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HAGUE INTERNATIONAL TRIBUNALS

Report on the Oral Proceedings in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*: Selected Procedural Aspects

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Abstract

This article is intended to be a report of the oral proceedings in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, detailing what took place in the Peace Palace and considering the arguments of the parties relating to the procedure adopted in the proceedings. These include the preliminary question of whether or not the International Court of Justice has jurisdiction in the case, a question which has been reopened by Serbia and Montenegro following the 2004 judgment in the *Legality of the Use of Force* cases; the question of the impact of the workings of the ICTY on the current proceedings; the issue of new documents which has arisen, given the very long gap between the written and oral proceedings; the burden and standard of proof adopted by the Court and what inferences it may draw; and the methodology for hearing witness testimony in the Court. Each of the parties addressed the Court on these procedural issues in some detail, in addition to their pleadings on the substance of the merits of the case.

Key words

affidavit evidence; burden of proof; evidence; ICTY; inferences; judicial notice; jurisdiction; new documents; oral proceedings; procedure; *res judicata*; standard of proof; subpoenal disclosure; translation problems; weighing evidence; witness testimony

1. INTRODUCTION

On 27 February 2006, the International Court of Justice (ICJ) in The Hague began the long-awaited oral proceedings on the merits of 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)*,[1] which arose out of the events following the

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1. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, ICJ Pleadings, Application of 20 March 1993. All case documentation and pleadings are available at http://www.icj-cij.org/docket.

break-up of the Socialist Federal Republic of Yugoslavia (SFRY) between 1991 and 1995. The purpose of this article is to examine the way in which the parties presented their cases in the Peace Palace and some of the issues that became apparent as they did so. At the time of writing, judgment in the case is still pending, and this therefore constitutes an ideal opportunity to consider some of the procedural issues arising in the Court which might well become lost amid discussion on the legal aspects once the judgment becomes available.

This is perhaps the most factually and legally complex case ever heard in the Great Hall of Justice, and has been the subject of great debate both in the media and in academia. Thanks to parallel prosecutions of individual war criminals in the International Criminal Tribunal for the former Yugoslavia (ICTY), the eyes of the world have been focused on these efforts to adjudicate on the troubled history of the region. In particular, those who found themselves caught up in the conflict over the years have paid close attention to events in The Hague, with the media in Bosnia and Herzegovina and Serbia and Montenegro televising ICTY hearings and reporting closely on those hearings held in camera in the ICJ. The death of Slobodan Milošević, the former president of Serbia and the Federal Republic of Yugoslavia (Serbia and Montenegro),[2] on 11 March 2006 shortly after the opening of the oral hearings served only to highlight the political importance of this case for the region. The Tribunal has also been the provenance of a considerable volume of evidence which has been presented to the Court, and since this is the first time the ICJ has had to consider in detail the interplay between itself and another tribunal, it will have to think carefully whether and in what manner the deliberations of the ICTY can affect its own adjudication.

2. A BRIEF HISTORY OF THE CASE

It has taken some 13 years for the merits phase of the case to be heard before the Court. Proceedings began on 20 March 1993, when Bosnia and Herzegovina filed an application against the Federal Republic of Yugoslavia (FRY, now Republic of Serbia[3]) in respect of a dispute concerning alleged violations of the Genocide Convention. It was requested that the Court adjudge and declare that the citizens of Bosnia and Herzegovina had been 'killed, murdered, wounded, raped, robbed, tortured,

2. 1989–97 and 1997–2000 respectively.
3. Following the adoption of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February 2003, the name of the party was changed to Serbia and Montenegro for the purposes of these proceedings by a letter to the Court dated 5 February 2003. Following a referendum in Montenegro on 21 May 2006 shortly after the close of the oral proceedings, Montenegro declared its independence from Serbia. Serbia and Montenegro's membership of the United Nations has been continued by the Republic of Serbia on the basis of Art. 60 of the Constitutional Charter of Serbia and Montenegro (see the list of members on the UN website: http://www.un.org/Overview/unmember.html), activated by the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006. The Republic of Montenegro was admitted as a member of the United Nations by General Assembly Resolution 60/264 of 28 June 2006. The name of the case has not yet been changed following this development, and therefore the respondent will be referred to as follows: Federal Republic of Yugoslavia (1992–2003); Serbia and Montenegro (2003–6); Republic of Serbia (after the separation of Montenegro in 2006, after the hearings).

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kidnapped, illegally detained and exterminated' by the agents of Yugoslavia, and that this 'ethnic cleansing' must immediately cease, and reparations be paid.[4]

Shortly after the case was filed the Court issued two orders on provisional measures requiring the FRY to take steps to prevent the commission of genocide in Bosnia and Herzegovina.[5] The FRY then raised preliminary objections, stating that Bosnia and Herzegovina's application was inadmissible because it referred to events that took place within the framework of a civil war, and consequently there was no international dispute on which the Court could make a finding, and also the decision to initiate proceedings had not been made by the competent organ. It also alleged that there was no jurisdiction *rationae personae*, since Bosnia and Herzegovina was not bound by the Convention and, even if it had been, it could not have entered into force between the parties since the two states did not recognize one another and the conditions necessary to found the consensual basis of the Court were therefore lacking. The FRY further argued that there was no jurisdiction *rationae materiae*, since state responsibility was excluded from the application of Article IX of the Convention. The final two objections claimed the Court had no jurisdiction *rationae temporis*.[6]

The Court found that it had jurisdiction on the basis of Article IX of the Genocide Convention, since both parties recognized each other as sovereign independent states following the Dayton–Paris Agreement which entered into force on 14 December 1995. Even if the Convention had not entered into force between the parties until that date, all the conditions for jurisdiction *rationae personae* were considered to be fulfilled. With regard to the scope *rationae materiae*, the Court observed that there were no exclusions in the Convention of any form of state responsibility, nor indeed on the responsibility of states for the actions of its organs.[7] It also held that there was no clause in the Convention limiting the scope of its jurisdiction *rationae temporis*. Additionally, it found that the application was admissible on the ground that a dispute under the Genocide Convention existed, and therefore there was in fact an international dispute, and the fact that it had arisen during a civil war could not render the application inadmissible.[8] Finally, the Court held that the granting of authorization to initiate proceedings had been made by the recognized head of state of Bosnia and Herzegovina at the time.

The counter-memorial and a counterclaim requesting the Court to adjudge that Bosnia and Herzegovina had committed genocide against Serbs in Bosnia and

4. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Memorial of the Government of Bosnia and Herzegovina, 15 April 1994, at 292.
5. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Provisional Measures, Order of 8 April 1993, [1993] ICJ Rep. 3, and Order of 13 September 1993, [1993] ICJ Rep. 349.
6. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections of the Government of Serbia and Montenegro, June 1995.
7. The Court stated that 'the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III" does not exclude any form of State responsibility'. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595, at 616, para. 32.
8. Ibid., at 615.

Herzegovina was then filed by the FRY on 23 July 1997,[9] and on objections from the Bosnian side about the counterclaim, the Court found that it was admissible as such.[10] However, the counterclaim was withdrawn in April 2001 after the fall of Milošević regime,[11] and subsequently an application was made to the Court under Article 61 of the ICJ Statute, stating that a 'new fact' had come to be known, namely that the FRY had only become a member of the United Nations in 2000 and was not a party to the Statute before that date, and requesting the Court to revise the *Judgment on the Preliminary Objections* on the grounds that there had been no jurisdiction *rationae personae*.[12] On 3 February 2003 the Court found this application inadmissible because an application for revision may be made only when it is 'based upon the discovery'[13] of some fact which, 'when the judgment was given',[14] was unknown. Such a fact must have been in existence prior to the judgment and have been discovered subsequently. A fact which occurs several years after a judgment has been given is not a 'new fact' within the meaning of Article 61, and therefore the admission of the FRY to the United Nations in 2000, well after the 1996 judgment, cannot be regarded as such.[15] On 26 October 2004 the parties were informed that the Court had fixed 27 February 2006 as the date for the opening of the oral proceedings.

3. The oral proceedings

The oral proceedings saw the judges attend thirty days of hearings at the Peace Palace, six of which were focused on the taking of witness testimony. This took some ten weeks in total, ending on 9 May 2006.

