CR 2006/37 (translation)
Monday 24 April 2006 at 10 a.m.

CR 2006/37 (traduction)
Lundi 24 avril 2006 à 10 heures

10 The PRESIDENT: Please be seated. You have the floor, Professor Stern.

Ms STERN:

WHEN THE 1996 JUDGMENT WAS HANDED DOWN, THE RESPONDENT HAD TO BE REGARDED AS A MEMBER OF THE UNITED NATIONS

1. Madam President, Members of the Court, let me remind you at the outset that our opponents put forward two reasons which each of itself ought in their view necessarily to lead your Court to deny that it has jurisdiction, though you have twice asserted that it has: prima facie in 1993, reaffirmed in 1996 in a decision carrying the final authority of *res judicata* and before the admission of the FRY as a new Member of the United Nations; and further confirmed in your decision of 2003 after the FRY's admission as a new Member of the United Nations. In support of its request to you to review your decision, Serbia and Montenegro adduces two reasons, each of which is claimed to be sufficient to bar your jurisdiction: these two reasons are either that the FRY is not a Member of the United Nations, or that it is not party to the Genocide Convention.

2. It now falls to me to show you that the Federal Republic of Yugoslavia, today Serbia and Montenegro, which — and I hope I have convinced you of this — was party to the Genocide Convention in 1993, was also to be considered, on the same date, a Member of the United Nations. Assuming a decision were to be taken *de novo* today, which, let us be clear, and thanks to the principle of *res judicata*, is not the situation we are in but the situation which I am nevertheless considering *in the alternative*, I shall therefore analyse the position of the FRY in relation to the United Nations in 1993.

3. I am well aware that in the *Legality* cases you held that, *in the circumstances of the case* — let me emphasize this — *and only in the circumstances of the case*, the situation obtaining from 1992 to 2000 could not be regarded as equivalent to the status of Member. But those were different cases, even if during these oral pleadings one sometimes found oneself wondering whether counsel for the Respondent had not got the wrong case. Taking only the argument on jurisdiction by Messrs. Djeric, Varady and Zimmermann, the cases on *Legality* are cited twice as often as the case before us here, with which we should be exclusively concerned; more

11 specifically, the cases on *Legality* are cited 34 times[1], whereas the various decisions in the present proceedings are referred to only 15 times[2]!

4. In respect of the present proceedings between ourselves and Serbia, I shall endeavour to show you that there was in fact a State exercising many of the prerogatives of a Member of the United Nations from 1992 to 2000. We well know that international law sometimes rests on fictions, but we also know the important, the central role played in it by *effectivité*, in particular when that *effectivité* does not run counter to the law. When a succession process is in progress, it therefore frequently happens that one of the States becomes the continuator of the predecessor State in international organizations: this was the case of India at the time of partition. It was more recently the case of Russia, the continuator State of the USSR, it was also the claim of the FRY which, as I shall endeavour to show you, subsisted until another legal solution, favoured by the international community, and above all by the other States of the former Yugoslavia, was adopted in November 2000.

5. However, while a State's participation in a treaty depends on its desire manifested in the appropriate forms, as I have had occasion to indicate, matters are much more complex when it comes to the status of member of an international organization, which status must be considered *on a case-by-case basis*[3], as the General Assembly's Sixth Committee indicated when the problem of the succession of a United Nations Member State first arose. The Sixth Committee first pointed out that the continuator State could remain a Member of the United Nations since the successor State had to request its admission, adding that: "[b]eyond that, each case must be judged according to its merits"[4]. Although this position concerned the partition of the Indian Empire into two States,

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[1]See CR 2006/13, p. 2, para. 2.3; p. 3, para. 2.5; p. 4, paras. 2.6 and 2.9; p. 6, paras. 2.13, 2.15 and 2.16; p. 8, paras. 2.21 and 2.22; p. 9, paras. 2.23 and 2.24; p. 10, paras. 2.26 and 2.28 (Djerić). See also CR 2006/13, p. 13, para. 3.9; p. 17, para. 3.23; p. 18, para. 3.27; p. 21, para. 3.38; p. 48, para. 1.36; p. 51, para. 1.46; p. 52, para. 1.47; p. 57, paras. 5.9-5.11; p. 58, para. 5.15 (Varady). See lastly CR 2006/13, p. 29, para. 4.2; p. 30, paras. 4.3 and 4.8; p. 34, paras. 4.22-4.24; p. 35, para. 4.25; p. 36, para. 4.33; p. 37, para. 4.36; p. 40, para. 4.45 (Zimmermann).

[2]See CR 2006/13, p. 5, para. 2.13 (Djerić). See also CR 2006/13, pp. 11-12, paras. 3.2-3.3; p. 13, para. 3.7; p. 14, para. 3.10; p. 24, para. 3.48; p. 27, para. 3.58; p. 28, para. 3.61; p. 49, para. 1.39; p. 58, para. 5.13 (Varady). See lastly CR 2006/13, p. 32, para. 4.15; p. 33, para. 4.21; p. 35, para. 4.28; p. 36, para. 4.32; p. 37, para. 4.35 (Zimmermann).

[3]Emphasis added.

[4]United Nations, doc. A/CN.4/149, 6 October 1947.

the same approach was also adopted very recently by the ICTY with respect to the FRY, when it stated that:

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> "[t]he proper approach to the issue of the FRY membership of the United Nations in the period between 1992 and 2000 is not one that proceeds on a *a priori*, doctrinaire assumption . . . As the FRY membership was neither terminated nor suspended by General Assembly resolution 47/1, it is more appropriate to make a determination of its United Nations membership in that period on an empirical, functional and case-by-case basis."[5]

It seems to me that this case-by-case examination is all the more necessary in the present proceedings in view of the FRY's *sui generis* situation from 1992 to 2000. I will endeavour to explain exactly what this phrase means in law, for that is clearly not self-evident, as you yourselves stated in the *Legality* cases:

> "It must be stated that this qualification of the position of the Federal Republic of Yugoslavia as *'sui generis'*, which the Court employed to describe the situation during this period of 1992 to 2000, is not a prescriptive term from which certain defined legal consequences accrue; it is merely descriptive . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections*, Judgment of 15 December 2004, para. 74.)

It is this *sui generis* situation which I shall now address, and I shall demonstrate that:

A BODY OF CONCORDANT EVIDENCE SHOWS THAT THE FRY WAS A MEMBER OF THE UNITED NATIONS AS THE EFFECTIVE CONTINUATOR STATE FROM 1992 TO 2000

6. With respect to the FRY's status in the United Nations, we know that a battle raged regarding the characterization of the status of the State now accused before you of acts of genocide, and that the battle is not yet over, as shown by the discussions in this Court. Before beginning my legal analysis of the situation, I therefore feel it would be helpful briefly to remind you of:

The political positions adopted in United Nations and diplomatic circles

7. It is well known that the FRY wished to be the one and only continuator State; the other States of the former Yugoslavia felt that all States should be considered, on a similar footing, as successor States. The insistence of the four other States that emerged from the former Yugoslavia in refusing the FRY the status of continuator State stems from the fact that they wanted all States involved in the succession process to be treated equally, as regards both their status at the United

[5] ICTY, *Prosecutor* v. *Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic*, case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 38.

Nations and the sharing out of the assets of the Socialist Federal Republic of Yugoslavia. This
13 position was thus based on political considerations and was certainly not the product of any legal analysis. These two versions, these two "narratives", were presented with great lucidity by Professor Varady[6]. They are well known. The Federal Republic of Yugoslavia thus asserted that it was the continuator State of the SFRY and, as such, could remain a Member of the United Nations, without requesting admission; the four other States involved in the Yugoslav succession process claimed on the contrary that no State had continued the former Yugoslavia's legal personality and that there were thus five successors who were to be treated equally, which implied, among other things, that they should all five go through United Nations admission procedure.

8. The international community asked the FRY to agree to be treated like the other States of the former Yugoslavia. And we know that, following the régime change in Belgrade, the FRY did eventually agree to become a successor like the others from 2000, when, like the other successor States of the former Yugoslavia, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Slovenia, it requested admission to the United Nations. We know that its flag was raised at the United Nations on 1 November 2000.

9. But this political dispute — which I have only briefly touched on as it is so well known — could not change the institutional reality. However, before describing that reality, I should like, with your permission Members of the Court, to recall the position adopted by the FRY in this Court on the question of its membership of the United Nations, since — as I stressed in my presentation on the Genocide Convention — statements before your Court have considerable legal significance.

Serbia and Montenegro's legal position that it was a Member of the United Nations, as presented in its Memorial on the *Legality* case

10. It seems appropriate to begin this analysis of the FRY's status in the United Nations by letting counsel for Serbia and Montenegro speak for themselves, as they seem better than I at destroying the argument which they are now putting forward. Following the example of my
14 opponents, I shall cite the *Legality* cases, or more precisely the views expressed by the FRY in its Memorial filed on 5 January 2000 in those proceedings, from which I shall quote some extracts,

[6]CR 2006/12, pp. 47-48, paras. 1.32-1.34 (Varady).

beginning with the evocative and unambiguous heading: "The Federal Republic of Yugoslavia is a Member State of the United Nations". Serbia and Montenegro follows this by quoting the analyses of its status in the United Nations made by two of the permanent members of the Security Council, then cites the ICJ *Yearbook*. I shall read out these extracts. First, the view expressed by Mr. Vorontsov, Permanent Representative of the Russian Federation, who states:

> "The decision to suspend the participation of the Federal Republic of Yugoslavia in the work of the General Assembly will in no way affect the possibility of participation by the Federal Republic of Yugoslavia in the work of other organs of the United Nations, in particular the Security Council . . . (Security Council, Provisional Verbatim Record of the 3116th Meeting, S/PV.3116, 19 September 1992, 4-5)" (*Legality of Use of Force*, Memorial, para. 31.1.)

Then the Permanent Representative of the People's Republic of China, Mr. Li Daoyu, is quoted:

> "The resolution just adopted does not mean the expulsion of Yugoslavia from the United Nations. The name-plate 'Yugoslavia' will be kept in the General Assembly hall . . . The Federal Republic of Yugoslavia will continue to issue its documents in the United Nations." (Security Council, Provisional Verbatim Record of the 3116th Meeting, S/PV.3116, 19 September 1992, pp. 14-15) (*Legality of Use of Force*, Memorial, para. 31.2.)

There follows a reference to the Court's *Yearbook* — "the I.C.J. Yearbook informs that Yugoslavia is one among the 185 member States of the United Nations on 31 July 1997" (*Legality of Use of Force*, Memorial, para. 3.1.17). The dialectical mindset of counsel for the Federal Republic of Yugoslavia is then displayed in the following highly pertinent observation taken from the same Memorial, which Bosnia can but endorse:

> "Indeed, on 28 April 1993, the Security Council adopted resolution 821 (1993) by which it recommended to the General Assembly to decide that the Federal Republic of Yugoslavia shall not participate in the work of the Economic and Social Council. The General Assembly accepted the recommendation by its resolution 47/229. If Yugoslavia's membership in the Organization was terminated or suspended by resolution 47/1, there would be no need for a new resolution excluding Yugoslavia from the work of the Economic and Social Council." (*Legality of Use of Force*, Memorial, para. 3.1.5.)

These are highly pertinent, helpful arguments. But we are well aware that it is not for the State concerned legally to determine its status as Member of the Organization, which is a matter for the

15 Organization itself. However, in our case it should be noted that by not excluding the FRY the United Nations had in fact accepted that status.

The full and complete participation of the FRY as a Member of the United Nations from 27 April 1992 to 22 September 1992

11. It should certainly not be overlooked that, for the first six months of its existence — and it is often said that the first months of life are decisive for the future — the Federal Republic of Yugoslavia was an undisputed Member of the United Nations, exercising all the prerogatives of such a Member State. I venture to note this fact, which is sometimes forgotten when the chronology of the changes in the status of the Federal Republic of Yugoslavia is reviewed. For example, on 22 May 1992 the Federal Republic of Yugoslavia was part of the consensus on the admission of Bosnia, Croatia and Slovenia as Members of the United Nations. Similarly, it of course voted against resolution 47/1 concerning its own status in the United Nations, under the name of Yugoslavia. This shows that nothing, no legal obstacle, barred the FRY, as continuator State, from continuing the status of the predecessor State. It was only six months later that sanctions "internal" to the Organization were adopted, sanctions which are clearly not unconnected with the events in Bosnia and Herzegovina. Let me simply underline the fact that, while sanctions may be imposed which deprive a member State of certain of the prerogatives it exercises as a member State of an international organization, that is an irrefutable sign that the State concerned is indeed a member of the organization. Need I add that, over and above these internal sanctions, the Federal Republic of Yugoslavia was also the object of sanctions under Chapter VII throughout the period of ethnic cleansing and that it has never been argued that those sanctions were aimed at a State not a Member of the United Nations? I will now clarify the scope and significance of those internal sanctions.

