CR 2006/12

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Wednesday 8 March 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 mercredi 8 mars 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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Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

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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 Laura Dauban, LL.B (Hons),

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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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comme assistants.

The PRESIDENT: Please be seated. The Court meets today to begin the hearing of the first round of oral argument of Serbia and Montenegro. In the same way as Bosnia and Herzegovina, Serbia and Montenegro will dispose for this purpose of ten sessions. I now give the floor to the Agent of Serbia and Montenegro, Mr. Radoslav Stojanović.

M. STOJANOVIĆ : Merci, Madame le président. Je commencerai avec un discours d'introduction sur notre plaidoirie.

L'INTRODUCTION

1. Et tout d'abord, Madame le président, permettez-moi de vous féliciter, au nom de la Serbie-et-Monténégro, de mon gouvernement et au nom de mon équipe, pour votre élection à la présidence de cette honorable Cour qui est la plus prestigieuse institution judiciaire. Permettez-moi également de saisir cette occasion et de féliciter les nouveaux membres de la Cour de leur élection.

2. Madame le président, Messieurs les juges, c'est un grand honneur pour moi de prendre la parole devant vous aujourd'hui, mais permettez-moi de vous dire que je ne le fais pas sans peine et affliction. Car, en tant qu'agent je suis chargé de défendre mon pays contre une accusation du crime le plus grave de la civilisation moderne.

3. Cette guerre a fait beaucoup de victimes et de destructions, et qui plus est, elle a engendré le manque de confiance ainsi que l'intolérance, voire la haine entre les peuples de l'ex-Yougoslavie. Cela est malheureusement évident encore aujourd'hui, plus de dix ans après la fin des guerres. Cela engendre en moi-même une sorte de peur pour l'avenir des Etats créés après le démembrement sanglant de la Yougoslavie.

4. Le requérant a exposé devant cette Cour une façon de voir les événements des années quatre-vingt-dix en ex-Yougoslavie. Cette vision est liée à l'histoire entière des relations entre les groupes ethno-nationaux qui participaient à ce conflit. Cette histoire a été sanglante à un tel point que la Yougoslavie est devenue une exception par rapport à l'histoire mondiale en général. Malheureusement, cette histoire comprend aussi la guerre en Bosnie-Herzégovine de 1992-1995.

5. Les événements en Bosnie-Herzégovine lors de la guerre sont l'objet de ce procès. Nous n'avons pas l'intention de nier les crimes, tout au contraire, comme je démontrerai un peu plus tard,

sans égard aux problèmes internes et la crise, la Serbie-et-Monténégro a commencé en 2000 de se diriger vers la confrontation avec le passé et la punition des crimes. Cependant, l'objet de ce procès devant cette Cour n'est pas le prononcé des peines aux auteurs des crimes, ce qui est la tâche du Tribunal pénal international pour l'ex-Yougoslavie et des tribunaux nationaux. Ce procès, avec tout le respect que j'ai pour une décision judiciaire et surtout pour une décision de votre Cour, ne pourra contribuer à la prise de conscience du passé et apportera l'approfondissement des problèmes entre les nations surtout en Bosnie-Herzégovine.

6. Pendant la guerre en Bosnie-Herzégovine, de graves crimes ont été commis. Le peuple musulman bosniaque a subi de pires souffrances car il avait ses victimes dans la guerre avec les Serbes, avec les Croates et même dans un conflit intramusulman en Bosnie occidentale. Nous avons vu et entendu des choses atroces dans ce prétoire lors de ce procès, mais la question qui se pose est de savoir si les allégations du requérant sont exactes. Nous allons démontrer que le requérant a présenté de nombreuses allégations inexactes.

7. Madame le président et Messieurs les juges, avant de répondre à toutes ces questions, la Cour doit déterminer si elle peut se prononcer sur cette requête. Afin d'être certaine qu'elle a la compétence à connaître de la présente affaire, la Cour doit déterminer si le défendeur avait accès à la Cour au moment du dépôt de la requête et si la Cour avait par rapport au défendeur, la compétence en application de l'article IX de la convention sur le génocide. Nous allons démontrer que le défendeur n'avait pas accès à la Cour et que la compétence ne peut être établie en application de l'article IX de la convention sur le génocide. Le manque de la compétence devrait mettre fin à ce procès, cependant nous allons débattre sur le fond car la Cour a décidé de déterminer la compétence ensemble avec le fond de cette affaire, ce qui nous donnera l'occasion de démontrer que les allégations du requérant ne peuvent être acceptées.

8. Ce procès concerne l'établissement de la responsabilité de l'Etat pour le génocide. Premièrement le requérant doit démontrer que les événements et les crimes allégués ont eu lieu et deuxièmement que ces événements, allégués par le requérant, peuvent être attribués au défendeur. Nous allons démontrer que le requérant ne peut démontrer ni l'un ni l'autre. Enfin, si la Cour établit que les crimes étaient commis, elle devra les qualifier juridiquement. La qualification juridique est la tâche de chaque Cour, c'est également la tâche de cette Cour qui est aussi l'organe

judiciaire principal des Nations Unies. Les actes criminels qui étaient commis en Bosnie-Herzégovine sont des actes graves, mais la question de leur qualification juridique est une question juridique que cette Cour devra déterminer. S'agissant du génocide, le Tribunal pour l'ex-Yougoslavie a adopté une conception large de ce crime, mais malgré cette conception large, le Tribunal n'a pas trouvé que le génocide ait été commis en Bosnie-Herzégovine, sauf à Srebrenica. Le jugement du général Krstić rendu dans l'affaire Srebrenica est fondé sur une théorie particulière, contestée par la doctrine et qui, de plus, n'est pas suivie par d'autres chambres du Tribunal.

9. Je veux souligner que nous sommes, par notre position dans ce procès, obligés de nous défendre et donc de nier des allégations du requérant, mais en aucun moment nous ne voulons nier les souffrances des victimes que nous ne pouvons et ne voulons pas oublier.

10. Madame le président, je suis certain que je n'ai nul besoin de rappeler que l'histoire des Balkans est chargée de tragédies. Nous avons commencé à croire que nous avions dépassé cette histoire lorsque des millions de gens à Belgrade et dans la Serbie entière ont renversé le dernier régime communiste en Europe qui a fait beaucoup de mal à son propre peuple. Malheureusement, ce régime a laissé derrière lui un héritage plein de lourdes dettes, y compris le présent procès.

11. Je me trouve moi-même dans une situation paradoxale : je dois défendre, devant cette Cour, le régime auquel j'étais opposé depuis le début. En effet, j'étais l'un des treize fondateurs du premier parti d'opposition en Serbie, le parti démocrate, fondé en 1989. Il s'agit d'un parti qui avait auparavant une tradition presque centenaire terminée lorsque les communistes sont montés au pouvoir en 1945. Nous, l'opposition en Serbie, nous avions des conflits avec le régime criminalisé, nous avons aussi subi les attaques et les chantages des organisations criminelles qui permettaient l'enrichissement des criminels aux dépens des intérêts d'un peuple appauvri.

12. En même temps, nous n'avions pas d'autres ressources sauf les donations bénévoles des membres et des partisans de notre parti. Le régime faisait tout pour empêcher l'union des partis d'opposition qui, unis, auraient pu déjà en 1990 gagner les élections et renverser le régime de Milosevic. En effet, lors des premières élections «démocratiques» du 9 décembre 1990, le parti au pouvoir n'a gagné, malgré tous les avantages financiers et la propagande dans les médias, que 42,5 % de voix.

13. Plus tard, je donnerai une image détaillée de la lutte futile de l'opposition serbe qui avait choisi l'opinion antimilitariste et qui était, par conséquent, pour la solution pacifique des conflits politiques en Yougoslavie. L'opposition luttait contre les prémisses de base du système communiste, contre la criminalisation de la société et pour une administration démocratique et responsable. J'aimerais convaincre cette Cour que je vais sortir de ma position paradoxale par mon obligation professionnelle de contribuer, avec mes collègues, par cette défense, à découvrir la vérité. Je souligne que sans la vérité on ne peut s'attendre à la justice que nous attendons de cette Cour honorable.

Le renversement du régime en Serbie le 5 octobre 2000

14. Enfin, le 5 octobre 2000, un nombre imposant de plusieurs millions de Serbes a libéré la Serbie du pouvoir du régime de Milosevic. C'était en même temps un grand soulagement pour la communauté internationale, car elle a été libérée des soucis concernant l'établissement de la paix et de la sécurité dans les Balkans.

15. La question qui se pose maintenant est de savoir ce que l'opposition serbe a trouvé dans les institutions de l'Etat dans lequel elle a pris le pouvoir. Le grand soutien du peuple serbe n'a pas pu détruire immédiatement tous les éléments criminels de la société, les organisations extrémistes et surtout elle ne pouvait rétablir immédiatement l'économie détruite de notre pays, trouver le travail pour un million de chômeurs et trouver la solution pour un million de retraités qui en majorité vivaient dans une misère totale. De plus, elle n'avait pas les moyens d'assurer un logement acceptable et digne de ce nom pour des centaines de milliers de réfugiés et encore moins faire revenir en Serbie des centaines de milliers de jeunes gens qui avaient quitté la Serbie et émigré partout dans le monde. Tout était détruit : le système de l'éducation, le système de l'assurance, le système juridique. La corruption régnait partout. Tout ce que je viens d'énumérer montre que le nouveau Gouvernement serbe a hérité, en 2000, d'un Etat dont le système ne fonctionnait pas. L'opposition a donc hérité d'un chaos total.

16. L'opposition démocratique en Serbie est, soutenue par le peuple, montée au pouvoir mais elle ne disposait pas d'importants outils du pouvoir, à savoir la police et l'armée. En effet, un grand nombre d'employés dans ces deux institutions provenaient de l'ex-régime et sabotaient les

décisions du nouveau pouvoir. Par conséquent, le nouveau régime avait beaucoup de difficultés à imposer la politique pouvant apporter des solutions aux problèmes intérieurs et qui était conforme au droit international. En tout cas, le nouveau pouvoir tendait à remplir les obligations de la Serbie-et-Monténégro envers la communauté internationale.

17. Ainsi, le nouveau régime démocratique a immédiatement montré sa volonté de s'acquitter de ses obligations envers la communauté internationale. Celle-ci a répondu positivement en montrant qu'elle était prête à l'aider dans la solution des problèmes hérités de l'époque précédente. Le nouveau pouvoir a tout de suite commencé à arrêter les personnes accusées par le procureur du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) et de les extrader au Tribunal. Ainsi, le nouveau pouvoir n'a pas hésité à arrêter et transférer au TPIY l'ancien président de la Serbie et de la Yougoslavie, Slobodan Milosevic. D'autres hauts fonctionnaires de la Serbie-et-Monténégro ont été arrêtés ou se sont rendus volontairement et ont tous été transférés au Tribunal. Nous pouvons cité le président de la République de Serbie, Milan Milutinovic, certains chefs de la police secrète ainsi que plusieurs ministres et chefs de l'état-major de l'armée yougoslave.

18. La Serbie-et-Monténégro a rempli dans les deux dernières années une grande majorité de ses obligations envers le Tribunal pénal international pour l'ex-Yougoslavie qui concernaient la libération des témoins de l'obligation du secret d'Etat et du secret-défense afin de leur permettre de contribuer, par leurs témoignages, à l'établissement de la vérité sur les événements en Bosnie-Herzégovine dans la guerre qui a eu lieu de 1992 à 1995. Jusqu'à cette date plus de trois cent cinquante personnes, membres de la police et de l'armée ont été libérées de l'obligation du secret d'Etat et du secret-défense. Par ailleurs, la Serbie-et-Monténégro a communiqué au Tribunal plus de mille documents. La Serbie-et-Monténégro n'a jamais eu aucun avertissement du Conseil de sécurité en raison de non respect des obligations internationales car elle n'a jamais failli à se conformer aux obligations qui lui ont été imposées par une chambre du Tribunal pour l'ex-Yougoslavie.

19. Je veux aussi souligner que la Serbie-et-Monténégro a pris la décision d'ouvrir ses archives d'Etat justement pour établir la vérité et pour permettre l'établissement de la responsabilité individuelle des auteurs de ces actes criminels.

Les mesures du nouveau gouvernement pour normaliser la situation en Serbie

20. Le nouveau gouvernement démocratique en Serbie est en train de s'acquitter de ses obligations qui lui incombent sur le fondement de la résolution du Conseil de sécurité concernant la formation du TPIY, car il a délivré au Tribunal les individus qui occupaient des positions principales dans l'ancien régime de la Serbie-et-Monténégro. La coopération de la Serbie-et-Monténégro avec le Tribunal de La Haye n'est pas uniquement basée sur l'obligation de l'Etat envers les Nations Unis mais également sur la détermination du nouveau gouvernement de démontrer sa volonté à établir la vérité et à juger toutes les personnes soupçonnées des violations graves du droit international.