Bosnia and Herzegovina began by outlining the procedural history of the case, followed by the history of the Balkan region and its account of what took place there during the war years. Counsel then proceeded to outline briefly the reasons for the Court having jurisdiction, and also the issues of evidence arising in the case, before going on to examine the substance of the case in more detail, focusing separately on the issues of genocide and of state responsibility. Serbia and Montenegro then took the floor, and first examined the evidence presented by the applicant, pointing out what it considered to be its weaknesses. Counsel Tibor Varady then turned to what he termed 'issues of procedure', which concerned the jurisdiction point.[16]

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9. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Memorial of 23 July 1997.
10. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 17 December 1997.
11. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 10 September 2001, [2001] ICJ Rep. 572.
12. *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*), 24 April 2001, [2001] ICJ Rep. 1.
13. ICJ Statute, available at http://www.icj-cij.org/documents Art. 61.
14. Ibid.
15. *Application for Revision of the Judgment of 11 July 1996 in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment of 3 February 2003, [2003] ICJ Rep. 1, at 23, para. 67.
16. This was the assertion by Serbia and Montenegro that, because the Court found that its predecessor (the FRY) had no access to the Court in the *Legality of the Use of Force* cases in 2004 (see *Legality of Use of Force (Serbia*

Despite assertions that a lack of jurisdiction should prevent the Court from needing to examine the merits, Serbia and Montenegro went on to discuss the substance of the merits claim, because, it said, it wanted the opportunity to demonstrate that Bosnia and Herzegovina's allegations were false.[17]

This first round of oral proceedings, in which each party was allocated ten Court sessions to present its case, was followed by the hearing of the witness testimony, which will be examined in detail below. The parties and the Court took a small break following the testimony, and reconvened at the start of the next full week for the second round of oral argument, in which each party had eight Court sessions in which to conclude its case. Again, Bosnia and Herzegovina took the floor first, and elaborated upon its factual case, analysing the first round of pleadings of Serbia and Montenegro, and giving a summary of its legal arguments. The witness testimony was then examined in detail, and commented on, and counsel then moved on to consider the jurisdiction issue. A plea was made to the Court to examine the case on the merits, citing the importance of the substance of the case and the opportunity for the Court to clarify the issue, but counsel went on to look at the jurisdiction question in more detail, responding to some points made by the opposing party in its pleadings. The Agent of Bosnia and Herzegovina, Sakib Softić, then read out the final submissions.[18]

Serbia and Montenegro then presented its second round of oral pleadings, beginning with the fundamental principles underlying its case, and then moving on to assess the evidence of Bosnia and Herzegovina, alleging much of it to be unreliable or insubstantial, and then to consider the witness testimony. Mirroring the order adopted by its opponent, Serbia and Montenegro then discussed the substance of the case on genocide and state responsibility, before finally reiterating its argument that the Court has no jurisdiction in the case and reading out the final submissions.

Aside from the fact that each side contested the other's legal arguments, both parties faced interesting questions of procedure and evidence on which they had to present argument, many of which were particular to the case and which affected greatly the way they argued their cases in the main. The most significant of these was the question of the jurisdiction of the Court.

4. Reopening the debate on jurisdiction

It is not within the parameters of this paper to go into the substance of the question of whether the Court has jurisdiction, but given that the issue was much discussed in the oral proceedings, it must instead be considered why the issue has been raised

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and Montenegro v. Belgium), Judgment of 15 December 2004, [2004] ICJ Rep. 1; although the cases were not joined, their text is very similar, and so for practical purposes only the first of the remaining eight cases will be referenced here), correspondingly it could not be subjected to the Court's jurisdiction in the present case. See *infra*, at section 4, 'Reopening the debate on jurisdiction'.

17. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 8 March 2006, CR 2006/12, at 11, para. 7 (Stojanović).

18. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 24 April 2006, CR 2006/37, at 59 (Softić).

again, and whether, as a matter of procedure, the Court is able to consider jurisdiction again at this stage of the proceedings.

In previous phases of this case, at the preliminary objections and the application for revision stages, the Court found that it did have jurisdiction, and thus from the history of this case alone it would seem the matter had been definitively decided. However, in another chapter of the Yugoslav conflict, the FRY attempted to bring cases under the Genocide Convention against ten[19] members of NATO individually on the legality of the use of force during the bombing campaigns in Kosovo.[20] In 2004 the ICJ dismissed these *Legality of the Use of Force* cases, stating it had no jurisdiction because the FRY (as it then was) did not have access to the Court at the relevant time, since it was not a member of the United Nations and could not be one until it applied in 2000 for new membership.

As a result of this decision, Serbia and Montenegro have asked the Court to once again consider this matter, since they believe that pursuant to this judgment there can now be no jurisdiction in this case, and therefore the parties have each had to present the Court with their interpretations of the previous judgments. Jurisdiction has two facets. On the one hand, it means that a state has access to the Court to bring a case – in essence, that it has standing before it. The corollary of this is that a state can have a case brought against it by another state – that is, the Court has jurisdiction *rationae personae* over it. Because in the 2004 case it was denied access to the Court, Serbia and Montenegro now argues that it cannot therefore be a defendant before it and be subjected to its jurisdiction.

The difficulty with this argument is of course the doctrine of *res judicata*, which means that once a particular fact has been adjudicated at some stage between the parties in any case, the matter must be considered as definitively dealt with for the purpose of any other proceedings between them. On previous consideration of the doctrine[21] the ICJ said that the language and structure of Article 60, which deems judgments final and without appeal, 'reflects the primacy of the principle of *res judicata*'.[22] Serbia and Montenegro points to the judgment in the *ICAO Council* case as authority for the principle that 'There is no *res judicata* bar which would disallow the Court to address the issue of access and jurisdiction if it appears justified.'[23] In that case the Court stated that it 'must . . . always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*',[24] and Serbia and Montenegro

19. By two orders dated 2 June 1999 the Court rejected the applications for preliminary measures and dismissed the cases against Spain and the United States for manifest lack of jurisdiction: *Legality of the Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep. 761, at 773–4; *Legality of the Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep. 656, at 670–1, paras. 41–43.
20. See *Legality of Use of Force*, *supra* note 16.
21. *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections *(Nigeria v. Cameroon)*, Judgment of 25 March 1999, [1999] ICJ Rep. 1.
22. Ibid., at para. 12. However, it must be noted that this case concerned a request for interpretation of a judgment on preliminary objections, and therefore differs from the context of the present case.
23. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 17, at 55, para. 1.39 (Varady).
24. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, at 52, para. 13. However, it must be noted that this case also says that 'a jurisdictional decision

argues that this dictum justifies the re-examination of the issue of jurisdiction in the present case, given that there now exists sufficient doubt surrounding the issue for the Court to have to consider it anew at this stage of proceedings.

Bosnia and Herzegovina has argued that Serbia and Montenegro is prevented from making this argument by virtue of estoppel. The essence of its argument was that Serbia and Montenegro 'may not, at the present stage of these proceedings, take a position regarding its status that is completely different from the one it took in each of the other phases of this litigation'.[25] Professor Franck said, 'This is the posture which Belgrade chose throughout the first eight years of this litigation, sometimes seeking to benefit from it – as by launching a counter-claim – and sometimes willingly paying a cost for maintaining it consistently.'[26]

In fact, Serbia and Montenegro during this period actively asserted that it was a party to the Convention in order to make the counterclaim against Bosnia and Herzegovina. Almost all of the first 500 pages of the rejoinder of 22 February 1999[27] were an assertion of its adherence to the Convention.

Professor Franck went on to outline previous jurisprudence on the matter, arguing that the most pressing authority for the principle that once a party has run a particular argument it cannot then contravene it is Vice-President Alfaro's Separate Opinion in the *Temple of Preah Vihear* case. Alfaro said that 'a State party to an international litigation is bound by its previous acts or attitude when it is in contradiction with its claims in the litigation'.[28] He did not label this doctrine 'estoppel' as such, but the doctrine is consistent with the common understanding of the operation of estoppel. He continued by saying that

> in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). The rule's purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State.[29]

However, Bosnia and Herzegovina does not appear to allow for consideration of the fact that the rejoinder appeared after the Court had already asserted its jurisdiction in 1996, and that it was drafted by the old Milošević regime. That the advent of a new government in Serbia and Montenegro brought a change of stance cannot be entirely surprising, and so other arguments have been advanced as to why the question of jurisdiction cannot be reopened, the main point being that it has already

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is . . . unquestionably a constituent part of a case, viewed as a whole, and should, in principle, be regarded as being on a par with decision on the merits as regards any rights of appeal that may be given' at para. 18, and a careful reading of the case in its entirety may in fact support the opposite conclusion to the one for which it is being held up as an authority. See M. C. Vitucci, 'Has Pandora's Box Been Closed? The Decisions on the *Legality of the Use of Force* Cases in Relation to the Status of the Federal Republic of Yugoslavia (Serbia and Montenegro) within the United Nations', (2006) 19 LJIL 105, at 119.

25. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 21 April 2006, CR 2006/36, at 26, para. 6 (Franck).
26. Ibid., at para. 9.
27. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Rejoinder of 23 July 1999.
28. *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, [1962] ICJ Rep. 40.
29. Ibid.

