HAGUE JUSTICE JOURNAL | JOURNAL JUDICIAIRE DE LA HAYE
VOLUME/VOLUME 2 | NUMBER/ NUMÉRO 2 | 2007

Reparation in Cases of Genocide

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1. Introduction

The judgment of the International Court of Justice (ICJ or the Court) of 26 February 2007[2] must have left the Muslim population of Bosnia and Herzegovina in a state of perplexity and bitterness. First of all, the finding that Serbia, at the relevant time the Federal Republic of Yugoslavia (FRY), did not commit genocide was contrary, in their eyes, to what they as the victims had witnessed as first-hand evidence. Second, the finding that Serbia violated its obligation to prevent genocide is not accompanied by any tangible consequential finding. The Court confines itself to stating that 'a declaration of this kind is "in itself appropriate satisfaction"'.[3] No reasons are given for this rather cursory treatment of the request for reparation. Thus, the death of more than 7,000 Bosnian Muslim men[4] entails no substantial reparation for the benefit of the next of kin of the slaughtered victims. Serbia receives a blame which has a legal character but this boils down to no more than a gesture of moral reprobation—and that disposes of the matter. It is true that the perspective of the layman cannot be determinative. To establish legal responsibility in accordance with the applicable rules of international law is a complex juridical process which cannot be accomplished solely by looking at the relevant facts. These facts need to be assessed and evaluated by lawyers—but even lawyers will find it hard to follow the Court's convoluted line of reasoning.

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[2] Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, 26 February 2007, available online at: http://www.icj-cij.org/docket/files/91/13685.pdf (visited 29 April 2007) (hereinafter 'Judgment').

[3] Judgment, § 463.

[4] *Ibid*., §§ 278, 290.

2. The (In-)adequate form of reparation ordered by the ICJ

Of course, not everything can be taken up again in this short commentary on the specific issue of reparation. The Court set the course when it determined that Serbia was not directly responsible for the atrocities committed at Srebrenica, arguing that the murderous actions of the Bosnian Serbs could not be attributed to the FRY, a neighbouring state which was intimately linked to the Republika Srpska but which had no effective control over the perpetrators, not even a decisive influence. However, logic would seem to require that the failure of the Serbian Government, specifically acknowledged by the Court, to halt the mass killing in and around Srebrenica should give rise to an obligation on the part of Serbia to compensate for the damage suffered by the victimized population and thereby also the state of Bosnia and Herzegovina.

The Court starts out[5] from the well-known proposition enunciated in the *Factory at Chorzow* case of the Permanent Court of International Justice according to which 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[6] It is a matter of common knowledge that this proposition has also found its way into the Articles on State responsibility drafted by the International Law Commission (ILC)[7] and 'taken note of' by the UN General Assembly.[8] The relevant requirements were met. By not taking any initiative to prevent the genocidal occurrences as they had to be envisaged on the basis of available indicia the Government of Serbia committed a breach of its obligations under Article I of the Genocide Convention.

A. The refusal to accord compensation

Obviously, *restitutio in integrum* could not be ordered by the Court. The dead could not be brought back to life. Under such circumstances, the ILC Articles suggest that compensation should be paid (Article 36). The Court explicitly refers to this subsidiary secondary rule as well.[9] However, it seeks to demonstrate that the failure to abide by the duty of prevention incumbent on the FRY had no nexus relating it to the tragic outcome at the end of the causal chain.[10] Consequently, the Court denies the possibility of attributing the losses of human lives to the FRY, which today has shrunk to Serbia. In fact, it interprets Article I as a provision which obligates every state to take remedial action when being apprised of a threat of genocide without burdening it with any specific responsibility for averting that looming threat. According to the majority of judges, the Applicant would have had to prove that the genocide would not have happened had the FRY complied with its duty of prevention. The intrinsic consistency of this argument can hardly be dismissed.