21. Il ne s'agit pas d'une tâche facile et simple pour le nouveau gouvernement qui avait au sein de son propre Etat les groupes criminels organisés, liés à certaines institutions étatiques. La détermination à éliminer les organisations criminelles en utilisant les instruments juridiques et en établissant l'état de droit en Serbie-et-Monténégro a coûté la vie au premier ministre du premier gouvernement démocratique serbe après la chute du communisme, docteur Zoran Djindjic. Le procès contre ses meurtriers est actuellement en cours à Belgrade.

22. Le nouveau gouvernement démocratique en Serbie a constitué une Cour spéciale, chargée de juger les crimes de guerre, les crimes contre l'humanité et les organisations criminelles. Ceux qui ont commis les crimes sur les territoires de l'ex-Yougoslavie, de la Croatie, à travers la Bosnie-Herzégovine, jusqu'au Kosovo sont traduits devant la justice. La plupart de ses malfaiteurs ont déjà été condamnés. Ceux qui ont fusillé les six jeunes Bosniaques en filmant l'exécution, dont l'enregistrement vidéo, diffusé à la télévision dans le monde entier, nous a été montré dans ce prétoire, sont jugés par cette cour. Ce film a dénoncé les assassins qui, jusqu'à ce moment, se sont promenés en toute liberté, mais qui dès la découverte de cet enregistrement vidéo ont été arrêtés. Il y aura malheureusement sans doute d'autres cas semblables à l'avenir. Rappelons qu'encore aujourd'hui l'on découvre des criminels de la deuxième guerre mondiale qui ont réussi à se cacher pendant plus de soixante ans.

23. Cependant, la volonté politique de la Serbie démocratique de nos jours est évidente : la Serbie-et-Monténégro veut à tout prix libérer la société des gens qui sont devenus dangereusement agressifs dans la guerre (ou, tout simplement, sont nés dangereux) et qui sont, par conséquent,

dangereux pour le développement de la vie normale en Serbie. Malheureusement, il s'agit d'une tâche à longue durée, pour les générations actuelles mais également pour les générations futures.

24. Les années quatre-vingt-dix ont été marquées par les guerres abominables en ex-Yougoslavie. Mes collègues et moi, nous étions contre la guerre. Donc, je ne voudrais pas continuer la guerre des paroles. Nous sommes persuadés que la vraie paix devrait être établie par nous-mêmes et non par quelqu'un d'autre. Il faudrait donc confronter des points de vue, avouer des maux commis, chercher ensemble la vérité et les causes de ces maux et montrer la bonne volonté des uns et des autres. Nous sommes prêts pour le dialogue de toute façon; qu'il y ait une décision sur le fond ou non. Nous ne fuyons pas des responsabilités et nous sommes prêts à chercher une solution par le dialogue. Je suis d'avis que c'est la seule voie vers la paix durable, vers de bonnes relations avec nos voisins et vers la coopération.

25. Aujourd'hui la Serbie démocratique est en train de négocier avec l'Union européenne sur les accords de partenariat et de coopération. C'est là que nous voyons notre voie et qui est la voie où nous ne pouvons nous engager sans la Croatie et sans la Bosnie-Herzégovine. Tôt ou tard nous allons nous diriger tous vers les intégrations euro-atlantiques. Et comment prendra-t-on ce même chemin si l'on s'accuse mutuellement de crimes différents qui sont en fait la négation de la civilisation dans laquelle nous aimerions vivre ensemble ?

26. J'ai peur de l'avenir, car l'on peut bel et bien s'attendre aux problèmes dans les conflits politiques éventuels portant sur les différends issus du passé qu'on est en train de vouloir régler ou qu'on voudra régler devant les cours nationales et internationales. Il serait donc nécessaire d'établir une communication constante entre les Etats concernés par ces différends afin de pouvoir résoudre les problèmes dans les dialogues directs. Je suppose qu'aujourd'hui il est possible de le faire car je ne peux imaginer que nous n'avons pas tiré les leçons de notre passé récent dans lequel on a manqué plusieurs occasions parce qu'on refusait les négociations directes. Ces négociations auraient pu aboutir à un compromis grâce auquel on éviterait la transformation des conflits politiques en conflits armés.

27. J'ai peur des phénomènes qu'on peut observer en Bosnie-Herzégovine, Croatie et Serbie. Ces phénomènes sont des indicateurs clairs que des groupes extrémistes créés sur les plates-formes nationalistes et religieuses existent encore.

28. Je crains que la décision de n'importe quelle cour (nationale ou internationale, y compris la Cour internationale de Justice, et sans égard si la Cour accepte ou rejette la demande du requérant) ne résulte dans une augmentation de l'extrémisme général. Je n'ose pas exprimer ici mes craintes liées à la naissance d'une atmosphère politique dans laquelle des groupes extrémistes arriveraient à attirer et faire bouger les masses. La présence internationale est par conséquent encore nécessaire en Bosnie-Herzégovine afin d'atténuer des passions et des idées nationalistes qui pourraient être réveillées par ces organisations extrémistes (qui, malheureusement, existent encore sur le territoire de l'ex-Yougoslavie) dans le peuple.

29. En raison de mes craintes concernant l'avenir des relations de nos peuples, j'ai déjà lancé plusieurs fois des propositions visant une solution diplomatique de nos conflits. C'est indubitablement la seule voie qui peut aboutir aux positions acceptables pour les deux côtés. De plus, cette voie diplomatique minimiserait le danger de l'extrémisme. Certes, il est impossible d'exclure complètement l'apparition de la haine, mais elle serait plutôt orientée vers son propre gouvernement, ce qui est sans doute moins grave que l'extrémisme xénophobe dirigé vers d'autres groupes nationaux ou religieux.

30. Je ne veux pas pourtant dire que j'ai peur de perdre ce procès. Peut-être s'agit-il de ma déformation professionnelle : je suis professeur de droit international et j'ai un respect profond vis-à-vis de la Charte des Nations Unies et par conséquent, vis-à-vis de la Cour internationale de Justice dont le Statut est une partie constitutive de la Charte. Pour cette raison je n'ai aucune peur de la décision de cette Cour, tout au contraire j'ai beaucoup de confiance en son sens de justice.

31. Je dois rappeler que depuis la fin de la guerre en Bosnie-Herzégovine et en Croatie plus de dix ans se sont écoulés. Il est important de souligner ce fait car l'on dit souvent que trop peu de temps s'est écoulé depuis la fin de la guerre pour qu'une réconciliation puisse avoir lieu. Je dois souligner que peu de temps après la fin de la deuxième guerre mondiale, la Yougoslavie était pleine de touristes allemands, des compétitions sportives avec des Allemands étaient organisées et les relations économiques avec l'Allemagne étaient très développées. Bien que je ne connaisse pas de rapports officiels de la police yougoslave de l'époque, je sais que des incidents particuliers impliquant les touristes allemands n'ont pas eu lieu, aucune voiture ou autobus allemand n'a été démoli et, bien évidemment, il n'y avait pas de bagarre.

32. En conséquence je considère que, dans notre cas actuel, il serait temps de commencer les négociations et le dialogue menant vers la réconciliation des peuples qui, en même temps, éliminerait toute possibilité d'un nouveau conflit dans la région.

Le processus de réconciliation

33. La réconciliation ne signifie pas l'oubli. Tout au contraire ! Il ne faut pas oublier le mal qui a été commis. Cependant la réconciliation ne signifie pas le droit à la vengeance. La vengeance est la justice barbare, malheureusement celle-ci est toujours présente dans les relations humaines, individuelles ou collectives. Mais j'aimerais encore une fois répéter que la justice est lente mais atteignable. Tout malfaiteur doit être jugé et cette image doit s'engraver dans la mémoire des futures générations.

34. Le processus de réconciliation qui a été initié en Serbie, Croatie et Bosnie-Herzégovine devrait montrer que la justice doit être rendue premièrement par la condamnation des individus coupables des crimes. La justification de ces individus, si souvent entendue, selon laquelle «leur seul but était la protection de leur peuple» ne peut excuser les actes commis. Les auteurs individuels des crimes doivent donc être jugés et punis pour les crimes commis et afin d'atteindre cet objectif, chaque groupe ethno-national devrait décider de traduire devant les instances judiciaires tous ceux qui ont commis des crimes pour «défendre leur peuple».

35. Je suis d'avis que nous, les ex-Yougoslaves, devons et pouvons réaliser ce qui a été réalisé en Europe après la deuxième guerre mondiale. Je pense que le moment est arrivé où nous pouvons le faire à condition que nous fassions des efforts. Malheureusement, jusqu'à présent nous n'avons pas fait suffisamment d'efforts. Ma proposition reste la même, que la Cour internationale de Justice rende la décision sur le fond ou qu'elle ne la rende pas, nous devrions commencer, après le prononcé de la décision de la Cour ou même avant, un dialogue sur la réconciliation nationale.

36. Madame le président, Messieurs les juges, je voudrais rappeler ce que l'agent adjoint du requérant a déclaré dans son discours le 27 février 2006. M[e] van den Biesen a déclaré que «the Respondent never advanced any *«[s]ubstantive or serious initiative for any «amicable solution»*»[1]. Cette déclaration tout simplement ne correspond pas à la vérité. Le défendeur a pris l'initiative afin

[1] CR 2006/2, p. 26, par. 29.

de trouver un règlement amiable, mais la réponse qu'il a obtenue du requérant était un rejet sans appel.

37. Un certain nombre de nos initiatives a été même porté à l'attention de la Cour. Par exemple, dans notre lettre dans laquelle nous avons informé la Cour du retrait de notre demande reconventionnelle, nous avons avancé deux raisons principales de ce retrait : premièrement nous avons souligné que : «[n]ew facts have put the issue of jurisdiction into a different perspective and introduced conclusive evidence that this Court did not have and does not have jurisdiction over the Federal Republic of Yugoslavia *ratione personae*». Deuxièmement, nous avons indiqué que

> «The withdrawal of the counterclaim is supported by the fact that the new Government of the Federal Republic of Yugoslavia strongly believes that the period of conflicts and disputes must be left behind, and that the two countries have to move toward an era of cooperation and amicable resolution of pending disputes.»[2]

38. Nous pouvons citer d'autres tentatives du règlement à l'amiable que nous avons portées à la connaissance de la Cour. Ainsi dans sa lettre à la Cour en date du 22 octobre 2003 et en réponse à la lettre du requérant, notre agent a écrit «[w]e would like to reiterate one more time that Serbia and Montenegro is ready at any time — either directly, or with the assistance of neutral mediators — to start negotiations on a peaceful settlement of all outstanding disputes»[3].

39. Le 24 novembre 2003, encore en réponse à une lettre du requérant, le défendeur a soumis à la Cour la lettre dans laquelle il a écrit «We would also like to reiterate that Serbia and Montenegro has been taking steps towards reconciliation.»[4]

40. Nous avons pris l'initiative à plusieurs reprises car nous sommes persuadés que les négociations sont le meilleur chemin vers la réconciliation. Depuis le début de mon engagement dans ce procès j'ai continué les efforts de mes prédécesseurs afin de persuader la Bosnie-Herzégovine qu'un règlement diplomatique serait le meilleur chemin vers la réconciliation qu'un procès judiciaire. J'ai considéré et je considère toujours que les négociations diplomatiques peuvent nous mener vers une solution acceptable pour les deux Parties. De l'autre côté la décision judiciaire, sans égard à son verdict, pourrait provoquer l'insatisfaction de l'une ou de deux Parties.

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[2] Lettre de l'agent de la Yougoslavie au greffier de la Cour internationale de Justice du 20 avril 2001.

[3] Lettre de l'agent de la Serbie-et-Monténégro au greffier de la Cour internationale de Justice du 22 octobre 2003.

[4] Lettre de l'agent de la Serbie-et-Monténégro au greffier de la Cour internationale de Justice du 24 novembre 2003.

41. Nous n'avons jamais posé les conditions du dialogue. Nous avons uniquement cherché l'occasion de présenter notre point de vue à l'autre côté. Nous n'avons jamais obtenu cette occasion.

42. Comme je l'ai dit, Madame le président, Messieurs les juges, le requérant ignorait ou rejetait nos initiatives. Permettez-moi de présenter juste quelques exemples des rejets que nous avons rencontrés.

