not possess the key to a time machine. That only leaves satisfaction — which in itself would be enough, but it again raises the issue of the form which it would take.

50. In the only two cases in which the Court has upheld a submission concerning non-compliance with an Order indicating provisional measures, it confined itself to a simple declaration to this effect — although the declaration was included in the operative part of the Judgment[95].

51. The Respondent's conduct certainly requires a clear finding on your part, and this is an opportunity, not just to reaffirm the importance of the provisional measures indicated by the Court,

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[93] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Judgment of 31 March 2004, para. 152.

[94] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 508, para. 116.

[95] *Ibid*., p. 516, para. 128.5. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 345.7.

and their binding effect, but also to establish beyond all doubt that Serbia and Montenegro did not comply with the measures that you addressed to it on two separate occasions.

52. This is particularly important in the present case, since, as the Court emphasized in its initial Order of 8 April 1993[96] and repeated in that of 13 September of the same year[97], citing

48 General Assembly resolution 96 (I) on "the Crime of Genocide" of 11 December 1946: "the crime of genocide 'shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations'"[98].

53. That is also, Members of the Court, the real reason why Bosnia and Herzegovina requests you to go beyond a mere declaration and to demonstrate the gravity of the Respondent's conduct by the award of what, at first reading in 1996, Article 45 of the ILC Draft Articles on State Responsibility termed "symbolic damages". Article 37 of the final version of 2001 was less specific, and no longer referred to this possibility as such, providing only that "[s]atisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or *another appropriate modality*", among which the commentary mentions "the award of symbolic damages for non-pecuniary injury"[99], of which it provides some examples.

54. It goes without saying, Madam President, that Bosnia and Herzegovina will leave it entirely to the discretion of the Court to determine the level of symbolic damages.

55. The reason that we propose this to you, Members of the Court, is largely self-evident. In our opinion, when the Court informs a State, in firm terms, that it has to comply with one of the most fundamental, the most imperative and sacred obligations — possibly the most important in all of contemporary international law: the prohibition of genocide; when it indicates concrete measures which that State must take, and the State concerned not only does nothing — nothing whatever — to comply with its obligations, but continues to perpetrate genocide, the Court has no

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[96] *I.C.J. Reports 1993*, p. 23, para. 49.

[97] *Ibid*., p. 348, para. 51.

[98] See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23 or *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Preliminary Objections, Judgment*, *I.C.J. Reports 1996*, p. 616, para. 31 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* Judgment of 19 December 2005, para. 64.

[99] Paragraph 5 of the Commentary (Report of the International Law Commission, Fifty-third session 23 April-1 June and 2 July-10 August 2001, A/56/10, p. 265 and Crawford, *op. cit.*).

option but to address the consequences of the scale of the breach — albeit in a purely symbolic manner — rather than to respond simply as it would to any "ordinary" internationally wrongful act.

56. Madam President, a breach of international law by a State is always deplorable — but to commit genocide, to take no steps to prevent it, to incite it, to make plans to that end and to refrain
49 from prosecuting the individuals guilty of the crime, is a different matter; it is the gravest of grave breaches. This clearly has to be borne in mind when addressing the consequences of the resultant responsibility. Bosnia and Herzegovina is convinced that you will do just that.

Members of the Court, I thank you very much for your attention. And I ask you, Madam President, to give the floor to my highly respected colleague and friend, Professor Thomas Franck. Thank you very much, Madam President.

The PRESIDENT: Thank you, Professor Pellet. I call Professor Franck.

Le PRESIDENT : Je remercie M. Pellet. Je donne la parole à M. Franck.

M. FRANCK : Merci beaucoup, Madame le président.

L'IMPORTANCE QUE CONSERVENT LES DECISIONS PRISES PAR LA COUR INTERNATIONALE DE JUSTICE EN VERTU DE L'ARTICLE IX DE LA CONVENTION SUR LE GENOCIDE

1. Madame le président, Messieurs les juges, nous avons fait faire à la Cour un parcours très long et très pénible à travers les faits sur lesquels repose notre thèse, à savoir que la Bosnie, au cours de la période critique qui a immédiatement suivi son accession à l'indépendance et son admission à l'ONU, a été victime d'un génocide brutal.