[5] Judgment, § 460.
[6] [1928] PCIJ Series A, No. 17, 47.
[7] Article 31 of the ILC Articles on State Responsibility.
[8] GA Res. 56/83, 12 December 2001.
[9] Judgment, § 460.
[10] *Ibid*., §§ 461- 2.

However, the Court should have shifted the burden of proof. It should have required Serbia to show that even if the institutions of the FRY had taken appropriate measures, the Bosnian Serbs would nonetheless have completed their criminal plans.

Why was such a shift of the burden of proof indicated? Because of the preceding events: Serbia was not confronted with sudden, unforeseen occurrences, but knew well ahead of the massacre of Srebrenica that there existed a real threat of genocidal activities on the part of military and paramilitary units which, massively supported by the Yugoslav Armed Forces, were operating in the Republika Srpska. The two orders issued by the Court in 1993 explicitly enjoined the FRY to 'take all measures within its power to prevent commission of the crime of genocide'.[11] Doubtless, such steps were not taken. Without wavering, the Court finds that 'the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.'[12]

Given the passivity of the Serbian authorities with regard to the orders imparted to them by the Court, it rested upon them to exonerate themselves, adducing evidence to the effect that the genocide would have happened anyway, notwithstanding their best efforts. The proof which the Court imposes on the Applicant could not be administered, in particular because the internal relationship between the Government of the FRY and the authorities of the Republika Srpska remained surrounded by secrecy. The Court failed to insist on Belgrade's duty to lay open all of its available files in an un-redacted form.[13] Consequently, it was highly unfair to require the Applicant, the Republic of Bosnia and Herzegovina, to show that compliance by Serbia with its duties under the Genocide Convention would have altered the course of events. The Respondent had been officially made aware of the general mood of hatred and enmity which bore the seeds of genocide. Thereby, it had been promoted to the role of a guarantor of the lives of the Muslim population. If it failed in discharging that role, it had to bear all the consequences deriving there from.

B. An unsatisfactory form of satisfaction

The Court acknowledges that as a remedy of last resort Bosnia and Herzegovina is entitled to reparation in the form of satisfaction.[14] In an extremely short passage of its holdings, the Court concludes that a declaration to the effect that the Respondent has failed to abide by its duty of prevention is in itself appropriate satisfaction. As is well known, the ILC Articles on State Responsibility do not explicitly mention any form of satisfaction that would have a financial dimension. But Article 37(2) is not exhaustive as may be gleaned from its wording ('Satisfaction may consist …') as well as from the Commentary of the

[11] Order of 8 April 1993, ICJ Reports (1993) 3, at 24.
[12] Judgment, § 438.
[13] *Ibid.*, §§ 205-6.
[14] *Ibid.*, § 463.

ILC.[15] Moreover, there exist clear precedents in international practice which show that the full range of forms of satisfaction includes symbolic monetary damages as well. Thus in the *Rainbow Warrior* case, the Arbitral Tribunal stated unambiguously that

> an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage.[16]

No such order was made by the Tribunal, however, since New Zealand had not requested the award of monetary compensation.

This is exactly the ground which the Court relies on in denying any financial reparation to the Applicant under the head of satisfaction. Using a fairly misleading formulation, it points out that 'the Applicant itself suggested' that a declaration finding that the Respondent had failed to comply with its obligations of prevention under the Genocide Convention was the most appropriate form of satisfaction.[17] On this point, one simply has to contradict the Court. It seeks to create the impression that no one else other than the Applicant confined itself to requesting such a declaration and that its wishes did not go any further. Even a superficial reading of the submissions of the Applicant, however, shows that Bosnia and Herzegovina sought to obtain full reparation for any kind of the damage which had been inflicted upon it. In its application, Bosnia and Herzegovina had already requested 'reparation for damages to persons and property as well as to the Bosnian economy and environment … in a sum to be determined by the Court.'[18] This request was concretized and amplified in the reply, where Bosnia and Herzegovina made it clear that

> the Federal Republic of Yugoslavia is required to pay and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to determined by the Court.[19]

It would be hard to contend that the scope *ratione materiae* of these formulations is so narrow as not to include monetary compensation under the head of satisfaction. It is true that the Applicant did not explicitly mention that concept. But the moral injury suffered by Bosnia and Herzegovina is clearly encompassed by the phrase 'damages and losses'. Accordingly, the reader must disagree with the Court's observation that the Applicant itself had limited the scope of its demands, thereby implicitly compelling the Court to apply the proposition *ne ultra petita*.