43. En 2003, M. Softic, l'agent du requérant, a déclaré que la Bosnie-Herzégovine n'a aucun intérêt de trouver un accord avant le prononcé de l'arrêt de la Cour dans ce procès. Ensuite, en 2004, M. Sulejman Tihic, à l'époque le représentant des Musulmans en présidence de la Bosnie-Herzégovine, a déclaré que «la présente requête est une question où aucune transaction ne pourrait être envisagée et que la Serbie-et-Monténégro ne peut que reconnaître qu'elle a participé dans l'agression et dans le génocide en Bosnie-Herzégovine. Ce serait la seule transaction acceptable.»[5]

44. Madame le président, Messieurs les juges, je pense qu'il était approprié et équitable que la Serbie-et-Monténégro fasse le premier pas vers la réconciliation et vers le règlement à l'amiable. Nous l'avons fait, nous avons retiré notre demande reconventionnelle et nous avons renouvelé nos demandes d'un règlement à l'amiable. Je souhaite réitérer encore une fois notre volonté de régler à l'amiable le litige qui nous oppose à la Bosnie-Herzégovine.

45. Madame le président et Messieurs les juges, permettez-moi de souligner plusieurs choses qui ont l'air optimiste. Premièrement, c'est le retour des réfugiés dans leurs villages et villes en Bosnie-Herzégovine. D'après les informations de UNHCR de 1996 et jusqu'en septembre 2005 le nombre total de personnes qui sont retournées dans les endroits où ils vivaient avant le commencement de la guerre s'élève à 453 464 dont 209 672 Musulmans bosniaques, 86 581 Croates, 153 160 Serbes et 4051 autres (UNHCR; Municipal authorities; OHR Brcko district; DP Associations and NGO). Cela réveille un certain optimisme car conformément à l'article 1 de l'accord de Dayton (Dayton Peace Agreement, Ann. 7, Art. 1) «Le retour prochain des

[5] Le journal *Danas*, 29 juillet 2004, p. 8, reprise de la déclaration du journal de Sarajevo *Dnevni avaz.*

réfugiés et de personnes déplacées est un but très important de la solution des conflits en Bosnie-Herzégovine.»

46. En Serbie il y a encore plusieurs centaines de milliers de réfugiés provenant du Kosovo, de Croatie, mais également de Bosnie-Herzégovine. Encore actuellement environ 150 000 réfugiés de Bosnie-Herzégovine se trouvent en Serbie. Vous avez cela dans le dossier des juges.

47. Dans son discours d'inauguration, le nouveau président de la Serbie, Boris Tadic, a exprimé plusieurs notes optimistes que j'utiliserai pour finir cette déclaration préliminaire qui elle-même pourrait être vue comme assez pessimiste.

> «Nous saluons et soutenons l'avancement de tous nos voisins vers les intégrations européennes et euro-atlantiques car c'est une garantie de l'avenir stable et paisible de toute notre région. Pour cette raison il faut développer des relations solides avec nos voisins, des relations fondées sur le respect mutuel. C'est le point crucial dans la politique extérieure de la Serbie-et-Monténégro.
>
> La coopération avec le Tribunal international de La Haye est une priorité de notre politique intérieure et extérieure car elle est une avant-condition de toutes les intégrations européennes et euro-atlantiques et car elle confirme notre attachement aux valeurs européennes.
>
> L'histoire des actes criminels dans les Balkans est longue et dans ce sens tous les peuples de cette partie de l'Europe du sud-est doivent les uns aux autres les excuses historiques. La confrontation avec les actes criminels commis par soi-même est toutefois la condition de la vie commune avec les voisins ainsi que de l'établissement des valeurs européennes dans notre partie de l'Europe.»

48. La Serbie-et-Monténégro considère que jusqu'au commencement du débat sur les mérites elle a le droit de s'attendre à ce que la Cour examine la question de sa propre compétence dans ce procès.

49. A ce propos et tout d'abord, M. Saša Obradović, coagent exposera les inexactitudes factuelles dans les écritures du requérant et dans les différents rapports auxquels le requérant se réfère.

Nous présenterons ensuite nos arguments relatifs à la compétence, au génocide et à l'imputabilité des événements en Bosnie-Herzégovine à la Serbie-et-Monténégro.

Je vous prie, Madame le président, de donner la parole au coagent M. Sasa Obradovic. Merci.

The PRESIDENT: Thank you, Mr. Stojanović. I now call the Co-Agent of Serbia and Montenegro, Mr. Obradović.

Mr. OBRADOVIĆ:

SOURCES OF EVIDENCE

Introduction

1. Madam President, distinguished Members of the Court, I am honoured to appear for the first time before the International Court of Justice as a representative of my country — Serbia and Montenegro. Following the introductory speech of our Agent, and before turning to matters of procedure, I would like to submit to your attention some observations regarding the allegations and the evidence submitted by the Applicant. This seems particularly appropriate in the light of the grave assertions advanced by the applicant State.

2. First of all, I will try to establish some clear examples of false and inaccurate allegations contained in the Applicant's written submissions.

3. Noting that such allegations are based on certain documents, quoted mainly accurately by the applicant State, it is my further task to demonstrate that those documents cannot be considered as credible evidence in any judicial procedure.

4. Furthermore, I challenge some sources of evidence proposed by the Applicant for the first time in the oral proceedings.

5. The general purpose of this presentation is to demonstrate that the vast amount of documentation submitted by the Applicant does not fulfil the required standard of proof, set out in the Judgment of this honourable Court in the *Corfu Channel* case, as follows: "The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt."[6]

Some examples of incorrect allegations of the applicant State

A. The attack on Zvornik

6. Madam President, allow me to start with the first example. In the Reply, the applicant State quoted information from the Final Report of the United Nations Commission of Experts (the

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

Bassiouni Commission) that in the town of Zvornik "2,500 men were killed on 9 and 10 April [1992]" [7].

7. To begin with, let us see what was really stated in the Report of the Bassiouni Commission. The document reads: "According to one report, 2,500 men were killed on 9 and 10 April."[8] The report that was referred to in the Final Report of the Bassiouni Commission is the declassified document of the United States Department of State, No. 94-60. However, this United States document that is supposed to be the key evidence on the crimes committed in Zvornik in the time described by Ms Dauban as the beginning of ethnic cleansing cannot be found in annexes to the United Nations Commission of Experts' Final Report.

8. Since the key document was missing, we decided to investigate the matter further, and the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia kindly assisted the Government of Serbia and Montenegro by providing the requested declassified document of the United States Department of State, which in the meantime had been transferred to the Prosecutor's database, together with other materials of the Bassiouni Commission. As a result, the research could be continued and the Court can see today that the "key document" is actually a record of an anonymous Bosnian refugee's witness account. That was clearly stated in the warning given in paragraph 4 of the United States declassified document, as follows:

> "This report on the debriefing of a Bosnian refugee is being provided because it meets current criteria for firsthand information on the situation in Bosnia-Herzegovina. *The allegations of atrocities have not yet been confirmed by separate accounts. Please note that this information is raw data that has not been subjected to an editorial or analytical review process, and it should be carefully assessed for accuracy and validity prior to further use*."[9]

9. The Applicant has failed to provide any information on the circumstances under which the statement of that anonymous refugee was given, or any further information in this regard.

10. Madam President, for the last 12 years the ICTY Office of the Prosecutor has been making significant efforts to investigate crimes committed in the town of Zvornik. It is certain that numerous witnesses must have been examined, and that the best investigation equipment has been

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[7]Reply, Chap. V, p. 100, para. 64 and p. 256, para. 433.

[8]Final Report of the United Nations Commission of Experts, Ann. X, para. 387. (This document can be found in the Peace Palace Library.)

[9]United States Department of State, declassified document No. 94-60, para. 4 (folder with new public documents, Vol. III, doc. No. 1); emphasis added.

used on the site. Nevertheless, in the Amended Indictment against Mr. Slobodan Milosevic dated 21 April 2004, it was alleged that "[i]n Zvornik town, (on 9 April 1992), 15 Bosnian Muslim and Bosnian Croat males were executed by Arkan's soldiers"[10]. The same allegation appeared in the Consolidated Indictment against Ms Biljana Plavsic dated 7 March 2002, to which she pleaded guilty. No ICTY judgment with findings about events in Zvornik has so far been rendered.

11. The Respondent thus considers that it is obvious that the allegation of 2,500 men killed in Zvornik on 9 and 10 April 1992 is a clear example of an enormous exaggeration.

B. The alleged massacre at the Zvornik hospital

12. This example does not stand alone. The Applicant has very often alleged crimes that have never happened. If we keep our attention to the evidence related to the town of Zvornik, we will also find an allegation that a horrible massacre took place at the local hospital in the second half of May 1992. The Applicant claims that Serb soldiers shot 36 Muslim adult patients on the hospital grounds and broke necks and bones of 27 Muslim children. This allegation is repeated three times in the Applicant's written submissions:

— firstly, it appears in the Memorial[11], based on the information from the Third United States Submission to the United Nations[12];

— secondly, it is repeated in the Reply[13], Chapter V, based on the information given in the letter of the Permanent Representative of Austria to the United Nations addressed to the Secretary-General[14];

— thirdly, it is for the second time repeated in the Reply[15], Chapter VIII, based on the information contained in the Final Report of the United Nations Commission of Experts[16].

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[10]ICTY, case IT-02-54-T, *Prosecutor* v. *Slobodan Milosevic*, Amended Indictment (Bosnia and Herzegovina) dated 21 April 2004, Schedule A, para. 16. (This document is available at www.un.org/icty.)

[11]Memorial, p. 32, para. 2.2.2.10.

[12]Third United States Submission to the United Nations, No. S/24791, dated 5 November 1992 (Annex 32 to Part 2 of the Memorial).

[13]Reply, Chapter 5, p. 123, para. 142.

[14]Letter of the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, S/25613, dated 13 April 1993, pp. 9 and 10 (folder with new public documents, Vol. III, doc. No. 2).

[15]Reply, Chapter 8, p. 640, para. 295.

[16]Final Report of the United Nations Commission of Experts, Ann. IV, para. 369 (Peace Palace Library).

13. Having read the three sources carefully, one might assume that all of them have been based on the account of only one witness. Is it the same person? Although the answer to this question should have been given by the Applicant, which presented the allegation to the Court, the following facts point to such a possibility.

14. Chronologically, the first of the three sources used by the Applicant is the Third United States submission, published on 5 November 1992. According to this document, the statement relating to this crime was taken from "a former employee of the Zvornik medical center . . .".

15. The second source is the Austrian Submission, published on 13 April 1993. According to this Submission, the statement relating to the massacre was given again by a refugee who was a former employee of the Zvornik medical centre: "witness was working as an X-ray assistant". In addition, it is stated that the witness, before giving the statement to an Austrian official, also gave a statement to a United States diplomat. Although this witness alleged that he was standing about 50 metres from the place of execution, he could not give precise information on the number of victims.

16. The third source, the United Nations Final Report, is actually based on another report, submitted by the Ludwig Boltzmann Institute from — and it is very indicative — Austria, the report that was sent to the United Nations Commission of Experts on 6 April 1994.

17. In spite of these reports, the alleged massacre in the Zvornik hospital has never appeared among the crimes described in the ICTY indictments. It was mentioned only once by the protected witness B 1780 at the trial of Mr. Slobodan Milosevic, but the witness said that he had not been an eyewitness to the massacre, although he had been a patient at the same hospital. The person who told him about the alleged killings of three children was "Ramo, the X-ray technician who had worked in the Zvornik hospital"[17].

18. The respondent State considers that the three reports mentioned by the applicant State cannot be used as evidence before the Court, because it remains unknown even who was the witness who gave the original information on the alleged crime to the different international bodies.

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[17]ICTY, case IT-02-54, *Prosecutor* v. *Slobodan Milosevic*, transcripts, 29 October 2003, p. 28255 (folder with new public documents, Vol. III, doc. No. 17).

We may only assume that his nickname was Ramo. Therefore, the credibility of this testimony cannot be examined before this Court.

19. On the other hand, Serbia and Montenegro has submitted to the Court several documents (Annexes 41-47 of the Counter-Memorial), as strong confirmatory evidence that such a crime has never been committed.

20. For the purpose of this oral procedure, I would only like to remind you of the statement of the protected witness KG, which can be found in Annex 45 of the Counter-Memorial[18]. This statement was given on 27 December 1994 to the investigating judge of the Zvornik court, Mr. Vaso Eric, in accordance with the rules of the criminal procedure of the former Yugoslavia. The witness was a doctor who worked at the Paediatric Department of the Zvornik Medical Centre. She said that the Paediatric Department had 12 Muslim children who could not be returned to their parents because of the outbreak of fighting. All those children were treated in a professional way. After a few months, the children were sent back to their parents thanks to the efforts of the International Red Cross. At the time of her testimony, four children from the Zvornik Social Centre, who had previously also been in the hospital, were in the Rehabilitation Centre in Igalo, Republic of Montenegro. Their stay in Igalo was sponsored by the Norwegian Embassy. No Muslim child died in the hospital. No one maltreated children at the paediatric ward.