2. Nous nous sommes d'abord efforcés de démontrer que ces événements indéniables s'étaient produits grâce au concours actif des autorités de Belgrade, le gouvernement d'un Etat voisin. Nous avons ensuite développé les éléments qui prouvent l'imputabilité de ces faits à ce gouvernement.

3. Nous avons invité la Cour à examiner nos preuves, en tenant compte de la crédibilité de leurs sources, notamment celles provenant des organes principaux de l'ONU et de leurs rapporteurs, du Secrétaire général et des décisions du TPIY. Lorsque le défendeur s'est obstiné à retenir des éléments de preuve ou à ne les communiquer au TPIY qu'à la condition qu'ils ne soient

pas divulgués dans le cadre de la présente instance, nous vous avons priés d'en tirer les seules conclusions possibles — d'autant plus que les passages supprimés semblent avoir trait aux discussions sur les modalités du soutien et de l'aide apportés à la Republika Srpska, son gouvernement, son économie et son armée.

4. Nous avons établi le fondement juridique de la responsabilité du défendeur pour génocide, entente en vue de commettre un génocide et complicité de génocide, et démontré que, en ne prévenant pas et en ne réprimant pas ces actes, et en ne traduisant pas devant le TPIY les personnes mises en accusation, il avait également engagé sa responsabilité.

50 5. Nous avons démontré que les Etats parties à la convention sur le génocide voulaient créer, et ont effectivement créé, un moyen de remédier à l'avenir à toute résurgence de ce fléau qu'est le génocide. C'est ce qu'ils ont fait en rédigeant l'article IX de la convention, qui prévoit de soumettre ces différends à la Cour.

6. Le Gouvernement de la Bosnie, au nom des centaines de milliers d'habitants tués, torturés, violés et déplacés à jamais, n'a-t-il pas mérité le droit de présenter la requête visée à l'article IX ? Et l'article IX ne précise-t-il pas que la Cour répondra à cette requête et ce, en se prononçant sur «la responsabilité d'un Etat en matière de génocide» ?

7. La réponse à ces questions ne devrait pas dépasser nos capacités d'interprétation des traités.

8. Le droit évolue cependant, et la convention sur le génocide a presque cinquante-cinq ans. Beaucoup d'eau a coulé sous les ponts. Alors qu'on le pensait définitivement éliminé de la panoplie des moyens dont dispose l'homme pour faire le mal, le génocide revient comme instrument délibéré de mise en œuvre d'une politique : au Rwanda, en Croatie et, eh bien oui, en Bosnie.

9. Vous êtes donc saisis d'un «différend» que vous êtes invités à trancher en vous prononçant sur les responsabilités.

10. Et pourtant, certains voudront peut-être soutenir que cette responsabilité a perdu de son importance en raison des faits nouveaux survenus depuis l'entrée en vigueur de la convention, notamment l'événement capital que constitue la création de juridictions pénales chargées de réprimer certains crimes internationaux commis par des individus, dont le génocide. Maintenant

qu'existent les Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda et la Cour pénale internationale, chacune de ces juridictions disposant de pouvoirs étendus d'enquête et de poursuite, est-il vraiment toujours utile et nécessaire que la Cour internationale de Justice joue le rôle que lui a confié l'article IX de la convention sur le génocide en matière d'établissement des responsabilités ? C'est là, au fond, une question de politique juridique, ou judiciaire.

11. C'est cette même question que deux juges de la Cour ont soulevée en 1996, au cours de la phase de la présente instance consacrée aux exceptions préliminaires et, par égard pour eux et pour tous les autres qui pourraient se poser la même question, il nous faut consacrer quelques-uns des derniers instants du premier tour de nos plaidoiries à essayer d'y répondre.

