CR 2006/3

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Tuesday 28 February 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro)**

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le mardi 28 février 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda
		Bennouna
		Skotnikov
	Judges *ad hoc*	Ahmed Mahiou
		Milenko Kreća
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda
Bennouna
Skotnikov, juges
MM. Ahmed Mahiou,
Milenko Kreća, juges *ad hoc*

M. Couvreur, greffier

The Government of Bosnia and Herzegovina is represented by:

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as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

Mr. Thomas M. Franck, Professor of Law Emeritus, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,

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Ms Joanna Korner, Q.C., Barrister at Law, London,

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as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,

Ms Laura Dauban, LL.B (Hons),

Mr. Wim Muller, LL.M, M.A.,

Mr. Mauro Barelli, LL.M (University of Bristol),

Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

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Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

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Ms Ivana Mroz, LL.M. (Minneapolis),

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Mr. Christian J. Tams, LL.M. (Cambridge),

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M. Miloš Jastrebić, deuxième secrétaire au ministère des affaires étrangères de la Serbie-et-Monténégro,

M. Christian J. Tams, LL.M. (Cambridge),

Mme Dina Dobrkovic, LL.B.,

comme assistants.

The PRESIDENT: Please be seated. The session is open and I give the floor to Professor Pellet.

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

REMARQUES SUR LA COMPÉTENCE DE LA COUR LE PRINCIPE *RES JUDICATA*

1. Madame le président, Messieurs les juges, pour la troisième fois, j'ai le grand honneur de me présenter devant vous comme avocat de la République de Bosnie-Herzégovine — le grand honneur car c'est toujours un privilège d'apparaître dans ce grand hall de justice; mais pas le plaisir, pas le plaisir car l'affaire est trop grave; les enjeux sont trop immenses; les principes en cause sont trop fondamentaux, les faits sont trop dramatiques pour qu'il puisse être question de plaisir. Notre responsabilité, la vôtre, Madame et Messieurs les juges, est écrasante : il s'agit de rien moins que d'établir la responsabilité d'un Etat dans un génocide qui s'est traduit par la mort de plus de cent mille personnes, des hommes, des femmes, des enfants, simplement parce qu'ils n'étaient pas nés serbes, qui s'est traduit par des souffrances physiques et morales abominables infligées aux membres d'un groupe ethnique dans l'intention de l'éradiquer, de «nettoyer» un territoire prétendument partie d'une «Grande Serbie», née de l'imagination criminelle des dirigeants de l'époque d'un Etat voisin, et par l'exode forcé de plusieurs centaines de milliers de personnes, chassées de chez elles au nom de la «pureté raciale» et de préjugés ethnicoreligieux.

2. Et pourtant, malgré cela, et pour la quatrième fois, la Bosnie-Herzégovine juge prudent de justifier à nouveau votre compétence[1], fût-ce, à ce stade en tout cas, très brièvement. Tout, en effet, porte à croire que la Partie adverse va, une nouvelle fois, essayer de vous convaincre de ne pas vous prononcer sur le fond — je dis «la Partie adverse» mais j'ai failli dire : «nos amis, de

[1] Pour les précédentes plaidoiries de la Bosnie-Herzégovine, voir notamment *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), exceptions préliminaires*, CR 96/8 (1er mai 1996), p. 68-86, par. 20-40 et CR 96/11 (3 mai 1996), p. 36-55; *Demande en revision de l'arrêt du 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires *(Yougoslavie c. Bosnie-Herzégovine)*, CR 2002/41 (5 novembre 2002), p. 31-55, par. 5-67 et CR 2002/43 (7 novembre 2002), p. 20-24, par. 18-24. Voir aussi : *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), mesures conservatoires*, CR 93/12 (1er avril 1993), p. 24-29 et CR 93/33 (25 août 1993), p. 28-34 (F. Boyle); *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), exceptions préliminaires*, CR 96/9 (1 ami 1996), p. 14-42 (B. Stern) et p. 42-58 (T. Franck), CR 96/11 (3 mai 1996), p. 55-78 (B. Stern).

l'autre côté de la barre». Car c'est cela le paradoxe : la Serbie-et-Monténégro est devenue un Etat démocratique, qui reconnaît les fautes énormes du régime passé tout en refusant de les assumer devant vous, comme si un Etat pouvait échapper à ses responsabilités internationales en changeant de régime ou de nom. Ceci, Madame et Messieurs de la Cour, vous ne sauriez l'admettre : une élection, même démocratique, n'abolit pas le passé et ne saurait rendre justice à des centaines de milliers de morts, de torturés, d'exilés. Un Etat accusé de génocide ne peut échapper à sa responsabilité, et moins encore à une responsabilité de ce type qui résulte de la violation des normes impératives du droit international les mieux établies, par des arguties de procédure. L'Allemagne, l'Italie, ont, en d'autres temps, su assumer leurs responsabilités pour des faits tout aussi atroces; ce serait la grandeur de la Serbie-et-Monténégro de suivre ces exemples.

3. Oh ! certes, Madame le président, le droit est le droit et la Cour ne peut exercer sa compétence que si celle-ci est établie. Mais ce droit, vous l'avez dit — et vous l'avez même redit et re-redit, puisque, à trois, voire à quatre reprises, vous avez écarté l'argumentation de la Yougoslavie qui tentait de vous convaincre de votre incompétence :

— dans vos ordonnances des 8 avril et 13 septembre 1993, sans préjuger, bien sûr, votre compétence définitive pour connaître du fond de l'affaire ou de la recevabilité de la requête[2], vous avez constaté que l'article IX de la convention de 1948 sur le génocide semblait «constituer une base sur laquelle la compétence de la Cour pourrait être fondée, pour autant que l'objet du différend a trait à «l'interprétation, l'application ou l'exécution» de la convention, y compris les différends «relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III» de la convention»[3];

— sans doute ne s'agissait-il que d'une constatation *prima facie* et aviez-vous souligné que la solution adoptée par l'Assemblée générale et le conseiller juridique des Nations Unies quant au statut de la République fédérative de Yougoslavie (Serbie-et-Monténégro) ne laissait «pas de susciter des difficultés juridiques»[4]; mais c'est en pleine connaissance de ces difficultés, sur

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[2] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 23, par. 51.

[3] *Ibid.*, p. 16, par. 26 et *ibid., mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993*, p. 338, par. 25.

[4] *Ibid*., ordonnance du 8 avril 1993, p. 14, par. 18.

lesquelles les Parties se sont longuement expliquées dans leurs plaidoiries écrites et orales sur les exceptions préliminaires[5] que, par votre arrêt du 11 juillet 1996, vous avez, à la quasi-unanimité, écarté ces exceptions en constatant notamment qu'«il n'a pas été contesté que la Yougoslavie soit partie à la convention sur le génocide»[6]; et la Cour, «étant parvenue à la conclusion qu'elle a compétence en l'espèce, tant *ratione personae* que *ratione materiae*»[7], «dit qu'elle a compétence sur la base de l'article IX de la convention pour la prévention et la répression du crime de génocide, pour statuer sur le différend»[8]; et de conclure : «Ayant établi sa compétence en vertu de l'article IX de la convention sur le génocide, et ayant conclu à la recevabilité de la requête, la Cour peut désormais procéder à l'examen du fond de l'affaire sur cette base»[9]; ceci, Madame le président, est chose jugée;

— après une longue période d'inertie, marquée seulement par les demandes répétées de la Bosnie-Herzégovine qui souhaitait que cet examen soit mené dans les meilleurs délais[10], la Yougoslavie a demandé, en 2001, la revision de l'arrêt de 1996, en arguant d'un prétendu «fait nouveau» qui aurait tenu à ce que son admission aux Nations Unies, le 1er novembre 2000, aurait «révélé» qu'elle n'était pas partie au Statut au moment de l'arrêt et «ne demeurait pas liée par l'article IX de la convention sur le génocide…»[11]; et par son arrêt du 3 février 2003, rendu à la majorité de dix voix contre trois, la Cour a rejeté cette requête.

4. Après avoir précisé que «la résolution 47/1» de l'Assemblée générale, demandant à la République fédérative de Yougoslavie de présenter une demande d'admission aux Nations Unies, «ne portait notamment pas atteinte au droit de la RFY d'ester devant la Cour…» et «ne touchait pas

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[5] CR 96/5 (29 avril 1996), p. 12-14 (R. Etinski) et p. 49-59 (E. Suy), CR 96/6 (29 avril 1996), p. 8-33 (E. Suy), CR 96/10 (2 ami 1996), p. 18-28 (E. Suy), p. 28-33 (G. Perazic) et voir ci-dessus, note 1.

[6] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), exceptions préliminaires, arrêt, C.I.J. Recueil 1996*, p. 610, par. 17.

[7] *Ibid.*, p. 617, par. 34.

[8] *Ibid.*, p. 623, par. 47.2. *a)*.

[9] *Ibid.*, p. 622, par. 46.

[10] Voir les lettres de l'agent et de l'agent adjoint de la Bosnie-Herzégovine des 17 juin 1999, 21 juin 1999, 15 septembre 1999, 4 octobre 1999, 11 octobre 1999, 20 mars 2000, 23 mars 2000, 8 mai 2000, 19 juin 2000, 21 septembre 2000 et 6 octobre 2000.

[11] *Demande en revision de l'arrêt du 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires *(Yougoslavie c. Bosnie-Herzégovine), exceptions préliminaires, arrêt, C.I.J. Recueil 2003*, p. 9-10, par. 19.

davantage à la situation de la RFY au regard de la convention sur le génocide», la Cour, dans son arrêt de 2003, a tenu

> «à souligner que la résolution 55/12 de l'Assemblée générale en date du 1er novembre 2000 [c'est la résolution par laquelle la République fédérative de Yougoslavie était admise aux Nations Unies] ne peut avoir rétroactivement modifié la situation *sui generis* dans laquelle se trouvait la RFY vis-à-vis de l'Organisation des Nations Unies pendant la période 1992-2000, ni sa situation à l'égard du Statut de la Cour et de la convention sur le génocide»[12].

C'est ce que vous avez jugé en 2003.

5. Bien entendu, Madame le président, nous n'ignorons pas que, dans les arrêts qu'elle a rendus, le 15 décembre 2004, sur les exceptions préliminaires soulevées par huit Etats membres de l'OTAN à l'encontre des requêtes formées contre eux dans les affaires relatives à la *Licéité de l'emploi de la force*, la Cour a dit n'avoir pas compétence pour se prononcer, en se fondant notamment sur l'admission de la RFY aux Nations Unies.

6. Ni ces arrêts, ni la circonstance sur laquelle ils se fondent, l'admission de la RFY (devenue depuis la Serbie-et-Monténégro) aux Nations Unies, n'ont, cependant, d'incidence sur votre compétence, Madame et Messieurs de la Cour, pour vous prononcer sur le fond de la présente affaire.

I. Les arrêts du 15 décembre 2004 dans les affaires de la *Licéité de l'emploi de la force* n'ont aucune incidence en la présente affaire

7. Madame le président, il ne me paraît pas utile de passer beaucoup de temps à se demander quelle pourrait être l'incidence dans la présente affaire des huit arrêts que vous avez rendus le 15 décembre 2004 dans les affaires relatives à la *Licéité de l'emploi de la force*. La réponse me paraît aller de soi : ils n'en ont aucune.