[15] See text in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 232.
[16] Award of 30 April 1990, Reports of International Arbitral Awards, Vol. XX (1963), 217, at 272, § 118.
[17] Judgment, § 463.
[18] Judgment, § 64(r)
[19] *Ibid*., § 65(7).

It is undeniable, on the other hand, that an international judge enjoys a large measure of discretion in awarding satisfaction. In trying to find support for its overly succinct manner of addressing the issue of satisfaction, the Court refers to the *Corfu Channel* case of 1949[20] where, indeed, the finding that Albania had breached its international obligations vis-à-vis the United Kingdom had been deemed to constitute the appropriate form of satisfaction. However, can the two cases really be put on the same level? Precedents should never be resorted to without a careful consideration of their factual context. When mines exploded in the Corfu Channel, British ships were damaged, and a number of British sailors were injured and died. But it was, conversely, Albania that requested satisfaction for the unlawful passage of ships through Albanian waters.[21] Albania had not suffered any tangible, material damage. What was at stake was a violation of the sovereign rights over its coastal sea. Its claim for satisfaction had almost no legitimacy since the Court came to the conclusion that Albania was responsible for the explosions caused by the mines and for the damage and loss of human life that resulted therefrom. Here, by contrast, more than 7,000 men were murdered in cold blood. Therefore, can one really equate the *Corfu Channel* case with the *Srebrenica* case? No doubts should be permitted: the Court was not well-advised to refer to a case dating back almost six decades and dealing with a factual background that was fundamentally different from the circumstances of the instant case. To deal with the death of 7,000 persons as if it were *un petit rien*, namely purely legal injury not requiring anything else than a toothless declaration of a breach, does not appear to do justice to the moral harm inflicted on the victims and their next of kin. We do not mix up the killing itself with the failure of the Belgrade authorities to discharge their responsibilities under Article I of the Genocide Convention. But the intimate relationship between the two phenomena is self-evident. There was at least a strong possibility that those 7,000 lives could have been saved, and in any event the Government of the then Federal Republic of Yugoslavia deliberately hazarded the consequences of its inertia. Therefore, in making a determination on the right form of satisfaction, the genocidal tragedy itself could not be left aside.

The Court could have found guidance in the case law of the European Court of Human Rights. The Strasbourg Court has indeed evolved a jurisprudence which in many instances deems a declaration of a violation to constitute sufficient reparation.[22] But it deviates from this line whenever an applicant has suffered considerable emotional distress and anguish, in particular because of the loss of a close relative.[23] Another formulation to be encountered in the judgments of the Strasbourg Court focuses on 'anguish and feelings of helplessness and frustration' experienced by the applicant as a consequence of a breach of

[20] ICJ Reports (1949), 4.
[21] *Ibid*., at 12: 'The Court should find that … the Government of the United Kingdom of Great Britain and Northern Ireland committed a breach of the rules of international law and that the Albanian Government has a right to demand that it should give satisfaction there for.'
[22] See, for instance, C. Tomuschat, 'Just Satisfaction under Article 50 of the European Convention on Human Rights', in P. Mahoney et al. (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssda*, (Köln: Carl Heymanns Verlag, 2000) 1409, at 1423.
[23] See the most recent judgments: *Baysayeva* v. *Russia*, 5 April 2007, § 179; *Tysiac* v. *Poland*, 20 March 2007, § 152. For the earlier case law see Tomuschat, *ibid*., at 1425 et seq.

its obligations by a state party.[24] Clearly, in the human rights field the judges take into account the degree of pain and suffering endured by the victims. It is hard to understand why the international judge at The Hague dismisses any such considerations, without even addressing the issue. The praetorian statement—one sentence!—that a simple declaration indicating the occurrence of a breach constitutes appropriate satisfaction fails to comply with the duty of any judge to support his or her decision by explicit reasons. This is all the more deplorable since the proceedings in the case had been going on for 14 years. There was ample time to assess every facet of the relevant facts. Instead, the Court rushes though the issue of satisfaction as if it intended to avoid giving it due consideration.