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The FRY was a Member of the United Nations with fewer rights in the General Assembly from 22 September [1992] onwards

1. The legal positions taken by the two principal organs of the United Nations

12. I shall only take up the essence of the resolutions adopted on the FRY's status within the United Nations because you are well acquainted with them. Even though this Court, curiously, does not apparently wish to accord these resolutions the significance they deserve (case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment*, 15 December 2004, para. 67), they nevertheless, in my view, provide a strong indication of the

actual situation in the United Nations at the time. It all began, of course, with *Security Council* resolution 777 (1992), dated 19 September 1992, in which:

> "The Security Council,
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> . . . . . .
>
> 1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly." (United Nations, doc. S/RES/777 (1992), 19 September 1992, para. 1.)

13. This recommendation was followed by the *General Assembly*, which, as we well know, on 22 September 1992 adopted its resolution 47/1, the relevant part of which repeats the Security Council text, and I shall therefore not reread it.

14. It may be noted that this resolution refers neither to Article 5 of the Charter, on suspension of a State, nor to Article 6, on expulsion of a State. It appears however, from the legal standpoint, that the suspension of certain prerogatives of a State does indeed fall within Article 5, because *one who can do more can do less*, and if the General Assembly can suspend a State, that is to say suspend it from the exercise of its prerogatives within the United Nations, then it can obviously suspend the exercise of just some of them. Let us note, however, and I think this important, that the suspension of certain prerogatives of a Member means *a fortiori* that the State in question is indeed a Member of the United Nations.

17 15. Now, to see this resolution from a political viewpoint, I would like to underscore that, in saying that the FRY did not "automatically" continue the membership of the SFRY, the Security Council and General Assembly left the door open, I believe, to the possibility of accepting such continuity if the political circumstances were to make such a move acceptable to a majority of States, and most importantly among them the four SFRY successor States, which were opposed to such a course. As controversy arose as to the meaning of this United Nations resolution, its consequences were spelled out by the Legal Department of the United Nations.

2. The legal position taken by the Director of the Legal Department of the United Nations

16. The Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations, addressed a letter on 29 September 1992 to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and of Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of [the] resolution" was as follows:

> "[T]he only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) *shall not participate in the work of the General Assembly* . . .
>
> On the other hand, *the resolution neither terminates nor suspends Yugoslavia's membership in the Organization . . . The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies*. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."[7]

17. Two important points are to be noted here. The United Nations made it clear first that this was neither a suspension nor an expulsion and that the Federal Republic of Yugoslavia therefore remained a Member, but also, secondly, that it remained a Member with reduced prerogatives. In other words, the Federal Republic of Yugoslavia's *institutional position* was not altered, even though its *functional prerogatives* were.

18. We know that initially those prerogatives were cut back only in respect of the General Assembly: a debate took place moreover on the scope of this interdiction, the FRY being of the
18 view that it was not prevented thereby from participating in sessions of the General Assembly and in meetings of Assembly committees, the United Nations deciding to the contrary that it applied to the work of the General Assembly and of its subsidiary bodies, like conferences and meetings held by the General Assembly. It is obvious that these exchanges could not have taken place had the Federal Republic of Yugoslavia not been a Member of the United Nations.

19. A number of other aspects of this position warrant analysis: the text clearly shows that the Federal Republic of Yugoslavia was permitted to take the place, or occupy the seat, of the *former Yugoslavia*, whose seat, name and missions subsisted, until it agreed to sit as the *new Yugoslavia*: in other words, as the Director of the Legal Department tells us, the admission of the

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[7] United Nations, doc. A/47/485, 30 September 1992; emphasis added.

new Yugoslavia would terminate the membership of the Federal Republic of Yugoslavia as the former Yugoslavia, because from then on it would sit as the new Yugoslavia.

20. Mr. Varady seeks to interpret this letter from the Legal Director in a way which would render it meaningless. He says in effect that we do not know what entity is being referred to in the statement that the resolution does not terminate membership[8]. And he thus exploits the *possible* ambiguity in the reference to Yugoslavia. He therefore suggests that the United Nations could have maintained the membership status of the SFRY, a State which, as we well know, had been replaced lock, stock, and barrel, if I might say so, by the FRY. This is obviously a clever construction, but it does not stand up to rigorous analysis. True, it is said that the resolution "neither terminates . . . Yugoslavia's membership". But that means the FRY. One need only read on in the text. If we pursue our reading of the legal opinion, we see that the resolution does not take away Yugoslavia's right to participate in the work of the General Assembly. Who could claim that this refers to a State other than the FRY, in respect of which the resolution had just been adopted? How can it be imagined that the United Nations, having maintained the hypothetical member status of the SFRY, would adopt a resolution to prohibit equally hypothetical representatives of a hypothetical SFRY
19 from participating in sessions of the General Assembly? No, Mr. Varady, the Yugoslavia referred to here can only be the FRY.

21. I would also like to note, Madam President, Members of the Court, that it was while this initial situation prevailed — a situation not completely identical with that obtaining in 1999, when the Federal Republic's powers were further curtailed — when the prerogatives of the Federal Republic of Yugoslavia had been restricted only in relation to the General Assembly, that Bosnia and Herzegovina filed its Application on 20 March 1993. Thus, I cannot concur with Mr. Djeric when he says that "the situation that obtained in 1999 was completely identical to the situation that obtained in 1993"[9]. In reality, the sanctions were increased after the filing of the Application, because, as I am going to explain, the Federal Republic of Yugoslavia was barred from further participation in the work of ECOSOC, which was a serious curtailment of its prerogatives, given the number of subsidiary bodies of that principal organ.

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[8]CR 2006/13, p. 22, para. 3.41 (Varady).

[9]CR 2006/13, p. 16, para. 2.22.

The Federal Republic of Yugoslavia was a Member with even more limited rights in respect of ECOSOC from 28 April 1993 onwards

22. A little later, the prerogatives of the Federal Republic of Yugoslavia were further limited, but, as our opponents correctly pointed out in their Memorial, if resolution 47/1 had in fact terminated Yugoslavia's membership in the Organization, it would not have been necessary to adopt this new resolution.

23. A further step was therefore taken in curtailing the functional prerogatives of the FRY on 28 April 1993, with the adoption of Security Council resolution 821 (1993)[10] and, on the same day, the adoption of General Assembly resolution 47/229, whereby these two organs thus decided "that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council"[11]. But once again, I repeat, the limitation of a State's rights is part of a process of supervision, if I may use that term, but supervision within the Organization, not with a view to expulsion.

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United Nations practice

24. What these various resolutions I have just mentioned tell us is that the situation of continuation which obtained was not what a majority of Members wanted. But that did not prevent the actual situation of continuation from subsisting. Evidence of the Federal Republic of Yugoslavia's membership is so abundant that I would not know which elements to single out, but I will give you the most significant examples. United Nations practice shows that, while the opinion of States which was manifested in the resolution more or less favoured the position of the four successor States which rejected the status of continuator, the practice very much supported the stance of the Federal Republic of Yugoslavia, this stance as to continuity. It was this complexity which characterized what you have called a *sui generis* position. Before I flesh out this expression, please allow me, Members of the Court, to note that if the FRY had *not* been a Member, it is difficult to see how such a *sui generis* position could have been used: this expression seems to me in and of itself, inherently, to imply that a special relationship, a *sui generis* relationship, existed with the United Nations, even if not all of the effects of this position were felt.

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[10]United Nations, doc. S/RES/821 (1993), 28 April 1993.

[11]United Nations, doc. A/RES/47/229 (1993), 28 April 1993.

The procedure whereby the FRY replaced the SFRY

First a few words about the procedure whereby the FRY replaced the SFRY, which is one illustration of continuity.

25. It should be observed that the FRY clearly manifested the intent to hold itself out as the continuator, including in the procedures by which it so informed the United Nations. Two documents were sent to the United Nations: a letter dated 6 May 1992 containing a Note Verbale in which it was stated that "the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro". This letter was sent under the letterhead of the "Permanent Mission of the Socialist Federal Republic of Yugoslavia"; it was sent to the Secretary-General, who was asked to circulate it as a document of the General Assembly, which he did[12]. Another letter, with identical content but under the letterhead of the "Mission of the Federal Republic of Yugoslavia", was sent by the

21 individual representing the SFRY to the President of the Security Council, who was asked to circulate it as a General Assembly document, which he also did[13]. In effect:

Circulation of official documents was never suspended

26. We know that it is, in principle, a privilege, barring special circumstances, of United Nations Members to be able to circulate official documents. It is important to note that the documents emanating from the Federal Republic of Yugoslavia continued to be circulated, even when it was no longer allowed to participate in the work of the General Assembly or of ECOSOC. They were signed by various dignitaries in the name of the Permanent Mission of the Federal Republic of Yugoslavia. Thus, in a letter dated 27 December 2001 from the Secretary-General to the President of the General Assembly, the former stated: "From 27 April 1992 to 1 November 2000, the Government of the Federal Republic of Yugoslavia . . . availed itself of the right of the former Yugoslavia, as a Member State, to circulate communications as official documents of the United Nations."[14] Does the Respondent maintain that these documents never existed? Or that it would be necessary to deconstruct the past, as it invites the Court to do in

[12]United Nations, doc. A/46/915, 7 May 1992.

[13]United Nations, doc. S/23877, 5 May 1992.

[14]United Nations, doc. A/56/767, letter dated 27 December 2001, sent to the President of the General Assembly by the Secretary-General, 9 January 2002, para. 7.

respect of its jurisdiction, by "privatizing" all documents circulated in its name? I do not think that is a realistic solution.

The Mission to the United Nations was also maintained

27. From 1992, the Mission of the Federal Republic of Yugoslavia, at the address of the former mission of the SFRY, appeared on the list of missions to the United Nations. The other countries resulting from the process of Yugoslav succession protested against this clear sign that the FRY was a Member State of the United Nations[15]. I wish however to note that Bosnia, while protesting against this inclusion of the FRY Mission in the *Blue Book of Permanent Missions*, stated that it was because the FRY was "manifestly not a Member State in good standing"; it did not say "is not a Member"; I think this is important. Not to be a Member in good standing, that is

22 what the Court called, in more learned terms, a *sui generis* position, that is to say the position of a Member which cannot exercise certain powers, these measures having been taken to put pressure on it, to force it to respect the rules regarding the maintenance of peace, non-intervention, and respect for human rights and humanitarian law.

Institutional participation was largely maintained

28. We all know that, even though it was unable to exercise its prerogatives — particularly its right to vote in the General Assembly — not all links with the General Assembly were broken. For example, the nameplate of Yugoslavia remained in place in the Assembly Hall.

29. Above all, however, it continued to participate in the work of the other organs. Its relations with the Security Council were not broken. The FRY was entitled to address the Security Council under a special procedure, authorizing the representative of the FRY not only to attend formal meetings, but even to take the floor at such meetings. Over the first three years, FRY representatives thus received 13 invitations: 11 invitations to address the Security Council (13 November 1992, 19 February 1993, 19 April 1993, 29 June 1993, 14 February 1994, 21 April 1994, 27 April 1994, 23 September 1994, 30 September 1994, 8 November 1994, 12 January 1995) and two invitations to sit at the Security Council table during meetings on 17 April 1993, at which

[15]See, for example, United Nations, doc. A/47/566, doc. S/24694, 21 October 1992.

it was precisely the situation in Bosnia and Herzegovina which was discussed, and on 9 August 1993, at which there was discussion of the issue of CSCE missions to Kosovo, Sanjak and Vojvodina. This unique special procedure, under which invitations could be extended to FRY representatives, seems to me to provide a perfect illustration of the potential scope of the term *sui generis*.

30. However, relations with the Court were not affected either. In particular, the FRY was included in the absolute majority necessary to elect the Members of the Court, as is made clear in Mr. Shabtai Rosenne's book.

> "Here the General Assembly on the recommendation of the Security Council adopted a series of resolutions having the effect of preventing the former Yugoslavia from participating in the work of different organs of the United Nations. The Court was not included amongst those named organs. One effect of this relevance to the affairs of the Court was that during that period of suspension, Yugoslavia was included in the 'absolute majority' required in the General Assembly for the election of Members of the Court although it was prevented from participating in that vote."[16]

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31. It is easy to see the significance of this partial suspension of certain functional privileges, which nevertheless left all institutional links intact. It is important to understand clearly the reasons for the decisions taken by the United Nations in respect of the FRY, which were in any case not intended to authorize it to disregard its obligations vis-à-vis the United Nations: on the contrary, the limitation on some of its rights was intended to compel it to comply with its obligations. From this point of view, it is perfectly possible to approach the right of access to the Court in different ways: it may be regarded as a positive dimension of *jus standi*, or as the right to answer for one's acts before the Court, which is the negative aspect of *jus standi*. Professor Tom Franck has already had occasion to stress this lack of symmetry between rights and obligations. And then, last but not least, the FRY continued to contribute to the budget.