8. Ces arrêts ont été rendus dans des affaires complètement distinctes de celle qui nous occupe aujourd'hui, à l'égard de Parties défenderesses différentes, et plaidées par la Serbie-et-Monténégro dans un esprit complètement opposé à celui qui avait inspiré l'argumentation qu'elle avait développée dans notre affaire et sur laquelle tant la Cour que la Bosnie-Herzégovine s'étaient fondées en 1996. Les décisions de 2004 ne sauraient à l'évidence être revêtues de l'autorité de la chose jugée vis-à-vis de la Bosnie-Herzégovine qu'elles ne concernent en aucune

[12] *Ibid.*, p. 27-28, par. 69 et 70.

manière. L'article 59 du Statut est formel : «La décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé.»

9. A maintes reprises, la Cour a eu l'occasion de rappeler qu'au même titre que ses arrêts au fond, ses décisions en matière de compétence sont *res judicata* et qu'elle ne saurait (je cite votre arrêt de 1999 dans l'affaire relative à la *Frontière terrestre et maritime entre le Cameroun et le Nigéria*) «remettre en cause l'autorité de la chose jugée qui [s'y] attache» à l'occasion d'une phase ultérieure de l'affaire[13]. C'est aussi très exactement ce que vous avez dit dans vos arrêts de 2004, dans lesquels vous avez précisé que celui de 2003 «ne saurait en aucun cas revêtir une quelconque autorité de la chose jugée» pour les espèces alors en examen[14]. Vous avez ajouté :

> «Lorsque la Cour se prononce sur sa compétence dans une affaire déterminée, c'est uniquement pour décider si elle peut connaître de cette affaire au fond, et non pour procéder à l'élucidation d'une question controversée de nature générale. Une décision de la Cour devrait avoir, selon les termes de l'arrêt rendu en l'affaire du *Cameroun septentrional*, «des conséquences pratiques en ce sens qu'[elle devrait] pouvoir affecter les droits ou obligations juridiques existants *des parties*, dissipant ainsi toute incertitude dans *leurs* relations juridiques» (*C.I.J. Recueil 1963*, p. 34; les italiques sont de la Cour); et telle est la conséquence de la décision que la Cour rendrait sur sa compétence en l'espèce.»[15]

10. L'inverse est évidemment vrai et vous ne sauriez, Madame et Messieurs de la Cour, transposer la solution des arrêts de 2004 à la présente espèce — dans laquelle, il faut le rappeler, vous avez, en toute connaissance de cause, reconnu votre compétence avec l'autorité définitive de la chose jugée pour les deux Parties qui se présentent aujourd'hui devant vous. Ceci d'autant moins que, dans les affaires de la *Licéité de l'emploi de la force*, aucune des Parties n'a avancé d'argument en faveur de votre compétence : l'une comme les autres avaient le même intérêt à ce que vous déclinez votre compétence et il ne vous appartenait sans doute pas de soulever d'office des questions sciemment ignorées par les Parties. La situation est, évidemment, complètement différente dans notre affaire.

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[13] *Demande en interprétation de l'arrêt du 11 juin 1998 en l'affaire de la* Frontière terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigéria), exceptions préliminaires *(Nigeria c. Cameroun), arrêt C.I.J. Recueil 1999*, p. 31, par. 16; voir aussi *Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 23 et affaire du *Détroit de Corfou, fixation du montant des réparations (Royaume-Uni c. Albanie), C.I.J. Recueil 1949*, p. 248; arrêt du 18 août 1972, *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan, arrêt, C.I.J. Recueil 1972*, p. 56, par. 18.

[14] *Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique)*, arrêt du 15 décembre 2004, par. 80.

[15] *Ibid.*, par. 38.

II. L'admission de la Serbie-et-Monténégro aux Nations Unies n'a aucune incidence en la présente affaire

11. Nous sommes parfaitement conscients, Madame le président, qu'en 2003, lorsqu'elle a rejeté la requête en revision de la Yougoslavie, la Cour s'est fondée sur les règles particulières qui gouvernent la revision et je n'essaierai pas de me faire plus sot que je le suis en confondant un fait nouveau au sens de l'article 61 du Statut avec un fait qui pourrait être de nature à vous conduire à ne pas exercer votre compétence pour d'autres raisons. Mais il se trouve que l'admission de la Serbie-et-Monténégro aux Nations Unies n'est ni l'un, ni l'autre. Ce n'est pas un fait nouveau au sens de l'article 61 — vous l'avez jugé en 2003 dans un arrêt revêtu de l'autorité définitive de la chose jugée et il n'y a aucune raison d'y revenir. Mais ce fait n'a certainement pas non plus vocation à remettre en cause la décision que vous avez prise dans votre arrêt de 1996 — en admettant que vous le puissiez. Or vous ne le pouvez pas et, le puissiez-vous, vous avez donné à la décision par laquelle vous avez retenu votre compétence des fondements que l'admission de la Serbie-et-Monténégro aux Nations Unies ne contredit nullement.

A. L'arrêt de 1996 est revêtu de l'autorité de chose jugée

12. Sans doute, Madame et Messieurs les juges, votre arrêt de 1996 ne porte-t-il que sur la compétence de la Cour et la recevabilité de la requête. Il n'en reste pas moins que, sur ces deux points, il est «définitif et sans recours» sous les seules réserves de la possibilité de recours en interprétation ou en revision. Le simple fait que la Cour ait accepté de connaître de la demande en revision de la Yougoslavie montre bien d'ailleurs qu'en dehors de ces hypothèses, il s'agit d'un arrêt comme un autre qui ne peut être contesté d'aucune autre façon[16]. Or nul ne prétend qu'il soit obscur et nécessite une interprétation; quant à la revision, la Serbie-et-Monténégro a essayé cette voie; sans succès.

13. En d'autres termes, dès lors qu'en l'absence de fait nouveau au sens de l'article 61 du Statut, il n'est pas susceptible de revision, l'arrêt de 1996 doit être exécuté et, comme elle l'a expressément constaté dans son arrêt sur les exceptions préliminaires ainsi que je l'ai rappelé, la Cour «peut désormais procéder à l'examen du fond de l'affaire» sur la base de l'article IX de la

[16] Voir aussi *Demande en interprétation de l'arrêt du 11 juin 1998 en l'affaire de la* Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires *(Nigéria c. Cameroun), arrêt, C.I.J. Recueil 1999*, p. 35, par. 10.

convention sur le génocide — ou, plus exactement, *elle le doit* faute de désistement de la Bosnie-Herzégovine : «cet arrêt est définitif et sans recours [en ce qui concerne la compétence de la Cour] et … en conséquence il y a à cet égard chose jugée»[17] — et c'est vous, Madame et Messieurs de la Cour que je viens de citer dans l'affaire du *Détroit de Corfou*.

14. La Cour aurait d'autant plus mauvaise grâce à remettre en question ce qu'elle a jugé il y a maintenant dix ans, que, et je le dis avec regret et gravité, Madame le président, cette affaire a attendu treize ans — treize ans… — depuis le dépôt de la requête bosniaque, pour faire enfin l'objet de plaidoiries orales. Je ne m'étendrai pas sur les raisons pour lesquelles il en est ainsi — raisons que l'agent adjoint de la Bosnie-Herzégovine a rappelé hier matin — et je me bornerai à dire qu'elles ne relèvent pas de la responsabilité de l'Etat demandeur. Il serait désastreux pour l'image de la Cour et de la justice internationale qu'un Etat puisse échapper à l'établissement de ses responsabilités grâce à son attitude dilatoire ou à l'encombrement du rôle de la Cour ou à son hésitation à se prononcer sur le fond.

15. Et ces considérations sont encore plus pressantes en l'espèce pour les raisons suivantes :

1) les faits internationalement illicites qui, selon le demandeur, engagent la responsabilité de la Serbie-et-Monténégro ne sont pas d'anodins manquements à des règles «tout-venant» du droit international mais, pour reprendre la terminologie finalement retenue par la Commission du droit international dans ses articles de 2001 sur la responsabilité; ce sont des «violations graves d'obligations découlant de normes impératives du droit international général»;
2) l'Etat défendeur porte la responsabilité, peut-être pas exclusive mais, à l'évidence, prédominante, de la lenteur avec laquelle la procédure a progressé dans cette affaire pourtant si importante et qui fut sans aucun doute si urgente : c'est la Yougoslavie qui a fait tout ce qui était en son pouvoir pour retarder l'issue; c'est elle qui a multiplié les manœuvres dilatoires; et il serait plus que choquant qu'elle puisse maintenant se prévaloir d'un changement de circonstances alors que, l'affaire eût-elle pu être jugée dans un délai raisonnable de deux, trois, ou même quatre ans après le dépôt de la requête, ou même avec une célérité normale après l'intervention de l'arrêt sur les exceptions préliminaires, aucun problème de compétence ne se

[17] *Détroit de Corfou, fixation du montant des réparations, arrêt,C.I.J. Recueil 1949*, p. 248.

serait posé — je rappelle à cet égard que la duplique de la Yougoslavie a été déposée au Greffe le 22 février 1999 — 1999 —, plus d'un an et huit mois *avant* que cet Etat soit admis aux Nations Unies, non plus comme continuateur de l'ex-Yougoslavie comme il le prétendait, mais comme un Etat nouveau, successeur parmi d'autres de la RSFY; et ceci est d'autant plus important que

3) il ne tenait qu'à la Yougoslavie — maintenant Serbie-et-Monténégro — de «clarifier la situation» comme elle le dit[18] en demandant son admission aux Nations Unies comme le Conseil de sécurité et l'Assemblée générale le réclamaient avec insistance depuis 1992[19], alors que, contre tous les avis, elle s'est durant plus de huit ans obstinée dans ses prétentions unilatérales, seule cause de la perpétuation de la situation *sui generis* sur laquelle la Cour s'est fondée pour rendre son arrêt de 1996.

16. Il va de soi qu'un Etat ne peut tenir ainsi en échec la justice internationale. Comme l'a rappelé la Cour permanente, «il est certainement incompatible avec le caractère des arrêts que rend la Cour et avec la force obligatoire qui y est attachée par les articles 59 et 63, alinéa 2, de son Statut, que celle-ci prononce un arrêt que l'une ou l'autre partie pourrait rendre inopérant»[20]. Et il en va d'autant plus certainement ainsi en la présente espèce que :

B. L'admission de la Serbie-et-Monténégro aux Nations Unies ne remet pas en cause la motivation de l'arrêt de 1996

17. Durant la procédure sur la demande en revision, la Yougoslavie a voulu, Madame et Messieurs les juges, vous faire remonter le temps et vous convaincre que son admission aux Nations Unies le 1er novembre 2000 constituait un fait nouveau de nature à remettre en cause la décision sur la compétence que vous avez prise en 1996[21]. Ce fait n'entre pas dans les prévisions de l'article 61 et, faute de revision, votre arrêt ne saurait être remis en cause. Mais je souhaite aller plus loin et imaginer que ce soit possible. Même dans cette hypothèse — que j'admets pour les

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[18] Voir la *Demande en revision de l'arrêt du 11 juillet 1996* (23/04/2001), p. 24-30, par. 18-21, p. 49, par. 35 et p. 50, par. 37. Lors des plaidoiries sur la *Demande en revision*, voir CR 2002/40 (4/11/2002), p. 36-39, par. 3.3-3.11 et p. 41-43, par. 4.2-4.09 (T. Varady); CR 2002/42 (6/11/2002), p. 21-22, par. 2.18-2.21 et p. 27, par. 2.35 (T. Varady).