C. The killings at the Prijedor detention facilities

21. The examples of the false and inaccurate allegations in the Applicant's written submissions are numerous. In the Reply the applicant State presented an incredible estimation that "fifty to sixty people died in Trnopolje every day"[19]. Trnopolje was a detention facility in the Prijedor municipality. The estimation was based on the Despatch of the Bureau of Public Affairs of the United States Department of State, dated 12 April 1993[20]. From Annex 46 to Part 2 of the Memorial, the Court can see that the original source for this allegation was again a statement of an

[18]Annex 45 to the Counter-Memorial, Vol. II, p. 431.

[19]Reply, Chapter V, p. 210, para. 330.

[20]Despatch of the Bureau of Public Affairs of the United States Department of State, dated 12 April 1993, No. 15, p. 245 (Annex 46 to Part 2 of the Memorial).

anonymous witness. If this estimation was true, and bearing in mind that Trnopolje existed for about four months, the number of victims according to this source would have to be at least 6,000.

22. However, the judgment rendered in the ICTY *Stakic* case found that 28 people altogether had been killed in Trnopolje[21].

23. The numbers of victims in the other two detention facilities in the Prijedor municipality — Keraterm and Omarska — were magnified too. The Applicant's Reply contains an allegation that "the number of prisoners killed at Keraterm was at least ten per day during the approximately three months that the camp was operated"[22]. The claim relies on the Final Report of the Bassiouni Commission of Experts[23]. At the same time, the Reply contains an allegation that "the estimates of prisoners killed at Omarska vary between at least 1,000 and 5,000"[24]. The source is again the United Nations Final Report[25], as well as a book by Mr. Roy Gutman *A Witness to Genocide*.

24. No ICTY judgment has found any evidence that could confirm the estimations alleged by the applicant State. Six judgments have so far dealt with horrible events in Omarska and Keraterm and unfortunately, the two detention facilities definitely were the places where atrocities were committed[26]. However, in the light of the facts established in these six judgments, the killings in the Prijedor were committed sporadically and against individuals who were not a significant part of the group[27]. The killings were neither committed on such a large scale nor so systematically as the applicant State wants to portray by quoting the Bassiouni Commission's Final Report and other documents made in a similar way.

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[21]ICTY, case IT-97-24, *Prosecutor* v. *Milomir Stakic*, Judgement, 31 July 2003, paras. 226-227 (www.un.org/icty).

[22]Reply, Chapter V, p. 219, , para. 353.

[23]Final Report of the United Nations Commission of Experts, Annex VIII, para. 1932 (Peace Palace Library).

[24]Reply, Chapter V, p. 226, para. 369.

[25]Final Report of the United Nations Commission of Experts, Annex VIII, para. 1795 (Peace Palace Library).

[26]*Tadic* Judgement of 7 May 1997, *Sikirica et al*. of 3 September 2001, *Kvocka et al*. of 2 November 2001, *Stakic* Judgement of 31 July 2003, *Banovic* Judgement of 28 October 2003 and *Brdjanin* Judgement of 1 September 2004.

[27]For example, see ICTY, *Sikirica et al*. case, Judgement on Defence Motion to Acquit, 3 September 2001, para. 95.

The credibility of the Final Report of the United Nations Commission of Experts

25. Madam President, let me briefly explain now why the Respondent considers that the Final Report of the United Nations Bassiouni Commission of Experts of 28 December 1994 cannot be treated as a reliable source of evidence in any judicial procedure.

26. The United Nations Commission of Experts was appointed on 26 October 1992 pursuant to Security Council resolution 780 of 6 October 1992. The Commission commenced its activities in November 1992 and concluded them in April 1994. In May 1994, the database and all information gathered by the Commission were forwarded to the Office of the Prosecutor of the International Criminal Tribunal.

27. The probative value of the Final Report of the Bassiouni Commission depends on the probative value of the original sources that were incorporated in the report. The Applicant often tried to present certain facts as being established by the United Nations Final Report. This report actually, in most instances, contains the information coming from external sources.

28. Although the Commission's findings award equal weight to all information, regardless of its sources, it is obvious that the original sources did not employ the methodology of investigation that would guarantee the accuracy of their allegations.

29. For that reason, the Commission of Experts itself noted, in paragraph 6 of the Introduction to Annexes of the Final Report, that "[w]ith some exceptions, the information and allegations contained therein *have not been verified*".

30. Also, in paragraph 11 of the same document, the Commission concluded:

> "It was not the Commission's intention or part of its responsibility to prepare cases for criminal prosecution or to pronounce upon the guilt of individual persons. These are tasks for prosecutors and judges, who will form their own views after thorough investigation and deliberation, in accordance with the 'rule of law'."

31. The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, who keeps all materials of the Bassiouni Commission, *has never used any part of the Final Report as evidence before the ICTY Chambers*. Actually, the Final Report was never meant to be used as evidence at all, in any proceedings. It was rather an initial attempt to collect materials so as to convince the Security Council to take a more robust action in connection with the events in the former Yugoslavia.

32. In the Judgment of 19 December 2005, in the case concerning *Armed Activities on the Territory of the Congo*, the Court, faced with a vast amount of evidentiary materials, found that

> "The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts."[28]

33. Thus, when the Court decided to accept the Report of the Porter Commission, which had obtained evidence in credible manner "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", the Court noted that the Report, since its publication, had not been challenged to its credibility, which had been accepted by both Parties[29].

34. The Final Report of the Bassiouni Commission of Experts does not have that quality. It cannot be more credible or reliable than the original reports upon which it was based. Those reports, however, were often — on the Commission's own account — unverified, unverifiable, unreliable, inaccurate and/or incomplete. The following statement by the Commission itself, taken from Annex I.A to the Final Report should suffice to illustrate these claims:

> "Since the submitting sources did not always provide sufficient information to support their allegations, the incidents reported and entered into the database frequently lacked necessary information. Difficulties in data entry and analysis occurred because of the following common problems of the reports received:
>
> (1) sources upon which reports were based were usually not verifiable because many reports did not disclose original sources;
>
> . . . . . .
>
> (4) reports of the same incident sometimes varied significantly in important details;
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> . . . . . .
>
> (6) numbers of victims or other variables were often reported within large ranges;
>
> . . . . . .
>
> (7) names of victims, witnesses and perpetrators were often intentionally omitted from the reports . . ."[30]

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[28] Case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment*, 19 December 2005, para. 58.

[29] *Ibid.*, para. 61.

[30] Final Report of the United Nations Commission of Experts, S/1994/674, Annex I.A, para. 21(Peace Palace Library).

35. Madam President, distinguished Members of the Court, the Respondent considers that, in spite of enormous efforts of the members of the United Nations Commission of Experts and their staff, the Final Report cannot be treated as a reliable source of evidence before the Court. Each piece of information contained in the Final Report must be evaluated with a view to its source, on a case-by-case basis. At any rate, such presentation should be the task of the applicant State.

The credibility of the States' submissions to the United Nations

36. The same principle should apply to all States' submissions, regardless of whether they served as sources for the Final Report of the Bassiouni Commission, or were directly cited in the written submissions of the applicant State. In the case of the United States and Austrian submissions that concern the alleged killings committed in Zvornik, I believe that their unreliability has already been clearly demonstrated.

37. The next example can be found in the Memorial. Invoking the Report to the United Nations submitted by the Permanent Representative of Canada on 10 March 1993, the Applicant alleged that "[a]t the beginning of April 1992, more than 1,000 Muslim civilians were killed by Serb paramilitary forces in Bijeljina"[31]. According to the cited Report, this information was based on "a credible Canadian source"[32].

38. There has not been any confirmation of this allegation for the last 13 years. The ICTY Prosecutor charges Mr. Slobodan Milosevic with "[t]he killing of at least 48 Bosnian Muslim and/or Bosnian Croat men, women and children in the town of Bijeljina on 1-2 April 1992"[33]. The two other accused before the ICTY, Mr. Radovan Karadzic and Mr. Momcilo Krajisnik, face the same charges. Thus, it follows that the number of killings that the ICTY Prosecutor found to have occurred in Bijeljina is 20 times less than stated in the Applicant's source — the Canadian Report.

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[31]Memorial, p. 30, para. 2.2.2.2.

[32]Report to the United Nations submitted by the Permanent Representative of Canada on 10 March 1993, No. S/25392, p. 14 (Annex 25 to Part 2 of the Memorial).

[33]ICTY, case IT-02-54-T, *Prosecutor* v. *Slobodan Milosevic*, Amended Indictment (Bosnia and Herzegovina) dated 21 April 2004, Schedule A, para. 1 (www.un.org/icty).

What can be inferred from the ICTY indictments?

39. Madam President, I would now turn to the probative value of the ICTY indictments. It should be noted that each indictment is a document based on evidence that we cannot see. The ICTY indictments are not the evidence as such, and nothing can be confirmed by them. Therefore, the Respondent cannot accept the Applicant's position, often expressed in the Reply, and repeated here by Ms Karagiannakis, that allegations can be confirmed by the ICTY indictments[34].

40. However, the Respondent considers that the ICTY indictments can be used as *argumentum a contrario* in a case when the Applicant's allegations are not contained in them. The ICTY Prosecutor's Office has a duty to prosecute and to try to prove beyond a reasonable doubt all serious violations of international humanitarian law committed in the former Yugoslavia since 1991. The alleged killing of more than 1,000 civilians in Bijeljina, if it had really occurred, should surely be defined as a crime against humanity and should be a matter for an indictment.

41. Still, for more than ten years, the investigation teams of the ICTY Prosecutor have had at their disposal all documents and sources of information on which Bosnia and Herzegovina based its written submissions in this case. They have had the possibility to conduct investigations, interview victims and witnesses, review documents from State archives. The co-operation between the Federation of Bosnia and Herzegovina and the Prosecutor of the ICTY has never been questioned and a failure of the Federation authorities to provide all relevant information on the alleged crimes, committed by the Serb forces, to the investigators of the Tribunal is beyond imagination. And still, no single ICTY indictment mentions the alleged killing of 1,000 men in Bijeljina.

The reports of Mr. Tadeus Mazowiecki, Special Rapporteur of the United Nations Commission on Human Rights

A. The attack on Kozarac

42. Madam President, there is no evidence that more than 1,000 civilians were killed in Bijeljina, just as there is no evidence for another unsupported allegation that 5,000 people were executed in the town of Kozarac, in Prijedor municipality.

43. In this context, the Applicant alleged:

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[34]See Reply, Chapter V, p. 138, para. 180; CR 2006/3, pp. 39-40, paras. 8-13 (Ms Karagiannakis).

> "On or around 25 May 1992, Serbian artillery began to shell the town of Kozarac, followed by an attack by tanks and infantry. The town was virtually destroyed and of the population of 15,000, around 5,000 are estimated to have been executed by the Serb forces."[35]

44. This allegation was based on the report of Mr. Tadeus Mazowiecki, Special Rapporteur of the United Nations Commission on Human Rights, dated 17 November 1992[36].

45. However, the ICTY judgment in *Brdjanin* case, dated 1 September 2004, did not confirm this allegation. It was stated in paragraph 403 of the judgment that "[t]he Trial Chamber is satisfied that at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area"[37].

46. The Applicant's counsel, Professor Franck, considers that the facts established by the ICTY should assist the Court in order to reach its own conclusions[38]. Let us then see how the nature of the attack of the Serbian forces on the Kozarac area has been established in the ICTY judgment in the *Stakic* case.

To start with, the conflict in the Kozarac area commenced after the Muslim personnel at the checkpoint near the village Hambarine had opened fire on a car with six soldiers, four Serbs and two Croats, killing two and wounding four of them.

Second, it was followed by an attack of extremists among Muslim population on a military column of the Republic of Srpska army at the village of Jakupovići near Kozarac.

Third, at that time 1,200-1,500 armed members of the Muslim unit called the "Green Berets" were present in the Kozarac area.

Fourth, the units of the army of the Republic of Srpska asked for the handover of weapons in order to secure the area before making a search for perpetrators, but Muslim units refused to comply.

Fifth, there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants.

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[35]Memorial, p. 32, para. 2.2.2.11.

[36]Report of the Special Rapporteur of the United Nations Commission on Human Rights, Mr. Tadeus Mazowiecki, dated 17 November 1992, No. S/24809, p. 8, para. 17d (Annex 33 of Part 2 to the Memorial).

[37]ICTY, case IT-99-36, *Prosecutor* v. *Radislav Brdjanin*, Judgement, 1 September 2004, para. 403 (www.un.org/icty).

[38]CR 2006/5, p. 19, para. 34 (Prof. Franck).

Sixth, the summary report from the 1st Krajina Corps of the Republic of Srpska army of 27 May 1992, quoted in paragraph 147 of the *Stakic* judgment, indicated that five Serbian soldiers had been killed and 20 wounded during the operation[39].