51 12. Dans une déclaration commune jointe à l'arrêt rendu en 1996 par la Cour, MM. les juges Shi et Vereshchetin se sont penchés sur la création et le rôle du TPIY et de la CPI, ainsi que sur les répercussions de ces éléments nouveaux sur la présente affaire. Voici ce qu'ils ont notamment dit :

> «La détermination de la communauté internationale à voir les individus auteurs d'actes de génocide traduits en justice, quelle que soit leur origine ethnique ou la position qu'ils occupent, montre la meilleure manière d'envisager la question.
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> . . . . . .
>
> Donc, à notre avis, la Cour internationale de Justice n'est peut-être pas l'instance appropriée pour se prononcer sur les griefs formulés par la Partie requérante en la présente instance…»[100]

13. Quant aux raisons pour lesquelles la Cour ne serait peut-être plus la juridiction appropriée, les deux juges citaient un article publié peu auparavant par sir Hartley Shawcross, qui avait été le procureur général britannique aux procès des criminels de guerre de Nuremberg. Dans cet article, auquel les deux juges adhéraient, ce dernier exprimait ainsi son opinion : «[i]l ne peut y avoir de réconciliation tant que la culpabilité individuelle pour les crimes horribles commis au cours des dernières années ne remplacera pas la théorie pernicieuse de la responsabilité collective qui nourrit tant de haines raciales». MM. Shi et Vereshchetin, dans leur déclaration commune, semblent donc envisager la possibilité que la Bosnie souhaite, par la présente instance, que la Cour

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[100] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II)*, p. 632.

établisse la «responsabilité collective» du défendeur et, de ce fait, la culpabilité collective du peuple serbe.

14. Il nous faut consacrer quelques minutes à l'examen de ces idées, même si elles n'émanent pas de la majorité des juges. La Cour, en assumant la responsabilité qui lui incombe en vertu de l'article IX d'établir la «responsabilité» d'un Etat pour génocide, risque-t-elle de perpétuer l'idée de «culpabilité collective» ?

15. A vrai dire, ce sont deux questions connexes de politique juridique qu'il nous faut examiner : la première est de savoir si une instance devant la Cour ferait double emploi avec les instances devant le TPIY et la seconde, de savoir si l'instance que nous avons introduite risque de perpétuer l'idée d'une culpabilité collective. La première question — y a-t-il double emploi entre les fonctions de la Cour et celles du TPIY ? — a déjà été abordée par M. Pellet vendredi dernier.

16. Il est tout à fait clair que les rédacteurs de la convention sur le génocide entendaient prévoir à la fois des sanctions pour les individus qui participent à une entreprise de génocide et la responsabilité de l'Etat qui affecte les structures et ressources de la nation à cette entreprise. Les
52 articles IV, V et VI de la convention établissent les modalités de sanction des individus auteurs d'un génocide, tandis que l'article IX prévoit parallèlement de quelle manière la CIJ pourra se prononcer sur la responsabilité des Etats. De toute évidence, les rédacteurs estimaient que les deux recours étaient distincts, qu'ils ne faisaient pas double emploi et qu'ils étaient tous deux nécessaires à la mise en place d'un dispositif efficace permettant de débarrasser le monde de ce fléau qu'est le génocide.

17. Mais la création d'un dispositif international permettant de statuer sur la responsabilité pénale des individus réduit-il d'une quelconque manière l'importance du rôle dévolu à la Cour pour statuer sur la responsabilité des Etats en matière de génocide ? Non : ce n'est que la concrétisation de l'éventualité prévue par l'article VI de la convention, à savoir la création d'une «cour criminelle internationale» pour juger les «personnes», au lieu que celles-ci soient jugées «devant les tribunaux compétents de l'Etat sur le territoire duquel l'acte a été commis». C'est donc plutôt la compétence des tribunaux pénaux *nationaux* que la convention projetait de compléter ou de remplacer grâce à la nouvelle cour criminelle internationale, s'agissant de juger les individus; elle n'avait

certainement pas prévu d'effet comparable sur la compétence de la Cour, ni sur l'importance du rôle de celle-ci, s'agissant de statuer sur la responsabilité des Etats.

18. Cela ne semble pas clair à la Partie adverse qui, dans sa duplique[101], nous défie de «citer les dispositions de la convention sur le génocide envisageant l'Etat en tant qu'auteur de génocide». Il semble donc bien que la Cour a toujours un rôle important à jouer : expliquer, non seulement au défendeur, mais aussi aux gouvernements du monde entier, qu'il *existe* bel et bien une responsabilité de l'Etat pour génocide et que, en outre, la convention donne à la Cour les pouvoirs nécessaires — des pouvoirs qu'elle exercera — pour déterminer si un Etat a engagé sa responsabilité pour violation de la convention.