Participation in the budget

32. It is also important to emphasize that, on 8 January 1993, that is to say, early in the first year after Yugoslavia had ceased to exist, the Secretary-General informed the chargé d'affaires of the FRY that it was liable for certain unpaid contributions of the SFRY. What is interesting is that

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[16] S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. II, *Jurisdiction*, 4th edition, Leiden/Boston, 2006, p. 606. See also S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. I, *The Court and the United Nations*, 4th edition, Leiden/Boston, 2006, p. 374.

the FRY was asked to pay, as continuator, amounts owed by the SFRY, less the amounts owed by the successor States, which now became contributors in their own right.

33. Here again, I think that our opponents' arguments help our cause. Thus they emphasized, in their Memorial on *Legality* of 5 January 2000, to which I have already referred, that they were assuming responsibility for all the financial obligations of a Member State. I could cite a number of extracts from that Memorial, but I shall take only one. In a Note of 25 September 1996, it is stated that "*in the extremely difficult financial situation the Federal Republic of Yugoslavia has made a payment to the amount of . . . as its contribution to the budget for 1996.* (Ann. No. 174, p. 490)" (*Legality of Use of Force*, Memorial, paras. 3.1.7, 3.1.14, 3.1.15.). And such Notes were sent every year.

24 34. This is the right moment, Madam President, to answer the important question asked by Judge Tomka, which was worded as follows:

> "On 28 February 2006, counsel for Bosnia and Herzegovina stated that '[l]a Yougoslavie est demeurée Membre des Nations Unies'. In a letter dated 9 August 2005 from the Permanent Representative of the former Yugoslav Republic of Macedonia, and the chargés d'affaires *ad interim* of Bosnia and Herzegovina, Croatia, Serbia and Montenegro and Slovenia, addressed to the Under-Secretary-General of the United Nations for Management, all these five States, including the Applicant, stated that '[t]he Federal Republic of Yugoslavia that came into existence on 27 April 1992 became a United Nations Member not earlier than 1 November 2000. The State is presently known as Serbia and Montenegro.' I would welcome any explanation of, or comment on, the latter statement Bosnia and Herzegovina might wish to make."[17]

35. Your question, Judge, relates to the consistency of the positions taken by Bosnia and Herzegovina. It is true that Alain Pellet stated: "Yugoslavia has remained a Member of the United Nations"[18]. It is true that I, too, have just supported this contention. Moreover, it cannot be denied that the chargé d'affaires of Bosnia, who was one of the signatories of the letter, indicated that "[t]he Federal Republic of Yugoslavia . . . became a . . . Member not earlier than 1 November . . ."[19].

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[17]CR 2006/29, p. 21.

[18]CR 2006/3, p. 19, para. 20 (Pellet).

[19]Letter dated 9 August 2005 from the Permanent Representative of the former Yugoslav Republic of Macedonia and the Chargés d'affaires a.i. of Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and Slovenia addressed to the Under-Secretary-General for Management, reproduced in Annex IV to the report of the Secretary-General, United Nations, doc. A/60/140, 16 September 2005, pp. 17-19; p. 17.

36. In order to respond to the question asked, I should like first of all to make clear what was the object and purpose of that letter. It has to be placed in its United Nations context, which was one of discussions concerning the outstanding assessed contributions payable by the five States of the former Yugoslavia. In other words, there was no question of principle, merely a question of money. The only issue for the five successor States was to avoid paying the outstanding assessed contributions owed by either the SFRY or the FRY. What could be more simple than to say that, from 1992 to 2000, Yugoslavia (the SFRY) no longer existed, and therefore that no member State was its continuator and, as a result, that no one was liable for arrears. As the letter indicates, "the

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common position of the five successor States on this issue has been that the unpaid assessed contributions of the Socialist Federal Republic of Yugoslavia should be written off"[20].

37. As grounds for their position, the five States relied on an indisputable fact, namely that the former FRY, under the name of Serbia and Montenegro, was admitted as a new Member on 1 November. But this common position cannot and could not alter the "*sui generis*" situation in which the State in question found itself, in relation to the United Nations, prior to the above-mentioned date: that situation, in fact, depended not on what the five States thought, but on the Organization. And the five States were quite entitled to express their views on this subject by making the following observation, in the same document moreover, although this is merely — as they state explicitly — an opinion: "[w]e . . . *believe* that the unauthorized participation of the Federal Republic of Yugoslavia in United Nations sessions cannot be the basis for assessed contributions to be paid by the former Socialist Federal Republic of Yugoslavia"[21]. This opinion is, however, incorrect: as a matter of fact, the assertion that the FRY's participation in United Nations sessions between 1992 and 2000 was "unauthorized" is mistaken, since, quite to the contrary — as I have just explained in detail — its participation had in fact been maintained by decision of the competent United Nations organs.

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[20]Report of the Secretary-General, United Nations, doc. A/60/140, 16 September 2005, Ann. IV, p. 18.

[21]Letter dated 9 August 2005 from the Permanent Representative of the former Yugoslav Republic of Macedonia and the Chargés d'affaires a.i. of Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and Slovenia addressed to the Under-Secretary-General for Management, reproduced in Annex IV to the report of the Secretary-General, United Nations, doc. A/60/140, 16 September 2005, p. 17.

38. It seems to us, moreover, that the report of the Secretary-General, to which the letter we are discussing is annexed, supports the argument that the FRY was to be considered a Member of the United Nations. Thus, the following passage is highly significant:

> "From 27 April 1992 . . . until 27 October 2000, when its President submitted to the Secretary-General an application for the admission of the Federal Republic of Yugoslavia to membership in the United Nations, the Government of the Federal Republic of Yugoslavia claimed that it constituted the Government of the Member State that was the former Yugoslavia. This claim was advanced on the explicit basis that the State that was formerly known as the Socialist Federal Republic of Yugoslavia continued to exist, that that State therefore continued to be a Member of the United Nations, that the Federal Republic of Yugoslavia continued the personality under international law of the Socialist Federal Republic of Yugoslavia, that the Federal Republic of Yugoslavia was therefore a State Member of the United Nations and that the Federal Republic was, in consequence, the same person of international law, and so the same Member State, as the former Yugoslavia."[22]

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39. The Secretary-General thus cites the assertion by the FRY of its continued participation, and the effective reality of such continued participation, in the activities of the Organization, in order to draw a number of conclusions in respect of financial matters. It is difficult to see why this status of continuator, which involved full participation in bodies other than those from which the FRY had been excluded, should not apply in relation to the Court. And it is therefore difficult to see on what basis it could be held that, in 1993, it was excluded from being a party to the Statute.

40. I hope, Judge, that I have helped to answer some of the points raised by your question to Bosnia and Herzegovina.

THE FRY'S ADMISSION TO THE UNITED NATIONS AS A SUCCESSOR STATE DOES NOT CHANGE THE FACT THAT IT REMAINED A MEMBER OF THE UNITED NATIONS IN THE ROLE OF CONTINUATOR STATE FROM 1992 TO 2000

41. We are all familiar with the distinction between continuator States and successor States, and I shall therefore not dwell on this point. Allow me merely to recall a few definitions.

42. When a succession occurs, the crucial question is whether the State that emerges from the process, which, like Baudelaire's dream lover, is neither exactly the same one, nor exactly a different one, should be considered as rather the one or rather the other. When a State that emerges from a succession process is to be considered the same as the predecessor State, we speak of a continuator State, but when it is to be regarded as different, we speak of a successor State.

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[22]Report of the Secretary-General, United Nations, doc. A/60/140, 16 September 2005, p. 2, para. 6.

43. Thus, when there is *continuation*, this means that the State retains its previous identity, that there is only *a single subject of international law*, subject to certain changes. If there is a continuation — thus, in appearance, an identity of status — the legal consequences, those not in dispute, are *maintenance* of the obligations of the "original" State, with a possible *adjustment* of the rules applicable to it.

44. When a *succession* takes place, this means that, in place of the original State, there is a new State, and the succession implies therefore the existence of *at least two subjects of international law*, concerning which the problem arises of the *transmission* of rights and duties from one to the other.

45. Irrespective of their complexity, succession processes should be capable of producing only straightforward outcomes: in the event of dissolution, that is, disappearance of the

27 predecessor State, there should be no continuator and only successors: in the event of non-disappearance of the predecessor State, there should be a continuator and one or more successors. However, the reality is multifaceted: there have been situations where two States have been considered as continuators; and there have been even more complex cases where certain States have been considered simultaneously as continuators in respect of some of their rights, and as successors in respect of others. Let me provide examples of both these situations. First, situations in which two States have been considered as continuators: this was, for example, the interpretation given to the dissolution of the Austro-Hungarian Empire, which gave rise to continuation by two States, Austria — even if, as we know, Austria refused to ratify this continuator status, outside the peace treaty — and Hungary; hence the title of continuator applied to each of the States under the Treaties of St. Germain (1919) and Trianon (1920). Mention may also be made of the very specific succession process to which the five States that emerged from the former Yugoslavia were made subject at the IMF and the World Bank, where all five were considered as continuators, without being required to go through the admission procedure. But there have been even more complex cases: some States have been considered simultaneously as continuators in respect of some of their rights and obligations, and as successors in respect of others.

46. For example, the Netherlands, at the time of its separation from Belgium, was regarded as the successor State with respect to treaties and the continuator State in regard to colonial administration. Similarly, Austria accepted the continuation of the USSR by Russia in terms of its membership of the United Nations and other organizations, but not with respect to bilateral and multilateral treaties. While different characterizations can coexist simultaneously, they can also replace each other over time.

47. It is in effect perfectly acceptable, in a given historical situation, to adopt *a sequential analysis, which would make it possible to regard the FRY as the continuator State until 2000 and a successor State thereafter*. Such a situation would not be entirely unprecedented, at least in the reverse sequence, despite the fact that this would appear more improbable. We only have to think of the succession process that led to the break-up of the USSR. During the dissolution of the USSR, although the international community, for obvious reasons, finally attributed the status of

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continuator to Russia, it is no less obvious that, initially, the demise of the USSR had been duly recognized and confirmed by those principally involved and by the other successor States. The sequence was thus successor State/State recognized as continuator State, although there was no change in Russia's identity.

48. To recapitulate the process: following the announcement in the Minsk Agreement of 8 December 1991 that the Soviet Union had ceased to exist as a subject of international law and as a political reality, a number of members of the international community reacted immediately by declaring their recognition of Russia's independence, thereby demonstrating that a new State had emerged. This was true of Norway[23], Sweden[24] and Finland[25] *inter alia*.

49. Switzerland did the same thing, announcing in a press conference on 23 December 1991 the decision of the Federal Council to recognize 12 States to have come out of the USSR; thus 12 new States were recognized, reflecting a typical process of succession without a continuator.

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[23]According to *Izvestia* of 17 December 1991 and K. Bühler, *State Succession and Membership in International Organizations,* The Hague, Kluwer Law International, 2001, p. 161, note 719.

[24]According to *Izvestia* of 19 December 1991.

[25]According to *Izvestia* of 20 December 1991 and K. Bühler, *op. cit.*, p. 161, note 719.

50. This was also the attitude of the United States. It unreservedly accepted the demise of the USSR. George Bush greeted the emergence of the independent States with the words: "New, independent nations have emerged out of the wreckage of the Soviet empire."

51. The position of the United States was regularly reiterated in subsequent declarations by the United States administration, which referred to the "dissolution of the USSR" and to the existence of "12 new independent States". In particular, the United States presented its diplomats' credentials to the Russian Federation[26], a prime illustration that it was regarded as a new State. Thus, what I wanted to show you was that, initially, Russia was seen as a successor State. However, subsequently, it is clear that Russia was regarded by all as a continuator State. Switzerland, moreover, expressly noted this change of characterization in a declaration in

29 January 1994, stating: "The *Russian Federation* is *now* recognized as the "continuator" State."[27]

52. The transition to continuator from successor State went almost unnoticed, as it occurred rapidly. Russia was regarded as the continuator of the Soviet Union shortly after the disappearance of the USSR had been recognized. Despite the short timescale, there was nonetheless a change of legal status.

53. The same is true of Yugoslavia, except that the transformation was from continuator to successor and the timescale for the replacement of one status by the other was, of course, considerably longer. Thus we can conclude that, in the case of Yugoslavia, the sequence was the opposite to that for Russia, since the FRY initially claimed to be the continuator State and was accepted as such, before accepting, after a certain date, the status of successor State that the international community wanted it to adopt: the sequence was thus continuator State/State recognized as successor State.

54. The issue before the Court is, in reality, particularly complex — especially as the FRY did nothing for eight years in order to simplify it — since it concerns three players or, to be absolutely precise, two, one of which changed status over time: there was the Socialist Federal Republic of Yugoslavia, the first player, and the second, the Federal Republic of Yugoslavia, which

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[26]Declaration by John F.W. Rogers, Under Secretary for Management, *New US Embassies in the Former Soviet Union*, Washington DC, 25 February 1992, in *US Department of State Dispatch*, 9 March 1992, vol. 3, No. 10.

[27]Extract from *Pratique suisse 1993*, No. 6.1, also featured in the published version of the previously cited pilot project, document CH/6, pp. 322-323, italics in original, inverted commas added.

was successively viewed as the Federal Republic of Yugoslavia/continuator from 1 April 1992 to 1 November 2000 and the Federal Republic of Yugoslavia/successor from 1 November 2000. The Federal Republic of Yugoslavia remained a Member of the United Nations, only its status changed: as continuator from 1992 to 2000 and as successor since 2000.