[19] Voir S/RES/777 du 19 septembre 1992 et A/RES/47/1 du 22 septembre 1992.

[20] *Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance du 6 décembre 1930, C.P.J.I. série A n° 24*, p. 14.

[21] Voir la *Demande en revision* (23/04/2001), p. 31-49, par. 22-35 et CR 2002/40 (4/11/2002), p. 35-45, par. 2.66-4.16 (T. Varady) et CR 2002/42, p. 21-27, par. 2.18-2.37 (T. Varady).

seuls besoins de la discussion, il n'y aurait pas, dans l'admission de la Yougoslavie à l'Organisation des Nations Unies, un motif pour revenir sur votre arrêt de 1996.

18. Dans celui-ci, la Cour, qui, à aucun moment, ne se fonde sur le statut de l'Etat défendeur par rapport aux Nations Unies, constate d'emblée «qu'il n'a pas été contesté que la Yougoslavie soit partie à la convention sur le génocide»[22]. En ce qui concerne la Bosnie-Herzégovine, la Cour estime qu'elle «pouvait devenir partie à la convention par l'effet du mécanisme de la succession d'Etats»[23] et prend soin d'insister sur les caractères et l'importance particuliers de la convention qui justifient l'adhésion la plus large[24]. En outre, aux paragraphes 30 et 33 de son arrêt de 1996, la Cour s'interroge sur la portée de sa compétence pour se prononcer sur le différend que la Bosnie-Herzégovine lui a soumis et conclut «qu'en visant la «responsabilité d'un Etat à raison d'un acte de génocide ou de l'un quelconque des autres actes énumérés à l'article III», l'article IX n'exclut aucune forme de responsabilité d'Etat»[25]. Comme l'ont rappelé plusieurs juges dans l'opinion individuelle commune jointe à l'arrêt du 3 février dernier dans l'affaire des *Activités armées sur le territoire du Congo*, «Article IX speaks not only of disputes over the interpretation and application of the Convention, but over the "fulfilment of the Convention». Further, the disputes that may be referred to the Court under Article IX «include those relating to the responsibility of a State for genocide».»[26]

19. Si je me suis quelque peu attardé sur la motivation de votre arrêt sur la compétence de 1996, Madame et Messieurs les juges, ce n'est que pour montrer que votre raisonnement n'est pas fondé sur l'appartenance ou non de la Yougoslavie aux Nations Unies. Tout au plus constatez-vous en passant que *nul* n'a contesté que celle-ci fût partie à la convention sur le génocide — «nul» c'est-à-dire pas la Bosnie-Herzégovine (cela va de soi puisqu'elle fonde la compétence de la Cour sur l'article IX de cette convention); mais pas non plus la Yougoslavie qui,

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[22] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), C.I.J. Recueil 1996*, p. 610, par. 17.

[23] *Ibid.*, p. 611, par. 20.

[24] *Ibid.*, p. 611-612, par. 22-23.

[25] *Ibid.*, p. 616, par. 32.

[26] *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda)*, opinion individuelle commune de Mme le juge Higgins et MM. les juges Kooijmans, Elaraby, Owada et Simma, par. 28.

pourtant, a soulevé pas moins de sept exceptions préliminaires. Et, parmi celles-ci, pas non plus la moindre allusion à une possible absence de participation aux Nations Unies. En omettant délibérément de soulever cette exception, la Yougoslavie a créé une situation d'*estoppel* peut-être et, en tout cas, ne saurait, de bonne foi, se rétracter et venir déclarer aujourd'hui qu'à la réflexion il y avait une huitième exception préliminaire qu'elle aurait «oublié» de soulever en 1995 et vous demander d'y faire droit, au mépris des dispositions de l'article 79 du Règlement de la Cour. Au surplus, on doit sûrement considérer qu'en omettant de soulever une telle exception, la Yougoslavie a, à cet égard, accepté *de facto* la compétence de la Cour sur ce point et créé une sorte de *forum prorogatum*, que la bonne foi la plus élémentaire lui interdit de contester à nouveau aujourd'hui.

20. Et pour cause d'ailleurs : la Yougoslavie est demeurée Membre des Nations Unies. Les résolutions 777 (1992) du Conseil de sécurité et 47/1 de l'Assemblée générale l'invitent, certes, à présenter une demande d'admission aux Nations Unies et décident «qu'elle ne participera pas aux travaux de l'Assemblée générale» mais elles se gardent bien de l'exclure de l'Organisation. Comme l'avait précisé le Secrétaire général adjoint, conseiller juridique, la résolution 47/1

> «ne met pas fin à l'*appartenance* de la Yougoslavie à l'Organisation et ne la suspend pas. En conséquence, le siège et la plaque portant le nom de la Yougoslavie subsistent… La mission de la Yougoslavie auprès du Siège de l'Organisation des Nations Unies, ainsi que les bureaux occupés par celle-ci, peuvent poursuivre leurs activités, ils peuvent recevoir et distribuer des documents. Au Siège, le Secrétariat continuera de hisser le drapeau de l'ancienne Yougoslavie … La résolution n'enlève pas à la Yougoslavie le droit de participer aux travaux des organes autres que ceux de l'Assemblée [et, plus tard, de l'ECOSOC]. L'admission à l'Organisation des Nations Unies d'une nouvelle Yougoslavie, en vertu de l'article 4 de la Charte, mettra fin à la situation créée par la résolution 47/1.»[27]

Au surplus, la Yougoslavie a continué de s'acquitter — et s'est acquittée — d'une contribution au budget de l'Organisation[28].

21. Il va de soi que cette situation n'était pas celle d'un Etat non-membre mais celle d'un Etat qui avait fait l'objet de sanctions internes. J'ajoute que les objections constantes de la Bosnie-Herzégovine et des autres Etats issus de la dissolution de l'ex-Yougoslavie ne tenaient pas à

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[27] Lettre du 29 septembre 1992 aux représentants permanents de la Bosnie-Herzégovine et de la Croatie (Nations Unies, doc. A/47/485), citée dans l'ordonnance du 8 avril 1993, *C.I.J. Recueil 1993*, p. 13-14, par. 17 et dans l'arrêt du 3 février 2003, *C.I.J. Recueil 2003*, p. 13-14, par. 31 (les italiques sont dans l'original).

[28] Voir l'arrêt du 3 février 2003, *ibid.*, p. 19-20, par. 45-47.

la présence de la RFY au sein des Nations Unies, mais à sa prétention d'y *continuer* exclusivement l'ex-Yougoslavie alors qu'ils la considéraient comme un Etat successeur comme un autre — ce qu'elle a fini par reconnaître en 2000. Mais il paraît évident que cette persistance dans l'erreur ne saurait profiter aujourd'hui à l'Etat défendeur : c'est lui qui, en s'obstinant à s'opposer à la volonté du Conseil de sécurité et de l'Assemblée générale, a créé et perpétué la situation sur laquelle la Cour s'est fondée pour rendre son arrêt de 1996; il ne pourrait aujourd'hui venir contester qu'il était Membre des Nations Unies (il s'est accroché à son statut qu'il voulait, à tort, privilégié) et, d'ailleurs, il l'était, Membre des Nations Unies, même si ce n'était qu'avec de moindres droits; il ne pourrait aujourd'hui venir plaider l'erreur de bonne foi — il n'a commis aucune erreur et il n'était pas de bonne foi.

22. De tout ceci, la Cour a été pleinement consciente. Dès qu'elle a été saisie de l'affaire, en 1993, dans sa première ordonnance en indication de mesures conservatoires, celle du 8 avril 1993, elle a cité de larges extraits de la lettre du conseiller juridique des Nations Unies que j'ai lus en partie il y a un instant tout en admettant que «la solution adoptée ne laisse pas de susciter des difficultés juridiques»[29]. Surtout, comme la Cour l'explique de manière limpide dans son arrêt du 3 février 2003 sur la demande en revision, dont je crois devoir citer un large extrait :

> «l'admission de la RFY en tant que membre de l'ONU a eu lieu plus de quatre années après le prononcé de l'arrêt dont elle sollicite la revision. Or, au moment où cet arrêt a été rendu, la situation qui prévalait était celle créée par la résolution 47/1 de l'Assemblée générale. A cet égard, la Cour observera que les difficultés concernant le statut de la RFY, survenues entre l'adoption de cette résolution et l'admission de la RFY à l'ONU le 1er novembre 2000, découlaient de la circonstance que, même si la prétention de la Yougoslavie à assurer la continuité de la personnalité juridique internationale de la RSFY n'était pas «généralement acceptée» …, les conséquences précises de cette situation (telles que la non-participation aux travaux de l'Assemblée générale ou du Conseil économique et social et aux réunions des Etats parties au pacte international relatif aux droits civils et politiques, etc.) étaient déterminées au cas par cas.
>
> La résolution 47/1 ne portait notamment pas atteinte au droit de la RFY d'ester devant la Cour ou d'être partie à un différend devant celle-ci dans les conditions fixées par le Statut. Elle ne touchait pas davantage à la situation de la RFY au regard de la convention sur le génocide. Pour «mettr[e] fin à la situation créée par la résolution 47/1», la RFY devait présenter une demande d'admission à l'Organisation des Nations Unies comme l'avaient fait les autres Républiques composant la RSFY. *Tous ces éléments étaient connus de la Cour et de la RFY au jour du prononcé de l'arrêt.* Ce qui toutefois demeurait inconnu en juillet 1996 était la réponse à la

[29] *C.I.J. Recueil 1993*, p. 14, par. 18.

> question de savoir si et quand la RFY présenterait une demande d'admission à l'Organisation des Nations Unies et si et quand cette demande serait accueillie, mettant ainsi un terme à la situation créée par la résolution 47/1 de l'Assemblée générale.
>
> La Cour — car c'est toujours la Cour qui parle dans son arrêt de 2003 — tient en outre à souligner que *la résolution 55/12 de l'Assemblée générale en date du 1er novembre 2000 ne peut avoir rétroactivement modifié* la situation *sui generis* dans laquelle se trouvait la RFY vis-à-vis de l'Organisation des Nations Unies pendant la période 1992-2000, ni *sa situation à l'égard du Statut de la Cour* et de la convention sur le génocide.»[30]

23. Ainsi donc :

— pour rendre son arrêt de 1996, la Cour s'est fondée sur la situation *sui generis* existant alors;

— cette situation lui était parfaitement connue et tenait à l'attitude de la Yougoslavie elle-même; et

— l'admission de la RFY en tant que successeur (et non plus comme continuateur) de l'ex-Yougoslavie n'a en aucune manière modifié rétroactivement la situation sur laquelle s'est fondée la Cour.

24. Celle-ci était compétente pour se prononcer sur la requête de la Yougoslavie en 1993, en 1996, en 2003, et elle l'est toujours en 2006, l'admission de ce pays aux Nations Unies a modifié la situation pour l'avenir mais n'a pas effacé d'«un trait de vote» la situation antérieure, celle au vu de laquelle la Cour s'est prononcée définitivement par son arrêt de 1996. Il n'y a assurément pas là une circonstance autorisant à remettre en cause l'autorité, sacrée pour une cour de justice, qui s'attache, Madame et Messieurs les juges, à votre décision de 1996.