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been decided with the authority of *res judicata* in 1996. Professor Pellet says that 'From then on, by virtue of *res judicata*, which applies to judgments on preliminary objections just as it does to judgments on the merits, neither of the parties – which were alone bound by these decisions – could challenge them.[30]

It is also pointed out that a ruling to the contrary would not only be incompatible with *res judicata*, but it would also contravene Articles 59, 60 and 61 of the Statute.[31] Bosnia and Herzegovina further argue that the 2004 judgment is not *res judicata* in the present case, because the parties in that case were different from those in the present case.[32]

Even if the 2004 judgment were considered to have some impact on this case, one might have to bear in mind that seven judges appended a declaration that made it clear that they did not agree with the reasoning of the majority and consensus was only obtained due to a conservative wording of the operative part of the judgment. The separate opinion criticized the judgment on the basis that it failed in three areas,

> Namely 'consistency with [the Court's] own past case law in order to provide predictability', 'the principle of certitude' (i.e. that the Court should 'choose the ground which is most secure in law'), and finally 'the possible implications for other pending cases'[33].[34]

Indeed, it was doubted whether '"from the vantage point from which the Court now looks at the legal situation", the "new development in 2000 . . . has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations"[35] at the relevant time',[36] and therefore perhaps these criticisms by almost half of the judges who heard the case limit its potential impact. In addition, the composition of the Court has changed since the rendering of the 2004 judgment and the present bench might have decided that case somewhat differently.

Both parties spent many hours presenting their detailed and multifaceted arguments on the issue of jurisdiction, and the Court must now decide upon it one way or the other. If it decides it has no jurisdiction to entertain the merits of the case, the judgment will not have cause to cover the many and interesting issues which have arisen out of the rest of the parties' arguments. However, if the Court finds that it has jurisdiction in addition to deciding the case on the merits, it will also have to consider the matters of proof and evidence which were also at the forefront of the parties' arguments, particularly the burden and standard of proof, inferences, and judicial notice, given that much of the evidence which Bosnia and Herzegovina

30. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 25, at 17, para. 42 (Pellet). Original: 'Dorénavant, du fait de l'autorité de chose jugée qui s' attache aux arrêts sur les exceptions préliminaries comme aux arrêts relative au fond, aucune des parties – seules liées par ces décisions – ne peut les remettre en question.' All translations are those of the Registry, and are available at http://www.icj-cij.org/docket.
31. Ibid., at para. 61.
32. Ibid.
33. See *Legality of Use of Force*, *supra* note 16, Joint Declaration of Vice President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby, at para. 3.
34. S. Olleson, 'Killing Three Birds with One Stone? The Preliminary Objections Judgments in the International Court of Justice in the *Legality of Use of Force* Cases', (2005) 18 LJIL 237, at 248.
35. See *Legality of Use of Force*, *supra* note 16, at para. 79.
36. Ibid., at paras. 19–20 (Judge Higgins, Separate Opinion).

needed in order to prove its case remained in the hands of Serbia and Montenegro. Also a considerable amount of time was spent discussing the involvement of the ICTY in the case, and the documents and judgments emanating from it. In addition the hearing of live witness testimony took up almost two weeks of the Court's time and presented it with many novel considerations. These issues will now be addressed in turn.

5. Issues of proof

Before a discussion of the multifarious evidentiary matters arising in this case can take place, it is necessary first to establish which party bears the burden of proof. This issue was raised by Bosnia and Herzegovina, which argued that it had adduced enough evidence to prove certain of its allegations, and that from this, by way of inferences, the remaining allegations should be considered also to have been proved. This issue is approached differently by the ICJ from municipal courtrooms. Given the international nature of the Court, and the widely varying subject matter of disputes from the very first days of the operation of the Permanent Court of International Justice (PCIJ) to the present day, it has always been the policy of the Court to adopt a very flexible and broad approach to matters of proof and evidence. With no detailed rules on the burden and standard of proof or the production of evidence, the Court is free to take whatever position it likes in a particular case. In addition, as Article 59 of the ICJ Statute sets out, the ICJ is not subject to the principle of *stare decisis* and therefore no binding precedents are created.[37] This left considerable scope for argument by the parties in this case to persuade the Court to adopt a particular approach.

5.1. Burden of proof

5.1.1. Actori incumbit onus probandi

It is considered well established in the Court's jurisprudence that the maxim *actori incumbit onus probandi* applies and therefore that each party asserting a fact must furnish proof of that fact. The principle was illustrated clearly in the *Nicaragua* case, where the Court stated that 'it is the litigant seeking to establish a fact who bears the burden of proving it',[38] and it has consistently adhered to this principle. The situation is less clear-cut than in municipal civil cases where one party is a claimant and the other the defendant, in which case the obligation is on the claimant to provide all the evidence to succeed in their claim, and the defendant may in turn adduce evidence to refute those arguments. In the ICJ the terms used are 'applicant' and 'respondent', and it is often difficult to discern which party is effectively the applicant. For example, in cases of boundary disputes, both parties are essentially applicants in that both allege certain facts, namely that the land in question belongs

37. ICJ Statute, *supra* note 13, Art. 59: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' However, it must be noted that the Court does tend to follow its previous practice in order to create consistency and coherence in its jurisprudence.

38. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392, at 437.

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to them. This problem was demonstrated in the *Minquiers and Ecrehos* case, in which both parties were subject to an equal burden of proof and the Court then had to appraise the relative strength of the opposing claims.[39] Thus the Court puts less emphasis on the applicant/respondent dichotomy and more on who is seeking to establish certain facts. The obligation will therefore shift between the parties in relation to particular aspects. As Rosenne notes,

> Although the Rules of Court use the term applicant and respondent, this is a matter of drafting convenience and only designates the formal position of the parties. On the other hand, viewed as a matter of substance, the tendency of the Court is to separate the various issues arising in any one case, treating each one separately. The result is that each state putting forward a claim is under the general duty to establish its case in fact and in law, without there being any implication that such state is plaintiff or applicant in the sense in which the term is used in municipal litigation.[40]

In this case, Bosnia and Herzegovina alleges that Serbia and Montenegro has failed in several respects to comply with the 1948 Convention, namely that it committed genocide, was complicit in or aided and abetted it, conspired in or incited its commission, failed to prevent it being committed, and failed to punish the perpetrators. Following the usual rule of *actori incumbit onus probandi*, the burden to establish these facts lies with Bosnia and Herzegovina. In response to these contentions, Serbia and Montenegro argues that these acts were not attributable to the state, and therefore it is incumbent on Bosnia and Herzegovina to prove this. Its main argument, however, is that the Court has no jurisdiction because the respondent had no access to the Court at the relevant moment, and did not remain or become bound by Article IX of the Convention. The burden of proof on these matters also lies with Serbia and Montenegro.

At first glance, the matter would appear to be relatively straightforward – over certain matters one party bears the burden of adducing evidence to prove its assertions, and over other matters it falls on the other party where it is alleging facts. However, the matter cannot be disposed of as simply as this. It is clear that in some circumstances where a party bears the burden of establishing a particular fact, it is unable to do so because the necessary evidence is unobtainable. This difficulty has been overcome by civil courts the world over by the use of inferences.

5.1.2. Inferences

Where the party asserting a particular case has presented clear evidence of certain essential facts, the court may infer from those facts certain additional facts, because, as Bosnia and Herzegovina put it in its memorial, 'to do so fits with ordinary probablistic [*sic*] expectations'.[41] The onus will then rest on the other party to demonstrate that such deductions or presumptions are unwarranted in the specific case. The burden of proof is effectively shifted to the other party.

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39. *Minquiers and Ecrehos (France v. United Kingdom)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47.
40. S. Rosenne, *The Law and Practice of the International Court* (2005), 526–7.
41. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Memorial of Bosnia and Herzegovina, *supra* note 4, at para. 5.3.3.3.

An example of this is where the evidence required to prove a fact lies solely in the hands of the opposing party, which will not allow the other party access to it. This is a particular problem where there has been secession of countries and government records and other important papers have remained in one of the new states, or where armed conflict has occurred, as in this case. Bosnia and Herzegovina noted that 'many important sources of evidence remain within the sole domain of the régime in Belgrade and its archival materials are not fully accessible to the Applicant or to this Court'.[42] A further example of this problem is where the incident in dispute took place in the sovereign territory of one of the parties, as occurred in the *Corfu Channel* case, in which a British ship was destroyed by a mine in Albanian waters. The British alleged that Albania had known about the existence of the mines, but were unable to prove this because they had no access to Albanian territory to carry out investigations or gather evidence. The Court noted that

> exclusive territorial control exercised by a state within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that state as to events. By reason of exclusive control, the other state, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility.[43]

However, whether this actually means that the Court will allow the burden to shift to the party in possession of the necessary evidence to disprove the alleged facts is not certain, since the Court went on to say,

> Such a state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[44]

It seems, therefore, that what the Court does is to allow the party with no access to direct evidence to make its case using circumstantial evidence and inferences of fact. The latter concept is not clear, however, and it could be used as authority to mean that the Court will make inferences of fact in cases such as this which will constitute proof, and therefore require the opposing party to rebut them. So the question remains whether this would be a suitable case for the Court to consider such action.