19. La seconde question est de savoir si statuer sur cette responsabilité de l'Etat équivaut à établir une «culpabilité collective».

20. La réponse est un «non» catégorique.

21. Nous admettons que faire porter à un peuple entier, à la population d'un Etat, la responsabilité de faits dont ce dernier est l'auteur reviendrait à appuyer l'idée décriée de «culpabilité collective». Nous nous félicitons de la naissance d'un corps de règles en matière de droits de l'homme qui reconnaissent que les droits des individus sont distincts de ceux de l'Etat, voire parfois opposés à ceux-ci. Nous constatons et saluons l'apparition d'un système parallèle de responsabilité juridique personnelle. Et nous soulignons que, en ces temps modernes où droits et
53 obligations sont individuels, il n'est pas justifiable de rejeter sur toute la cité — sur l'ensemble des citoyens — la responsabilité des méfaits commis *soit* par des individus, soit par un gouvernement criminel.

22. Il est évident que nous n'essayons pas de ressusciter l'idée désuète de culpabilité collective, de responsabilité de tous les Serbes. Nous reconnaissons volontiers que cette notion de culpabilité collective n'est que le résidu décrié d'un âge où les individus ne se distinguaient pas juridiquement de leur souverain — le roi ou l'Etat — ou n'en étaient que les serfs. Mais il est tout aussi évident que, même en cette ère nouvelle où les droits et les responsabilités sont individuels, l'Etat n'a pas cessé d'exister. Il existe, il agit et il doit rendre des comptes. Quand l'Etat commet

[101] 22 février 1999, p. 644, par. 4.1.1.2.

les pires méfaits, on ne saurait lui permettre de s'exonérer de sa responsabilité en punissant quelques dirigeants. Comme le souligne l'ouvrage *Oppenheim's International Law*,

> «les faits illicites dont des individus sont les auteurs en tant qu'agents de l'Etat constituent des délits qui engagent de manière distincte la responsabilité du commettant et celle de l'agent. Ces faits sont directement, et pas seulement indirectement, imputables à l'Etat qui les a autorisés ou permis, ou qui n'a pris de mesures raisonnables pour les empêcher ou les réprimer.»[102] *[Traduction du Greffe.]*

Il y a donc la responsabilité de l'Etat pour fait de génocide et, en même temps mais séparément, sa responsabilité pour manquement aux «obligations préventives et répressives de l'Etat … dont la violation … engage directement la responsabilité de l'Etat»[103].

23. Ainsi le droit international moderne opère-t-il une distinction entre les actes criminels d'une personne — qu'elle soit premier ministre, commandant d'opérations sur le terrain, gardien dans un camp de prisonniers ou chef d'une milice privée — et le manquement d'un Etat à ses obligations juridiques envers d'autres Etats. Bien que, dans les deux cas, les griefs puissent émaner des mêmes faits, ils impliquent la violation d'obligations entièrement distinctes. Et dans les circonstances spécifiques du génocide, il doit aussi y avoir des actions distinctes pour la mise en jeu des deux types de responsabilité.

24. Dans le droit qui constitue le fondement de notre affaire, il ne saurait par conséquent être question ni de culpabilité collective, ni de double incrimination.

25. Pourtant, au-delà de ces questions juridiques quelque peu techniques, il en est une autre de plus grande portée, de nature morale ou politique, sur laquelle je suis convaincu que votre Cour voudra se pencher dans sa quête d'équité dans sa jurisprudence.

54 26. Est-il juste qu'un Etat tout entier soit tenu pour responsable des actes ordonnés par ses dirigeants et exécutés par ses institutions ?

27. Si vous concluez que le défendeur a effectivement commis un génocide, le fait de tenir ainsi un Etat pour responsable ne risque-t-il pas d'imposer la charge de la réparation à l'ensemble de ses citoyens, qu'ils aient ou non soutenu ou toléré les actes d'un régime qui a été renversé depuis lors ?

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[102] *Oppenheim's International Law*, 9e éd., p. 501, no 13.