47. There is no doubt that the army of the Republic of Srpska abused its right to self-defence. The *Stakic* judgment finds that disproportionality and the use of armed force against the civilian population rendered this attack illegal. Such a finding about the events in Kozarac is still far from the initial thesis of the Applicant, that the Serbian forces intended to destroy, in whole or in part, the group of Muslims, as such.

Madam President, I think that it is a good time now for a short break, if you agree?

The PRESIDENT: Yes, thank you. The Court will rise for ten minutes.

The Court adjourned from 11.25 to 11.35 a.m.

The PRESIDENT: Please be seated. Mr. Obradović.

Mr. OBRADOVIĆ:

B. Hambarine

48. Madam President, referring to the same Report of the United Nations Special Rapporteur of the Commission on Human Rights, the Applicant claims that probably as many as a 1,000 people died in the attack of Serbian forces on the village of Hambarine in May 1992[40].

49. That assertion is once again incorrect. The *Stakic* indictment before the International Criminal Tribunal mentioned "a number of people killed in Hambarine from May through July 1992"[41]. The known names of the victims have been listed in the Annex to the indictment, and we can see today that there are altogether 11 names. The Prosecutor added that "[t]he victims included other persons whose identities at this time are either not known to or cannot be confirmed

[39]ICTY, case IT-97-24, *Prosecutor* v. *Milomir Stakic*, Judgement, 31 July 2003, pp. 40-46, paras. 139-158 (www.un.org/icty).

[40]Reply, Chapter V, p. 85, para. 22.

[41]ICTY, case IT-97-24, *Prosecutor* v. *Milomir Stakic*, Fourth Amended Indictment dated 10 April 2002, Annex, para. 44/3 (www.un.org/icty).

by the Prosecution"[42]. The Fourth Amended Indictment was dated 10 April 2002, almost ten years after the attack on Hambarine had taken place.

50. If, after a long-term investigation of the ICTY Prosecutor's Office, including all available documentation as well as numerous witnesses and expert-reports, merely 11 names of the victims are known, the respondent State considers that it is impossible that a total number of victims in Hambarine was "as many as 1,000".

51. All this, however, shows that the reports of the United Nations Special Rapporteur of the Commission on Human Rights, Mr. Tadeusz Mazowiecki, were based on the same sources of information as the Final Report of the Bassiouni Commission, and for that reason, they cannot be treated as a reliable source of evidence.

52. In this regard, the Respondent fully agrees with the observation of the ICTY Trial Chamber in the *Stakic* case, given in the judgment of 31 July 2003, that:

> "most witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony."[43]

53. It is well known that testimonies before the Trial Chambers are still more incontestable than those before the investigators, the same as the testimonies before the investigators who possess all necessary experience and equipment for criminal cases are more reliable than those given to observers, such as the distinguished United Nations Special Rapporteur of the Commission on Human Rights.

The incorrect references to the United Nations Human Rights Committee

54. As stated in the Reply, the Applicant allegedly has "the consistent approach to this case" that the evidence presented as a rule "originates from independent sources"[44].

55. However, the Applicant several times refers to the Report of the United Nations Human Rights Committee, dated 27 April 1993, in order to show examples of ethnic cleansing[45]. The Applicant is creating an impression that specific allegations are to be found *in* the United Nations

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[42] *Ibid.*

[43] ICTY, case IT-97-24, *Prosecutor* v. *Milomir Stakic*, Judgement, 31 July 2003, para. 15 (www.un.org/icty).

[44] Reply, Chapter VIII, p. 466, para. 5; also, CR 2006/02, p. 27, para. 37 (Mr. van den Biesen).

[45] Memorial, p. 30, para. 2.2.2.2; see also p. 46, para. 2.2.5.2; also p. 49, para. 2.2.5.10.

Human Rights Committee Report, although Annex 26 to Part 2 of the Memorial clearly shows that these allegations are contained in a document written by the applicant State and *submitted to* the Human Rights Committee, which has never confirmed those allegations.

56. The Respondent will try to avoid any debate on the credibility of the Applicant's own sources made during wartime, but this example clearly demonstrates that great caution is necessary in examining each piece of information presented by the Applicant in this case.

The credibility of the NGOs' reports

57. Madam President, I have so far demonstrated that various United Nations bodies, tasked with gathering information on war crimes in the former Yugoslavia, even though acting with the best of intentions, did not employ adequate investigative methods and consequently their results cannot be considered as reliable. Likewise, if the United Nations bodies lacked the necessary capacities for a proper investigation in wartime, this even more applies to many non-governmental organizations and their various reports and letters. Let me present one clear example.

58. In the Reply, the Applicant alleged that "[c]hildren ranging from babies to five year olds, were thrown into ovens by the guards . . . [T]hose mothers who resisted giving up their children were killed on the spot."[46]

59. The Applicant did not even say where and when that alleged monstrous crime had been committed. Once again the applicant State quoted the Final Report of the Bassiouni Commission of Experts. That allegation is situated in Annex VIII of the Final Report, entitled "Prison Camps"[47], where the alleged conditions in the camp called Ciglane are described. Having read that paragraph and the corresponding note No. 3329, we can find the original source of that allegation. It was an anonymous witness statement included in the report from the *ad hoc* non-governmental organization called Women's Group *Tresnjevka*, dated 28 September 1992.

60. Even today the name of that witness is unknown. Such a testimony has never appeared in any of the cases before the ICTY. Consequently, the Respondent considers that this allegation remains unproven.

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[46]Reply, Chapter V, pp. 132-133, para. 164.

[47]Final Report of the United Nations Commission of Experts, Ann. VIII, p. 260, para. 2190 (Peace Palace Library).

61. The shortcomings of testimonies given to non-governmental organizations in wartime were clearly shown in the ICTY *Milosevic* case. Namely, on 11 September 2003, a witness, Mr. Isak Gasi, spoke about his statement given to the Danish Helsinki Committee in Copenhagen on 7 May 1993, in relation to the notorious crimes committed in Brcko. His testimony before the ICTY Trial Chamber shows how his previous statement was misinterpreted in the subsequent NGO report and points out the shortcomings in the process of translation and making of the report[48]. Accordingly, Mr. Gasi said that he had seen 14 to 15 people killed in the town of Brcko, but not at all that he had seen between 300 to 400 persons executed in the town square, as it was stated in the Danish Helsinki Committee submission to the United Nations in May 1993. Furthermore, Mr. Gasi stressed that he had never stated that the executions had been ordered by the head of the police in Brcko, in spite of the fact that such allegation also appeared in the report. He explained that he had only mentioned who had been the commander of the police at that time and emphasized that he had never received the written record of his statement given to the Committee in the original language.

62. Nevertheless, this report of the Danish Helsinki Committee was included in the Final Report of the Bassiouni Commission, which states: "The witness also reported that he saw between 300 to 400 persons executed in the town square, under the order of the head of police and the deputy head of police."[49]

63. There is no doubt that a similar mode of testimony was used as a source for the allegation given in the United Nations Final Report[50] and repeated in the Reply, which states that between 3,000 and 5,000 people had been killed in the Luka Camp in Brcko[51]. If we compare it with the charges of the ICTY Prosecutor in the *Milosevic* indictment[52], claiming that approximately 30-35 Bosnian Muslim prisoners were executed in the Luka Camp, the enormous discrepancy becomes obvious.

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[48]ICTY, case No. IT-02-54, *Prosecutor* v. *Slobodan Milosevic*, transcripts, 11 Sep. 2003, pp. 26447-26448 and 26452-26453 (folder with new public documents, Vol. III, doc. No. 16).

[49]Final Report of the United Nations Commission of Experts, Ann. III.A, para. 390 (Peace Palace Library).

[50]Final Report of the United Nations Commission of Experts, Ann. III.A, para. 396 (Peace Palace Library).

[51]Reply, Chapter V, p. 240, para. 398.

[52]ICTY, case No. IT-02-54-T, *Prosecutor* v. *Slobodan Milosevic*, Amended Indictment (Bosnia and Herzegovina) dated 21 April 2004, Schedule B, para. 6 (www.un.org/icty).

The credibility of the media reports

64. As it has already been presented, the media war reports were a very important source of the Final Report of the Bassiouni Commission. The footnotes with the Report on Sarajevo — Study of the Battle and Siege of Sarajevo — show that the entire Report was based almost exclusively on media coverage.

65. Also, the source of information on the alleged rape of 40 women from Brezovo Polje[53] was the report published in the United States Department of State Despatch, which was entirely based on information from an article of the Croatian weekly *Globus*. That allegation has never appeared in any indictment before the International Criminal Tribunal.

66. However, the Applicant sometimes quoted media reports in its written submissions as independent sources of evidence. An example can be found in the part of the Reply which deals with the fall of Srebrenica in July 1995.

> "Compelling evidence exists that the entire operation was orchestrated by the commander of the Yugoslav Army, General Momčilo Perišić. One month after the fall of the enclave, the United States daily *Newsday* carried the following report:
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> > '*Intelligence officials from two western countries and from Bosnia said that the commander of the Yugoslav army, General Momčilo Perisic, was on a mountaintop across the border in Yugoslavia, sending instructions and counsel to General Ratko Mladić, the commander of Bosnian Serb military forces. The radio conversations, intercepted by intelligence agencies, took place before, during and after the battle for the enclave captured by the Serbs on July 11.*
> >
> > "*Mladić and Perisic conferred constantly about their strategy and what they were doing", said one of the western officials, who like all of the intelligence officers interviewed asked to remain unidentified . . .*'
>
> According to a senior Bosnian government official, who also spoke on condition of anonymity, several hundred Yugoslav infantrymen fought alongside Bosnian Serb soldiers when they attacked the enclave . . ."[54].

67. No fact may be judicially established based only on the media report. The media reports could serve merely to illustrate a fact, which was previously established on the basis of other evidence. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court held that the media reports, even when they are fully objective and reliable, should be treated

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[53]Memorial, p. 43, para. 2.2.4.5.

[54]Reply, Chapter VIII, pp. 595-596, para. 203,.

> "not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence"[55].

68. However, there is no other source of evidence that General Perisic lead the operation around Srebrenica in July 1995. If the intelligence officials from Bosnia and Herzegovina had really had any intercepted radio conversation between General Perisic and General Mladic "before, during and after the battle", the Applicant would surely have submitted that material to the Court, as it has been done in the case of the alleged telephone chat of Mrs. Ljiljana Karadzic, a wife of the former President of the Republic of Srpska[56]. Instead of such evidence, the Applicant submitted to the Court only the extract from the Tosovic diary, in which we can find that General Perisic allegedly had a "quick lunch" with General Mladic and his officers on 8 January 1994, 18 months before the attack on Srebrenica[57].

69. The Respondent considers that the *Newsday* article and similar material, based on the alleged statements of anonymous persons, cannot be treated as objective and reliable source at all, and consequently, it cannot contribute to corroborating the existence of facts in this case.

The credibility of the wartime statements of the Bosnia and Herzegovina officials

70. Madam President, "from the point of view of morality", the Respondent can agree with the position of the Applicant's distinguished Deputy Agent that there is no relevant difference between 100,000 and 200,000 killed[58]. But just for that reason, the Respondent cannot understand the persistent intention of the Applicant to magnify the number of war victims.

71. According to Mr. van den Biesen's new estimation, it is clear that the statement given to the *New York Times* by Mr. Haris Silajdzic, the Foreign Minister of Bosnia and Herzegovina on 14 November 1992, which contained the allegation that 100,000 people, mainly Muslims, had already been killed as a result of Serbian aggression[59], cannot be taken as accurate. The conflict in Bosnia and Herzegovina continued for the next three years, causing significant loss of life. Ten years after the war, on 15 December 2005**,** Mr. Mirsad Tokaca, the President of the Research and

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[55] *I.C.J. Reports 1986*, p. 40, para. 62.

[56] Folder submitted by the Applicant on 16 January 2006, doc. No. 4.

[57] *Ibid.*, doc. No. 1.

[58] CR 2006/2, p. 45, para. 60 (Mr. van den Biesen).

[59] Application, para. 87A.

Documentation Centre from Sarajevo, stated that the confirmed number of the population losses in Bosnia and Herzegovina is 93,837 (among them, 54,190 soldiers). He estimated that the final and total number of the war victims could be around 100,000, i.e. the same figure that Mr. Silajdzic had already claimed in November 1992. Of course, all the victims are not Muslims, there is a significant number of Serbs among victims — 24,216[60]. Who killed them? It may be also that from the point of view of morality, the Serbs in Bosnia and Herzegovina expect the answer to this question from Mr. van den Biesen, who should be representing them as well in this case.

72. The Research and Documentation Centre from Sarajevo is an independent and multi-ethnic association established in March 2004. Its study, Population Losses in Bosnia and Herzegovina 1992-1995[61], is based on the examination of names and data of all victims, and supported by the Norwegian Foreign Ministry and Embassies of several States, but not by the Bosnian Government.