Here, as noted above, most of the evidence needed to prove that the state carried out acts with the requisite *mens rea* is in the hands of the government of Serbia and Montenegro. Bosnia and Herzegovina believes that it has adduced enough evidence to prove certain facts, and from the pattern of those facts asserts that a presumption arises that the remaining facts for which they cannot produce evidence are also true. Professor Franck stated, 'We will . . . ask the Court to draw inferences from patterns – patterns of facts to conclusions that are logically or experientially inescapable, even if

42. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 28 February 2006, CR 2006/3, at 24, para. 16 (Franck).
43. *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, [1949] ICJ Rep. 1, at 4, para. 18.
44. Ibid.

they cannot be proven with direct evidence.'[45] It was argued that the circumstances of the case meant that 'It should be up to the Respondent to rebut these logical inferences with evidence that is solely within its control.'[46]

However, this doctrine must be approached with care, as was noted in the *El Salvador/Honduras* case, in which El Salvador drew to the attention of the chamber the difficulty it was experiencing in collecting evidence in certain areas owing to interference with governmental activities resulting from acts of violence. The chamber stated that it fully appreciated those difficulties, but 'It cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced.'[47] Thus the first difficulty is whether the evidence which is missing would be supportive of Bosnia and Herzegovina's allegations, or whether it would extinguish them. This can be answered fairly easily, since if such evidence exists, and is in the hands of the other party, it would clearly wish to produce it in order to defend the allegations against it. It could therefore be presumed that any documents which do exist do not support Serbia and Montenegro's case; however, this would be to oversimplify the matter and to leave aside perhaps considerations of national security which might act as a hindrance to the production of certain documents in evidence in the Court. The second difficulty is whether any evidence even exists. In the present case, however, it is extremely unlikely that there is no evidence at all of the intention of the government in its actions over the course of the conflict, whichever way that intention points. Indeed, many hundreds of documents emanating from the organs of the Serbian and Montenegrin state have been brought before the ICTY, and one set of documents in particular which was requested by Bosnia and Herzegovina, namely the minutes of the Supreme Defence Council, has not been adduced in evidence in this case. The danger that the Court would be presuming documents to exist where none did can thus be seen to be minimal in this particular case.

5.1.3. Judicial notice

In addition to asking the Court to draw inferences from patterns of events, Bosnia and Herzegovina spoke of facts as being 'notorious', and asked the Court to take judicial notice of these. Serbia strongly rejected the propriety of the Court undertaking this task, stating that 'The concepts of notoriety of facts, of inference, of a pattern of events relied upon by the applicant state, have no legal weight in the absence of substantial evidence including evidence of context and elements of causation.'[48]

Some examination of the circumstances in which the Court can take judicial notice of facts is necessary. Amerasinghe describes judicial notice as 'a measure

45. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 42, at para. 15.
46. Ibid., at para. 16.
47. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 351, at para. 63.
48. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 2 May 2006, CR 2006/38, at 25, para. 14 (Brownlie).

through which international tribunals can rely on some facts in a pending case without requiring the party that relies on them to provide proof thereof'.[49] In the present case, given the difficulties which Bosnia and Herzegovina has faced in presenting evidence, it will certainly be to its benefit if the Court takes judicial notice of certain facts. Professor Franck in his pleadings states that the idea that the Court 'will take notice of "the notoriety of the facts" was recognized in 1951, in the *Fisheries* case[50] and, again, in the *Nuclear Tests* cases,[51,52] and that Bosnia and Herzegovina asks the Court 'to consider some facts as "notorious" because of the frequency and regularity with which they have entered the public domain: mostly through reports of reliable observers'.[53] In particular, it asks the Court to take judicial notice of the context in which this case arises, which Professor Franck describes as being 'an international war in which the Respondent has been declared by the Security Council of the United Nations to have intervened with force in the territory of the Applicant'.[54]

Serbia and Montenegro advise caution with respect to the use of judicial notice, arguing that

> 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,[55] without any evidence for so massive a scale of violation, denies the role of the Court.[56]

However, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to facts which 'are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries'.[57] The Court is also able to take judicial notice of matters whether or not the parties have drawn their attention to it.[58] In the *Nuclear Tests* case, the Court took cognizance 'of information as to events said to have occurred since the close of the oral proceedings and has treated it as evidence

49. C. F. Amerasinghe, *Evidence in International Litigation* (2005), at 160–1.
50. *Fisheries Case (United Kingdom v. Norway)*, Judgment on the Merits of 18 December 1951, [1951] ICJ Rep., at 138–9.
51. *Nuclear Tests Case (Australia v. France)*, Judgment on the Merits of 20 December 1974, [1974] ICJ Rep., at 9, para. 17.
52. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 42, at para. 12.
53. Ibid., at para. 14.
54. Ibid., at para. 16.
55. Ibid., at para. 11.
56. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 17, at 40, para. 76 (Obradović).
57. *US Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1989, [1980] ICJ Rep., at 9, para. 12.
58. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on the Merits of 27 June 1986, [1986] ICJ Rep. 14, at 72.

in the proceedings. It has not informed the parties of the material which it has thus introduced into evidence. By the use of it the Court has drawn a conclusion of fact.'[59]

It is clear from these last cases that the Court is adept at using its powers to inform itself on matters relevant to the case under deliberation and, indeed, their willingness to do so must save the parties considerable effort in adducing proof of the tritest facts. However, some matters which one party considers to be notorious may not be so for the other party, as demonstrated by the example Serbia and Montenegro adduces of large-scale rape during the war. This matter is yet another example of the delicate nature of the task before the Court, and the necessity for it to balance pragmatism with a fair hearing for the parties. When taken together, the often conflicting doctrines of the burden of proof, inferences, and judicial notice have the potential to cause the Court considerable difficulty, particularly when assessed from the opposing points of view of the parties.

It is important, however, that the Court does not shirk this task, which is especially important where considerations such as war or the break-up of states have left the parties in an unequal position regarding access to, and the production of, evidence. Judge Owada noted a particular injustice in the *Oil Platforms* case, whereby the United States, in order to justify its own actions, had to prove that the illegal activities of Iran took place, and were it unable to do so the case would result not only in a failure to establish a claim against Iran but in the attribution of international responsibility to the United States for 'its own actions taken against the alleged by unsubstantiated activities of the Applicant'.[60] He further noted the importance of a correct position being taken in every case in this regard:

> Accepting as given this inherent asymmetry that comes into the process of discharging the burden of proof, it nevertheless seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion.[61]

5.2. Standard of proof

A discussion on the burden of proof and the various factors affecting it would not be complete without also considering the standard of proof which must be adopted. In certain cases where a party has difficulty in establishing facts because of a lack of access to evidence, instead of shifting the burden of proof to the other party to disprove allegations it might perhaps be more appropriate to adopt a lower standard of proof, so that the claims may be more easily proved. However, the standard of proof is one of the greatest controversies concerning the rules of evidence in the ICJ. Naturally it is a matter of much importance to the parties and therefore uncertainty is undesirable, but on examination of the Court's consideration of the standard of

59. *Nuclear Tests Case*, *supra* note 51, at 391 (Judge Sir Garfield Barwick, Dissenting Opinion).
60. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 77, at para. 42 (Judge Owada, Separate Opinion).
61. Ibid., at para. 47.

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proof in past cases, it appears it prefers to leave the matter unclear rather than adopt a concrete standard.

5.2.1. What standard does the Court generally employ?

As a former registrar of the Court points out, 'the concept of an identifiable or quantifiable standard of proof emanates from the common law system'.[62] In criminal cases, because of the presumption of innocence and the potential deprivation of liberty which may result from a guilty verdict, it must be proved 'beyond a reasonable doubt' that the accused is guilty. In civil proceedings the justifications for adopting such a high standard are not so strong, and a case need only be made out 'by a preponderance of the evidence', or in other words, be proved to be 'more likely than not'. In civil, or continental, law systems, however, all that is needed is that the court be persuaded by a case, without reference to a particular standard. The judge relies on his 'inner conviction'.