3. Ensuring Compliance by Serbia with the Obligation to Prevent Genocide

The passages devoted by the Court to the request for the provision of guarantees and assurances of non-repetition are not totally satisfactory either. It is true that the Applicant had related that request to the alleged wrongful acts.[25] Thereby, it gave its demands a misleading twist. The ILC has clarified in its Articles on State Responsibility that assurances and guarantees of non-repetition do not specifically pertain to the secondary obligations arising from a breach of a rule of conduct, but should be considered as an articulation of the duty of performance itself in situations where the willingness of the author state to abide by its duties has been put in jeopardy through its own conduct. In fact, Article 30 of the ILC Articles deals with cessation and non-repetition. They are not included in Article 34 which lists the appropriate forms of reparation, namely restitution, compensation and satisfaction.[26] The official commentary of the ILC states, therefore, that such assurances and guarantees should better be treated 'as an aspect of the continuation and repair of the legal relationship affected by the breach.'[27]

The remedy of assurances and guarantees of non-repetition is therefore not linked to a breach of a primary duty only but should be available on a somewhat broader scale. Of course, special reasons must be present to justify such a demand. Under normal circumstances, each state party to a multilateral treaty can place its trust in the *bona fides* of all the other parties. Consequently, it is not entitled to request its partners formally to affirm their legal-mindedness in an anticipatory fashion. Events must have occurred that shake the general assumption of future compliance. The Court itself has found that such events took place. The Serbian authorities refrained from taking even the slightest initiative with a view to forestalling any recurrence of the genocidal acts that had already notoriously marked the initial phase of the armed conflict. There was absolute uncertainty as to their intention to do better in any upcoming crisis situation. But the Court is probably right in

[24] *Xenides-Arestis* v. *Turkey*, 7 December 2006, § 47.
[25] Hearing of 24 April 2006, point 6 (d).
[26] The text adopted on first reading had listed assurances and guarantees of non-repetition as one of the classes of secondary obligations: see International Law Commission, 'Article 46', *Yearbook of the International Law Commission*, Vol. II, Part Two (Report of the Commission to the General Assembly on the work of its fifty-second session) (2000), at 63.
[27] Crawford, *supra* footnote 14, commentary to Article 30, at 199, § 11.

concluding that an assessment of the prevailing situation in Bosnia and Herzegovina did not provide any clues as to an actual threat to the physical integrity of the Muslim population.

It is significant, however, that more than three months after the delivery of the judgment, the Belgrade authorities have not yet complied with the finding of the Court under point 8 of the *dispositif* that Serbia must take effective steps to discharge its obligations under Article I of the Genocide Convention, transferring 'individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia [ICTY], and to co-operate fully with that Tribunal'. It is still not clear that General Mladić will be surrendered to the ICTY. This reluctance to act sheds a new light on the occurrences as they took place from 1992 to July 1995, when Srebrenica was taken by assault. Again, the strong ties of solidarity between the Serbian leadership in Serbia on the one hand and in the Republika Srpska on the other hand come to light quite unequivocally. Although the huge delay casts retrospectively doubts on the Court's assessment of the facts, the Court cannot be blamed for not having taken into account subsequent events which it could not have known on the day of its pronouncement. But it is the reputation of Serbia which is in issue. A country that provides protection to a person charged not only with committing genocide, but with conceiving of a plan to commit genocide and directing the commission of that crime, makes itself an accomplice *ex post* of genocide—with far-reaching consequences for its envisaged integration into the European Union.