[103] *Ibid.*, p. 502, par. 145.

28. Pour répondre à cette question, il importe une fois de plus de souligner qu'en jugeant l'Etat responsable, vous ne concluriez aucunement à la culpabilité collective de tout un peuple. A l'évidence, il y avait des Serbes qui comprenaient l'énormité de ce qui se faisait en leur nom, et qui s'opposaient au régime de Belgrade. Mais comme l'a souligné M. Michael Walzer, l'éminent philosophe de Princeton, même si «l'on ne peut pas dire que chaque citoyen est à l'origine de tout ce que fait l'Etat», il n'en demeure pas moins que «chacun peut à bon droit être appelé à en répondre». Comme il l'explique,

> «la citoyenneté est un destin commun, et personne, pas même les opposants [au régime] … ne peut échapper aux effets d'un mauvais régime, de dirigeants ambitieux ou fanatiques, ou d'un nationalisme exacerbé. Mais, si hommes et femmes doivent accepter ce destin, ils peuvent parfois le faire en bonne conscience, car acceptation ne veut pas dire responsabilité individuelle. La répartition des coûts n'a rien à voir avec celle de la culpabilité.»[104]

29. Lorsque l'Etat lèse un citoyen, ce citoyen, s'il vit dans un Etat de droit, peut avoir droit à réparation, même si le préjudice est le fait d'un seul individu (par exemple un policier malhonnête), et tous les citoyens, tous les contribuables doivent assumer, non pas la culpabilité, mais la responsabilité de procéder aux réparations appropriées et de réaffirmer la primauté du droit. Il en va de même pour la primauté du droit entre Etats : tous les citoyens d'un Etat qui a mal agi doivent être invités à contribuer aux réparations dues à la victime et à la réaffirmation de la primauté du droit. La citoyenneté implique de nombreux privilèges, mais aussi des devoirs; c'est un destin commun. Elle implique non pas une culpabilité collective mais, assurément, une acceptation commune de la responsabilité.

30. La répartition des coûts, et non celle de la culpabilité : c'est de cela qu'il s'agit en l'espèce. Il est à la fois équitable et conforme au droit que les citoyens d'un Etat qui en lèse gravement un autre aient à supporter au moins une part importante du coût des réparations et de l'indemnisation des victimes. Par «coûts», je n'entends pas seulement les réparations financières, mais aussi, et surtout, le rétablissement de la vérité historique. Lorsque quelqu'un a mal agi et s'en repend, il lui coûte une bonne part de sa fierté nationale de dire : «Oui, ces choses terribles ont été

55 faites au nom de notre nation et nous le regrettons profondément; nous offrons nos condoléances

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[104] Michael Walzer, *Just and Unjust Wars*, 1977, p. 297.

aux familles des victimes et nous souhaitons aider à panser les plaies que nous avons infligées, car nous avons vraiment tourné la page.»

31. Ce partage de la charge que représentent les réparations aux victimes est en lui-même une raison suffisante pour ne pas abandonner la notion de la responsabilité de l'Etat, laquelle crée un droit de la victime à obtenir davantage qu'un haussement d'épaules navré accompagné d'une remarque du type : «ainsi va la vie dans les Balkans». Le droit qui impose cette responsabilité de l'Etat est un complément utile, voire essentiel, des actions pénales contre les individus, et le partage de la responsabilité qu'il impose aux récalcitrants est un élément essentiel du processus de «cicatrisation» des plaies.

32. Il existe cependant une autre raison de ne pas laisser tomber en désuétude la responsabilité de l'Etat.

33. Nous avons relevé dans une partie précédente de nos plaidoiries que la Cour, dans son avis consultatif de 1951 relatif aux réserves à la convention sur le génocide, avait fait observer que cette convention, plus encore que tout autre traité, avait été adoptée dans un but «purement humain et civilisateur». En d'autres termes, la convention a une fonction d'exhortation. Ce «but civilisateur» consiste à faire savoir à toute personne, où qu'elle se trouve, qu'elle ne saurait échapper à sa responsabilité pour le mal qui a été fait à d'autres personnes en son nom. En ce sens, le rôle assigné à la CIJ par la convention sur le génocide est essentiel pour éviter l'effet secondaire nocif et non intentionnel qu'aurait le développement de la responsabilité pénale *individuelle*. Cet effet est décrit comme suit par M. Mark Drumbl :

> «[L]e choix délibéré, par les institutions de la justice pénale internationale, de condamner sélectivement une poignée d'individus … oblitère … l'implication des [citoyens] ordinaires … d'où des failles dans la distribution des peines, dans la mesure où seules quelques personnes reçoivent leur juste châtiment, alors que de nombreux et puissants Etats et organisations échappent à toute responsabilité.»[105]

Votre Cour doit nous prémunir contre semblable régression.