The ICJ is generally perceived as more closely following the continental procedure. This is demonstrated, for example, by the priority it accords to written evidence,[63] and the preference for finding virtually all evidence admissible.[64] There can also be little debate about whether the Court is civil or criminal in nature, since it does not deal with criminal matters pertaining to individuals, but instead with disputes between states, and it has no mechanism for the prosecution of a state for criminal acts. It must, therefore, by its very nature, be a civil court. However, despite the procedure in the ICJ generally following that of the continental system, on this matter it appears to depart from it and on occasion speaks of standards of proof, resembling more closely the Anglo-American system.

However, it has not definitively outlined the standard of proof which it adopts, but has, over the years, referred to a number of varying standards. In the *Corfu Channel* case alone, the following standards were mentioned: 'free from any doubt',[65] 'not sufficient . . . to constitute decisive legal proof',[66] 'falling short of conclusive evidence',[67] and 'no room for reasonable doubt'.[68] In that case the Court suggested that the standard of proof would be higher in 'charges of exceptional gravity against a state',[69] which the present case could be argued to be, and indeed in some cases there has been mention of the higher standard of 'beyond reasonable doubt', commonly used in criminal courts. The first example of this is Judge Read in his dissenting opinion in the *Fisheries* case,[70] when he asserted that the evidence presented had

62. E. Valencia-Ospina, 'Evidence before the International Court of Justice', (1999) 1 (4) *International Law Forum du droit international*, at 203.
63. See D. Sandifer, *Evidence before International Tribunals* (1975), at 198.
64. See, e.g., J. F. Lalive, 'Quelques Remarques sur la Preuve devant la Cour Permanente et la Cour International de Justice', (1950) 7 *Schweizerisches Jahrbuch fur internationales Recht* 77, at 102: 'The almost total absence of restrictions relating to admissibility of evidence resembles more closely the continental than the Anglo-American system' (author's translation).
65. *Corfu Channel*, *supra* note 43, at 14.
66. Ibid., at 16.
67. Ibid.
68. Ibid., at 18.
69. Ibid., at 17.
70. *Fisheries Case*, *supra* note 50, at 196 (Judge Read, Dissenting Opinion).

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established a particular proposition to that standard. However, it is not clear what the Court may have meant by a 'higher' standard, since

> Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is . . . little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court. . . . The principle judicial organ of the United Nations should . . . make it clear what standards of proof it requires to establish what sort of facts.[71]

This judicial criticism appearing in a separate opinion demonstrates that there is a division in the Court between on the one hand those who would like to see a definitive standard of proof, and on the other those who consider that it would not be advisable. The differing judicial traditions of the judges mean that those coming from a common-law background are used to, and feel the need for, a standard of proof, whereas for the civil-law lawyers a 'standard' is not necessary, given that they rely on the inner conviction of the judge. In addition there may be those who, although accustomed to having a standard of proof, believe that in the ICJ it is inappropriate to set a standard in stone, because they feel that the disputes before the Court require a degree of flexibility with regard to evidential standards that such an exercise would not afford.

There has also been academic criticism of this piecemeal approach. Kazazi points out that justice requires evidence on different issues within and among cases to be treated equally, since 'Applying different criteria may do injustice and is susceptible to being viewed by the parties as a sign of partiality. . . . [I]t is necessary to determine a measure to be applied equally in all cases.' [72]

But this latter point of view is perhaps a slightly dangerous one to adopt in the ICJ. As the above discussion on burden of proof notes, it is often difficult for one party to produce evidence as a result of state secession or conflict, and in cases such as these 'the degree of the burden of proof . . . to be adduced ought not to be so stringent as to render the proof unduly exacting',[73] as Lauterpacht stated in the *Norwegian Loans* case. The ICJ also gives no powers to the parties to demand disclosure or investigatory powers such as they might have in a municipal tribunal, given that the Court operates on the basis of states' consent, which they would not be willing to give were they subjected to such demands. So in cases involving situations such as those mentioned above, where the party cannot adduce enough evidence to shift the burden of proof to the party who has possession of all the evidence, does the Court adopt a lower standard of proof in order to prevent an injustice? This would enable cases to be proved more easily in these 'difficult' cases, but this would run counter to the Court-accepted assertion that the standard of proof is higher in cases of exceptional gravity, since these cases are likely to be the ones in which the charge concerns genocide, the use of force, or other such grave situations.

71. *Oil Platforms, supra* note 60, at para. 33 (Judge Higgins, Separate Opinion).
72. M. Kazazi, *Burden of Proof and Related Issues – A Study on Evidence before International Tribunals* (1996), at 323.
73. *Certain Norwegian Loans (France v. Norway)*, Judgment of 6 July 1957, [1957] ICJ Rep. 39 (Judge Lauterpacht, Separate Opinion).

An examination of the Court's jurisprudence on this matter therefore does not easily produce a solution which would have obvious applicability in this case. It is possible that the Court will follow the line of reasoning on the burden of proof, and shift the onus to Serbia and Montenegro to disprove Bosnia and Herzegovina's case. On the other hand, they may not, and the question will then be for them to elaborate the standard which will be adopted. Serbia and Montenegro argued that the standard should be a high one, Professor Brownlie pointing out that 'the present proceedings concern the most serious issues of state responsibility it is possible to imagine, and the standard of proof should, as a matter of the good administration of justice, be appropriately rigorous',[74] but Bosnia and Herzegovina counter that the standard should be lower because of the difficulties of obtaining evidence in the circumstances.[75] Given these two countervailing positions and the Court's general reluctance to elaborate on standards of proof, it is also possible that the issue will not be discussed in any detail, given the many other complex issues which the Court must decide. This latter course would certainly be undesirable, and, as Judge Higgins noted in the *Oil Platforms* case, 'even if the Court does not wish to enunciate a general standard for non-criminal cases, it should in my view, have decided, and been transparent about, the standard of proof required in this particular case'.[76] This criticism would certainly also apply in this case if the Court fails to discuss this issue in the judgment.

5.2.2. Is genocide a 'crime'?

Genocide has been recognized by many writers to be 'the crime of crimes'.[77] When considering individual responsibility for genocide in the international criminal tribunals, the standard of proof is clearly the criminal 'beyond reasonable doubt'. It is confusing to speak of genocide as a 'crime' in the context of state responsibility, however, and the parties were forced to confront this in their pleadings. In an interview with the Institute of War and Peace Reporting, President Higgins acknowledged that the ICJ is a civil court and adopts an appropriate standard of proof to reflect that fact, but noted, 'you're in an overlap area where you've got something like genocide . . . a crime under international law',[78] and acknowledged that difficult questions arose regarding the standard of proof to be adopted with regard to a state rather than an individual in this context. However, the fact remains that the ICJ is not a criminal court and, indeed, as Sir Gerald Fitzmaurice explained in proposing what became Article IX of the Convention, 'the responsibility envisaged . . . was civil responsibility, not criminal responsibility',[79] and as Bosnia and Herzegovina pointed out to the Court, 'You, Members of the Court, are not criminal judges; the parties that appear

74. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 13 March 2006, CR 2006/16, at 52, para. 155 (Brownlie).
75. See, e.g., Professor Franck's pleadings, *supra* note 42, at 24.
76. *Oil Platforms*, *supra* note 60, at para. 33 (Judge Higgins, Separate Opinion).
77. E.g. by the trial judge in *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR 97-23-S, September 1998, para. 16.
78. Interview with President Higgins, 9 February 2006, Institute of War and Peace Reporting, available at http://www.iwpr.net/index.php?apc_state=hsritri&s=o&o=tribunal_rh_int.html.
79. GAOR, 3rd Sess., 6th Committee, UN Doc. A/C6/258, at 440.

before you are not accused or prosecutors; and the evidence admissible is not the evidence that applies in criminal law.'[80] The Court is therefore unlikely to adopt the criminal standard of proof unless they find merit in the argument that the gravity of the allegation ought to raise the standard and consider that in this case it would be to the extent that proof 'beyond reasonable doubt' is required.

5.2.3. A higher standard for establishing jurisdiction?

The above discussion relates to the standard of proof for facts which must be proved by each party to establish the various elements necessary for a finding in their favour. With regard to the question of whether the Court has jurisdiction, a different standard is thought to be employed. Given that the Court's operation is based on the consent of states, it has been suggested that if it is alleged that the Court has jurisdiction this must be established to a very high degree of certainty, otherwise, in cases where jurisdiction is disputed, a state may find itself unwillingly subjected to the Court's jurisdiction.[81] Given the fierce debate between the parties on whether the Court has jurisdiction, the standard to which it must be satisfied with this fact is of obvious importance to them. Although neither party explicitly raises the issue, it is worth mentioning in this context.