25. Ceci, Madame le président, conclut cette brève plaidoirie «de précaution», que nous avons cru devoir consacrer, à nouveau et pour la troisième fois, à des questions de compétence. Mais la Bosnie-Herzégovine tient à dire que, sur ce point, elle se trouve en position de «défendeur» et que si la Serbie-et-Monténégro tenait à rouvrir ce débat, pourtant déjà tranché, elle réserve formellement son droit d'y revenir tout le temps qui pourrait être nécessaire lors du second tour des plaidoiries orales : je n'ai avancé que certains des arguments qui nous paraissent pouvoir l'être, je l'ai fait assez brièvement; nous en avons d'autres en réserve si la nécessité s'en faisait sentir.

Madame et Messieurs les juges, je vous remercie de votre attention; et je vous prie Madame le président, de bien vouloir appeler à cette barre mon éminent collègue et ami, le

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[30] *C.I.J. Recueil 2003*, p. 28, par. 70-71 (les italiques sont de nous).

professeur Thomas Franck, qui entamera les plaidoiries de la Bosnie-Herzégovine sur les questions de preuves, si importantes dans la présente affaire. Merci beaucoup.

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

Mr. FRANCK: Madam President, it is a profound honour and privilege to plead once again at the Bar of the World Court. Members of the Court, I will be discussing this morning the sources of evidence that we will adduce to prove that genocide was committed in Bosnia. I would like to begin by emphasizing that Bosnia's case rests on the overwhelming evidence that genocide was committed and to examine the sources of that evidence.

1. Sources of evidence

1. Since at least 20 March 1993 — when Bosnia and Herzegovina first filed its Application instituting proceedings in this Court — you have been receiving evidence of shocking crimes against humanity and egregious violations of international law's most sacred text: the Genocide Convention. Unfortunately, in the intervening 13 years, the evidence of these heinous crimes has continued to pile up, alongside the mounds of corpses unearthed in more recent years. While it is sad that the evasive manoeuvrings of the Respondent has so long delayed us in reaching this day of judgment, the passing years, month by month, have made ever more irrefutable the evidence of what happened and who was responsible.

2. That evidence, as this Court will see, is now so overwhelming that it cries out for the validation which only this Court can give. With such validation, at last, can come surcease in the suffering and the anger; without it would come incredulity, disbelief, and more agony. We ask you to hear this evidence as judges, of course, but also as, potentially, the designated authors of an indelible chapter in the history of humanity's climb from the depths of depravity to a higher consciousness.

3. For its part in that process, Bosnia will have to inundate you with our evidence, and we apologize in advance for forcing you to relive, once again, that horrific time in all its gory detail. The evidence calls to us from everywhere and echoes down the halls of a dreadful decade, compounded by the feckless denials of its perpetrators.

4. We ask you to take judicial notice of that which is notorious: notorious in its awfulness and notorious, also, in the sense that it is so well known.

5. We will ask you to watch visual evidence of what is otherwise virtually unbelievable.

6. We will ask you to listen again, as it is related on the public record, to the anguished voices of the victims: but in particular, not in person, but as related under oath and subject to cross-examination in the International Criminal Tribunal for the former Yugoslavia.

7. We will present the professional opinions of respected experts and the first-hand reports of seasoned reporters.

8. We will recall the facts found by United Nations rapporteurs and resolutions of the General Assembly and the Security Council that fix facts and ascribe responsibility.

9. We will ask you to note decisions by *ad hoc* criminal tribunals for Yugoslavia and Rwanda, which, this past decade, have weighed some of the same, or similar, evidence as we will be presenting to you, and have drawn factual and legal deductions, much as you will now have to do.

10. Permit me a few words with respect to each of these sources of evidence.

2. Judicial notice and inferences

11. There will be presented to you notorious facts that are so well known that it would be appropriate for this Court to take judicial notice of them without requiring further proof, subject to their refutation of course, by the Respondent, if they are so able. For example, the fact that 7,000 to 8,000 persons were put to death at Srebrenica in just a few days in July 1995, and that many thousands more were deported, is now so well known that it can no longer be contested. It has been reported by the High Representative for Bosnia and cited in several cases before the International Criminal Tribunal for the former Yugoslavia, and we will be reminding the Court of these findings. But now, in 2006, the crimes, and the realities and the motives behind these crimes have become so notorious as to be undeniable. There can no longer be any need to prove that most of those who were murdered were Muslims, as were the thousands of women who were raped. We will present evidence, but often it will be primarily for the record. We know that you, the judges, already know many of these things.

12. As C. F. Amerasinghe has written in his recent book: "Judicial notice is . . . a measure through which international tribunals can rely on some facts in a pending case without requiring the party that relies on them to provide proof thereof." [31] That this Court will take notice of "the notoriety of the facts" was recognized in 1951, in the *Fisheries* case[32] and, again, in the *Nuclear Tests* cases[33]. Similarly, the Arbitral Tribunal in the *Island of Palmas* case referred to its power to consider notorious facts by taking judicial notice of them[34]. Article 21 of the Charter of the Nuremberg Tribunal makes specific provisions for the taking of judicial notice of facts of common knowledge which, in the circumstances of the litigation, are self-evident and, thus, do not need to be proven.

13. Related to the concept of judicial notice is that of judicial presumptions. These, as Amerasinghe has pointed out, are logical deductions made from evidence of certain facts to the probable, if also rebuttable, existence of certain other facts[35]. As the Inter-American Court of Human Rights has said in the *Velasquez Rodriguez* case[36]:

> "The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia and presumptions may be considered, so long as they lead to conclusions consistent with the facts."

14. In the present case we will mostly present direct evidence, whenever it is available. Nevertheless, for reasons of economy, we will ask the Court to consider some facts as "notorious" because of the frequency and regularity with which they have entered the public domain: mostly through reports of reliable observers.

15. But we will also ask the Court to draw inferences from patterns — patterns of facts to conclusions that are logically or experientially inescapable, even if they cannot be proven with direct evidence. For example, where an intent must be demonstrated, we ask the Court to consider

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[31] C. F. Amerasinghe, *Evidence in International Litigation* 160-161 (2005).

[32] *I.C.J. Reports 1951*, pp. 138-139.

[33] *I.C.J. Reports 1974*, p. 9, para. 17.

[34] 1928 2 United Nations, *Reports of the International Arbitral Awards (RIAA)*, pp. 841-842.

[35] *Id*., Chapter 11.

[36] 1988 IACHR, Series C: Decisions and Judgments No. 4, p. 135, para. 130.

direct evidence of what was said and done, with what frequency and to whom, and how, as indirect evidence of the perpetrators' intent.

16. Such inferences are especially appropriate in the circumstances of this litigation. We will ask this Court to take judicial notice of the context in which this case arises: as an international war in which the Respondent has been declared by the Security Council of the United Nations to have intervened with force in the territory of the Applicant. Since the aggressor has not been defeated and has not surrendered, many important sources of evidence remain within the sole domain of the régime in Belgrade and its archival materials are not fully accessible to the Applicant or to this Court, even though some of the relevant documents have been provided to the Yugoslav Tribunal, but under conditions of non-disclosure to us and to you. This makes it inevitable that certain facts about the perpetrators' intent and, also, the attribution of acts in Bosnia to the authorities in Belgrade will have to be demonstrated, yes, by inference from activities and events on the ground in Bosnia and Herzegovina, as to which evidence can be adduced, that is as to the activities themselves which can be proven here. It should be up to the Respondent to rebut these logical inferences with evidence that is solely within its control.

17. As this Court said in the *Corfu Channel* case at the merits phase, the State seeking to prove facts that are solely within the purview of the other party and which are unavailable to it

> "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[37]

This, the Court thought, was especially so when

> "the fact of . . . exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to . . . events. By reason of this exclusive control, the other State, the victim of the breach of international law, is . . . unable to furnish direct proof of facts giving rise to responsibility."[38]

It is true that, in the circumstances of that case, the Court did not need to make an inference because the facts were otherwise established. Where, however, this is not so — as in some matters

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[37] *I.C.J. Reports 1949*, p. 18.

[38] *Ibid.*

pertaining to the present case — then the Court should, of course, resort to the logical inferences that connect what is knowable with what must be presumed.

18. That courts have the right to do so is further confirmed by the World Trade Organization Appellate body's 1999 decision in the *Civilian Aircraft* case where it was established that "the Panel had the legal authority and the discretion to draw inferences from the facts before it — including the fact that Canada had refused to provide information sought by the Panel"[39]. This merely restates again the general principle set forth by the United States-Mexican General Claims Commission in the *Parker* case to the effect that the parties before it "are sovereign nations who are in honour bound to make full disclosure of the facts in each case so far as such facts are within their knowledge or can reasonably be ascertained by them . . . no matter what their effects may be"[40]. The right to draw negative inferences from the failure of a State to provide evidence or to suppress evidence under its sole control is further confirmed by arbitral practice: as for example, in the French-Greek *Lighthouse* case arbitration of 1956[41].

19. This is precisely a case in which the drawing of such inferences from incomplete production of evidence is warranted. In our case, the first-hand documentary evidence essential to establish the link of State responsibility between events in Bosnia and the authorities in Belgrade is solely within the control of Belgrade. To the extent that we have been unable to persuade the Respondent to give us access to the unredacted official documents we have requested, this Court is left to draw logical inferences. It will be asked to do so, however, only on the basis of excellent inferential evidence detailing acts, and patterns of acts, committed in Bosnia that speak eloquently, leading us to make surmises about what has been withheld that are virtually inescapable to the ordinary mind. These inferences will necessarily bear both on the question of whether the killings, rapes, torture and forced displacement, that is, ethnic cleansing, perpetrated against non-Serbs in Bosnia were manifestations of intentional genocide and, also, whether that genocide is attributable to the authorities in Belgrade.

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[39] *Canada — Measures Affecting the Export of Civilian Aircraft*, para. 203.

[40] *Administrative Decisions and Opinions*, 39-40, cited in D. V. Sandifer, *Evidence Before International Tribunals*, p.115 (1975 ed.).

[41] *France* v. *Greece*, Claim No. 6, PCA (1956), 23 ILR at 678.

20. The drawing of inferences is well established in circumstances where relevant evidence is in the sole possession of the party that refuses to disclose it. We only ask the Court to act consistently with its own practice, in this respect, and in accordance with the common practice of other international tribunals.

21. To summarize: to whatever extent, if any, the Respondent fails to produce exculpatory evidence or evidence requested by the other party or by the Court, either in response to a direct request, or in response to supported allegations made against it in written pleadings, it is appropriate — it is appropriate, we urge — for the Court to draw a negative inference supporting the Applicant's version of the disputed facts. Article 49 of the International Court of Justice Statute confers authority on this Court to do so; authority that is important to the judicial function. Even in the absence of such a formal order for production, however, it is up to the parties to honour their obligation to produce the evidence under their control, when only that could satisfy the need to provide a full explanation of events previously demonstrated before this Court. As Judge Buergenthal has written, with reference to his experience at the Inter-American Court, it is appropriate to make adverse inferences against a party that has not produced documents exclusively available to it[42].

22. Let us be clear: during the course of preparations for this case, it has become evident that the Respondent, however reluctantly, has provided documents relevant to this case to the ICTY, after that Tribunal issued orders compelling their production. Although some of these documents, or parts thereof, have been made public through the Tribunal, others have been designated for withholding and others have been partially redacted at the request of the Respondent. We have become convinced by evidence, and it is quite logical to presume, that this wilful withholding of evidence from this Court is itself evidence of the damage these documents could do in undermining the Respondent's defence in the present case.