73. This current estimation, based on the more reliable research, completely cancels the validity of figures contained in the Memorial, which allegedly were compiled by the Bosnia and Herzegovina Institute for Public Health in February 1994, as well as the alleged figure of "around a quarter of a million . . . mainly Muslim but also Croat" victims[62].

74. Finally, we have to ask ourselves why the Applicant in its written submissions exaggerated the number of victims, and now continues to insist on those documents which could not be confirmed either by the judgments or the indictments of the International Criminal Tribunal. Why are the 100,000 victims not enough for Mr. van den Biesen, who tries to find more death records even among those who moved out from Bosnia during the conflict[63], and why is it so difficult to say how many Serbs were killed and who killed them? The only possible answer may be that the Applicant, having failed to demonstrate a clear proof of the required *mens rea* for the crime of genocide, needs to maintain the allegations of the high number of victims, in order to create evidence of the destruction of a reasonable substantial number of the group relative to its

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[60]G. Klepic: "Mirsad Tokaca: A Hundred Thousand Killed?", Glas Srpske, Banja Luka, 17/18 December 2005; S. Gojkovic: "Mirsad Tokaca: 93,837 People Killed", *Nezavisne novine*, Banja Luka, 16 December 2005; (folder with new public documents, Vol. II, docs. Nos. 7 and 8).

[61]This document can be found at www.idc.org.ba/project/populationlosses.

[62]Memorial, p. 14, para. 2.1.0.8.

[63]CR 2006/2, p. 45, para. 59 (Mr. van den Biesen).

total population, as a factor from which the genocidal intent may be inferred. Without such exaggeration of the number of victims, the Applicant, prima facie, would fail to fulfil the necessary elements of genocide required by the Convention.

New sources of evidence used by the Applicant in the oral proceedings

A. Judicial notice of notorious facts

75. It seems that the Applicant finally, at the stage of the oral proceedings, became aware of the lack of credibility of its documentary materials. The Final Report of the Bassiouni Commission has been rarely mentioned in the previous days. Instead of the demonstration of clear and hard evidence, Professor Franck asked the Court to take judicial notice of the alleged crimes as notorious facts without requiring further proof. He based that request on the Court practice in the *Fisheries* jurisdiction and *Nuclear Tests* cases[64].

76. However, the notoriety of the facts about the common knowledge on the Norwegian system of delimitation in the North Sea[65] cannot be compared with an issue whether the crimes which constitute acts of genocide were committed. The notorious fact that France carried out tests of nuclear devices in the territory of French Polynesia[66] is the fact of the same certainty as the fact that there was a war in Bosnia and Herzegovina from 1992 to 1995. The Court, however, should not be able to take a judicial notice of the legality of nuclear tests, because it should not be a fact, but a legal conclusion based on certain evidence. Existence of a crime, even when it can be an element of any other specific crime, must be the result of the legal findings. If a crime was treated as a notorious fact, a court would be needless. For that reason, the Respondent considers that the request for taking a judicial notice that, for instance, thousands of women were raped in Bosnia and Herzegovina[67], without any evidence for so massive a scale of violation, denies the role of the Court.

77. But the best refuting explanation why Professor Franck's proposal for taking judicial notice of massive crimes as notorious fact cannot be treated seriously, has been given at the same

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[64]CR 2006/3, pp. 23 and 24, paras. 11 and 12 (Prof. Franck).

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

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

[67]CR 2006/3, p. 23, para. 11 (Prof. Franck).

session by Ms Karagiannakis, who referred to the very strict requirements under which the ICTY had taken judicial notice of adjudicated facts:

— no dispute between parties;

— no judicial notice of judicial notice;

— no judicial notice of facts established in a plea agreement;

— no judicial notice of factual findings from appealed judgments[68]. It seems that these criteria are very reasonable and in accordance with the rule of law and should be applied in the present case.

B. Video materials

78. Before the opening of the oral hearings, the Applicant provided the Court with 23 video materials. In this regard, a few general observations are in order. Some of the video materials are the well-known broadcasts about the tragic events in the former Yugoslavia. A couple of them have been made in Dutch, and unfortunately, we cannot understand their contents. The Respondent was provided yesterday with the Applicant's explanation about the origin of the video materials shown in the courtroom, so it is difficult now to give a proper analysis of them.

79. However, it is easy to conclude that most of these materials are the author's creations, which cannot have a clear probative value. They are often based on prejudices in relation to the role of the main actors in the conflict. Above all, a lot of video materials were made in order to evoke public emotions. Each film contains more the attitudes of its director than the views of a person who talks about events. The words used by the persons who were directly involved in the events are most often only fragments cut out from their interviews.

80. Madam President, apart from these general observations about documentary films provided as evidence, I am compelled to say a few words about the video showed by the Applicant in this courtroom picturing the brutal execution of six young men in Trnovo. It is clear that the Applicant addressed those scenes to the Court for emotional reasons. If the Respondent followed the same approach to the presentation of evidence, the next video material would show the scenes of the bodies of Serbian soldiers decapitated by the members of the unit called "El-Mujahed" (also

[68]CR 2006/3, p. 51, para. 67 (Ms Karagiannakis).

known as "Holy Warriors") in the Kamenica camp near Sarajevo. In that case, the Respondent would, in the same manner as the Applicant, refer to the ICTY indictment against Mr. Rasim Delic. However, the Government of Serbia and Montenegro will not follow the way chosen by the Applicant. Instead, I would like to confirm to the honourable Court that the perpetrators of the execution in Trnovo have been arrested. According to the documentation available to our delegation, they were not members of the Serbian police or any other body of Serbia and Montenegro. The trial before the War Crimes Panel of the District Court in Belgrade is under way and some of the accused have already pleaded guilty. Her Honour Gordana Bozilovic, President of that Trial Chamber, was sitting in this courtroom during the first session in the present case, behind the delegation of Serbia and Montenegro, together with the President of the District Court in Belgrade and the Special Prosecutor for War Crimes of the Republic of Serbia.

C. ICTY materials

81. Madam President, I would like now to express briefly some of our views about the way in which the Applicant has so far used the different ICTY documents in this case:

— The Respondent of course cannot accept the position that the indictments of the International Criminal Tribunal can confirm the Applicant's allegations.

— It is also inappropriate that factual findings in the ICTY cases which have not been concluded can be taken as the sources of evidence in this case. The Rule 61 decisions and the decisions on defence motions to acquittal contain only facts presented by the Prosecutor.

— If the ICTY pre-trial and inter-trial decisions were enough to establish the facts in the case before the International Court of Justice, we could ask ourselves why the defence still exists in the criminal procedure before the ICTY. Fortunately, such a treatment of evidence is not known in the ICTY procedure. A fact contained in the ICTY pre-trial or inter-trial decision cannot be used as an adjudicated fact in another case.

82. Furthermore, the Respondent cannot accept that the facts contained in plea agreements may constitute evidence before this Court, as they do not constitute evidence in the procedure before the ICTY. The reason is that the so-called factual basis for the plea agreement is not always the original statement given by the accused. For example, the Applicant has so far cited frequently

the Factual Basis for a Plea of Guilty in the ICTY case of Ms Biljana Plavsic[69]. It is well known that that statement of facts has been prepared by the ICTY Prosecution Office. Ms Plavsic's defence agreed on that statement in order to reach the plea bargain. However, that statement (or factual basis) has not been used as evidence in *any other* trial before the ICTY. Only in the *Stakic* case, that factual basis was filed by the Prosecutor, but there was no procedural possibility that the Chamber would treat it as reliable evidence without a direct testimony of Ms Plavsic in the courtroom, and consequently the factual basis had to be withdrawn from evidence[70]. It should also be noted that, after the plea bargain, Ms Plavsic was sentenced to 11 years' imprisonment, while Mr. Stakic, who had not made the plea agreement with the Prosecutor, was sentenced to life imprisonment.

Conclusions

83. Madam President, distinguished Members of the Court, after the brief presentation of the incorrect allegations of the applicant State, it is my duty to conclude:

A. It is not true that Serbian forces executed children in the Zvornik hospital, as well as it is not true that children were thrown into ovens elsewhere. This kind of allegations was the worst type of war propaganda, with its only aim to shock the conscience of mankind and to portray the enemy as a bloodthirsty barbarian.

   It is not accurate that 2,500 Muslim men were killed in Zvornik on 9 and 10 April, or that 5,000 people were killed during the attack on Kozarac, or that 1,000 Muslim civilians were killed in Hambarine, or that another 1,000 were killed in Bijeljina. The crimes were committed, but the number of victims was tens of times less than it was alleged in the submissions of the Government of Bosnia and Herzegovina to the International Court of Justice.

   It is not true that 50 to 60 people died in Trnopolje every day, or that ten prisoners were killed daily in Keraterm, or that 5,000 people were executed in the most notorious Omarska camp.

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[69]For example, see CR 2006/6, p. 29, para. 8 (Prof. Franck).

[70]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 550.

There is no evidence that between 3,000 and 5,000 people have been killed in the Luka camp in Brcko.

I have established only some examples of the false and inaccurate allegations of the applicant State. These false allegations are numerous and can be found throughout the Applicant's written submissions. Together with unspoken data about the terrible crimes committed against Serbian civilians and war prisoners, they significantly change the general picture of the Bosnian conflict.

B. These improbable allegations should demonstrate that their sources cannot be taken as reliable sources of evidence in this case.

C. Consequently, the Respondent considers that the Applicant has not managed to reach the standard of proof requested in the case before the International Court of Justice.

84. Madam President, I would like to express the great remorse of the people and the Government of Serbia and Montenegro for all victims of the war in Bosnia and Herzegovina, regardless how many they were. It was not my intention today to deny that crimes indeed took place. Is there any difference to a person killed in the village of Hambarine whether the total number of victims was 1,000, as claimed by the Applicant, or 11 as listed in the indictment before the ICTY? Nevertheless, this great discrepancy is important to illustrate that the documents used by the Applicant are not credible and consequently, that the accusations based on them are ill found.

I would like now to conclude my pleadings. Thank you, Madam President, for your kind attention, and I would respectfully ask you to give the floor to Professor Tibor Varady.

The PRESIDENT: Thank you, Mr. Obradović. I give the floor to Professor Varady.

Mr. VARADY:

ISSUES OF PROCEDURE

1. Introduction

1.1. Madam President, distinguished Members of the Court. May it please the Court. It is, once again, an exceptional honour and privilege to appear before this Court. I would also like to give expression of my respect for the colleagues representing the Applicant for their presentations.

1.2. My colleagues, Professor Zimmermann, Mr. Djerić and myself, we would like to address the procedural side of this complex case. But let me start our presentations with some information of a more technical nature. We have envisaged submitting this part of the Respondent's presentation during the remainder of this morning, and tomorrow morning.

1.3. As a further technical matter, and for the sake of clarity, let me mention the following regarding names and designations. Both the Applicant and the Respondent are successor States of the former Socialist Federal Republic of Yugoslavia, the "SFRY"; we shall refer to the predecessor State as the "former Yugoslavia". Furthermore, at the time when the Application was submitted, the name of the Respondent was the Federal Republic of Yugoslavia or the "FRY". In February 2003, the FRY changed its name and became Serbia and Montenegro. We shall use both designations — the "FRY" and "Serbia and Montenegro" — depending on the time period to which we are referring and using the name which was official at the given moment.

1.4. We would also like to refer in an abbreviated form to three judgments of this Court, which are of a particular importance in the procedural history of the cases arising from the Yugoslav conflicts. We shall refer in an abbreviated form to the "1996 Judgment on Preliminary

Objections"[71], to the "2003 Revision Judgment"[72], and to the "2004 Legality of Use of Force Judgments"[73].

1. Raising issues of procedure

1.5. Approaching issues of procedure, I do not want to disregard the fact that in this case fundamental humanitarian issues are at stake, and that the allegation pertains to genocide, probably the greatest crime known. I could argue, of course — without departing from the truth — that the perception of the dramatic years of recent history presented by the Applicant was a perception couched in terms of adversarial proceedings with the aim of prevailing over the other party. But I have to agree with the Applicant, that in Bosnia and Herzegovina, the first half of the last decade of the twentieth century was marked by a unique tragedy — and was also marked by grave crimes. Such a setting commands due respect.

1.6. Madam President, responding to the remarks made by our colleagues on the side of the Applicant, let me say that the procedural issues we are raising are not mere technicalities which would detract us from a simple and straightforward path towards substance. The questions we would like to address pertain to the most fundamental precondition of proceedings before this honoured Court, determined by the Charter of the United Nations and the Statute of the Court.