In a well-known work on issues of proof Kazazi discusses the contention that the standard of proof pertaining to jurisdiction must be distinguished from that pertaining to the factual elements of each party's case.[82] In the first decision on this matter, the PCIJ decided that it would 'only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant'. This was elaborated upon in a dissenting opinion by four judges in the *Ambatielos* case in which they stated that

> Before declaring a state to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present court have always considered it necessary to establish positively and not merely on prima facie or provisional grounds, that the state in question had in some form given its consent to this procedure.[83]

In the *South West Africa* case, however, Judges Spender and Fitzmaurice in their joint dissenting opinion appear to have raised the standard from a preponderance of the evidence to requiring proof beyond reasonable doubt, and stated that 'a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied – satisfied beyond a reasonable doubt – that jurisdiction does exist'.[84]

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80. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 18 April 2006, CR 2006/31, at 28, para. 46 (Pellet). Original: 'Madame et Messieurs de la Cour, vous n'êtes pas des juges pénaux; les Parties qui se présentent devant vous ne sont pas des accusés ou des accusateurs; et les moyens de preuve recevables ne sont pas ceux qui ont cours en droit pénal.'
81. *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment 26 July 1927, PCIJ Rep Series A No 9, at 32.
82. See Kazazi, *supra* note 72, at 340.
83. *Ambatielos Case (Greece v. United Kingdom)*, Judgment of 19 May 1953, [1953] ICJ Rep. 10, at 29 (Judges McNair, Basdevant, Klaestad and Read, Dissenting Opinion).
84. *South West Africa* cases *(Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 21 December 1962, [1962] ICJ Rep. 473, at 474 (Judges Sir Percy Spender and Sir Gerald Fitzmaurice, Joint Dissenting Opinion).

It would therefore seem that in the opinion of six prominent judges in the 1950s and 1960s the existence of jurisdiction in a case must be established beyond reasonable doubt, and Kazazi follows their reasoning. If the Court also follows this argument and adheres to the *actori incumbit onus probandi* principle and considers that the burden of proof falls on Serbia and Montenegro because the latter asserts there is no jurisdiction, all Serbia and Montenegro needs to do is create a small element of reasonable doubt – which in this case, with the state's complicated history, will probably be easy to achieve – to prevent the Court from having jurisdiction in this case. Whether the Court will consider that jurisdiction must be established by a preponderance of the evidence or beyond reasonable doubt remains to be seen.[85] the dicta on the latter appear only in dissenting opinions, whereas the *Chorzów Factory* test was part of the majority judgment in that case. The Court does not adhere to the principle of *stare decisis*, so is not obliged to follow the *Chorzów Factory* line of reasoning, but it is usually careful to try and create consistency in its rulings; it may therefore be tempted to repeat that analysis. However, there seems to be a sound legal argument that a court whose jurisdiction is based on consent must have a high standard of proof for establishing its jurisdiction conclusively, and the Court may thus choose to follow the latter principle. This is another illustration of the difficulties which the renewed challenge to jurisdiction has presented in this case, and it remains to be seen how the Court will deal with it, both overall and with regard to the standard to which jurisdiction must be proved, if the Court decides that it must reopen the matter.

6. Issues of evidence

The problems of the applicable burden and standard of proof and what inferences may be drawn are not the only complex issues relating to evidence to raise their heads in this case. It has seen an almost unprecedented volume of evidence being presented, given the 13-year gap between the application and the commencement of the oral pleadings, and the constant production of evidence and decisions by the ICTY, which has continued to provide many evidential challenges. There are several pressing questions that the Court must examine, and the answers to these may, while not creating precedent as such, be a guide for cases yet to be brought, and thus the Court must consider not only their impact in the present case but also any possible rules or methods of treatment of evidence which may be born from their decisions. As was noted in the *Pulau Litigan and Sipadan* case, the 'rules of evidence [can] clarify not only the issues central to this case but also . . . elucidate – for these and for future litigants – the applicable principles by which the law shines a light on that which is unclear to the naked eye'.[86]

85. For a full discussion on the distinction between the two standards, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, [1995] ICJ Rep. 6 (Judge Shahabbuddeen, Dissenting Opinion).

86. *Case concerning Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment on the Merits of 17 December 2002, [2002] ICJ Rep. 40, at 1 (Judge Franck, Dissenting Opinion).

What are the issues concerning the admission of new documents which have come into existence since the application was made? How can the evidence presented before the ICTY be of use in the Court? And how is the Court to view the judgments of the ICTY? Does finding senior government officials or military men of Serbia and Montenegro guilty of genocide affect in any way the workings and decisions of the ICJ? And what of documents which have been accorded privilege in the ICTY? Can the ICJ require that these are presented for use in the present case? What procedure should be followed for the examination of witnesses? Each of these issues must be given careful consideration by the Court.

6.1. The evaluation of evidence

As noted above, the ICJ has considerable freedom in evaluating evidence; as Judge Azevedo in the *Corfu Channel* case observed, it is 'an international Court, having more freedom in regard to evidence than a municipal judge'.[87] This means that the Court usually allows most evidence, and does not have strict rules about admissibility, instead evaluating the weight to be attributed to certain documents, that is, its probative value – based on factors such as the provenance of the document, the reliability of the source or the author, and whether it was made contemporaneously with the events of which it speaks. This case will no doubt throw up many questions of weight, as in the oral proceedings alone, hundreds of documents were referred to, from many different sources. For example, resolutions of the General Assembly and the Security Council, reports to the United Nations by experts carefully studying the conflict, and documents which had previously been brought before the ICTY have all been adduced as evidence in this case. Some documents have been uncontroversial and the parties have not felt the need to plead as to the weight which should be attributed to them. Others have been more problematic. Bosnia and Herzegovina has relied heavily on documents emanating from the ICTY, which it says have 'withstood the rigorous testing of a virile adversary process and met the requirements of proof beyond a reasonable doubt'.[88] Serbia and Montenegro countered this assertion by arguing that these documents were based on insufficient or biased material.[89] But some of the evidence presented by both parties was of doubtful value. Passages were quoted by Serbia and Montenegro which apparently supported its position but were extracted from documents which clearly when taken as a whole concluded the opposite,[90] and Bosnia and Herzegovina accepted that some of the evidence presented was of a 'relatively untested value',[91] for example the testimony of witnesses

87. *Corfu Channel*, *supra* note 43, para. 84 (Judge Azevedo, Dissenting Opinion).
88. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 2 March 2006, CR 2006/07, at 45, para. 2 (Franck).
89. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 4 May 2006, CR 2006/41, at 24–25, para. 31, and at 19–21, paras. 46–49.
90. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 18 April 2006, CR 2006/30, at 25, para. 36 (Van den Biesen).
91. Ibid.

before the ICTY or indictments from that court. With each and every controversial document or source of evidence the Court, in making its judgment, will have to assess their probative value.

6.2. The use of new documents

One of the more problematic aspects of this case has been the need for both parties to produce evidence which did not exist at the time of the written proceedings, given the gap of many years in which considerable volumes of new documents have become available, both by reason of the time elapsed generally and the fact that the investigations of the ICTY have continually been unearthing new material. The use of new documents is governed by Article 56 of the Rules of Court. Paragraph 1 states that after the closure of the written proceedings, no further documents may be submitted unless the other party consents, or, in the absence of consent, under paragraph 2, if the Court, after hearing the parties, considers the document necessary. At the time of the hearings in this case the parameters of this Article were somewhat unclear, and the case raised many questions in relation to this. In December 2006 the Court revised its Practice Direction IX and adopted Practice Direction IX *bis* in order to provide guidance on this matter.[92] The clarifications made by these practice directions will be discussed after the problems which arose during the hearing of the case, since they clearly illustrated the need for guidance from the Court which has recently been duly provided.

6.2.1. New documents entered under Article 56(1)

According to an ICJ press release[93] both parties submitted new documents to the Registry in accordance with Article 56(1) shortly before the opening of the oral proceedings. Since neither party had any objection to the documents produced by its opponent, the Registrar decided to authorize their production and informed the parties of this in a letter. Bosnia and Herzegovina also transmitted copies of video material, extracts of which it wished to show at the oral proceedings, and the Registrar later 'informed the parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided . . . that Bosnia and Herzegovina could show extracts of the video material at the hearings'.[94] Despite the considerable volume of these documents, their introduction into evidence presented no difficulties to the Court and they were duly made use of by the parties in the oral proceedings.