55. The notion that there was no incompatibility in the same State having differing statuses over a period of time was upheld by the ICTY in a decision of 6 May 2003 in the *Milutinovic* case:

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> "[t]he somewhat untidy situation in which the FRY was barred from participating in the work of the General Assembly, without any termination or suspension of its membership of the Organisation, could only be resolved by the formal admission of the FRY to United Nations membership . . . But that formal admission does not necessarily mean, and does not in fact mean that the FRY was not a member of the United Nations for certain purposes in the period between 1992 and 2000."[28]

56. In other words, the Federal Republic of Yugoslavia viewed itself initially as a continuator State, that is to say: of its own free will, it opted to assume all the rights and obligations of the SFRY, *including* — and I insist upon this — the wrongful acts committed by that State. Subsequently, from November 2000, the FRY became the successor State, as it is now; that is to say, a State having, by its claim to continuity, assumed throughout the entire period of ethnic cleansing responsibility for everything that had occurred before 27 April, and a State having inherited under its new name and in its new geographical conformation all of the atrocities referred to before this Court. Put differently, the fact of its successor status had no retroactive effect, but followed on from its having assumed responsibility as continuator for all that had gone before.

57. Madam President, Members of the Court, this analysis is *the only one that makes it possible to avoid a legal vacuum* and is faithful to the reality, the reality that the FRY was thus, initially, a continuator of the SFRY, but then decided to apply for United Nations membership for purely political reasons.

58. That in no way implies that the new status as a successor State which it finally chose to adopt has any retroactive effect going back to the date when the FRY was established. You already said that in 2003, and you confirmed it in 2004. In your 2004 Judgment, you held *inter alia*: "its admission to the United Nations did not have, and could not have had, the effect of dating back to

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[28]ICTY, *Prosecutor* v. *Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic*, case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 42.

the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared" (*Legality of the Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections*, Judgment of 15 December 2004, para. 78).

59. Thus in that Judgment you emphasized the lack of retroactive effect of admission to the United Nations, but, in practice, the refusal of retroactivity as applied in that case has left us with a legal vacuum: rejecting retroactivity amounted to saying not that the previous situation could be characterized differently, but that it could not be characterized at all. There was no retroactive

31 effect, but therefore no new characterization. If we assume, correctly, that successor status cannot be applied retroactively, we arrive at no status at all, and everything continues as if nothing had happened, as if nothing had occurred between 1992 and 2000, as if the FRY had not existed. In other words, I believe, as was so clearly stated in a separate opinion in the *Legality* cases, that the resolution admitting the FRY as a new Member of the United Nations "necessarily clarifies the legal situation *thereafter*"[29], the emphasis being on *thereafter*, highlighting the fact that the previous situation can obviously not be clarified by an act aimed at the future.

60. I will not try to hide, as I come to the end of this presentation, that what I have attempted to show you does not correspond with the view taken in other proceedings, but those were indeed other proceedings, as Alain Pellet has already pointed out to you. It remains for the Court to address certain possible contradictions: those that exist already, and which we cannot and — I believe — must not deny, and those that Serbia and Montenegro is asking you to add. In my opinion, Madam President, Members of the Court, the key points that the Court has to bear in mind in addressing these contradictions are the *res judicata* principle, the principle of consistency within the same case — for I believe it is more important for decisions to be consistent within a given case than between two different cases — the principle of non-retroactivity and what I will call the *principle of respect for the legitimate expectations* which its previous decisions have for so long engendered among the Bosnian people.

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[29]Separate opinion of Judge Higgins appended to the Judgments in the case concerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections*, Judgment of 15 December 2004, para. 18 [emphasis in the original].

61. "We do not shirk our responsibilities"[30] said Mr. Stojanović, the Agent for Serbia and Montenegro, so convincingly and sincerely in his opening speech, before adding shortly afterwards that he had great confidence in the Court's sense of justice[31]. Members of the Court, Bosnia and Herzegovina also has great confidence in the Court's sense of justice in this key case involving the responsibility of a State for genocide. Thank you.

32 The PRESIDENT: Thank you, Professor Stern.

Ms STERN: Please can you call Mr. Alain Pellet now.

The PRESIDENT: Yes. I call Professor Pellet to the Bar.

Mr. PELLET: Thank you very much, Madam President.

JURISDICTION OF THE COURT

5. RECAPITULATION OF BOSNIA'S ARGUMENT ON THE JURISDICTION OF THE COURT

THE RIGHT TO A DECISION

1. Madam President, Members of the Court, it falls to me, as our second round of oral argument nears its close, to recapitulate the principal elements of the position of Bosnia and Herzegovina regarding the jurisdiction of the Court, just as, at the opening of this second round, I attempted to present a summary of its argument on the merits[32]. However, I have to say that, while it is normal, at the close of lengthy proceedings, to present an overview of a party's arguments on the merits, by the same token it is unusual — almost surreal — to be obliged to undertake such an exercise in relation to the jurisdiction of the Court to pass judgment upon a case which has been on its docket for 13 years — and which, moreover, resulted in a judgment, precisely on the issue of jurisdiction, some ten years back.

2. Thirteen years . . .; ten years . . . These two figures suffice to highlight one of the crucial aspects of this case in terms of procedure: the time factor. The second key element in issue is that

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[30]CR 2006/12, para. 24 (Stojanović).

[31]*Ibid*., para. 30.

[32]CR 2006/31, pp. 10-44.

which I addressed at some length last Friday: the various problems of "coherence" — or "consistency", for it seems to me that the English word provides an additional nuance. It is around these two themes that I shall attempt to summarize the terms in which the two most important issues in relation to jurisprudence are posed in this case. To do so, I shall certainly be obliged to repeat in part what Thomas Franck, Brigitte Stern and myself have already said, but I hope, Members of the Court, that you will forgive me: I shall endeavour to add certain elements and, above all, it seems to me that this overview will make more clearly apparent the very consistency of our position, and to show that certain apparent inconsistencies in what the Court has held are in fact explicable, at least in part, by the passage of time.

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I. (In)consistencies

3. Madam President, I should again like to take as my starting point the *leitmotif* of Professor Varady: "This is a most complicated and truly unorthodox case."[33] I am not sure that the complexity of the issues of jurisdiction — which are our opponents refer to, with a remarkable sense of litotes, as "procedural issues" — are as great as they claim. But in any event, if there is complexity on this point — and I am not speaking of the merits, which seem to be more tragic than complex — it stems (and stems solely) from the extraordinary variability in the Respondent's position, which initially led the Court to regard that State as a Member of the United Nations, because it so claimed, only to be persuaded subsequently that this was not the case (at least at the critical date), for it had — finally! — accepted that it was not what it claimed to be: the continuation of the former Yugoslavia.

4. According to what our opponents have told us, the script of this purported complexity can, I believe, be broken down into five acts:

— Act I: 1992 — The "criminalized régime" of Milosević (the expression is that used by Professor Stojanović, Agent of Serbia and Montenegro[34]) declares that the FRY is the sole continuator of the former Yugoslavia.

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[33]Cf. CR 2006/12, p. 56, para. 1.46. See also CR 2006/12, p. 45, para. 1.2; p. 46, para. 1.7; p. 48, para. 1.13; p. 49, para. 1.17; p. 51, paras. 1.23 and 1.26 (Varady); CR 2006/13, p. 23, para. 3.18; p. 60, para. 5.2. See also p. 36, para. 4.5 (Zimmermann).

[34]CR 2006/12, p. 12, para. 11.

— Act II: 1996 — This claim results in great uncertainty and legal difficulties, which lead the Court to adopt its Judgment of 11 July 1996, in which it recognizes that it has jurisdiction on the basis of this declaration, of an erroneous assumption.

— Act III: 2000 — Reversal of the situation: having rid itself of the "last communist régime in Europe, which had caused its own people much pain"[35] — these are again Professor Stojanović's words — and which alone was responsible for the crimes committed in

34 Bosnia and Herzegovina and, in particular, for the "great crime" committed at Srebrenica[36], the "new Yugoslavia" requests admission to the United Nations, and is so admitted.

— Act IV: 2003/2004 — Serbia and Montenegro requests the Court to address the consequences of this new situation with varying fortunes, for this fourth act falls into two separate scenes: in the first, the ICJ, in its Judgment of 3 February 2003, dismisses the request for revision of its 1996 Judgment; but the following year the Judgments handed down on 15 December 2004 in the cases concerning *Legality of Use of Force* find that between 1992 and 2000 the FRY was not a Member of the United Nations and had no access to the Court.

— Act V: 2006 — The epilogue, which we are writing together.

5. If it were not for the tragic context of these episodes, this, Members of the Court, would be the second-rate plot of a courtroom series which owes much to the imagination of the scriptwriters, but lacks legal credibility and is based on too many mistaken assumptions or half-truths:

— in the first place, the characters are poorly drawn: while Serbia and Montenegro is undoubtedly not the "continuator" of the former Yugoslavia (the SFRY, the *Socialist* Federal Republic of Yugoslavia), it is certainly the continuator of the FRY;

— it can therefore neither be acquitted of the latter's crimes nor released from the legal situation created by the FRY in the context of the present proceedings; furthermore,

— the inclusion of Act IV, Scene 2, in the play is unacceptable: the 2004 Judgment is from a different script; so much so that, if we view the facts from a continuous perspective, without

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[35]CR 2006/12, p. 12, para. 10 (Stojanović). See also p. 13, paras. 14-15.

[36]See http://www.info.gov.yu/saveznavlada/detailjis.php ?strid=699; document reproduced in the judges' folder of 6 March 2006.

this scene, which belongs to a different play, we find them to have a consistency of which the scenario skilfully devised by Respondent's counsel seeks to deprive them.

If you will allow me, Madam President, I will re-address these three points, but with a more restrained use of imagery.

1. The hypothesis of continuity

6. By formal declaration, adopted on the very day, 27 April 1992, that the FRY was proclaimed, the State undertook to "strictly abide by all the commitments that the Socialist Federal
35 Republic of Yugoslavia assumed internationally" (*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. 610, para. 17). It confirmed this undertaking in an official Note addressed that same day to the United Nations Secretary-General *(ibid.)*, which Brigitte Stern read out to us just now. It was on the basis of that undertaking, and on that basis alone, that, in 1996, the Court held that the Respondent was "party to the Genocide Convention", after noting that this had not been contested *(ibid.)*.

7. To this, our opponents respond with what is in reality just one argument, notwithstanding the learned speech of Professor Zimmerman, which addresses a whole range of other issues[37]. However, those other issues can be of only secondary interest — that is, if we ignore the 1996 Judgment, which is surely inconceivable, even if, in a concern to respond completely to all of the points raised by the Respondent, Ms Stern followed him onto this terrain. The Respondent's key argument is the following: "Today it is evident that the 1996 Judgment on preliminary objections was based on an erroneous assumption — the Respondent did not remain bound by Article IX of the Genocide Convention."[38] "Today" . . . Yes indeed, and I shall return to this when I come to the time factor; but at the time — in 1996? Matters were then far from "evident"; this is a point on which both sides in this case agree: Yugoslavia claimed continuity and, as Professor Varady puts it so appositely: "This was wrong but not implausible."[39] And what Professor Stern has just said confirms this. In other words, it might have been possible that the

[37]CR 2006/13, pp. 35-59.

[38]*Ibid.*, p. 24, Sect. 4.

[39]*Ibid.*, p. 30. para. 3.46.

wind would change and that the international community — which had never taken any measure to expel or suspend Yugoslavia from the United Nations — would resign itself to that country's being reintegrated into the Organization with full rights, for it was also perfectly possible that the other successor States of the former Yugoslavia (the SFRY) would recognize the status of continuator that it enjoyed in practice; as Brigitte Stern has also just shown us, this was what the members of
36 the former Soviet Union had done in the case of the Russian Federation, through the Alma-Ata Agreement of 21 December 1991, in relation to its status as a permanent member of the Security Council.

8. For its part, the Court had no reason to substitute itself for the international community and for the political organs of the United Nations, which had confined themselves to a half-measure, without ever taking a binding legal decision dismissing outright the claim of the FRY to be the continuator of the SFRY. And the Court had still less reason to do so — as it expressly notes in its 1996 Judgment — since Yugoslavia's participation in the 1948 Convention had not been contested before it (*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. 610. para. 17).

9. Professor Zimmerman affects to be surprised at this: "outside this Great Hall of Justice Bosnia and Herzegovina has consistently taken the position that there was only one way for the FRY to become a contracting party to human rights treaties — namely by specific notifications of succession"[40]. This is certainly true: Bosnia and Herzegovina has always taken the view that the FRY was only one successor among others to the former Yugoslavia; it has never concealed this and has always publicly maintained that the Respondent was subject to the same rules as the four other successor States, and it continues to believe this — as Professor Stern has just recalled. However, it was clearly not for Bosnia and Herzegovina to raise a preliminary objection to its own Application — in particular since, if the Respondent had done so, it believed that it could certainly raise arguments in reply: that the FRY was not the continuator of the former Yugoslavia was one thing, but that it was by the same token not party to the Genocide Convention was quite another.