1.7. Let me also add that this is not a simple and straightforward case; and, what is also significant, this is a case in which substance and procedure are closely intertwined. The conflict was marked with different perceptions and aspirations regarding statehood and dissolution of statehood. The picture is not as simple as the one depicted by the Applicant. This was not just a conflict between Serbs and non-Serbs. It is well known and uncontested, for example, that in some regions of Bosnia and Herzegovina — like the Mostar region — most violence took place between Muslims and Croats. Conflicts between Muslims and Croats also yielded a number of ICTY

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[71]The Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*.

[72]The 3 February 2003 Judgment on *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), I.C.J. Reports 2003*.

[73]Eight Judgments of 15 December 2004 in the cases concerning *Legality of Use of Force* decided between Serbia and Montenegro as Applicant, and eight NATO Member countries (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and the United Kingdom) as Respondents, *I.C.J Reports 2004.*

indictments — like the indictments prompted by the Lašva Valley confrontations. In the Bihać region, a long and acrimonious battle was fought between two Muslim factions. During the years of the conflict, state-like structures emerged and disappeared, parallel with shifting ethnic confrontations and alliances, while statehood and dissolution of statehood were on the banners of all participants.

1.8. This hallmark of the conflict also became the core of the jurisdictional problem. It is exactly the process of dissolution of the former Yugoslavia and the circumstances of the formation of new States, which gave rise to conflicting perceptions regarding membership in the United Nations and treaty status, the critical issues regarding access and jurisdiction.

1.9. Furthermore, a scrutiny of the procedural setting of this case shall also reveal that this legal dispute between two sovereign States, Bosnia and Herzegovina on one side, and Serbia and Montenegro on the other side — neither of which existed when the conflict began — is simply not a matching articulation of the actual conflict fought between Muslims, Serbs and Croats in Bosnia and Herzegovina.

1.10. Let me add, Madam President, that it is known that the stakes in this case are daunting. The question is whether the balance sheet of the twentieth century would show Serbia and Montenegro being the one and only State convicted for genocide. But the gravity of the substance does not diminish the importance of verification of the very foundations of the right to proceed.

1.11. Madam President, distinguished Members of the Court, let me also say that we are advancing our views on jurisdiction even at this stage, because it was not possible to take a conclusive position on these issues earlier and because it is our sincere conviction that the Respondent was not a party to the Statute, and had no access to the Court when the Application was submitted. We also trust that the Respondent never became bound by Article IX of the Genocide Convention. Serbia and Montenegro did not consent to the jurisdiction of this honoured Court in this case.

2. The actual conflict found no matching expression in this dispute

1.12. Before turning to specific issues, let me once again refer to the drama from which our case was born. There is no doubt that a human tragedy took place in Bosnia and Herzegovina. The

estimates and dimensions of the events vary quite considerably. The numbers may be controversial, but whichever estimate should one take, this is a tragedy. It is also a fact that the devastations were not caused without guilt. There was a war which was, like every war, conducive to aberrant behaviour, but the fact remains that there were crimes, and there were perpetrators, people guided by hatred or fanaticism, who committed crimes.

1.13. Let me say, Madam President, that the responsibility of these individuals is a rather straightforward matter. But things are becoming much more complicated — and sometimes perplexing as well — when attempts are being made to perceive the issue in terms of a dispute between States. Not every tragedy can be articulated as a dispute between States, subject to the jurisdiction of this honoured Court. The actual conflict we are facing was an ethnic conflict, the dividing lines between the warring parties were ethnic dividing lines. The propaganda which fuelled the conflict, and managed to separate people, not only from each other, but also from common sense, was an ethnic propaganda.

1.14. In the Memorial of the Applicant, the part entitled "The Facts" starts with the following allegation:

> "Since late 1991, Bosnia and Herzegovina has been the scene for acts of violence and destruction, the evil brutality of which has been calculated and aimed by Serbs to eliminate the lives, liberty, dignity, religion and culture of the Muslim and Croat people of Bosnia and Herzegovina."[74]

We do not agree with these allegations, but we do agree that since 1991, a brutal conflict emerged between Muslims, Serbs and Croats. The conflict damaged all participating ethnic groups, and the plight of the Muslims, that is of the Bosniacs, may have been the most difficult of all.

1.15. It is known, Madam President, that the ethnic groups that faced each other during the conflict were confronted earlier, as well, in the course of history. At the same time, it is also known that the States that are facing each other before this Court did not even exist when the conflict began. Neither Bosnia and Herzegovina nor the FRY existed in late 1991 or early 1992.

1.16. While the conflict lasted, States and state-like structures were emerging and disappearing, and so did borders, as well as disputes about borders, about sovereignty, continuity and secession. The legal character and the standing of the emerging structures remained for a long

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[74]Memorial of 15 April 1994, para. 2.1.0.1.

time volatile and controversial. The ethnic dividing lines during the conflict may have been quite clear, but they have not been mirrored in the dividing line between the States, Parties to the present dispute. This is what makes this case so unusual and detached from natural paths in search of justice before the Court.

1.17. The question arises whether the cause, which inspired the Application in 1993, has become the cause of the States which are facing each other today before this Court. The question also arises whether consequences allocated in a judgment could possibly be allocated between the actual participants and along the dividing lines of the actual conflict.

1.18. In its Memorial of 15 April 1994, Bosnia and Herzegovina submitted that "[s]pecific persons were targeted precisely on account of their adherence to an ethnical or religious group and that attacks on these groups was precisely a means to attain the end of clearing entire areas of their Muslim population"[75]. The Memorial continues by stating that acts prohibited by the Genocide Convention were committed by Bosnian Serbs, and that the authorities of the FRY aided and abetted such acts[76].

1.19. The armed conflict came to an end. An element of the solution which was accepted was that the Bosnian Serbs and their entity, the Republika Srpska, became an integral part of Bosnia and Herzegovina. This was confirmed in the Dayton Peace Agreement, which was signed on 14 December 1995 in Paris. The Constitution of Bosnia and Herzegovina was adopted as a part of this Agreement. The Agreement and the Constitution have established two entities of about equal size, which now constitute the State of the Applicant. According to Article 1 (3) of the Constitution: "Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska."

1.20. In spite of this new reality, the claim — following the dividing lines of the original conflict — still advances grievances against the Republika Srpska, now a constitutive part of the applicant State. For example, in its Reply of 23 April 1998, the Applicant alleged that: "The

[75]Memorial, p. 7, para. 1.3.0.4.

[76]Memorial, p. 7, para. 1.3.0.5.

creation of 'Republika Srpska' has been imposed through the use of force and genocide."[77] The conclusion suggested by the Applicant is that "[s]uch a situation cannot have any legal validity"[78].

1.21. Madam President, there are further circumstances contributing to doubts as to whether the actual conflict, which took place between 1991 and 1995, could find a fitting judicial resolution between those States which are now appearing as Applicant and Respondent before this honoured Court. We would like to point out that the Republika Srpska — covering about one half of the country of the Applicant — has strongly and consistently opposed this lawsuit. On 1 October 2003, the Parliament of the Republika Srpska adopted a Declaration which states, *inter alia*:

> "The Claim of Bosnia and Herzegovina before the International Court of Justice is, *de facto*, a claim against the Republika Srpska and against the essence of the Dayton Peace Agreement. The Republika Srpska and the Serbian people in Bosnia and Herzegovina cannot be an Entity, a part of the State of the Claimant, and at the same time the accused party — this is simply not possible.
>
> Life in common of all people of Bosnia and Herzegovina can only be built on the basis offered by the Dayton Peace Agreement, by the Constitution of Bosnia and Herzegovina, while the said Claim cannot contribute to reconciliation either in Bosnia and Herzegovina, or in the Region."[79]

In this Declaration, the Parliament of the Republika Srpska asks from the Presidency and the Parliament of Bosnia and Herzegovina, to place on their agenda the question of the claim against Serbia and Montenegro submitted to the International Court of Justice.

1.22. It has to be said that the Declaration of the Parliament of the Republika Srpska of 1 October 2003 was challenged by the representatives of the Bosniak people in the Republika Srpska. They initiated a procedure to establish that the Declaration, as well as the initiative to place the issue on the agenda of the Presidium and of the Parliament of Bosnia and Herzegovina, impairs vital interests of the Bosniac people. This motion reached the Constitutional Court of the Republika Srpska, which rejected it on 10 June 2005, and upheld the legitimacy of the Declaration[80].

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[77]Reply of Bosnia and Herzegovina of 23 April 1998, para. 82.

[78]Reply, para. 83.

[79]This Declaration was published in the *Official Gazette* of the Republika Srpska, No. 63/05.

[80]Decision of the Constitutional Court of the Republika Srpska was also published in the *Official Gazette* of the Republika Srpska, No. 63/2005.

1.23. A further event demonstrating how controversial the matter is in the applicant State, is the request submitted on 12 December 2005 to the Constitutional Court of Bosnia and Herzegovina by Mr. Borislav Paravac, one of the three members of the Presidency of Bosnia and Herzegovina. In this request, Mr. Paravac is seeking the Constitutional Court of Bosnia and Herzegovina to declare that the Application submitted to this Court represents a violation of the Constitution of Bosnia and Herzegovina[81].

1.24. Madam President, distinguished Members of the Court, we are, of course, aware of the fact that the Constitutional Court of Bosnia and Herzegovina has not reached a decision as yet. We do not intend to discuss here the legitimacy of the Application under the Constitution of Bosnia and Herzegovina. The point we want to make is that it is evident that there is a clear and deep divide between the two constituent entities of the applicant State regarding these proceedings. Just as it is evident that the Parties to this dispute are not identical at all with the parties to the conflict.

1.25. The truth of the matter is that, today, a judgment on the merits would find the Republika Srpska — the alleged perpetrator — in the position of the Applicant and the alleged victim, and the recipient of possible damages to be paid. The same judgment would find Kosovo — clearly a part of the FRY during the Bosnian conflict — in the position of the Respondent, the alleged perpetrator, and possible debtor of damages.

1.26. Madam President, the controversies about States, which only came into being during the conflict, incongruities between the setting of the actual conflict and the setting of this legal dispute yielded, quite understandably, a most complex situation and serious difficulties in articulating the substance of the problem as a legal dispute between States.

1.27. On 20 March 1993, Bosnia and Herzegovina initiated proceedings against the FRY for alleged violations of the Genocide Convention. It has practically been forgotten that several months later, on 15 November 1993, another tantalizing attempt was made to articulate the predicament as a legal dispute between States, subject to the jurisdiction of this Court. Bosnia and Herzegovina sent to the General Assembly and to the Security Council of the United Nations a "Statement of Intention" in which it declared its "solemn intention" to institute legal proceedings

[81]The submission of this request to the Constitutional Court of Bosnia and Herzegovina was reported in practically all daily papers in Bosnia and Herzegovina. For example, in the Sarajevo paper *OSLOBOĐENJE* of 13 December 2005.

against the United Kingdom before the International Court of Justice for violating the Genocide Convention. The key grievance stated in the "Statement of Intention" of the Applicant was the arms embargo, which was perceived as aiding and abetting genocide[82]. This effort was abandoned.

1.28. Parallel with these various endeavours, the International Criminal Tribunal for the former Yugoslavia, the "ICTY", was established, with the mission to establish individual responsibility and to punish those who committed crimes. The Bosnian conflict has been the subject-matter of a major part of the activities of the ICTY.

1.29. Madam President, the task of the ICTY is simpler in the sense that the cases submitted to the ICTY have been structured along the dividing lines of the actual conflict. The distribution of the roles in the proceedings mirrors the conflict, and consequences are reaching the actual perpetrators. The dispute brought before this Court does not have the benefit of a clear-cut setting.

1.30. This is a dispute between States that had been formed during the conflict, but the borders of which do not reflect the dividing lines of the conflict. There is no reason to regret this; this means that intolerance and ethnic partition did not prevail. One of the reasons behind the Dayton Peace Agreement of 1995, and one of the aims of the international community was exactly to bring about a Bosnia and Herzegovina which is the common State of Bosniacs, Serbs, Croats and others who fought against each other between 1991 and 1995, rather than to create sovereign States along the dividing lines of the conflict. This was the right approach. But one of the logical consequences of this approach is that the actual parties to the conflict did not and could not find an *alter ego* or matching representation in the newly emerging States which are now juxtaposed before this Court.

3. During earlier phases of these proceedings it was not possible to take a conclusive position on key procedural issues

1.31. The emerging problem is not only that of articulating the substance of the dispute between parties other than the actual participants to the conflict. The dilemmas and controversies regarding the personality and the standing of the subjects emerging from the conflict have also had a clear impact on the issues of access to the Court and jurisdiction.

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[82]See General Assembly, Security Council, United Nations doc. A/48/659, S/26806, 26 November 1993.

1.32. Madam President, distinguished Members of the Court, it is well known that the process of dissolution of the former Yugoslavia created two narratives: one espoused and promoted by the former Government of the FRY, and another one espoused and promoted by Bosnia and Herzegovina and other successor States.