3. Visual evidence

23. I would like next to turn to the question of our presentation of visual evidence. Almost ten years after the Srebrenica massacre, a vivid video surfaced in Serbia and was made available to

[42]Buergenthal, *Judicial Fact-Finding: The Inter-American Human Rights Court*, in Lillich, ed., *Fact-Finding before International Tribunals*, 1992, p. 266.

this Court and to the International Criminal Tribunal for the former Yugoslavia. The graphic video shows the deliberate killing, after torture, of six Muslim men by members of the Serbian paramilitary unit. As *The New York Times* observed at the time,

> "While the number of those killed represents a tiny proportion of those who died in July 1995, the video is being seen as irrefutable evidence that Serbia's [public] police forces, and not just Bosnian Serb forces, took part in the massacre, evidence that challenges the commonly held view among Serbs that the atrocity never took place."[43]

Some of these pictures, while exceedingly painful to watch, are the most effective refutations of the lies told by the criminals. Accordingly, this and other visual evidence of genocide will be presented to you, to make tangible the data and statistics that portray a European descent into barbarity that the drafters of the Genocide Convention had sought to bar forever.

4. Public witness testimony and documents from the former Yugoslavia

24. The Applicant will not be calling witnesses before this Court, because, had we chosen to do so, had we chosen to let the victims speak for themselves directly to you, we would have had to summon them in a chorus of thousands. Their accounts have already been publicly recited and examined in great detail before the International Criminal Tribunal for the former Yugoslavia. Instead, counsel for Bosnia will direct this Court to the witness testimony recorded in proceedings at the ICTY and also to the associated documentary evidence, which has been authenticated and attributed to organs of the Government in Belgrade or their surrogates. We will direct the attention of this Court to the findings of that Criminal Tribunal, where the witnesses' accounts and various incriminating documents have been subject to the rigorous procedural requirements of authentication, cross-examination and proof "beyond a reasonable doubt", before being found credible by that international panel of eminent jurists. Rather than recall the witnesses and reproduce all the evidence *de novo*, we will present them through the rigorous filter of the ICTY's demanding adversary process. Through references to the proceedings and judgments of that Tribunal, we will let the witnesses speak, their credibility often further augmented by having endured the test of confronting their victimizers.

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[43] *The New York Times*, International, June 3, 2005, p. A3.

25. You will next be hearing the reasons, advanced by my colleague, Magda Karagiannakis, why the evidence of fact and the procedures generated by the proceedings before the International Criminal Tribunal for the former Yugoslavia merit the most serious consideration by this Court.

But, Madam President, I have several more sources of evidence, which I would like to discuss with this Court, in order to make clear the reasons and the methods by which they are being introduced to you. May I respectfully request that we take our break and that I would resume thereafter?

The PRESIDENT: Yes, Professor Franck. The Court will rise for ten minutes.

The Court adjourned from 11.10 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Franck.

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

5. Reports and determinations of United Nations organs and institutions

26. We have been examining sources of evidence to which we will be making reference during these coming weeks, and I would like next to discuss our use of reports and determinations of United Nations organs and institutions. We will, of course, be reminding the Court of the written texts setting out findings of fact made by the United Nations Security Council, the United Nations General Assembly, as well as by United Nations experts and rapporteurs. It is normal for this Court to give great weight to such evidence, as established again in your 2005 decision in the *Democratic Republic of the Congo* v. *Uganda*[44] case. There, you said:

> "the Court will . . . give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, *merits special attention*."[45] (Emphasis added.)

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[44]Case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* 19 December 2005, especially paras. 60-62.

[45]*Id.*, para. 61

We, Bosnia, will be basing our case very largely on just such evidence, as we did earlier during the written pleadings.

27. The Respondent, in its Rejoinder of 22 February 1999, has asked the Court, without further proof, to conclude that "[a]ll these materials are of dubious evidential value"[46]. Common sense, common decency, and the role of this Court as a principal organ of the United Nations all mandate a rejection of this cavalier and even contemptuous approach to evidence, all of which confirms, over and over, the essential and irrefutable ingredients of the Applicant's contention that genocide was committed by the Respondent.

28. These organs and institutions have spoken with full authority. The United Nations Security Council and the General Assembly have responded to the crisis in Bosnia and Herzegovina by discharging their roles as the primary and secondary institutions for the maintenance of international peace and security, in conformity with the authority conferred on them by the Charter as construed by this Court ever since the *Certain Expenses* case[47]. Moreover, both principal organs of the United Nations system were acting in accordance with Article VIII of the Genocide Convention which provides that "*(a)* any Contracting Party may call upon the competent organs of the United Nations to take such action as they consider appropriate for the prevention and suppression of acts of genocide . . .".

29. The resolutions passed and the decisions taken by these organs also represent the sum of the informed judgments of the Member States, many of which were in a position to know what was happening as it happened, because they are situated in the vicinity of the conflict, or because they gave refuge to the victims, or because their diplomats were in place to report at first hand on the unfolding disaster.

30. Their conclusions both as to the facts and the applicable law, inform, and are apparent in, the resolutions passed by these authorized institutions as they sought to fulfil their responsibilities under the Charter of the United Nations and the Genocide Convention. In accordance with its responsibility, for example, the Security Council demanded, as early as 15 May 1992, in resolution 752 (1992), that "all forms of interference . . . by units of the Yugoslav People's Army

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[46]Page 474, para. 3.1.4.

[47]*Certain Expenses, Advisory Opinion, I.C.J. Reports 1962*, p. 151.

(JNA) . . . cease immediately" and that those units either be withdrawn or disbanded with their weapons placed under international monitoring. This resolution also called for an end to the forcible expulsion of persons and "any attempt to change the ethnic composition of the population". Evidently, the Members of the Council, after due deliberation, were able to conclude that the Yugoslav Army, sometimes acting with Bosnian Serb units, was engaged in activities which, multiplied many times over, as we shall show, must be seen as a constitutive element of genocide. That verdict cannot be dismissed, as the Respondent has sought to do, as "of dubious evidential value".

31. In passing a resolution which recognized both the role of the JNA — the Yugoslav Army — and also these activities which are ingredients of genocide, these other ingredients, the Security Council was responding not only to the reports of the media, non-governmental organizations, the information of the Council Members' own diplomatic and intelligence services, but also to information and documentation provided to the Council by the United Nations Secretary-General, who, on 12 May 1992, reported that the Serbs of Bosnia-Herzegovina, with the acquiescence and participation of the JNA — with the acquiescence and participation of the JNA — were engaged in a campaign to create "ethnically pure regions" through "the seizure and intimidation of the non-Serb population"[48]. The Secretary-General's report to the Security Council links the JNA directly to the deliberate killing of Muslims and to the creation of conditions calculated to bring about the physical destruction of their community[49], the very elements of genocide. Two weeks later, the Secretary-General again reported the continuing activities of the JNA against civilian populations "on a scale not seen in Europe since World War II"[50]. The Security Council took these reports of the Secretary-General to be factually credible and so, we urge, should you.

32. After further confirmation by the Secretary-General, on 30 May 1992, of the continuing intervention of the JNA in Bosnia and Herzegovina, the Security Council acted, adopting extensive economic and military sanctions against the former Yugoslavia "until the Security Council decides

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[48]S/23900, para. 5, 12 May 1992.

[49]*Id*., para. 6.

[50]S/24000, paras. 5 and 6, 26 May 1992.

that the authorities . . . including the . . . JNA have taken effective measures" to stop their prohibited activities[51]. Evidently, the Secretary-General's reporting was deemed credible by the Member States. That credibility extended to two essential determinations: that the acts amounted to extermination of Muslims in Bosnia and that responsibility for these acts is attributable to Belgrade.

33. Despite these measures, the Secretary-General continued to report, into 1993, that the JNA forces were not being withdrawn[52]. In response, the Council, again fully accepting the credibility of the Secretary-General's reporting, further tightened sanctions on Belgrade[53].

34. The General Assembly was equally explicit in identifying the elements of genocide being perpetrated in Bosnia and Herzegovina during this period and in specifically attributing responsibility to the FRY. On 18 December 1992, in resolution 47/80, the General Assembly noted the baleful record of

> "killings, torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes . . . the systematic terrorization and murder of non-combatants, the destruction of vital services, the besieging of cities and the use of military force against civilian populations and relief operations"

as a result of which "the Muslim population *[is] threatened with virtual extermination*" (emphasis added). The General Assembly added that Bosnian Serbs and "the Yugoslav Army and the political leadership of the Republic of Serbia *bear primary responsibility*" (emphasis added) and affirmed that States are to be held accountable for such acts "which their agents commit upon the territory of another State"[54]. These conclusions concerning the factual situation on the ground — the acts being committed that are tantamount to genocide, and the attribution of those acts to Belgrade — are not amateur guesswork. They are the synthesis of what national and international observers on the ground were reporting to the Governments whose representatives drafted these resolutions. They are anything but speculative.

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[51]Resolution 757 (1992) of 30 May 1992.

[52]A/47/869, 18 January 1993.

[53]Resolution 820 (1993), 17 April 1993.

[54]Resolution 47/147, 18 December 1992.

35. The next year, in resolution 48/153, the United Nations General Assembly again reiterated its finding of systematic offences "committed as a matter of policy" and amounting to genocide, for which responsibility, it found, lies in part with Bosnian Serbs but also with "political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro)" who share "primary responsibility for most of these violations". Permit me, Madam President, to reiterate the General Assembly's conclusion: that the leadership of Serbia and Montenegro, as a matter of policy, was engaging in activities in Bosnia that amounted to genocide. In the following year, the General Assembly, overwhelmingly, voted for resolution 44/88[55] which:

> "Condemns vigorously the violations of the human rights of the Bosnian people and of international humanitarian law committed by the parties to the conflict, especially those violations committed as policy, flagrantly and on a massive scale, by the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serbs."

There were 109 votes in favour of this resolution and none opposed. These votes were cast by senior diplomats representing every region, every ideology and every religion. The Governments that authorized their representatives to cast these votes were not engaging in attributional conjectures about vague facts. The resolutions thus must be given their due weight in the deliberations of this, the principal legal organ of the United Nations system.

36. These solemn determinations by the Security Council and the General Assembly, the former being acts of the Security Council acting under the mandate of its authority under Chapter VII of the United Nations Charter, surely deserve full faith and credit in this Court's deliberations as it fulfils its role as the principal judicial organ of the United Nations system. In numerous decisions and advisory opinions, this Court has made it clear that it is "concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes . . ."[56] In the instance of its recent Advisory Opinion on the wall in the Occupied Territories, as in many others, your Court has lent full credence to the facts reported in communications by the United Nations Secretary-General[57] and other official United Nations sources, and set out in the General

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[55] 20 December 1993.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* of 9 July 2004, p. 68, para. 161.

[57] *Id*., pp. 29-30, para. 57.

Assembly's request for an advisory opinion[58]. Among these are reports of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories, as well as relevant resolutions of the Security Council and the General Assembly. In the 1974 *Nuclear Test (Australia* v. *France)* case, this Court took note of the findings of the United Nations Scientific Committee on the Effects of Atomic Radiation reported to the General Assembly[59]. In the aforementioned *Congo* v. *Uganda* case, you took note of resolutions of the United Nations Security Council, reports of the Special Rapporteur of the Human Rights Commission, reports of the Secretary-General and of a United Nations panel of experts and the Porter Commission Report[60]. All of this of course, we have carefully footnoted in the written version of these pleadings. We will similarly present the Court with evidence of facts found by the principal organs of the United Nations system and of its experts and subsidiary organs: sources, we believe, entitled to the usual high degree of credence.