[40] *Ibid.*, p. 57, para. 4.92.

However, as the Respondent remained silent, Bosnia and Herzegovina had no reason to raise the issue itself, or to put forward arguments capable, in its view, of settling the issue; Professor Thomas Franck has made a clear showing on this point: by its silence, the FRY raised an *estoppel*, and the Respondent cannot come to you today to complain of the Applicant's silence, which it had itself induced; there was no reason for the Applicant to express itself on an issue which its opponent had not raised.

37 10. The same reasoning applies to the FRY's participation in the United Nations Charter and in the Statute of the Court:

— Yugoslavia had undertaken to abide by *all* the prior commitments of the SFRY;

— the Charter and the Statute annexed thereto undeniably formed part of those undertakings;

— nor did the Respondent, which regarded itself as having remained a Member of the United Nations, raise the issue, and the Applicant certainly had no reason to do so, particularly since in practice, as my colleague and friend Brigitte Stern has just shown you, Yugoslavia had been neither expelled nor suspended, and continued to enjoy certain rights within the Organization;

— quite logically, the Court drew the necessary conclusion and refrained from ruling on an issue which did not need to be addressed — whether it took the view that Bosnia and Herzegovina had implicitly accepted that the FRY was still a Member of the United Nations, notwithstanding its own political campaign for the complete cessation of the latter's participation in the Organization (which was effectively a way of admitting that the FRY had not ceased to be a Member); or whether it considered that the issues of participation in the Convention on the one hand, and in the Organization on the other, were not necessarily linked; or whether — and this is the most likely — the Court was persuaded that such participation — effective but limited — sufficed to establish the *jus standi* of the Respondent before it.

11. In any case two things are certain, Madam President:

— first, quite legitimately, the Court ruled only on the objections actually raised by the Respondent; on this point both Parties are in agreement[41];

[41]CR 2006/13, p. 40, para. 4.22 (Zimmermann).

— secondly, the Court saw no need to raise other objections *proprio motu*, although there can be no doubt — and this is another point on which the Parties agree[42] — that it must "always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). The Court did not consider it necessary to have recourse to this inherent power.

38 12. This is particularly noteworthy in that the Court was perfectly well aware of the situation, to which it had referred in its Order of 8 April 1993 indicating provisional measures (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 12-14, paras. 16-18). Moreover, Bosnia and Herzegovina had itself addressed the issue of whether or not there was continuity between the SFRY and the FRY in its Memorial[43], and Judge Kreća included a lengthy discussion of the matter in his dissenting opinion of 1996 (*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)*, pp. 658 *et seq.*, paras. 91-98); he would certainly not have failed to draw the attention of his colleagues to these problems in deliberation. Quite clearly, the Court refused to get involved in a discussion of the issue; but that does not mean to say that it was unaware of it. Here again, Mr. Varady shows that he is in agreement: "Yes, the problem — or at least a part of the problem — was indeed known from the outset." But he adds: "But the solution was not known."[44]

13. Madam President, the Court undoubtedly has immense resources available to it, but it does not possess powers of divination. It could rule only on the basis of the situation as it existed at the time when it rendered its Judgment, having listened to the adversarial debate between the Parties. And that Judgment, rendered in full knowledge of the situation, is crystal clear: by thirteen votes to two, the Court "finds that, on the basis of Article IX of the Convention . . ., it has jurisdiction to adjudicate upon the dispute".

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[42]CR 2006/12, p. 57, para. 1.48 (Varady); CR 2006/13, p. 20, para. 3.5 and p. 60, para. 5.1 (Varady); CR 2006/35, p. 57, para. 8 (Pellet).

[43]Pp. 160-162, paras. 4.2.2.11-4.2.2.15.

[44]CR 2006/13, p. 20-21, para. 3.8.

2. The Respondent must assume the consequences of its positions

14. Madam President, whether with respect to the merits or to procedural issues, the Respondent is quick to find excuses. It is as if the virtues of the current Government should wipe away the outrages of the previous régime, whose conduct before the Court should in no way be binding on Serbia and Montenegro — an argument with echoes of that (on the merits), according to which the criminal liability of the leaders responsible for the genocide should exonerate Serbia and Montenegro from the FRY's international responsibility.

39 15. Madam President, I understand the current leaders' desire to break with this dark past, but refusing to assume responsibility for it is not necessarily the most commendable way to achieve that. And in any event, on the international level such refusal conflicts with at least two fundamental principles: that of State continuity[45] and that of good faith, capable of expression in a vast array of Latin maxims —*allegans contraria non audiendus est*; *venire contra factum proprium non potest*, etc. —, maxims which, with some nuances, all convey the same idea, as Judge Alfaro showed so very well in his separate opinion in the *Temple* case (*Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 40), cited by Professor Franck last Friday[46]: you cannot blow hot and cold; adopt a particular course of action and then disavow it — at least when it has led one or more States — or the Court itself — to draw the inferences from it; in that case, we can, in the international sphere, speak of estoppel, without having to concern ourselves with the technical niceties developed on this subject by certain systems of municipal law.

16. I need not go back over this in great detail and I think that, at this point, it will suffice to draw your attention, Members of the Court, once again to the main actions taken by the Respondent which run foul of these principles:

— Above all, there is the "legal posture" I just spoke of. Until 2000, the FRY claimed to be the continuator of the former Yugoslavia. This found expression in that deafening silence in respect of its *jus standi*, which it did not contest before you — a silence which precluded any

[45]See the arbitral decision of 18 October 1923, *Great Britain* v. *Costa Rica, Tinoco*, United Nations, *RIAA*, Vol. I, p. 369 or of 31 March 1926, *United States and Mexico Claims Commission, Hopkins*, United Nations, *RIAA*, Vol. IV, p. 41.

[46]CR 2006/36, pp. 32-33, paras. 22-24.

adversarial debate on this point during consideration of its preliminary objections, and which led you to accept jurisdiction in your 1996 Judgment.

— And what is more, Madam President, this goes even further: because it continuously acted like a Member of the United Nations and like a party to the Genocide Convention between 1992 and 2000, whether it was one or not, the Respondent is today estopped from taking the opposing position in respect of *that* period and in the framework of *this* case: it liked to think of itself as a party to your Statute; you based your decisions on its claims, implicitly as to the

40 Statute, explicitly as to the Convention. It must be deemed to have been a party to these instruments: in any case within the limits *ratione materiae*, *ratione temporis* and *ratione personae* which I have just described.

— Furthermore, the Respondent obviously cannot take advantage of its many procedural manipulations, which created great and undue delay in the examination of the case on the merits — I shall return to this in a few moments — to defeat Bosnia and Herzegovina by an objection that would amount to a sort of "special bonus" for delaying tactics.

17. Serbia and Montenegro must assume the consequences of the behaviour of the *State* it has continuously been since 27 April 1992. *That* State committed genocide against the non-Serbs of Bosnia and Herzegovina; it remains responsible for that notwithstanding the change of régime which occurred in 2000. Likewise, as for its access to the Court, *that* State announced that it was bound by the undertakings of its predecessor — even if it later retracted that position, it must assume the consequences of it — at any rate for the period during which that "legal undertaking" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43) was maintained.

18. According to the scenario improvised by Serbia and Montenegro, the entire legal structure supporting the Court's finding of jurisdiction in 1996 collapsed with Serbia and Montenegro's admission to the United Nations on 1 November 2000. As of that date,

> "it has become evident that the assumption on which the 1996 Judgment on preliminary objections was based is an erroneous one. It has also become evident that the information accessible to the Court at the time when it decided on jurisdiction was imperfect, ambiguous, and did not allow definitive conclusions."[47]

[47] CR 2006/13, p. 19, para. 3.3 (Varady).

19. That is as may be, Madam President, but that assumption, that *hypothèse*, who created it? The ambiguity and imperfection of that information, who was responsible for it? The FRY and it alone. It cannot now rely on its attitude to ask you, Members of the Court, to reverse your firm decision, which was founded, in the most explicit terms, on its own position. What is more, in truth this involved much more than a mere problem of information: it was the situation itself that,

41 in your own words, was "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18); and this was as a result of "the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000" (*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*, p. 31, para. 71). But putting an end to that situation, and thereby to the difficulties it engendered, depended solely on the FRY itself.

Madam President, I have quite a few minutes left. Perhaps this would be a good time for the break.

The PRESIDENT: You could break now or you could continue. I see there are a couple more paragraphs until an entirely new section. I would say continue until you come to the entirely new section.

Mr. PELLET: Thank you very much.

3. The 2004 Judgments in the cases concerning *Legality of Use of Force* have no bearing on this case

20. Yes, indeed, the President is right, and I will be brief. The problem was framed in very different terms in the cases relating to *Legality of Use of Force*. When you delivered your Judgment, on 15 December 2004, the die was cast: the Respondent had at last agreed to do what the United Nations, the whole world, had been asking it to do for more than eight years, and it submitted its candidature as a successor State — among others, like the four others — to the former

Yugoslavia. And it was on the basis of this new situation — resulting, I repeat, from an initiative by the FRY alone and depending only on the FRY — that the Court, in its eight Judgments in 2004, pronounced in favour of a solution different from that adopted eight years earlier.

42 21. As I said on Friday, the successive positions taken by the Court are no doubt less contradictory than they might appear[48]:

— in both cases, its decision had regard to the situation that was known to it on the date of the Judgment;

— in both cases, it relied on the position taken by the FRY, in the first case, and by Serbia and Montenegro, in the second — but it was the same State on that date — and it based itself on the concordance of the views of that State, during the proceedings, with the other Party or parties — Bosnia and Herzegovina (Applicant) in the instant case, the eight Member States of NATO (Respondents) in the other.

22. This does not necessarily point to any inconsistency — even if the similarity in the method followed produces different outcomes. There can in any event be no question of one case being "contaminated" by the other: just as there could be no question of the 2003 Judgment on revision "possessing any force of *res judicata*" in relation to the cases concerning *Legality of Use of Force* (Judgment of 15 December 2004, para. 80), so the Judgments rendered in those cases cannot constitute *res judicata* in the context of the present case. And even though there is undoubtedly a clash of jurisprudence, this is quite clearly mitigated by the fact that the parties to the two sets of cases are not the same and, perhaps more particularly, because the respective judgments concerning them were rendered at different points in time. It is here, Madam President, that the influence of the "time factor" takes on its full significance, and this will lead me to the second part of my presentation; but I believe that the same "time factor" this time leads us to the coffee break.

The PRESIDENT: Yes. Thank you, Professor. And now we come to the coffee break.

The Court adjourned from 11.35 to 11.50 a.m.

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[48]See CR 2006/36, p. 22, paras. 55-58.

The PRESIDENT: Please be seated. Yes, Professor Pellet.

43 Mr. PELLET: Thank you very much, Madam President.

II. The time factor

23. Once again, there would appear to be three crucial points:

— first, the importance, in all the relevant decisions, of the lapse of time and the change of circumstances;

— secondly, what may be called "the need to stop the judicial clock", which confirms, if that were necessary,

— Bosnia and Herzegovina's right to a decision on the merits of the case which it placed before you 13 years ago.

1. The consideration given to the lapse of time in all the relevant decisions

24. Madam President, I have said this many times before, but I think it is an essential point: the Court does not pass judgment in an ideal, platonic world; its judgments are delivered at a given point in time, in specific circumstances, in the light of the information available to it about those circumstances and at that point in time. It is a striking fact, that in *all* the decisions which, for one reason or another, are important to this case, it has shown itself to be particularly sensitive to this aspect of its work:

— this is implicitly true of the Orders for the indication of provisional measures, in which, while taking decisions binding on the parties — but reversible — the Court is taking only prima facie decisions, particularly with respect to jurisdiction and admissibility;

— it is true of the 1996 Judgment, which those of 2003 and 2004 interpret in the light of the situation obtaining "at the time when that Judgment was given" (*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*, p. 31, para. 70; see also *Legality of Use of Force*, Judgment of 15 December 2004, para. 73);

— this is also true of the 2003 Judgment on Revision, which begins by recounting the "background to the case with a view to providing the context for the contentions of the FRY"

44 (*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*, p. 14, para. 24), and presents the "contextual background" (*ibid.*, p. 26, para. 54), while stressing the fact that this description relates to "the FRY's special situation that existed between September 1992 and November 2000" (*ibid.*, p. 22, para. 45).

25. The Court's approach was no different in the cases relating to *Legality of Use of Force*. It is even striking that, in its Orders on the request for the indication of provisional measures of 2 June 1999, the Court confirmed, in relation to the basis of its jurisdiction under Article IX of the Genocide Convention, the position it had taken in 1996 in the instant case; thus, notwithstanding that some of the respondent States had disputed the fact that Yugoslavia was a Member of the United Nations and entitled to have access to the Court (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* p.135, para. 31), it stated:

> "it is not disputed that both Yugoslavia and Belgium are parties to the Genocide Convention without reservation; and whereas Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III' of the said Convention" (*ibid.*, p. 137, para. 37).