34. En matière de génocide, responsabilité de l'Etat ne signifie pas culpabilité collective, mais obligation de l'Etat concerné de prendre sa part dans la réparation des conséquences de sa violation du droit international. Cette responsabilité commande que le peuple de l'Etat victime et

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[105] Mark A. Drumbl, «Sands: From Nüremberg to The Hague» (notes bibliographiques), 103 Mich L.Rev 1295 (2005).

56 le peuple de l'Etat agresseur travaillent ensemble à réparer les dommages, qu'ils prouvent leur volonté nouvelle de collaborer, reconstruire, reconstituer. La décision rendue au fond par la Cour permanente de Justice internationale dans l'affaire de l'*Usine de Chorzów*[106] vous a déjà été rappelée : «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis».

35. Seule une volonté commune «d'effacer toutes les conséquences de l'acte illicite» permettra d'inaugurer une nouvelle ère dans les Balkans. Votre Cour peut encourager le développement de cette volonté commune.

36. Et puis il faut bien penser à l'avenir. En fonction de la façon dont la Cour va trancher dans cette affaire, sa décision peut jouer plusieurs rôles «civilisateurs» importants. Elle peut inciter les citoyens, partout dans le monde, à manifester le courage de s'opposer aux activités criminelles de leurs gouvernements.

37. En disant le droit, la Cour peut proclamer que la tolérance ou la complicité d'une nation à l'égard d'un comportement manifestement illicite ne peut pas s'expier par la punition d'une poignée de dirigeants notoires. Elle peut garantir que les réparations — et pas seulement financières — qui permettront de reconstruire ce qui a été illicitement détruit sont réellement partagées et ne pèsent pas exclusivement sur des victimes déjà meurtries et sanglantes.

38. Mais ce repentir, cette vision responsable et humaine d'un nouvel avenir sont très éloignés de ce que nous avons vu dans les plaidoiries de notre adversaire. Le défendeur espère qu'un point technique lui permettra d'échapper à toute acceptation de responsabilité, à son devoir de participer à la réparation des conséquences du génocide en Bosnie. M. Varady, récemment encore agent de la Serbie-et-Monténégro dans les instances engagées par son pays contre les Etats membres de l'OTAN, a déclaré à ses compatriotes serbes, ce dont leurs médias se sont fait l'écho, que son but, dans ces autres affaires, son «principal objectif stratégique», avait été de «transformer la responsabilité collective en responsabilité individuelle»[107]. Il entendait par là qu'en plaidant devant vous dans les affaires contre l'OTAN, il espérait faire en sorte que son pays ne soit pas tenu pour responsable, dans la présente espèce, du génocide commis en Bosnie, que l'Etat puisse

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[106] *Usine de Chorzów, fond, arrêt n° 13, 1928*, *C.P.J.I. série A n° 17*, p. 47.

[107] 12/NIN/9, décembre 2004.

échapper à sa responsabilité, et que le prix à payer, le cas échéant, le soit par les individus jugés pour crimes devant un autre tribunal. Si telle était effectivement l'issue de cette affaire — que l'Etat ne puisse pas être tenu pour responsable des actes abominables de ses dirigeants —, cela reviendrait à vider littéralement de sa substance la convention sur le génocide et à nous rendre tous encore plus vulnérables.

57 39. Quelle triste conséquence ce serait là ! Nous invitons respectueusement votre Cour à indiquer clairement que tel n'était pas le sens des décisions rendues dans les affaires relatives à l'OTAN.