6.2.2. New documents entered under Article 56(4): what does 'readily available' mean?

Both parties made reference to documents which had not been formally produced under Article 43 or 56(1) under the exception detailed in Article 56(4), which states

92. ICJ Press Release 2006/43 of 13 December 2006, available at http://www.icj-cij.org/presscom.
93. ICJ Press Release 2006/9 of 27 February 2006, available at ibid.
94. Ibid.

that reference may be made during the oral proceedings to a document not formally produced if it 'is part of a publication readily available'. This provision was introduced in 1972[95] following the tendency of counsel in the *South West Africa* cases to quote documents which had not been filed[96] and 'thus, by reading them into the verbatim record, to introduce them through the back door'.[97] These documents were regarded as arguments and not evidence as such,[98] unless they were formally produced. The concept of a 'readily available' publication at the time of the creation of the rule was perhaps not seen as problematic, given that so few documents could be described as such, for example the ICJ Reports, periodicals or statutes, or other information commonly found in legal libraries.

However, developments since then have meant that the Court had already experienced problems in defining 'readily available' before hearing this case. In *ELSI*, a decision of an Italian court published in Italian in the official court reports was not considered to be 'readily available', since it was not given in one of the official languages of the Court.[99] This reading of 'readily available' was quite restrictive, as it confined documentation to that which was in English or French only. Since the time of this judgment the amount of material in the public domain has exploded, thanks to the onset of the 'information age' and the wide availability of all forms of global media, in many languages, on the Internet. In the natural meaning of the phrase, information on the Internet could be described as 'readily available' since almost everyone has access to it. Whether, however, such a vast resource should be included within this phrase is doubtful, given that it includes all newspapers, articles, journals, government information, documentation from other courts and tribunals (including the ICTY), materials from non-governmental organizations (NGOs), and an immeasurable amount of information comprising personal opinions or speculation. There is no method of policing or limiting what could be used if the Internet is deemed to make documents 'readily available'. It is undesirable that any kind of volume of evidence should be referred to under the Article 56(4) exception, given that it would increase uncertainty in proceedings and does not allow a party to prepare its cases effectively without notice of the documents on which the other party would rely. The provision as it stood at the time of the hearings, however, had the potential to allow just that.

An example to illustrate this point was the attempted reference by counsel for Bosnia and Herzegovina to a newspaper article which was 'readily available' on the newspaper's website:

> The PRESIDENT: I have the impression that the financial document had not only not been provided to the witness, but to the Agent for Serbia and Montenegro and I do

95. Amendment of the ICJ Rules of Procedure, 10 May 1972, (1972) 11 ILM 899.
96. *South West Africa* cases, *supra* note 84, Pleadings, Vol. X at 460, Vol. XI at 220.
97. S. Talmon, 'Article 43' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.), *Commentary on the Statute of the International Court of Justice* (2006), 977, at 1015.
98. Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, PCIJ Rep Series A/B No 61, 208, at 214–16.
99. *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Pleadings, Vol. III, 79 at 178.

> not believe it has been provided to the Bench either. . . . Mr Obradović, do you wish to speak to that?
>
> Mr OBRADOVIĆ: Thank you, Madam President. That was just my objection. We would like to see it, in order to be prepared eventually for re-examination and to see and estimate the admissibility of those documents.
>
> The PRESIDENT: Thank you. I think you have some problem continuing your cross-examination on this line.
>
> Ms KORNER: The documents in themselves are not suggested that they should go in. I have got them here purely so that if the witness asks – as did Mr. Riedlmayer when Ms Fauveau-Ivanović was cross-examining – 'well, can I see the document?', that we had it there so there was no suggestion there was a trick. I just want him to confirm one line. It is not that we are trying to put the document in. This is to assist the witness, in fairness, because we think that is the proper way to do it.
>
> The PRESIDENT: I will allow this one line and then I would like to move away from documents that have not been provided.[100]

It would have been possible for Ms Korner to argue that the document in question was 'readily available', but even though she did not even seek to bring the document in, the Court appeared very reluctant to allow evidence which had not been introduced by the usual channels. It seemed that it too preferred to hear only evidence which had been formally produced, perhaps because it was aware of the potential of Article 56(4) to cause them considerable problems. Following the issue of the practice directions, it has become clear that the Court favours a restrictive reading of this provision.

6.2.3. New Practice Directions IX and IX bis

Practice Direction IX has been amended to make it clear that Article 56(1) and (2) of the Rules applies whenever a party wishes to submit a new document after the closure of written proceedings, 'including during the oral proceedings'.[101] This amendment will in future prevent parties from introducing documents during the oral proceedings without following the procedure laid down in the Rules – an issue in this case particularly during witness testimony, since witnesses were shown, or counsel referred to, documents which had not been introduced in evidence.

The most significant alteration is contained in new Practice Direction IX *bis*, which gives clear guidance on what will constitute 'part of a publication readily available', and says that whether a document can be considered as such is a matter for the Court to decide.[102] Paragraph 2(i) states that for a document to be 'part of a publication', it should be available in the public domain, but is very flexible on the format, form, or data medium in which it can appear. This reflects the prevalence of digital media and the acceptance by the Court of the changing nature of information provision from entirely paper-based in the past to an increasingly

100. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 23 March 2006, CR 2006/24, at 27.
101. Practice Direction IX, see *supra* note 92.
102. Practice Direction IX *bis*, para. 2, see *supra* note 92.

electronic format. This consideration is also reflected in paragraph 2(ii), which defines 'readily available' as being 'accessible in either of the official languages of the Court', and possible to consult 'within a reasonably short period of time'.[103] Given the restrictive requirement of the document being in either English or French, the Court has built in a degree of flexibility for those parties whose documentation will not be in either language, by stating that an official certified translation of the document into one of the two languages will suffice to ensure that the publication is 'readily available' to the Court. This is a helpful expansion of the jurisprudence in the *ELSI* decision,[104] and will mean that recourse to Article 56(4) will not be limited to anglophone or francophone states. There is a further requirement that the necessary references should be given 'for the rapid consultation of the document, unless the source of the publication is well known', defining the latter as 'UN documents, collections of international treaties, major monographs on international law, established reference works etc.'.[105]

This guidance on the operation of Article 56(4) is most welcome, and although it is regrettable that this practice direction did not appear sufficiently early to clarify the rules for the present case, it will still have a positive impact on the cases yet to come before the Court. It has reduced the potential for the volume of evidence in future cases to spiral out of control, and the willingness of the Court to address issues arising from the way in which the Statute and Rules are being interpreted is a welcome trait, which hopefully will in future be expanded to address some of the informal rules of evidence which have developed over the years. However, the latter exercise would probably prove far more controversial, and it may take a period of judicial activism from the bench to develop these areas in any considerable way.

6.3. The impact of the International Criminal Tribunal for the former Yugoslavia

The ICTY, which has had an impact on so many areas of this case, was established in 1993[106] in order to prosecute war crimes perpetrated since 1991 by individuals in the territory of the former SFRY. The indictees have ranged from soldiers to generals and police commanders and all the way to presidents, Slobodan Milošević being the first incumbent head of state to be indicted for war crimes. The Tribunal has largely been successful in bringing those responsible for the events of the war to justice.[107] However, the effectiveness of the Tribunal has been the subject of some debate, given that it has no powers of arrest, and therefore several indictees remain

103. Ibid., para. 2(ii).
104. See section 6.2.2 *supra*.
105. Practice Direction IX *bis*, para. 3, see *supra* note 92.
106. By Resolution 827 of the UN Security Council, passed on 25 May 1993.
107. As of 16 March 2006, 85 cases had been concluded: 43 defendants were found guilty, eight acquitted, 25 had their indictments withdrawn, and six had died – three of these in custody, three while on parole; four cases had been sent to national courts for trial; 15 of those convicted had completed their sentences and been released. See 'ICTY at a glance' at http://www.un.org/icty/glance-e/index.htm.

at large, notably Ratko Mladić, the former head of the Bosnian Serb army, the VRS. Serbia and Montenegro's continued refusal to hand him over to the Tribunal was made much of by the Bosnian legal team, who argued that Serbia and Montenegro was continuing to violate the Genocide Convention in failing to ensure that those responsible for genocide are punished.[108]

As has been noted already, much of the material brought before the ICTY has been relevant for the present case, and lawyers on each side have fought to produce documentation and use witnesses previously heard before the ICTY, and endeavoured to use the decisions and conclusions of the ICTY to illustrate their arguments. President Higgins in her speech to the International Law Commission recognized that

> the written and oral pleadings . . . relied very much on ICTY case law for both evidence as to facts and claims as to law. . . . An interesting legal question for us will be to ascertain what type of categories of findings made by the ICTY seem to fall within our notion of 'safe evidence' for purposes of determinations of particular facts. And certainly, it can only be helpful for the Court, when wrestling with the ample legal issues relating to the Genocide Convention, to be able to study various findings of law already made in the different ICTY Chambers.[109]

While the findings of law may merely be helpful, the factual findings of the ICTY are certainly of value in the present case, given that they will have been established to the criminal standard of beyond reasonable doubt, and therefore can be viewed as having been rigorously tested for the purposes of this ICJ case.