37. More graphically specific and detailed accounts of the killings, rapes, and concerted campaigns of ethnic cleansing and the destruction of Muslim religious and cultural property are provided by the Report of the Commission of Experts established in accordance with Security Council resolution 780 (1992)[61], the report of the Security Council Mission established pursuant to resolution 819 (1993)[62] and by the Reports of Tadeusz Mazowiecki, the Special Rapporteur of the Commission on Human Rights in 1993 and 1995[63]. Mazowiecki conducted his investigations, often *in situ*, while the events he was reporting were actually going on. In *Congo* v. *Uganda*, this Court said it would "prefer contemporaneous evidence from persons with direct knowledge"[64]. These reports are exactly that. They are set out in Part 3 of Bosnia and Herzegovina's pleadings of 15 April 1994 and its Annexes, and in later written pleadings. They constitute a deep well, one getting ever deeper, of factual evidence that is internally consistent and corroborative of an

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[58]*Id*., p. 7, para. 1. The resolution is: ES-10/14 of 8 December 2003.

[59]*I.C.J. Reports 1974*, p. 258, para. 18.

[60]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, para. 61.

[61]S/25274, 10 February 1993.

[62]S/25700, 30 April 1993.

[63]E/CN.4/1994/3, 5 May 1993 and E/CN.4/1996/9, 22 August 1995.

[64]*Congo* v. *Uganda, id.*, para. 61.

irrefutable design for deliberately planned and systematically executed genocide. In our oral pleadings, this Court will be reminded of some of these findings. You will be asked to see them as part of a seamless skein of other evidence we will present: evidence that is powerful, shocking and, after this Court has spoken, at last will become undeniable.

6. "Reliable evidence acknowledging facts or conduct unfavourable to the State"

38. I would like next to examine with you reliable evidence acknowledging facts or conduct unfavourable to the State uttering them. Again, in *Congo* v. *Uganda,* this Court said that it "will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them"[65]. We will be presenting you with such evidence against interest, not only by Republika Srpska co-President Mrs. Plavsić when she decided to plead guilty before the ICTY, but also in heedless proclamations filled with ambitious and murderous hatred by leaders of this genocide, without realizing in the least the legal implications of their braggadocio.

39. For example, during a public speech to the Assembly of the Republika Srpska, on 18-19 July 1994, the then President Radovan Karadzić announced "our first strategic goal: to drive our enemies by the force of war from their homes, that is, the Croats and Muslims, so that we will no longer be together in a state"[66]. The ICTY has heard direct testimony that Karadzić also said, "We will use this Serbian-supported war machine to make life impossible for civilians . . ."[67] In an intercepted telephone conversation of 12 October 1991, speaking of the Muslim population, Karadzić said, "they will disappear, that people will disappear from the face of the earth . . . They do not understand that there would be bloodshed and that the Muslim people would be exterminated."[68] Co-President Plavsić has confirmed that, by October 1991, she and the leadership — in her words — "knew and intended that the separation of the ethnic communities would include the permanent removal of ethnic populations, either by agreement or by force

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[65]*Id.*, para. 61.

[66]Dr. Donia Expert Report pp. 3-4; UNICTY *Prosecutor* v. *Milosević, Decision on Motion for Acquittal,* case No. IT-02-54-T, 16 June 2004, para.241.

[67]UNICTY *Prosecutor* v. *Milosević, id.* para. 240.

[68]UNICTY *Prosecutor* v. *Milosević, id.* para. 241; exhibit 613, tab 88 (intercepted communication with Gojko Djogo, dated 12 October 1991).

and . . . that any forcible removal of non-Serbs from Serbian-claimed territories would involve a discriminatory campaign of persecution"[69].

40. Can one imagine words from principal actors in this genocide that could more clearly disadvantage the State on whose behalf they were speaking? And that that State, for whom and with whom these leaders worked so intimately, hand-in-glove? In July 1991, Mr. Babić, a leader of the Serb-breakaway Republika Srpska Krajina, had a conversation with Milosević and Karadzić in which the Bosnian Serb leader develops his plans to bring about their grand design of Greater Serbia, and Milosević warns Babić not to get in Karadzić's way[70]. He meant: let Karadzić do his dirty work without hindrance. By his own words you will appreciate the total involvement of Milosević and his cohorts in Belgrade's massacre of non-Serbs in Bosnia.

7. The evidence of facts and the findings of law of the Yugoslav Criminal Tribunal

41. I would like next to discuss the evidence of facts and findings of law of the Yugoslav Criminal Tribunal, although I will do so briefly because it is the subject of much more discussion on my part tomorrow. Throughout these pleadings, we will be referring to the jurisprudence of the ICTY and, to a lesser extent, the ICTR. My colleague, Ms Magda Karagiannakis, will next speak of the Yugoslav Criminal Tribunal's procedures. It will be obvious that much of what we, and the world, know about the horrors of Srebrenica and the siege of Sarajevo, and much else, has become known due to the meticulous investigations, and tenacious judicial trial and appellate processes of these chambers. Both tomorrow and on Thursday I will be discussing in far more detail that jurisprudence.

42. These decisions will be seen to be particularly helpful in clarifying what the Genocide Convention means by requiring proof of "an intent to destroy", what is meant by "destroy", what is meant by the Convention's requirement of a demonstration that the intent to destroy was directed at the destruction of the group "in whole or in part" and, finally what was meant by requiring proof that the project of destruction aimed at destroying the group "as such". As to each of these difficult legal points we now have, as we did not in 1993, a rich jurisprudence which I will be summarizing.

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[69]UNICTY *Prosecutor* v. *Plavsić, Factual Basis for Plea of Guilty*, case No. IT-00-39 & 40, 30 September 2002, para. 10.

[70]UNICTY *Prosecutor* v. *Milosević, id.*, para. 253. The warning is not to "stand in Radovan's way".

43. Permit me a moment to summarize what I have said today: the facts of this case have had the benefit of an extraordinary period — almost a decade and a half — of fermentation. They have been established by the most credible sources of the international system. The multiple findings overlie and overlap one another and they are entirely confirmatory, each of all. They have been openly reported, ventilated, exposed to debate, cross-examination, investigative reporting and judicial as well as political decision making. There are no surprises here, although there may still, perhaps, be astonishment and, to the extent the world has retained its capacity to feel, there may still be horror.

44. But while all the evidence is there, either explicitly or implicitly, it has never been fully exposed before this Court. This body, uniquely the "conscience of humanity" can speak for that conscience. It, uniquely, has an opportunity to put together the myriad facts, total them up, proclaim the sum. That sum is genocide. Not the genocide of individual miscreants — that is the task of the ICTY — but the genocide for which the State must take responsibility.

45. Serbia so far has not done so. It remains responsible until it squares itself not only with Bosnia but with a world that has such a high-stakes interest in the Genocide Convention's still fragile capacity to protect us all.

Thank you, Madam President. I now ask you to give the floor to Ms Magda Karagiannakis.

The PRESIDENT: Thank you, Professor Franck. I call Ms Karagiannakis.

Ms KARAGIANNAKIS:

1. Madam President, Members of the Court. This is the first time I appear before you, and may I begin by saying that it is a great honour to appear before this Court.

2. During the course of Bosnia and Herzegovina's oral pleadings, the Court will be referred to sources emanating from numerous United Nations bodies including the United Nations International Criminal Tribunal for the former Yugoslavia[71].

[71] Hereinafter ICTY or Tribunal.

3. The purpose of this pleading is to address significant aspects of the criminal process at the United Nations ICTY. This will be done in order to explain why materials from this source may be considered as credible and reliable and therefore may be of assistance to this Court.

4. The independent United Nations Tribunal has spent more than ten years investigating and making extensively referenced and reasoned factual findings on specific topics of relevance to the case before this Court, that is, the events that occurred in the former Yugoslavia from 1991. It has done so using the conservative methods of its criminal investigative, trial and appellate process. Of course, evidentiary sources coming from the ICTY are delimited by factors including the temporal and territorial scope of particular cases. Nevertheless, the World Court may be assisted by the facts originating from this source, when considering the broader questions that it is faced with.

5. As the Court is aware, Bosnia has made use of publicly available ICTY sources in its Reply. The weight that they should be accorded has been addressed in those written pleadings, and has been addressed today[72].

6. Since the filing of our Reply, a significant body of materials has emanated from the ICTY. While much of the work of the Tribunal, as it relates to Bosnian Serb and Serbian defendants is irrelevant to this case, we have sought to limit ourselves by referring to the most pertinent materials. In general, it is safe to say that the Tribunal has confirmed and amplified the evidence and the facts set out in our Reply.

7. The public ICTY materials that may be of help to the Court include:

— indictments and pre-trial briefs;

— Rule 61 decisions;

— trial judgments;

— evidentiary sources from trial proceedings;

— decisions on motions for acquittal;

— sentencing judgments;

— appeals judgments; and finally,

— adjudicated facts.

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[72]Chapter 3, Section 2, paras. 30-41.

A. Indictments and pre-trial briefs

8. The ICTY process begins with an investigation conducted by the Prosecutor[73]. During an investigation the Prosecutor may question suspects, victims, witnesses, collect evidence and conduct on-site investigations. The Prosecutor may also seek the assistance of any State authority or relevant international body. Usually, this is done to obtain documents. At all times, States are obliged to co-operate with the Tribunal[74].

9. If the Prosecutor believes that there is a prima facie case, she prepares an indictment containing a concise statement of the facts and the crimes with which the accused is charged[75]. The indictment is brought before a single judge, along with supporting materials[76]. These materials are made up of individual pieces of evidence, usually in the form of witness statements and documents, which support each of the specific allegations in the indictment.

10. An indictment is then submitted to a judge. The reviewing judge examines each of the counts of the indictment, with the supporting materials, in order to determine whether a prima facie case exists against the accused[77]. A prima facie case for this purpose is made out if there is evidence, if accepted and not contradicted by the accused, upon which a reasonable finder of fact could be satisfied beyond reasonable doubt of the guilt of the accused[78]. If the indictment passes this test then it is confirmed and an arrest warrant is issued.

11. In sum, indictments constitute a source of facts that have been substantiated by evidence, tested by a judge and found to be proven to a prima facie standard.

12. The main indictments to which we refer the Court are those of officials of the FRY, who are indicted for participating in crimes in Bosnia and whose trials have not commenced, or have not yet concluded. They include the indictments against:

— Slobodan Milosović;

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[73]Article 18 of the Statute of the ICTY ("Statute") and Rule 39 of the Rules of Evidence and Procedure of the ICTY ("Rule" or "Rules").

[74]Article 29 of the Statute.

[75]Article 18 (4) of the Statute.

[76]Rule 47 (B).

[77]Article 19 (1) of the Statute and Rule 47 (E).

[78]ICTY *Prosecutor* v. *Milosević*, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, case No. IT-99-37-I 29 June 2001, para. 3.

— General Momcilo Perisić, who was the Chief-of-Staff of the Yugoslav Army[79];

— Jovica Stanisić, who was the Chief of the State Security Service of the Ministry of Internal Affairs of the Republic of Serbia — this is otherwise referred as the Serbian DB — and Franki Simatović, the Commander of the Special Operations Unit of the Serbian DB[80].