40. D'importants progrès ont été accomplis avec l'adoption de la notion fonctionnelle de responsabilité pénale personnelle, mise en œuvre par une institution judiciaire internationale légitime. Cette évolution nous a encouragés dans l'espoir que notre génération avait fait d'importants pas en avant pour sortir d'un passé très noir. Pour citer le juge Theodor Meron, du TPIY, qui s'exprimait en qualité de président de ce Tribunal,

> «Ceux qui, juste après la seconde guerre mondiale et l'holocauste, ont rédigé la convention pour la prévention et la répression du crime de génocide, étaient animés par la volonté de garantir que l'horreur du meurtre délibéré et massif, organisé par l'Etat, d'un groupe de personnes choisies exclusivement en raison de leur identité ne se reproduise plus jamais dans l'histoire de l'humanité.»[108] *[Traduction du Greffe.]*

41. Quel marché de dupes nous aurions conclu si, pour faire reconnaître la responsabilité pénale d'individus, nous avions sacrifié la notion de responsabilité de l'Etat. Et quelle conception erronée des exigences de la justice !

42. Dans le droit international moderne, le citoyen n'appartient plus à l'Etat : c'est l'Etat qui appartient, collectivement, aux citoyens. Certains d'entre vous ont joué un rôle moteur dans cette révolution juridique. Jouissant maintenant des privilèges de ce nouveau statut, les citoyens qui composent l'Etat moderne doivent accepter de bon gré leur part de la responsabilité de l'Etat, et non être encouragés à s'y soustraire. Nous faisons appel à la Cour pour qu'elle dissipe toute confusion qui risquerait de subsister entre la responsabilité de l'Etat et la notion de culpabilité collective. Juger le défendeur responsable du génocide, ce n'est absolument pas affirmer que les citoyens de la Serbie-et-Monténégro en partagent tous la culpabilité. Ce n'est bien évidemment pas

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[108] Communiqué de presse CT/P.I.S./860-e, 23 juin 2004.

le cas. Mais leur Etat n'en a pas moins délibérément dirigé, aidé, formé, armé, vêtu, payé et inspiré ceux qui ont commis le génocide. Un grand nombre de ces citoyens n'a aucune part dans la culpabilité de ce crime, mais tous partagent la responsabilité de reconnaître l'énormité de ce qui a été commis en leur nom et de réparer.

43. Cette affaire offre à la Cour une occasion unique de remplir la «mission civilisatrice» de la convention.

44. Il est essentiel que la Cour assume le rôle important que lui confère l'article IX de la convention sur le génocide. Qu'elle pèse les preuves. Qu'elle détermine les responsabilités.
58 Qu'elle enseigne aux nations et redonne espoir aux victimes. C'est un rôle qu'aucune autre institution internationale ne peut jouer et la seule autre possibilité est le cycle récurrent du sang et de la vengeance, qui ne nous est que trop familier.

45. Madame le président, Messieurs de la Cour, voilà qui clôt notre premier tour de plaidoiries. Nous nous sommes essentiellement centrés sur les faits et sur le schéma selon lequel s'ordonnent les faits dont nous avons eu connaissance depuis notre réplique. Nous avons essayé d'éviter de parler à nouveau des faits déjà prouvés dans nos plaidoiries antérieures, mais nous vous invitons instamment à en tenir compte, car ils obéissent essentiellement à ce schéma global qui vous a été présenté. Nous n'avons pas abordé en détail la question de votre compétence, puisque la Cour s'est exprimée sans ambigüité sur cette question en relation avec notre affaire. Nous comptons que vous considérerez les éléments de votre décision de 2003 sur la demande en revision comme *res judicata*. Nous aurons certainement à dire en plus après avoir entendu les plaidoiries du défendeur, sur ce point-là sans doute et sur d'autres questions, qui commenceront demain. La Bosnie vous remercie vivement de lui avoir donné la possibilité de plaider devant vous de façon si détaillée.

Le PRESIDENT : Merci, M. Franck. Voilà qui nous amène à la fin du premier tour de plaidoiries de la Bosnie-Herzégovine. La Cour siégera à 10 heures demain pour le début du premier tour de plaidoiries de la Serbie-et-Monténégro. L'audience est levée.

L'audience est levée à 12 h 50.