1.33. The essence of the position taken by the former Government of the FRY was the following: we stayed on course. We are a founding Member of the United Nations. We remained a Member of the United Nations, and a party to international conventions continuing the personality of the former Yugoslavia. We remained the same State from which others have tried to secede (or did secede). Hence, our admission to the United Nations is beside the point, and no scrutiny under Article 4 of the Charter is needed, since we never ceased to be a Member. Due to continuity, we remained a Member of the United Nations, and we remained a party to the treaties to which the SFRY was a party.

1.34. Contrary to this perception of the former Government of the FRY, Bosnia and Herzegovina and other successor States advanced a different narrative. The essence of this second narrative is the following: the former SFRY dissolved. Nobody continued the identity of the former Yugoslavia — hence nobody seceded either. There are five equal successors, five new States. As we had to seek admission to the United Nations, and had to go through an Article 4 scrutiny in order to become a Member of the United Nations, the FRY has to do the same; as we had to submit notifications of succession or accession in order to become a contracting party to the treaties, the FRY has to do the same.

1.35. Today it is clear what was the reality. But what is clear today was uncertain for almost a decade. The relationship between the newly emerging States and the former Yugoslavia to which they all belonged, the process of dissolution, questions of continuity and discontinuity, remained controversial for too long. Controversies did not only mark the positions taken by the emerging new States themselves. For a quite considerable period clear-cut answers were not given by those international organizations and authorities either, whose standpoint had to represent a point of support and reliance before this Court.

1.36. At various moments of these proceedings various facts and perceptions were accessible. Various international authorities, which were invited to qualify the emerging situation,

took various positions. A unique and unorthodox situation yielded more ambiguity and evasion than straight answers. As it was stated by the Court in the 2004 *Legality of Use of Force* Judgments:

> "[t]he legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations"[83].

4. The need to face issues of access and jurisdiction

1.37. This status which remained much too long undefined, is obviously of critical importance. If the FRY had continued the personality of the former Yugoslavia, then it would have remained a Member of the United Nations, it would have remained a State party to the Statute, and it would have remained bound by international conventions to which the former Yugoslavia was a party. If there was no continuity, then the FRY had to do what other successor States did: to seek admission to the United Nations as a new State, and to undertake appropriate actions in order to become bound by international conventions. We are respectfully submitting that, as this Court has already determined, the FRY was not a Member State of the United Nations, was not a party to the Statute and did not have access to the Court when the Application was submitted. We are also submitting that the FRY did not remain or become bound by any treaty provision which would establish the jurisdiction of this Court.

1.38. Madam President, distinguished Member of the Court, we are, of course, aware of the fact that this is not the first time that questions of jurisdiction have emerged in this case. Questions pertaining to jurisdiction were raised during various phases of the proceedings in this case, and they were also raised in other related cases arising from the Yugoslav conflict in which jurisdiction was dependent on the same issue — that of continuity or discontinuity, the position and treaty membership of the FRY between 1992 and 2000.

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[83]Case concerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium*), para. 64. Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 63 of the cases with France, Canada, Italy, Netherlands, Portugal, and in para. 62 of the cases with Germany and the United Kingdom.

1.39. There is no *res judicata* bar which would disallow the Court to address the issue of access and jurisdiction if it appears to be justified. Such a bar is not posed by the 1996 Judgment on Preliminary Objections. Arguing that the issue of jurisdiction cannot be reopened, the Applicant endeavours to draw support for its position from the Judgment of the Court of 25 March 1999 in the case between Cameroon and Nigeria. The Applicant suggests that this case shows that the position once taken by the Court cannot be changed during subsequent proceedings[84].

1.40. In the 1999 *Cameroon* v. *Nigeria* Judgment the Court opted, indeed, not to change what was decided earlier. But there is a very simple reason for this. Nothing else was possible in the given procedural setting, because the inherent limitations were set by the request itself. The *Cameroon* v. *Nigeria* case relied upon by the Applicant is a case where interpretation was sought**.** As the title of the case clearly indicates, the request was made for interpretation**.** A request for interpretation is just a request for that, for explaining a "yes" or a "no" — not for revisiting the conclusions and changing a "yes" to a "no".

1.41. The Applicant also referred to the *Corfu Channel* case[85]. But this case provides no support to the Applicant's contentions, as it does not settle at all the question of finality of judgments on preliminary objections. As a matter of fact, this case may very well be cited as a case in which the Court proceeded to re-raise the issue of jurisdiction in the merits phase. The Applicant actually relies on the third phase of the *Corfu Channel* case. In this third phase[86] the Court did, indeed, refuse to revisit an earlier finding on jurisdiction which was challenged on the same grounds as the ground submitted earlier. It is important to add that this earlier finding was the finding reached in the merits phase, rather than in the preliminary objections phase.

1.42. The *Corfu Channel* case yields an opposite conclusion, however, if one focuses on the exact situation we are facing in our case, that is, if we are investigating the treatment of the jurisdictional issue in the merits phase, after the preliminary objections were rejected. In the first phase, the Court rejected preliminary objections, and decided to move to the merits phase. But in the second phase of this case, the merits phase, the Court *did address new objections* raised

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[84]CR 2006/3, 28 February 2006, p. 14, para .9 (Prof. Pellet).

[85]CR 2006/3, 28 February 2006, p. 16, para. 13 (Prof. Pellet).

[86]The *Corfu Channel* case, Assessment of the Amount of Compensation, Judgment of 15 December 1949, *I.C.J. Reports 1949*, p. 244.

regarding jurisdiction, in spite of the existence of an earlier judgment on preliminary objections, and after due consideration, it reached one more conclusion on jurisdiction[87].

1.43. Explaining that the *Corfu Channel* case does not settle the question whether judgments on jurisdiction may have *res judicata* effects, Shihata points out and stresses that when the specific objection to jurisdiction was raised in the merits phase, this objection was *not* dismissed on grounds of *res judicata*, "[t]hough it was invoked after a decision affirming the Court's jurisdiction to deal with the case generally"[88].

1.44. It is important to point out that when it opted to reconsider jurisdiction during the merits phase of the *Corfu Channel* case, after a judgment rejecting the preliminary objections, the Court did not even feel the need to invoke the well-established entitlement of the Court to examine its jurisdiction *proprio motu*. It simply investigated an objection to jurisdiction raised by the Respondent during the merits phase, which objection did not figure among those raised in the preliminary phase.

1.45. Madam President, returning to our case, let me stress that the complexity of our case mirrors the complexity of the conflict. This case has a most complicated and unorthodox case history, because an unconventional and unpredictable sequence of events produced a most complicated and truly unorthodox case. Questions were recurring under different perspectives. On the grounds of what was visible and ascertainable earlier, it was not possible to take a clear position "without legal difficulties".

1.46. This is why, referring to positions taken earlier in various cases between 1992 and 2004, including the *Revision* case, the Court pointed out in its 2004 *Legality of Use of Force* Judgments that it was not in a position to take a definitive position before 2004. The Court stated:

> "The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period."[89]

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[87] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 26.

[88] Ibrahim Shihata, The Power of the International Court to Determine Its Own Jurisdiction, M. Nijhoff Publ., p. 76.

[89] Case concerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 74. Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 73 of the cases with France, Germany, Canada, Italy, Netherlands, Portugal, and in para. 72 of the cases with Germany and the United Kingdom.

1.47. The status of the FRY with regard to treaties, including the Charter and the Statute, during the "anomalous period" between 1992 and 2000, is of a decisive relevance regarding reconsideration of the issue of jurisdiction. As a matter of fact, it is difficult to imagine a situation in which the reinvestigation of the issue of jurisdiction would be more appropriate and more needed. A reconsideration of jurisdiction *proprio motu* is further justified by the fact that, after a long period in which the taking of a definitive position on the critical issue was impeded by lack of information or by procedural constraints, such a position *was* taken in 2004. In the 2004 *Legality of Use of Force* Judgments the Court stated unequivocally:

> "[f]rom the vantage point from which the Court now looks at the legal situation, and in the light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999"[90].

1.48. It is in this context that the logic of the *ICAO Council* Judgment finds full justification. Indeed, in its letter to the Parties of 12 June 2003 the Court referred to this Judgment, and cited it stating:

> "[a]s the Court has emphasized in the past, [it] is entitled to consider jurisdictional issues *proprio motu*, and must 'always be satisfied that it has jurisdiction' (*Appeal relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 52)."

In the same letter of 12 June 2003, the Court added:

> "It thus goes without saying that the Court will not give judgment on the merits of the present case unless it is satisfied that it has jurisdiction. Should Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it will be free to do so."

1.49. This course of action — mentioned in the letter of this honoured Court as a permitted option — is the one we intend to take. We shall respectfully present facts and arguments demonstrating that the FRY did not have access to the Court when the Application was submitted; and furthermore, it did not remain bound by Article IX of the Genocide Convention, and it never became bound by Article IX either. Since Article IX of the Genocide Convention is the only professed basis of jurisdiction, it follows that this honoured Court has no jurisdiction in this case.

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[90]Case concerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 79. Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 78 of the cases with France, Canada, Italy, Netherlands, Portugal, and in para. 77 of the cases with Germany and the United Kingdom.

5. The approach we have followed

1.50. Madam President, distinguished Members of the Court, there is one more point I would like to make within this introductory statement. The Applicant raised the question of our litigation strategies.

1.51. Let me say that no judicial instance inspires more dedication and requires more professional integrity than the International Court of Justice. My colleagues and I, we have been overwhelmed by the opportunity to present arguments before this Court, and we have sincerely tried our best to attain the requisite standard. We cannot, of course, judge ourselves, but let me put before you in all frankness our approach to this case, and to all our cases before this honoured Court.

1.52. Madam President, after the people of Serbia and Montenegro brought to an end the Milošević régime, our position towards the United Nations and treaties was not the only issue which had to be rethought and revisited. The new Government was faced with a daunting number of crucially important issues since the fall of 2000. Our country had to reconsider the basic premises on which it was functioning, including relationship of the FRY with its neighbours, with the international community, and with the entire past decade. Many things were changed or redirected — and many things still have to be changed or redirected.

1.53. At a number of critical junctures, the new Government of the FRY opted to follow the position taken by the majority of States in the international community — including that of the Applicant.

1.54. In this context, we reconsidered our position towards the assumption of continuity with the former Yugoslavia and towards the proposition of automatically continued membership in the United Nations and in treaties. Abandoning the proposition of continuity, which was professed by the former Government, meant that we had to submit to the procedure of admission of new members — and this also meant that we could not claim treaty membership on grounds of continuity. Instead, we had to submit a request for admission to the United Nations as a new Member as other successor States did, and we had to submit notifications of succession or accession to treaties as other successor States did.

1.55. We accepted a status and all of its consequences. This meant that we could not and did not continue the perception of the Milošević Government in our cases before this honoured Court either. We accepted instead a perception endorsed by the great majority in the international community, and we have stood by this perception both before this Court and before other international authorities and organizations.

1.56. Before this Court, we have presented our perception in a consistent way. We communicated the same perception in all cases irrespective of our role as applicant or respondent, and we have been asking the Court to decide on jurisdiction considering the same facts and the same analysis — and this is what we shall respectfully endeavour to do during these proceedings as well.

1.57. We shall point out two reasons, each of which is sufficient to yield the conclusion that this honoured Court has no jurisdiction in this case. First, we shall demonstrate that the FRY (now Serbia and Montenegro) had no access to the Court at the relevant moment when the Application was submitted. The second reason leading to the conclusion of lack of jurisdiction in this case is that Serbia and Montenegro never became bound and is not bound by Article IX of the Genocide Convention, which is the only purported ground of jurisdiction. Given that in our case the issue of treaty membership is interlinked with the question of disintegration of the former Yugoslavia, there are more imaginable ways in which links with a treaty could have possibly been maintained or created. We shall cover all ground, and we shall demonstrate that there is no conceivable way in which Serbia and Montenegro could have either remained or become bound by Article IX of the Genocide Convention.

1.58. Concluding my introduction, I would like to submit to you the schedule of our presentations. Our first speaker tomorrow morning will be our counsel and advocate Mr. Djerić. He will address issues of access. After him, I shall endeavour to demonstrate that the FRY —now Serbia and Montenegro — did not remain bound by Article IX of the Genocide Convention. Our counsel and advocate Professor Zimmermann will continue to demonstrate that Serbia and Montenegro never became bound by Article IX in any way, by way of treaty action or otherwise. After his speech I would like to add some concluding remarks. We intend to conclude this part of

the Respondent's presentation by the end of the morning session tomorrow. Madam President, distinguished Members of the Court, thank you very much for your kind attention.

The PRESIDENT: Thank you, Professor Varady. The Court now rises and will resume its hearings at 10 o'clock tomorrow morning.

The Court rose at 12.55 p.m.