13. After an indictment is confirmed and before the trial begins, the accused will be provided with the Prosecutor's pre-trial brief[81]. This document summarizes and refers to the evidence from the investigation of the defendant, which is the basis of the indictment.

B. Rule 61 decisions

14. I now move to the source of Rule 61 decisions. The next ICTY source that this Court is referred to is Rule 61 decisions. Rule 61 provides that if, within a reasonable time, a warrant of arrest has not been executed in relation to an indictment, a judge who confirmed the indictment can invite the Prosecutor to report on the measures taken to execute the warrant. If the judge is satisfied that all reasonable steps have been taken to secure the arrest of the accused, a judge can order that the indictment be submitted by the Prosecutor to the trial chamber.

15. The Prosecutor then submits the indictment to the trial chamber in open court, together with all the evidence that was before the judge who initially confirmed it. The Prosecutor may also examine any witness whose statement has been submitted to the confirming judge, before the trial chamber.

16. If the chamber is satisfied on that evidence, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine and an international arrest warrant will be issued.

17. A Rule 61 decision is one step further than a confirmed indictment in terms of veracity. These proceedings are presented to three judges as opposed to one. Further, the evidence of the witness is heard orally as opposed to being contained in a statement. Accordingly, the judges have

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[79]ICTY *Prosecutor* v. *Perisić*, Amended Indictment, case No. IT-04-81, 26 September 2005.

[80]ICTY *Prosecutor* v. *Jovica Stanisić and Franki Simatović*, Amended Indictment, case No. IT-03-69, 9 December 2003.

[81]Rule 65*ter*.

an opportunity of observing the demeanour of the witness. The judges then produce a written and reasoned decision.

18. Rule 61 proceedings are a discretionary procedure. They were initiated at the Tribunal in its early years when there were few accused persons in custody. As time progressed and more indictees were arrested and brought to trial, the focus of the Tribunal's resources went to trials and appeals.

19. The most notable Rule 61 decision, to which the Court has already been referred in our Reply, is the Rule 61 decision in the Karadzić and Mladić case which dealt with the charges of genocide against these two notorious Bosnian Serb leaders[82].

C. Trial judgments

20. The next source is trial judgments. One of the more important Tribunal sources that may assist the Court is factual findings from trial judgments of the ICTY. These factual findings provide a wealth of materials that may be very relevant to the Court's task in this case.

21. The overriding burden of the Bench when conducting a trial at the ICTY is to ensure that the trial is "fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"[83].

22. The rights of the accused, which the chamber is bound to protect, are enumerated in Article 21 of the Tribunal Statute. This Article incorporates minimum guarantees set out in Article 14 of the International Covenant on Civil and Political Rights. They include:

— the accused's right to a fair and public hearing;

— the presumption that the accused is innocent until proven guilty; and

— the accused's right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf.

23. These basic principles are actually put into practice in the criminal proceedings before the trial chambers. Even before the trial process begins the accused is provided with extensive

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[82]ICTY *Prosecutor* v. *Karadzić & Mladić*, Review of the Indictment pursuant to Rule 61, case No. IT-95-5/18, 11 July 1996.

[83]Article 20.

pre-trial disclosure including the supporting materials to his indictment and relevant witness statements. He is also provided with the pre-trial brief summarizing the evidence against him.

24. Significantly, the accused is provided with evidence or information which may exculpate him[84]. He is, through his counsel, empowered to electronically access and search the hundreds and thousands of pages of evidence in the documentary collections of the Prosecutor. These collections include masses of original documents seized from, or provided by, State, military and civilian authorities of the former Yugoslavia, including those of Bosnia and Herzegovina, the Republika Srpska and Serbia Montenegro.

25. In addition to all of this material, the defence conducts its own investigations and collects its own evidence from whatever source it thinks is relevant.

26. It is these materials that the defence uses to test the evidence and the allegations of the prosecutor during trial. The defence can test the prosecutor's case through its cross-examination of witnesses and objections, if any, to the admissibility of documents and other tangible evidence.

27. Madam President, Members of the Court, the actual trials at the ICTY are nearly always marathons which only increase in length with the breadth of the crime base alleged, the time span of the crimes and the importance of the accused in a military or political hierarchy. The proceedings usually last months, if not years, and can involve hundreds, if not thousands, of documentary exhibits and numerous witnesses.

28. A trial chamber seised of a wide-ranging case, both temporally and geographically, may put a time-limit on the presentation of the case. This will usually be done pursuant to the chamber's general discretion to ensure an expeditious trial. In such cases, the prosecutor reduces the evidence she presents and focuses on critical or exemplary aspects of the charges against the particular accused in question. In this way the practicalities of ensuring that the accused has a speedy trial may affect the scope and the volume of evidence that is presented. This of course, in due course, will affect the scope and breadth of the trial chamber's final judgment.

29. During the trial, each party is entitled to call witnesses and present evidence[85]. Most importantly the parties' witnesses are confronted and tested through cross-examination by the

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[84]Rule 68.

[85]Rule 85.

opposing party. After the parties have finished examining witnesses, the judges will generally ask questions. In fact, a judge may, at any stage, put any question to any witness.

30. After the parties have finished presenting their cases, the chamber may then call additional witnesses or call upon the parties to produce additional witnesses or other evidence[86]. In this way, the judges may seek to get more evidence on issues that have not been answered to their satisfaction.

31. During the trial, parties may object to the admission of certain documents on grounds including lack of authenticity or reliability. Such objections are followed by either written or oral submissions. In some cases evidence is called regarding the authenticity of documents; and finally the judges will make a decision regarding admissibility.

32. In matters of admissibility the procedure of the Tribunal, with its unique mix of common law and civil law rules on procedure and evidence, does not purport to conform to any particular system or tradition. Rather, it is inspired by the need for a fair determination of the matter before it. The general rules regarding the exclusion of evidence applied in common law systems are not followed by the trial chambers as a rule. The main reason for this is that these rules were developed in the context of a system of trial by jury. In a jury trial there is the absolute need to keep away from the lay jurors, prejudicial material of little or no probative value that may be difficult for them to remove from their minds. Proceedings before the Tribunal are instead conducted by professional judges, who, by virtue of their training and experience are able to consider each piece of evidence which has been admitted, and determine its appropriate weight[87]. Thus the Tribunal judges follow in the tradition of this Court and have a broad discretion regarding the assessment of evidence. However, the Tribunal is different from the World Court in that it applies the highest standard of proof in international litigation, that is, the standard of "beyond reasonable doubt". I will address this standard later on in this pleading.

33. The chambers at the Yugoslav Tribunal are not bound by national rules of evidence[88]; however, if there is a *lacuna* in the rules a chamber may apply principles which will best favour a

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[86]Rule 98.

[87]See ICTY *Prosecutor* v. *Oric*, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, case No. IT-03-68-T, T.Ch. II, 21 October 2004, paras. 7 and 11.

[88]Rule 89.

fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. The expression "general principles of law" in this context has been interpreted by the Tribunal as being similar to the expression in Article 38, paragraph 1, *(c)*, of the Statute of the International Court of Justice. As such it has been construed to mean rules accepted in the domestic laws of all States. Therefore, this provision permits the ICTY chambers to apply the general principles of municipal jurisprudence if the Tribunal Rules are silent on a particular issue of evidence[89].

34. Rule 89 (C) sets out the basic standard of admissibility of evidence. It states that a chamber may admit any relevant evidence which it deems to have probative value. When determining whether to admit evidence, it has to consider the reliability of evidence because if it is not reliable, it cannot have either probative value or be relevant to the case[90].

35. Documentary evidence is often tested according to this standard. However, before documents are even presented for admission by the Prosecutor, a number of steps will be taken to confirm their authenticity and their relevance.

36. First, the source of the document will be indicative of its authenticity. Most often the document will be sourced to a collection of documents provided by a State or through the execution of a search warrant on a military or political body of one of the former Yugoslav Republics. Often, if the document is provided by State authority such as, for example Bosnia and Herzegovina or Serbia and Montenegro, the documents will have gone through an authentication or verification process by the State authorities before being provided to the ICTY. Second, incoming documents are read by the ICTY military and/or political analysts who seek to authenticate them by judging them against the form and the substance of other documents that are considered to be authentic. Often the Prosecutor will interview the authors or previous custodians of materials to ensure their authenticity. When the authenticity is challenged by the defence, the Prosecutor will lead evidence from these sources and the investigators who seized or received the materials in order to authenticate them.

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[89]ICTY *Prosecutor* v. *Delalic et al. Celebici*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, case No. IT-96-21-T, T. Ch., 28 May 1997, paras.8 and 10.

[90]ICTY *Prosecutor* v. *Blagojević et al.*, Decision on the Admission into Evidence of Intercept-Related Materials, case No. IT-02-60-T, T. Ch. I Sec. A, 18 December 2003, para. 14.

37. In order for a document to be admitted into evidence as a trial exhibit, the trial chamber must be satisfied that it "presents sufficient indicia of reliability to make out a prima facie case" for its admission[91]. Once a document is admitted, the trial chamber maintains a discretion as to what weight it is to be given in the final judgment.

38. The trial chamber's discretion regarding the admission of evidence and then, the weight it is to be accorded in the final judgment, is not unfettered. A chamber may "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial"[92]. Further, if the evidence is obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, the evidence must be excluded.

39. ICTY trial chambers are permitted to take judicial notice of certain facts. Rule 94 (A) states that a "Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof". This rule has been used by chambers to take judicial notice of historical background facts to the conflict in the former Yugoslavia.

40. In one case judicial notice was taken of

> "many public documents which bear substantial authority — in particular, resolutions of the United Nations Security Council and General Assembly, the Final Report of the United Nations Commission of Experts, reports of the United Nations Secretary-General, and declarations and statements from the European Community and the Conference on Security and Cooperation in Europe"[93].

In this case judicial notice was taken of general background, political and military facts, regarding the dissolution of Yugoslavia.

41. Many of these aforementioned United Nations documents have been referred to in Bosnia's Reply and will be referred to during the course of proceedings. The fact that a criminal tribunal has taken judicial notice of some of the facts contained in these documents only serves to bolster their probative value.

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[91]ICTY *Prosecutor* v. *Brdanin and Talić, Order on the Standards Governing the Admission of Evidence*, case No. IT-99-36-T, T. Ch. II, 15 February 2002, para. 18.

[92]Rule 89 (D).

[93]ICTY *Prosecutor* v. *Delalić et al*., Judgment, case No. IT-96-21-T, 16 November 1998, para. 90.

42. Finally and most significantly, a guilty finding may be reached only when the trial chamber is satisfied that the guilt has been proved beyond a reasonable doubt[94]. This is one of the cornerstones of the criminal process. It is only when this high hurdle of proof is met that an accused can be convicted before the Tribunal.

43. The "beyond reasonable doubt" standard is the highest standard of proof in international litigation[95]. This standard has been interpreted as meaning that the judge must reach a finding based on the highest probability that a certain sequence of acts led to the commission of the crime by the accused. Therefore, a judge cannot rely on the balance of probabilities but must affirm guilt by excluding all other reasonable possibilities. The transparency of this process is ensured by the duty to render a reasoned decision[96].