All of this, Madam President, took place before the FRY's admission to the United Nations. On the other hand, in its 2004 Judgments, adopted four years *after* this event, the Court took full account of this new situation — of "such a turnaround of the relevant perspective"[49], to use Professor Varady's phrase:

> "the situation that the Court *now* faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. *If, at that time, the Court had had to determine definitively* the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court *now* looks at the legal situation, and in light of

[49]CR 2006/13, p. 60, para. 5.2 (Varady). See also p. 20, para. 3.6.

> the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment of 15 December 2004*, para. 79; emphasis added.)

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26. Why, then, should the same causes not produce the same effects; and why, just as between 1999 and 2004 the Court was led to adopt two completely different positions on account of the change in circumstances that took place in 2000, should the same not apply in our case; why, in 2006, should you not adopt a position contrary to the one you adopted in 1996?

2. The need to stop the judicial clock

27. A few moments ago, Madam President, I referred to "the need to stop the judicial clock". And it is here that we have to do so.

28. For there is a huge, immense, difference between the two cases: in those relating to the *Legality of Use of Force*, the Court's findings in 1999 were prima facie, in an Order for the indication of provisional measures which was not *res judicata*. Matters are quite different in the case between Bosnia and Herzegovina and Serbia and Montenegro: the 1996 Judgment is *res judicata*. I shall not revisit this — having covered it at sufficient length both on 28 February and last Friday[50] but I would nevertheless like to say a few words on the meaning and implications of this fundamental principle which, moreover, is not the only principle to be considered — not the sole principle applicable in this case.

29. The principle of *res judicata* is fully enshrined in and firmly supported by the jurisprudence of the Court (see *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248; *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 56, para. 18; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 31, para. 16). And it is

[50]CR 2006/3, p. 14, para. 9 and pp. 15-16, paras. 12-14 (Pellet); CR 2006/36, pp. 3-15, paras. 33-36 (Pellet).

46 supported by the same considerations as those which underlie Articles 59, 60 and 61 of your Statute, Members of the Court — three provisions which are obviously relevant in our case:

— Article 59: because it establishes both the binding force of your judgments and their relative value; among other things, this explains why Serbia and Montenegro is bound, no matter what, by the 1996 Judgment, but also why the solution in the 2004 Judgments cannot be transposed to our case;

— Article 60: because, the judgment being "definitive and without appeal", it cannot be challenged by any of the parties, nor by the Court itself, which *a priori* condemns the Respondent's efforts to failure;

— lastly Article 61: because, in a particularly restrictive way, it lays down the conditions for escaping the rule in the previous Article; this can only be through the procedure for revision, which may only be sought, subject to strict time-limits, as a result of the discovery of a new fact, itself narrowly defined. You found that these conditions were not met by your Judgment of 3 February 2003; the 1996 Judgment is therefore not "revisable" — unless the Respondent now intends to call for revision of the decision refusing revision (anything is possible . . .).

30. These statutory rules do not discourage our intrepid opponents: "the Court must always be satisfied that it has jurisdiction . . . if necessary even *proprio motu* . . ."[51]. This is true of course, Madam President. But as I showed on Friday[52], this principle is not an abstract rule authorizing the Court to revisit a final decision whenever it chooses. It must be applied in the context of the Statute — your supreme rule, Members of the Court — and must be employed in conjunction with the general principles governing your Court. I am certain that, if one were to review your old Judgments (and even, perhaps, some not so old), it would not be difficult to find some which would prove debatable or quite simply wrong, because, since their delivery, "perspectives" have changed; new facts have surfaced, which would necessarily call for the adoption of different reasoning and produce different outcomes. However, I shall not engage in this exercise — intellectually stimulating as it would doubtless be and which might perhaps be suggested to students in the

47 Rousseau, Telders or Jessup Moot Court Competition, but which could only be a simulated one, a

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[51]CR 2006/12, p. 57, para. 1.48 (Varady); CR 2006/13, p. 20, para. 3.5 and p. 60, para. 5.1 (Varady).

[52]CR 2006/35, pp. 57-62, paras. 8-17 (Pellet).

moot case. Obviously this does not fall within the scope of your high judicial functions, any more than does the revision of a judgment which has become final on grounds other than the — sole — one envisaged in Article 61 of the Statute of the Court, which you cannot rewrite. The Court must be satisfied that it has jurisdiction: the 1996 Judgment gave it the opportunity to do so; it cannot, today, call into question its own authority.

31. Unlike Penelope (or even skilled craftsmen), no judicial body can do its work twice over: all the principles and rules I have referred to preclude this — and for a sound and excellent reason: *ut sit finis litium*[53].

3. Bosnia and Herzegovina's right to a decision on the merits

32. Of course, Madam President this first, negative conclusion — that nobody has the power, neither the Respondent, nor the Applicant nor the Court itself, to challenge the 1996 Judgment — leads to a further, positive, conclusion: "Having established its jurisdiction under Article IX of the Genocide Convention, and having concluded that the Application is admissible, the Court may" — and I would say "must" — "now proceed to consider the merits of the case on that basis" (*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. 622, para. 46).

33. This, Members of the Court, was what you ruled ten years ago. This very long timeframe — indeed far too long! — is largely attributable to the delaying tactics and procedural skills of our opponents then as now, since in this respect nothing has changed: we have not felt the winds of change blowing since the end of the Milosević régime; the same iron will lies behind the velvet words (the only change). Our opponents' aim is to prevent, or at least delay as long as possible, a judgment on the merits.

34. I would just like to make two final observations, Madam President, if I may.

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35. The first concerns the length of the proceedings themselves. Irrespective of where the blame lies, it is largely excessive and — I have checked this point — unfortunately constitutes a

[53]Cf. CR 2006/36, p. 22, para. 55, Note 74. I apologize to the Court and to Serbia and Montenegro for having attributed to L. Brant a quotation which is in fact taken from an article by Charles De Visscher ("La chose jugée devant la Cour internationale de La Haye", *RBDI*, 1965, p. 5).

record in the history of this Court, a record previously held by the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* case — lasting nine years and seven months (Application of 8 July 1991, Judgment of 16 March 2001, *I.C.J. Reports 2001*, p. 40) — unless we take together the "two" cases concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* — totalling nine years and eleven months, with the initial Application of 23 September 1958 discontinued on 23 January 1961 (two years and four months), followed by the second Application of 19 June 1962 and Judgment of 5 February 1970 (seven years and seven months, *I.C.J. Reports 1970*, p. 3). This is closely followed in terms of duration by the eight years and six months that were required to settle the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (Application of 29 March 1994, Judgment of 10 October 2002, *I.C.J. Reports 2002*, p. 303), which, it is true, was also marked by numerous incidental proceedings. I am not simply citing these figures for the fun of it, Madam President. We felt it necessary to mention them in order to emphasize the fact that the present case has considerably exceeded these unfortunate examples, with the Application filed on 20 March 1993 and oral argument commencing on 27 February 2006, i.e., 12 years and 11 months later, with, of course, no idea of when the Judgment on the merits will be handed down; and moreover, these hearings have not been given over entirely to the merits of the case, since the Respondent has, for the fifth time, pleaded the Court's lack of jurisdiction.

36. The Respondent bears by far the greatest responsibility for this lamentable state of affairs. It cannot, however, be allowed to benefit from this situation: *nullus commodum capere de sua injuria propria* (the fundamental principles of good faith are always expressed in Latin maxims)[54].

37. Moreover, Madam President, there is little point in apportioning responsibility. The facts are there: the Application was filed in March 1993; the preliminary objections raised by the Respondent were rejected by the Court in July 1996 — ten years ago. The Rejoinder was filed at the Registry of the Court on 22 February 1999, over seven years ago — and some 20 months

[54]See R. Kolb, "La maxime *nemo ex propria turpitudine commodum capere potest* (nul ne peut profiter de son propre tort) en droit international public", *RDBI 2000*, pp. 84-136

49 before the "change in perspective", of which the Respondent makes so much, and upon which it bases itself in asking you to revise your 1996 ruling. By any standard of justice, it is before that event that we have to place ourselves in order to assess the Respondent's claims regarding the jurisdiction of the Court — if it felt itself compelled to consider these once more. There is no reason why Bosnia and Herzegovina should be a victim of the quite excessive tardiness of the proceedings, irrespective of where the blame lies; in any event, the blame does not lie with the Applicant.

38. Let me add, Madam President, despite the substantial questions of principle resulting from these delays, that, in our opinion, is not the key point: the key point, of course, is for justice to be done, which it most definitely would not be if you were to reverse your decision on jurisdiction. You settled this point ten years ago, with all the final authority of *res judicata*, and there is no principle or rule of law or of equity which would justify your revisiting the matter, in defiance of the clear terms of your Statute. Nor, moreover, were you to do so, would that cause you to go back on the findings that you made at the time. We are certain, Members of the Court, that you will not be tempted by the easy solution of an about-turn on jurisdiction which the Respondent is asking of you — for that is precisely what it would be. As for the passage of time, that cannot justify the shirking by the Court of its fundamental duty in this emblematic and tragic case — the duty to dispense justice by settling the dispute submitted to it in accordance with international law.

The Deputy Agent and Agent of Bosnia and Herzegovina are more capable than I am of expressing the confidence placed in your forthcoming decision by the country which has bestowed on us the signal honour of representing it before you. I would therefore be grateful, Madam President, if you could kindly give them the floor in turn. For my part, I thank you, Members of the Court, for your attention.

The PRESIDENT: Thank you, Professor Pellet. I now call Mr. van den Biesen.

50 M. van den BIESEN :

OBSERVATIONS FINALES GÉNÉRALES

Génocide

1. Madame le président, Messieurs de la Cour, que dire de plus ? Après plus de cinquante heures de présentation de nos arguments à la Cour, après les milliers de pages de preuves écrites, y compris leurs annexes, après les images que nous avons montrées à la Cour ? «Pas grand-chose», telle est probablement la réponse à cette question. Si nous n'avons pas réussi à convaincre dans nos plaidoiries antérieures, ce n'est certainement pas maintenant, au cours de la dernière demi-heure, que nous y parviendrons.

2. A l'évidence, l'avantage d'avoir dû plaider en l'espèce pendant si longtemps a été que nous avons pu nous pencher sur un nombre considérable de détails, et dans le même temps montrer à la Cour, qui n'est pas une juridiction pénale, que c'est le tableau d'ensemble qui ressort du dossier qui est important au moment où elle doit établir la responsabilité d'un Etat dans un génocide.

3. Ce n'est pas ce que telle ou telle personne avait à l'esprit qui est important : c'est de la politique de l'Etat concerné que ressortent les paramètres nécessaires à l'évaluation de l'intention. Mais la politique de l'Etat n'est pas suffisante en elle-même pour que nous puissions parvenir à une conclusion : ce sont les faits, tels qu'ils se sont produits sur le terrain, c'est l'exécution de cette politique, qui font ressortir les paramètres permettant de bien comprendre ce qui était au cœur de cette politique.

4. En ce qui concerne les faits tels qu'ils se sont déroulés sur le terrain, ce n'est pas le nombre précis de victimes dans tel ou tel endroit, le nombre précis de femmes violées dans tel ou tel camp qui nous fournissent les paramètres à partir desquels juger de ce qui s'est passé, c'est la nature répétitive de ces actes, les circonstances dans lesquelles ils ont été commis, la façon dont ils ont été perpétrés et, en fin de compte, l'ensemble des faits tels qu'ils se sont produits.

5. Ce ne sont pas les circonstances précises de la destruction de telle ou telle mosquée dans une ville donnée qui sont importantes, c'est l'ampleur géographique et la nature systématique de ces destructions, lesquelles font ressortir une autre série de paramètres.

6. La même observation s'applique aux déplacements internes : ce n'est pas tel ou tel mouvement d'une population donnée expulsée d'une certaine zone ou à une certaine date qui est décisif, mais l'ensemble des transferts forcés — provoqués par des meurtres, la terreur, la faim et les viols— de presque toute la population non serbe, c'est-à-dire des Bosniaques et des Croates de
51 Bosnie, contraints de quitter en très peu de temps 70 % du territoire de la Bosnie. Tel est l'autre fondement indispensable à l'évaluation juridique à laquelle nous invitons la Cour à procéder.

7. Ce ne sont pas les quantités précises d'équipement militaire fournies par Belgrade aux Serbes de Bosnie, tel ou tel jour ou dans telle ou telle zone, qui sont importants, mais le flux permanent de ces équipements tout au long des années 1992, 1993, 1994 et 1995, et l'ampleur de ce flux, car ce sont eux qui rendent le mieux compte du rôle indispensable et prédominant de Belgrade.

8. De même, ce qui montre la véritable nature du défendeur, ce n'est pas seulement le fait que la JNA ait laissé derrière elle une partie de ses hommes lorsqu'elle s'est «retirée», mais aussi le fait qu'on lui ait fait changer de casquette pour créer l'armée des Serbes de Bosnie et que plus de mille huit cents officiers de l'armée yougoslave aient continué à servir dans cette armée tout en étant payés, administrés et promus par Belgrade.

9. De même encore, ce n'est pas la participation accessoire d'un dirigeant paramilitaire venu de Belgrade qui est importante, mais la présence permanente et récurrente des Arkan, Šešelj, Legija, Bozović, Bérets verts, Scorpions et autres, tous agissant sous la responsabilité de Belgrade, preuve de ce qui se passait réellement.

10. Ce n'est pas un seul et unique char de la JNA sur une colline de Sarajevo, mais le déploiement massif par la JNA de troupes et d'équipements tout autour de la ville qui dépeint le mieux la situation telle qu'elle était alors. De même, ce qui permet de se faire une idée de l'ensemble de la situation et de l'apprécier au plus près, c'est l'apparition de chars, le 6 juillet 1995, descendant des collines autour de Srebrenica, chars qui avaient été donnés par la JNA aux Serbes de Bosnie et conservés par eux pendant leurs quatre années d'utilisation intensive, l'entretien et les pièces de rechange étant fournis par l'armée yougoslave.

11. Enfin, et même si cette liste n'est pas exhaustive, ce qui dépeint le mieux la situation, ce n'est pas non plus le fait que Belgrade apportait une aide en échangeant des marks contre des

dinars, mais la subordination à la Banque nationale de Yougoslavie de la totalité de la communauté monétaire réunissant les trois entités serbes, dont la Republika Srpska.

12. Aucun de ces aspects ne saurait en lui-même suffire à la Cour pour faire droit aux conclusions finales de la Bosnie dans cette affaire; en revanche, pris conjointement, ils constituent assurément un fondement solide permettant de conclure qu'il y a effectivement eu génocide et que Belgrade a effectivement été impliquée dans ce génocide, y jouant un rôle si prédominant qu'elle devrait en être tenue directement responsable.

52 13. Tout cela vient s'ajouter, bien entendu, au fait que Belgrade devrait manifestement être tenue directement responsable de ne pas avoir empêché ce qui s'est passé, et de ne pas avoir pris les sanctions qui s'imposaient.

La charge de la preuve

14. Madame le président, en faisant tenir à la Cour tous les documents que nous avons soumis au cours de ce procès, nous avons de toute évidence respecté notre obligation d'étayer notre argumentation par des preuves. Les éléments de preuve que nous vous avons présentés sont à notre avis suffisants pour que la Cour rende le jugement que nous lui avons demandé.

15. Cela est d'autant plus vrai que nous avons de toute façon produit suffisamment de documents pour transférer la charge de la preuve au défendeur. Dans notre mémoire, nous avons rappelé la jurisprudence pertinente relative au déplacement de la charge de la preuve[55]. Et dans notre réplique, nous l'avons de nouveau rappelée, plus en détail, tout en répondant à la réaction du défendeur dans son contre-mémoire[56].

16. Le défendeur n'a pas semblé prêt à agir en conséquence. Il n'a pas utilisé son premier tour de plaidoiries pour produire des preuves contraires, et encore moins des preuves contraires convaincantes. Cette évaluation, Madame le président, est finale, en ce sens que — comme nous l'avons déjà souligné[57] — il est certainement trop tard pour que le défendeur commence à présent à produire des preuves au cours de son deuxième tour de plaidoiries, puisque ce tour-là est le dernier.

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[55] Mémoire, par. 5.3.3.3, 5.3.3.7-5.3.3.8 et 5.3.3.10.

[56] Réplique, p. 37-41, par. 12-22.

[57] CR 2006/2, p. 21, par. 13 (Van den Biesen); CR 2006/30, p. 21-22, par. 24-25 (Van den Biesen).

Ce manque de preuves soumises par le défendeur dessert à l'évidence la position de la Serbie-et-Monténégro.

Les déclarations de Belgrade

17. Faute de preuves, nous aurons entendu un grand nombre de démentis répétitifs — du type de ceux que l'on nous a présentés tout au long de cette procédure, notamment dans les écritures du défendeur. A cet égard, nous n'avons guère été en mesure de discerner une quelconque différence entre la Belgrade d'avant octobre 2000 et la Belgrade d'après cette même date.

18. De plus, bien que les propos tenus ici, dans la grande salle de justice, par le défendeur se soient certes caractérisés par un ton nettement plus modéré, plus modéré en tout cas que celui que nous avons connu au cours de plaidoiries antérieures dans cette affaire, dès que l'on passe les portes de cette grande salle de justice, le manque de respect semble constituer l'approche

53 prédominante du défendeur. Le vice-premier ministre de la Serbie déclare carrément que la motivation de la Bosnie dans cette affaire n'est pas la recherche de la vérité mais l'argent[58]. Le témoin Mićunović a déclaré, à l'extérieur de la grande salle de justice, que la demande de la Bosnie relevait «de la pure propagande»[59]. Ce type d'observation est fréquent dans les médias serbes, mais aucun de ces commentaires publics, aucun non plus de ceux des dirigeants politiques, ne contient ne serait-ce même que le début d'une reconnaissance du rôle de la Serbie-et-Monténégro.

19. Manifestement, tout cela n'est pas vraiment fait pour donner crédit à l'image que les représentants du défendeur ont tenté de créer en déclarant : «at no point do we seek to deny the sufferings of the victims, which we cannot forget and have no wish to forget»[60]. On voit bien là que des propos qui expriment effectivement une certaine sollicitude ne sont pas suffisants, dans la mesure où ils peuvent être immédiatement démentis par d'autres mots qui expriment le contraire.

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[58] B92, 27 février 2006, «The Last Moment for Mladić in The Hague». Invité : Miroljub Labus, premier ministre adjoint de la Serbie, texte disponible à l'URL www.b92.net/info/emisije/kaziprst.php?yyyy=2006&mm=02&nav_id=189914.

[59] B92, 10 avril 2006, « Mićunović About the Application: Chances 50:50», disponible à l'URL www.b92.net/info/vesti/index.php?yyyy=2006&mm=04&dd=10&nav_category=64&nav_id=194325&fs=1; texte en anglais sur www.b92.net/english/news/index.php?&dd=10&mm=04&yyyy=2006&nav_category=&nav_id=34401&order=priority&style=headlines.

[60] CR 2006/12, p. 12, par. 9 (Stojanović).

Cela montre aussi que des propos aimables ne suffisent pas s'ils ne s'accompagnent pas d'une approche plus modérée sur le fond.

20. Madame le président, Messieurs de la Cour, M. Stojanović avait effectivement parlé, dans le passé, d'organisations criminelles liées aux institutions de l'Etat[61], mais sans préciser quelle sorte d'organisations, quelle sorte d'institutions de l'Etat et quelle sorte de crimes étaient alors en jeu. Cela ne semble donc pas nous aider beaucoup non plus. En fait, seul le conseil des ministres du défendeur a établi un lien entre le régime de Milosevic et les crimes commis en Bosnie, à savoir le massacre de Srebrenica, en déclarant le 15 juin 2005 dans un document officiel rendu public :

> «Ceux qui ont accompli les tueries à Srebrenica et ceux qui ont ordonné et organisé le massacre ne représentaient ni la Serbie ni le Monténégro, mais un régime antidémocratique de terreur et de mort, contre lequel la grande majorité des citoyens de Serbie-et-Monténégro ont opposé la plus forte résistance.»[62]

54 21. Cette déclaration est importante en tant que déclaration contraire aux intérêts de l'Etat dont elle émane, et elle laisse aussi la place à un peu d'espoir. Mais Madame le président, si le Conseil des ministres a établi un lien entre le régime de Milosevic et le massacre de Srebrenica, l'heure est venue de l'admettre, pas de le nier; c'est l'heure de la franchise, non celle de jouer à cache-cache; l'heure de faire face à la justice, et non de la perturber. En fait, il n'est pas trop tard pour que, lors de son deuxième tour de plaidoiries, le défendeur prenne toutes ses responsabilités. Toute position que prendra ici, en public, le défendeur sera examinée de près à Sarajevo et jugée à l'échelle de sa volonté et de sa disposition à rechercher véritablement la réconciliation, une échelle sur laquelle les démentis sont situés tout en bas et l'admission des faits tout en haut.

22. Nous savons qu'en Serbie-et-Monténégro nombreux sont ceux qui invitent instamment leur gouvernement à prendre une telle position, à adopter cette approche tournée vers l'avenir en abandonnant la vieille tactique des démentis.

Opposition

23. Madame le président, voilà qui nous amène à faire quelques observations au sujet de l'opposition en Serbie-et-Monténégro, plus particulièrement celle qui s'est élevée contre les autorités de la RFY pendant les années pertinentes pour notre affaire.

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[61] CR 2006/12, p. 13-14, par. 15-16.

[62] CR 2006/11, p. 11, par. 3 (Condorelli).

24. Nous avons entendu M. Mićunović nous parler de l'importance de l'opposition démocratique et de la façon dont cette opposition contestait la guerre. Après avoir écouté avec soin ce qu'il a dit et avoir relu la transcription de sa déclaration, nous sommes parvenus à la conclusion que s'opposer à la guerre signifiait s'opposer à ce que la RFSY soit engagée dans une guerre en Croatie. Cela n'a jamais signifié — telle est notre conclusion — s'opposer à ce que la RFY soit engagée dans une guerre en Bosnie. Mićunović n'a rien dit de tel. Au contraire, il a expliqué qu'au Parlement, tous les partis étaient d'accord avec le Gouvernement de Belgrade quant au fait que c'était à la Republika Srpska de mettre fin à la guerre en Bosnie et que c'était elle qui devait accepter le plan Vance-Owen[63]. Pourquoi ? Selon Mićunović, parce que les sanctions pesaient trop lourdement sur la RFY. Il n'a fait mention d'aucune opposition à l'engagement de la RFY dans une guerre en Bosnie, encore moins dans un génocide.

55 25. Nous avons effectué des recherches pour vérifier si le témoignage de M. Mićunović reflétait bien la situation telle qu'elle se présentait à l'époque pertinente, et nous sommes au regret de devoir conclure que tel est bien le cas. Les dirigeants de l'opposition de l'époque ne se sont pas exprimés contre l'engagement de Belgrade dans un nettoyage ethnique en Bosnie-Herzégovine et n'ont pas fermement invité Miloševic à démissionner suite à de tels agissements. L'opposition se préoccupait essentiellement de la situation économique désespérée de la RFY, mais ne semble pas s'être inquiétée de tout l'argent que la RFY dépensait pour le nettoyage ethnique en Bosnie-Herzégovine et pour la création de la Grande Serbie.

26. En fait nous n'avons trouvé qu'une seule déclaration susceptible d'être interprétée ainsi, celle faite le 10 juin 1993 par M. Stojanović, aujourd'hui agent du défendeur. M. Stojanović avait affirmé :

> «La Serbie va préserver non seulement le communisme mais aussi ce qui en découle — la création de frontières solides pour l'Etat national, donc, si possible, de la Grande Serbie. Et dans sa volonté de créer cet Etat, elle était déjà prête à recourir à la force. Armer le peuple serbe en Croatie et en Bosnie-Herzégovine a été très révélateur de ces intentions. Ce fut là une énorme erreur politique [dit M. Stojanović en 1993] — car lorsque le peuple est armé il n'y a plus de contrôle politique sur la force armée.»[64]

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[63] CR 2006/29, p. 16 (Mićunović).

[64] Interview de M. Radoslav Stojanović par Momir Djoković, «Povratak vrednostima Srbije» [Retour aux valeurs serbes], *Spona*, 10 juin 1993.

C'est cela Madame le président, qui semble constituer la véritable opposition à la politique de Miloševic. M. Stojanović confirme ici que l'on a bien armé le peuple serbe en Croatie et en Bosnie, et que cela prouve on ne peut mieux l'intention de créer une Grande Serbie. Plus avant dans son interview, sa position perd petit à petit des caractéristiques qui le plaçaient dans l'opposition, mais de toutes façons cette interview montre qu'il était opposé à ce que la Serbie distribue des armes et à ce qu'elle se prépare à recourir à la force pour créer une Grande Serbie. Là encore, c'est le seul signe clair d'opposition à la politique de Miloševic — politique qui avait pour but, comme cela a été confirmé, de créer une Grande Serbie.

27. Si notre évaluation est erronée, il est temps, là encore, de nous corriger et de nous démontrer l'ampleur réelle de l'opposition à cette époque, et, plus important encore, maintenant que cette même opposition est au gouvernement, de reconnaître les faits et non plus de les nier.

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La Cour n'est pas un parapluie

28. M. Varady a déclaré le 8 mars que dans son pays «beaucoup de choses doivent encore être changées ou rectifiées»[65]. Nous ne pouvons qu'être d'accord et comme nous venons juste de le faire remarquer, le défendeur peut bien sûr utiliser son second tour de plaidoiries pour décrire certains des changements auxquels il serait urgent de procéder dans sa position au regard du «legs criminel de l'ère Milosević», comme l'a appelé le témoin Mihajlović le 27 mars 2006[66].