44. This standard has been confirmed and clarified by ICTY case law, specifically in relation to the high standard of proof applied to cases based on circumstantial evidence. The Appeals Chamber of the ICTY has held:

> "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him . . . Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[97]

45. In conclusion, Madam President and Members of the Court, it may be said that trial judgments of the ICTY are reliable and credible. The trial process requires a strict adherence to the principles and procedures of fair trial. The trial chamber applies a high standard of proof to the evidence before it. In doing so, it must assess the testimony of persons directly involved in the events in question and of experts. That testimony will have been tested through the rigorous cross-examination by experienced counsel and questioning from the Bench. Documents must also be tested before they are admitted and then the appropriate weight must be assigned to them in light

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[94]Rule 87 (A).

[95]C. F. Amerasinghe, *Evidence in International Litigation*, 235-239 (2005).

[96]S. Zappala, *Human Rights in International Criminal Proceedings* 97-100 (2005) and Rule 98 (C).

[97]ICTY *Prosecutor* v. *Delalić et al.* Judgment, case No. IT-96-21-A, 20 February 2001, para. 458.

of all the evidence. This is all done by a Bench of three professional, independent judges experienced in assessing large amounts of factual and technical evidence.

D. Evidentiary sources from trial proceedings

46. Madam President, Members of the Court, we will also be referring to evidentiary sources from the trial proceedings. These will include public exhibits, witness testimony and expert reports that have been admitted into evidence during trial.

47. This will be done in situations where particular proceedings are ongoing and there is no final merits judgment. There are two major ongoing trials at the ICTY that have particular relevance to your deliberations. The first is the case of Momcilo Krajisnik. He was the Speaker of the Assembly of the Republika Srpska, a member of the joint presidency of the Republika Srpska, during 1992 and the right-hand man to Radovan Karadzić. He has been charged with genocide for the events in Bosnia during 1992. The other and most relevant trial in progress at the moment is the case of Slobodan Milosević. He is charged with genocide in relation to the crimes that occurred in northern and eastern Bosnia, Sarajevo and Srebrenica, covering the time period from 1992 to 1995[98].

48. The particular evidence to which the Court will be referred by Bosnia will have passed the admissibility threshold and may be considered reliable, especially if it is consistent with other reliable evidence which has already been presented for your consideration.

E. Decisions on motions for acquittal

49. Decisions on motions for acquittal are yet another source to which reference will be made. At the close of the Prosecutor's case and before the opening of the defence case, the trial chambers usually hear a defence application asking the chamber to enter a judgment of acquittal on all or some of the counts of the indictment on the basis that there is no evidence capable of supporting a conviction. After hearing the parties, the trial chamber will render a decision.

[98]ICTY *Prosecutor* v. *Krajisnik*, case No. IT-00-39 and 40 and ICTY *Prosecutor* v. *Milosević*, case No. IT-02-54-T.

50. Thus, even before the end of the trial and at the end of the prosecution case, the sufficiency of the evidence is assessed by a trial chamber[99].

51. The test for determining whether the evidence is insufficient to sustain a conviction is: whether there is evidence upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge. This test is not whether the trier of fact *would* actually arrive at a conviction beyond reasonable doubt on the prosecution evidence, but whether it could do so[100].

52. There are two decisions on motions for acquittal which may be most relevant the Court in this case. The first and most important one comes from the Milosević case[101] and the second one comes from the Krajisnik case[102]. Madam President, Members of the Court, in both of these cases, the respective trial chambers have found that there was sufficient evidence upon which a tribunal of fact could be satisfied that genocide was committed in certain municipalities in Bosnia and Herzegovina and that both accused *could* be found guilty of this.

F. Sentencing judgments

53. Additional sources of facts from the ICTY which will be presented are sentencing judgments. Among the potentially helpful sentencing judgments are those made in respect of persons who have pleaded guilty. In these cases, the sentencing judgment is accompanied by a statement of the defendant's agreed facts, which underlie his or her plea of guilty.

54. A guilty plea must be voluntary and informed. It will not be accepted by a trial chamber unless it is satisfied that there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on the lack of any material disagreement between the parties about the facts of the case[103].

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[99]Rule 98*bis*.

[100]ICTY *Prosecutor* v. *Jelisić*, case No. IT-95-10-A, Judgment, 5 July 2001, para. 37.

[101]ICTY *Prosecutor* v. *Milosević*, Decision on motion for Judgment of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 183.

[102]*Prosecutor* v *Momcilo Krajisnik*, Judgment on the Defence Motion for Acquittal under Rule 98*bis*, case No. IT-00-39-T delivered orally on Friday 19 August 2005, transcript pp. 17128-17130.

[103]Rule 62*bis*.

55. In satisfying itself, the chamber can obtain direct testimony from the accused and can also question him in order to clarify ambiguities[104]. If it is satisfied with the facts which underlie the plea, the chamber will proceed to a sentencing hearing. This may also include witness testimony and other evidence which speaks to the crimes which have been committed and other factors which may aggravate or mitigate sentence.

56. There have been an increasing number of guilty pleas in the Tribunal which may be worthy of this Court's consideration. Those who have admitted their guilt include:

— army officers such as Dragan Obrenović and Momir Nikolić, who pleaded guilty in relation to the events surrounding the Srebrenica massacre and the mass forcible transfer;

— camp commanders and guards such as Dragan Nikolić, with respect to Susica camp in Vlasenica municipality, and Goran Jelesić for his role in Luka Camp in Brcko; and

— municipal officials such as Stevan Todorović and Blagoje Simić, regarding the ethnic cleansing of Bosanski Samać and the detention of Muslims in that municipality.

57. There are two accused who have pleaded guilty that merit particular attention. The first is Miroslav Deronjić. He was the President of the Serbian Democratic Party, otherwise referred to as the SDS, and subsequently of the Crisis Staff, in Bratunac municipality. He worked with Bosnian Serb leaders and organs of the SFRY to commit crimes against humanity upon the non-Serb people in his municipality. Accordingly, his sentencing judgment and related facts and testimony are pertinent to this case[105].

58. Finally and most significantly, this Court will be presented with the sentencing judgment and agreed facts of Mrs. Biljana Plavsić, a member of the collective presidency of the Republika Srpska during 1992 and a close associate of Radovan Karadzić. She agreed that she participated in a joint criminal enterprise, along with officials and organs of the FRY, to persecute Muslims across 37 municipalities in Bosnia during 1991 and 1992. The goal of this persecution was to achieve the ethnic separation of Serbs and Muslims in Bosnia by force. As such, the factual findings in the judgment and Mrs. Plavisić's agreed facts are certainly relevant to the issues in this case[106].

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[104]See ICTY *Prosecutor* v. *Deronjić*, Sentencing Judgment, case No. IT-02-61-S, 30 March 2004, para. 29.

[105]ICTY *Prosecutor* v. *Deronjić*, Sentencing Judgment, case No. IT-02-61-S, 30 March 2004.

[106]ICTY *Prosecutor* v. *Plavsić*, Sentencing Judgment, case no. IT-00-39 and 40/1, 27 February 2003 and ICTY *Prosecutor* v. *Plavsić*, Factual Basis for Plea of Guilt, case no. IT-00-39 and 40, 30 September 2002.

G. Appeals Chamber judgments

59. I now move to the source of Appeals Chamber judgments. As in all fair criminal systems, there is a right of appeal. The results of such appeals are reflected in detailed and reasoned Appeals Chamber decisions issued by the five judges of the ICTY Chamber. Bosnia will be referring the Court to Appeals Chamber judgments: obviously, these judgments count among the most reliable of the ICTY sources.

60. Article 25 of the ICTY Statute allows both convicted persons and the Prosecutor to appeal *(a)* an error on a question of law invalidating the decision; or *(b)* an error of fact which has occasioned a miscarriage of justice. The Appeals Chamber may affirm, reverse or revise the decisions taken by the trial chambers.

61. An appeal in the Tribunal is not a retrial. The Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the trial chamber in the body of the judgment or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal[107].

62. With respect to errors of fact, the party alleging this type of error must provide evidence both that the error was committed and that this occasioned a miscarriage of justice. The Appeals Chamber has regularly pointed out that it does not lightly overturn factual findings because first instance courts are in a better position than the Appeals Chamber to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial. The Appeals Chamber will not call the findings of fact into question where there is reliable evidence upon which the trial chamber might reasonably have based its findings.

63. Where a party contends that a trial chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether such an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a trial chamber's decision when there is an error of law invalidating it. Therefore, not every error of law leads to a reversal or revision of a decision of a trial chamber[108].

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[107]ICTY *Prosecutor* v. *Plaskić*, Judgment, case No. IT-95-14-A, 29 July 2004, para. 13.

[108]ICTY *Prosecutor* v. *Kunarac et al.*, Judgment, case No. IT-96-23, IT-96-23/1-A, 12 June 2002, paras. 11, 12 and 38.

H. Judicial notice and adjudicated facts

64. Another source of factual findings from the ICTY is a special category of facts that have been adjudicated at one or more trials and have been confirmed on appeal or not appealed at all. Thus these facts have been tested and upheld in the ICTY and are of the highest order of reliability. This category of factual findings is referred to as adjudicated facts.

65. In this case a trial chamber may, "at the request of a party or *proprio motu*, . . . decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings"[109]. While trial chambers may take judicial notice of factual findings in other cases they may not take judicial notice of the legal characterization of the facts.

66. By taking judicial notice of an adjudicated fact, a trial chamber establishes a well-founded presumption for the accuracy of the fact, which therefore does not have to be proven again at trial. However, the adjudicated fact may, subject to that presumption, be challenged at that trial.

67. Three basic requirements should be met before a trial chamber may consider a fact as adjudicated. First, the fact must not be the subject of a reasonable dispute between the parties. Second, the said fact must have been the subject of adjudication in the previous case and not based upon agreement between parties in previous proceedings or a plea agreement. Finally, the facts from a previous judgment must not have been appealed or, if subjected to appeal, they must have been upheld by the Appeals Chamber[110].

68. A pertinent example of an adjudicated facts decision by a trial chamber has been made in the Krajisnik case[111]. In that case the chamber took judicial notice of hundreds of adjudicated facts relating to the following topics: the role of the JNA in Bosnia, the takeover of Prijedor and the camps in that municipality, the takeover of Foca and the detention facilities and sexual assaults in that municipality and finally the takeover of Visegrad municipality.

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[109]Rule 94 (B).

[110]ICTY *Prosecutor* v. *Milosevic*, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, IT-02-54-AR73.5, 28 October 2003.

[111]ICTY *Prosecutor* v. *Krajisnik*, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, IT- 00-39-PT, 24 March 2005.

Conclusion

69. In conclusion, Madame President and Members of the Court, the Tribunal materials that have been referred to and the factual findings in judgments in particular, are subjected to multiple stages of rigorous testing by the parties and ultimately by the trial and appeals judges of the ICTY. This testing has been conducted according to the thorough and conservative standards of the Tribunal's criminal process. As such, these sources may be considered as credible and reliable and, therefore, may be of great assistance to the Court in this case.

70. Madam President, that concludes my pleadings on this topic. I see that I have concluded earlier, and I apologize for that. However, it may be a good opportunity to have an early lunch?

The PRESIDENT: Thank you very much, Ms Karagiannakis. I understand from that last remark that the next pleadings of Bosnia and Herzegovina will begin after the lunch break. The Court will now rise and resume at 3 p.m.

The Court rose at 12.50 p.m.