29. Ces changements ou rectifications auxquels il serait urgent de procéder devraient également s'appliquer à l'attitude du défendeur envers la Cour. Ses antécédents à cet égard, Madame le président, ne sont pas de ceux dont un Etat peut être fier.

30. Nous avons vu de quelle façon le défendeur avait purement et simplement ignoré les ordres de la Cour en 1993, comme si ceux-ci ne valaient même pas le papier sur lequel ils avaient été imprimés. Nous avons vu comment il s'était engagé, avec le membre serbe de Bosnie de la présidence bosniaque, dans des machinations visant — en agiotant pour faire nommer un nouvel agent bosniaque — à faire croire à la Cour que la Bosnie avait retiré sa demande; comment le défendeur avait su appeler la Cour à l'aide, lorsque l'OTAN bombardait la République fédérale de

[65] CR 2006/12. p. 58, par. 1.52.

[66] CR 2006/27, p. 23.

Yougoslavie. Nous avons vu comment il avait menacé la Cour, dans notre affaire, d'appeler à la barre quatre cents témoins à l'appui de ses demandes reconventionnelles, une approche dont il savait pertinemment, en la proposant, qu'elle allait complètement désorganiser le mode de fonctionnement de la Cour. Enfin, nous avons vu, comme M. Franck l'a fait remarquer le 7 mars, que M. Varady avait expliqué dans un article publié dans un magazine serbe, une semaine avant le prononcé des jugements dans les affaires de l'OTAN, que l'une de ses tactiques, dans ces affaires, avait été dès le début de perdre sur la question de la compétence pour pouvoir sortir indemne de l'affaire bosniaque en invoquant ce même point technique de la compétence[67]. Nous nous poserons à jamais la question de savoir ce que la Cour aurait décidé dans les affaires de l'OTAN si M. Varady n'avait pas réservé cette révélation à un magazine mais avait clairement admis que c'était cette approche-là qu'il avait utilisée devant la Cour lors de ses plaidoiries dans les affaires de l'OTAN.

31. Madame le président, la Cour est bien évidemment ici pour protéger les Etats, ceux dont les droits sont menacés, mais elle n'est en rien une sorte de parapluie dont on ne peut tout à coup se servir lorsque le temps se gâte mais que l'on peut facilement laisser de côté si l'on pense que l'on peut s'en passer sans problème.

57 32. Il sera difficile d'accepter qu'une approche de type «parapluie» soit récompensée aux dépens d'un Etat qui a saisi la Cour de bonne foi et s'est lancé dans treize années de procédure afin d'obtenir la protection dont il a été déclaré qu'il y avait droit.

Observations finales

33. Madame le président, il est clair que la Bosnie-Herzégovine a placé sa foi en la Cour, mais elle n'est pas la seule à l'avoir fait. Lors du soixantième anniversaire de la Cour, il y a moins de deux semaines, le Secrétaire général de l'Organisation des Nations Unies a rappelé comment, lors du sommet mondial de 2005, les chefs d'Etat et de gouvernement avaient expressément reconnu l'importance de la Cour et la valeur de son œuvre. M. Kofi Annan a ensuite ajouté — et je suis désolé de ne pas avoir la magie de sa voix chaleureuse :

[67] CR 2006/11, p. 56, par. 38.

> «Ces éloges sont à la mesure du dynamisme de la Cour. Aujourd'hui plus que jamais, les Etats Membres de l'ONU se tournent vers elle, non seulement pour régler des différends concernant leurs frontières terrestres ou maritimes, ou pour se plaindre de la violation de traités, mais aussi pour des questions de génocide et d'emploi de la force. De ce fait, la Cour n'a jamais été aussi sollicitée.»[68]

34. En effet, Madame le président, la Cour est peut-être encore plus sollicitée dans cette seule affaire que dans celles qui l'ont précédée, tant sont nombreux ceux qui sont concernés par son issue. Comme nous l'avons déjà dit, la présente affaire est pour la Bosnie-Herzégovine une question de justice. Une issue favorable est essentielle à la réconciliation; il s'agit d'une étape importante vers une paix véritable qui, assurément, deviendra plus tangible lorsque justice aura été rendue aux yeux de tous. C'est pour cela que, manifestement, tous les citoyens de Bosnie-Herzégovine, qu'ils soient bosniaques, croates de Bosnie ou serbes de Bosnie, sont directement concernés par l'issue de la présente affaire. Par ailleurs, une issue favorable satisfera les victimes survivantes de la campagne de nettoyage ethnique, d'abord et avant tout sur le plan moral et peut-être aussi, à plus ou moins long terme, sur le plan matériel.

35. La convention sur le génocide est née de l'idée qu'il n'y aurait «plus jamais ça». La Bosnie est bien consciente que les faits de l'espèce n'atteignent pas l'ampleur inconcevable de la Shoah. Mais ce n'est pas seulement contre un autre holocauste que la convention vise à protéger des groupes définis sur une base ethnique et religieuse. «Plus jamais ça», cela doit s'appliquer
58 aussi à ce qui est survenu en Bosnie-Herzégovine. Il faut que l'on entende et que l'on comprenne cela d'un bout à l'autre des Balkans. Peut-on trouver meilleur moyen qu'un message envoyé sous le sceau de la Cour internationale de Justice ?

36. Madame le président, je vous remercie, vous-même et les membres de la Cour, de votre attention; nous souhaiterions que vous donniez la parole à l'agent de la Bosnie-Herzégovine pour qu'il donne lecture des conclusions finales.

Le PRESIDENT : Merci, Monsieur van den Biesen. Je donne la parole à M. Softić, l'agent de la Bosnie-Herzégovine, pour qu'il donne lecture des conclusions finales.

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[68] Allocution du Secrétaire général à l'occasion de la célébration du soixantième anniversaire de la Cour internationale de Justice, La Haye, le 12 avril 2006 : disponible à l'adresse Internet suivante : http://www.icj-cij.org/60/speeches/csp_annan.htm.

M. SOFTIĆ : Merci.

1. Madame le président, Messieurs de la Cour, avant de donner lecture des conclusions finales de la Bosnie-Herzégovine, je tiens à faire quelques observations.

2. Nous nous sommes efforcés de donner à la Cour une idée aussi complète que possible du génocide qui a été commis contre la population non serbe de Bosnie-Herzégovine. Après toutes ces semaines de plaidoiries, je n'ai plus à dire à la Cour combien ce génocide fut, et reste encore, un énorme fardeau pesant sur les épaules de la Bosnie-Herzégovine et de ses citoyens non serbes. Pour l'instant, je préfère vous exprimer notre reconnaissance pour cette charge qu'ont représentée toutes ces semaines d'audiences pour chacun des membres de la Cour, une charge qui ne disparaîtra certainement pas le jour où se termineront les plaidoiries. Nous vous savons gré de l'attention sans faille que vous avez prêtée à nos plaidoiries sur les points de fait et de droit et nous apprécions à sa juste valeur tout ce temps que la Cour a bien voulu consacrer à l'examen de notre affaire. Nous vous en remercions.

3. Nous remercions également le greffier et, ce faisant, les hommes et les femmes, moins visibles, du Greffe et du département de l'information de la Cour, qui se sont montrés d'une telle serviabilité, d'un si grand secours et nous ont manifesté tant de cordialité, même lorsque nous ne leur donnions aucune raison de le faire. De la même manière, nous remercions aussi les interprètes qui ont si bien fait leur travail, surtout lorsque nos collègues francophones parlaient à la vitesse de la lumière. Nous félicitions la Cour d'avoir en son sein ce trésor que sont tous ces gens dévoués — y compris tous les autres membres du personnel — qui oeuvrent pour la cause de la justice.

59 4. Comme nous l'avons indiqué tout au long de la présente instance, nous avons confiance en la Cour. Nous sommes convaincus qu'elle parviendra à une conclusion sans équivoque qui non seulement sera conforme au principe de légalité, mais aussi fera justice à la Bosnie-Herzégovine.

5. Madame le président, Messieurs de la Cour, à présent, je donnerai pour terminer lecture des conclusions finales du demandeur.

La Bosnie-Herzégovine prie la Cour internationale de Justice de dire et juger :

1. Que la Serbie-et-Monténégro, par le truchement de ses organes ou d'entités sous son contrôle, a violé les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide, en détruisant en partie et de façon intentionnelle le groupe national, ethnique ou religieux non serbe, notamment mais non exclusivement, sur le territoire de la République de Bosnie-Herzégovine, en particulier la population musulmane, par les actes suivants :

— meurtre de membres du groupe;

— atteinte grave à l'intégrité physique ou mentale de membres du groupe;

— soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;

— mesures visant à entraver les naissances au sein du groupe;

— transfert forcé d'enfants du groupe à un autre groupe;

2. A titre subsidiaire :

i) que la Serbie-et-Monténégro a violé les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide en se rendant coupable de complicité dans le génocide tel que défini au paragraphe 1 ci-dessus; et/ou

ii) que la Serbie-et-Monténégro a violé les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide en apportant aide et soutien à des individus, des groupes et des entités commettant des actes de génocide tels que définis au paragraphe 1 ci-dessus;

3. Que la Serbie-et-Monténégro a violé les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide en se rendant coupable d'entente en vue de commettre le génocide et d'incitation à commettre le génocide tel que défini au paragraphe 1 ci-dessus;

60 4. Que la Serbie-et-Monténégro a violé les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide en manquant à son obligation de prévenir le génocide;

5. Que la Serbie-et-Monténégro a violé et continue de violer les obligations qui lui incombent en vertu de la convention pour la prévention et la répression du crime de génocide en manquant et en continuant à manquer à son obligation de punir les actes de génocide ou autres actes prohibés par la convention pour la prévention et la répression du crime de génocide et en manquant et en continuant à manquer à son obligation de transférer au Tribunal pénal pour l'ex-Yougoslavie les personnes accusées de génocide ou d'autres actes prohibés par la convention et de coopérer pleinement avec ledit Tribunal;

6. Que les violations du droit international exposées dans les conclusions 1 à 5 constituent des actes illicites attribuables à la Serbie-et-Monténégro qui engagent sa responsabilité internationale et, en conséquence,

a) que la Serbie-et-Monténégro doit immédiatement prendre des mesures efficaces pour s'acquitter pleinement de l'obligation qui lui incombe, en vertu de la convention pour la prévention et la répression du crime de génocide, de punir les actes de génocide ou autres actes prohibés par la convention, de transférer au Tribunal pénal pour l'ex-Yougoslavie les personnes accusées de génocide ou d'autres actes prohibés par la convention et de coopérer pleinement avec ledit Tribunal;

b) que la Serbie-et-Monténégro doit réparer les conséquences de ses actes internationalement illicites et que, par suite de la responsabilité internationale encourue à raison des violations susmentionnées de la convention pour la prévention et la répression du crime de génocide, est tenue de payer à la Bosnie-Herzégovine, et cette dernière est fondée à recevoir, en son nom propre et comme *parens patriae*, pleine réparation pour le préjudice et les pertes causés. Que, en particulier, la réparation doit couvrir tout préjudice financièrement évaluable correspondant :

i) au préjudice causé à des personnes physiques par les actes énumérés à l'article III de la convention, y compris le préjudice moral subi par les victimes, leurs héritiers ou leurs ayants droit survivants et les personnes dont elles ont la charge;

ii) au préjudice matériel causé aux biens de personnes physiques ou morales, publiques ou privées, par les actes énumérés à l'article III de la convention;

61 iii) au préjudice matériel subi par la Bosnie-Herzégovine à raison des dépenses raisonnablement encourues pour réparer ou atténuer le préjudice découlant des actes énumérés à l'article III de la convention;

c) que la nature, la forme et le montant de la réparation seront déterminés par la Cour, au cas où les Parties ne pourraient se mettre d'accord à ce sujet dans l'année suivant le prononcé de l'arrêt de la Cour, et que celle-ci réserve à cet effet la suite de la procédure;

d) que la Serbie-et-Monténégro est tenue de fournir des garanties et assurances spécifiques de non-répétition des faits illicites qui lui sont reprochés, les formes de ces garanties et assurances devant être déterminées par la Cour;

7. Qu'en ne respectant pas les ordonnances en indication de mesures conservatoires rendues par la Cour le 8 avril 1993 et le 13 septembre 1993, la Serbie-et-Monténégro a violé les obligations internationales qui sont les siennes et est tenue de verser à la Bosnie-Herzégovine, à raison de cette dernière violation, une indemnisation symbolique dont le montant sera déterminé par la Cour. Merci.

Le PRESIDENT : Merci beaucoup, Monsieur Softić. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la Bosnie-Herzégovine.

Ainsi s'achève le second tour des plaidoiries de la Bosnie-Herzégovine. La Cour se réunira une nouvelle fois le mardi 2 mai 2006 à 10 heures pour le début du second tour des plaidoiries de la Serbie-et-Monténégro. L'audience est à présent levée.

L'audience est levée à 12 h 50.

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