In addition to documentation from the Tribunal making its way before the ICJ, several of the counsel in this case have also appeared before the ICTY as prosecutors or defence counsel. For example, two counsel for Bosnia and Herzegovina, Magda Karagiannakis[110] and Joanna Korner,[111] have worked as prosecutors in the ICTY. This overlap of personnel has also helped to increase the potential impact of the ICTY on the ICJ in this case.

6.3.1. What documents can be used?

As the president says, it will be a challenge for the Court to distinguish between the various types of evidence submitted, including trial transcripts,[112] witness testimony

108. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 20 April 2006, CR 2006/34, at paras. 19–26 (Condorelli).
109. Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice at the 58th Session of the International Law Commission, 25 July 2006, at 10.
110. See http://iwpr.net/?p=tri&s=f&o=260021&apc_state=henptri.
111. See http://iwpr.net/?p=tri&s=f&o=166735&apc_state=henitri2001.
112. E.g. *Prosecutor v. Radislav Krstić*, Case No IT-98-33, 29 June 2001, Trial transcript, 10155-7. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 19 April 2006, CR 2006/32, at 53, n. 120.

from trials,[113] expert reports,[114] indictments of the Court,[115] trial judgments,[116] and any documents used in trials. Included within these documents are tape recordings of conversations[117] and meetings,[118] as well as letters[119] and video footage.[120] The question of whether some of these documents are 'readily available' and can therefore be referred to without formally being entered into evidence under Article 56 is also problematic, since much of the ICTY material is available on the Internet.

Given that ICTY cases concern individuals, it is not certain whether evidence as to their actions can be used in a court which deals with state parties, and therefore the Court has a delicate task ahead in deciding the weight it will give to evidence from the Tribunal. However, as Professor Franck pointed out, the work of the ICTY is like assembling: 'pieces of a puzzle' and has hailed the ICJ case as an opportunity to present the judges with 'a very large canvas and with many parts of that puzzle'.[121] The Court must therefore view the present case and the ICTY cases as parts of the bigger story. The judges are well equipped to do so, having in previous cases carefully viewed the dispute as part of the larger conflict and adjudged accordingly.[122]

6.3.2. Witness testimony from the ICTY

Documentary evidence, whether being used for the first time in the ICJ, or having already been entered in evidence in a case before the ICTY, has a particular strength in that it can be submitted in advance, allowing both parties to examine it and test any of its contents and then have ample time to find evidence to counter any points made in it. Witness testimony, however, only presents the opportunity of challenge in the case in which it is originally heard. Thus it is impossible for the ICJ to test the evidence of witnesses heard in the ICTY; it can merely read transcripts of the examination which took place in those cases. This was considered to be an important

113. E.g. *Prosecutor v. Slobodan Milošević*, Testimony of Alija Gusalić of 31 March 2003, Case No IT-02-54-T, p. 18258. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 2 March 2006, CR2006/6, at 12, n. 3.
114. E.g. ibid., 'The Assembly of Republika Srpska, 1992–95: Highlights and Excerpts', Expert Report of Dr Robert J. Donia, 29 July 2003. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 3 March 2006, CR 2006/8, at 48, n. 94.
115. E.g. *Prosecutor v. Mile Mrksić*, Initial Indictment, Case No IT -95-13/1, 15 November 1994. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 114, at 54, n. 107.
116. E.g. *Prosecutor v. Radislav Krstić*, Judgment, Case No IT-98-33, 2 August 2001. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 113, at 32, n. 79.
117. E.g. *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-T, Prosecution Exhibit P 613/63, Conversation between Radovan Karadzić and Slobodan Milošević on 13 September 1991. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 89, at 28, n. 41.
118. E.g. ibid., 'Tape recording of the 50th National Assembly Session held on 15 and 16 April 1995 in Sanski Most', Public Records, 16490. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 2 May 2006, CR 2006/39, at 58, n. 113.
119. E.g. *Prosecutor v. Momcilo Krajisnik*, Case No IT-00-39&40, Exhibit No. P-620. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 118, at 48, n. 77.
120. Submitted in evidence by Bosnia and Herzegovina on 16 January 2006, DVD No. 2. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 21 April 2006, CR 2006/35, at 27, n. 77.
121. Tribunal Update No. 452, 12 May 2006, M. Farquhar, 'ICJ Case Builds on What Went Before', Institute of War and Peace Reporting, available at http://www.iwpr.net/?p=tri&s=f&o=261785&apc_state=henftri261787.
122. See, e.g., *Nicaragua*, *supra* note 58.

point by Serbia and Montenegro, who illustrated it with the example of the Milošević case, in which a statement by Milan Babić was not allowed to be entered as evidence; the ICTY required him to testify in person. He committed suicide the evening before he was due to do so, but, even then, the statement was not allowed in evidence. It is of course true that direct testimony is preferable to a prior statement made out of Court, but this example does not illustrate Serbia and Montenegro's contention that ICTY witness testimony should not be allowed in the ICJ because the point it makes is different. The lawyers in the ICJ cannot examine ICTY witnesses for themselves, but they have the record of the examination and cross-examination which took place in the ICTY, and therefore the evidence can be regarded as having been tested to some extent. However, it is possible that the lawyers in the ICTY may have had interests similar to or differing from those of the parties in the present case and the examination of the witness may therefore be more or less helpful to them. The Court must consider this fact when relying on evidence from witnesses who have appeared before the ICTY and determining what weight to ascribe it.

6.3.3. Indictments and decisions of the ICTY

Bosnia and Herzegovina on several occasions cited indictments,[123] which, while not containing tested evidence as such, are a useful source, since charges are only confirmed at the Tribunal once a judge is satisfied that there is a prima facie case to answer. Serbia and Montenegro denied their usefulness, and argued that an indictment 'cannot be used as evidence as such, since it only lists accusations, without referring to particular evidence to prove those accusations'.[124] Given that for a judge to be satisfied that there is a prima facie case he must have seen some evidence which convinced him of the need to try the individual, it is submitted that indictments are in fact useful to some extent, if only to demonstrate the types of people and activities which are being adjudicated, and therefore reference to them in this case is not without purpose. Both parties relied on judgments of the ICTY, Bosnia and Herzegovina to show that two individuals had been convicted under Article 4 of the Statute of the ICTY, and Serbia and Montenegro to show that despite the considerable number of cases which have been brought, in only two was there sufficient evidence to convict.[125]

The most controversial use of a trial document was that of the plea bargain of Biljana Plavsić, who pleaded guilty of crimes against humanity.[126] This document has not been accepted as evidence in any other ICTY trial,[127] but was cited by Bosnia and Herzegovina as being a statement made by her, and used to indicate the connections

123. See *supra* note 115.
124. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 118, at 70, para. 34 (Cvetković).
125. *Prosecutor v. Radislav Krstić* and *Prosecutor v. Vidoje Blagojević*, Cases IT-98-33 and IT-02-60. Neither was convicted for genocide per se, the former being convicted of aiding and abetting genocide, the latter with complicity in genocide.
126. *Prosecutor v. Biljana Plavsić*, Factual Basis for Plea of Guilt, Case No IT-00-39 & 40, 30 September 2002. Available at: http://www.un.org/icty/krajisnik/trialc/plea-300902e.pdf.
127. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 17, at 42–3, para. 82 (Obradović).

between the leadership of Republika Srpska[128] and Belgrade. Serbia and Montenegro asserted that such a document could not be used as evidence unless supported by the oral testimony of the person making it. As Brownlie said, 'it is well known that [the plea bargain] was prepared in the Office of the Prosecutor of the ICTY. The style and content of the drafting reflects the provenance of the statement.'[129] The reliance by Bosnia and Herzegovina on this document as being a form of testimony by Mrs Plavsić could be viewed as misguided, since it does not strengthen its point that the only evidence which could be found to support it was in fact written by a prosecution official at the Tribunal and is not Mrs Plavsić's own words, nor had the truth of these words been tested in court. However, the fact remains that the document was signed by her, and under very difficult circumstances. As Professor Franck noted, 'Mrs Plavsić agreed to give herself up. She received a very heavy sentence of 11 years, especially heavy for a defendant of advanced years. . . . [H]er plea was subject to careful scrutiny by the judges before they concluded that it was indeed valid.'[130] It will be interesting to see whether the Court relies on this document as proof of certain matters, and, if they do not, whether there is any discussion as to why it has been given little or no weight in the case.

The collapse of the Milošević trial, in which hundreds of documents were tendered in evidence and much testimony was heard in the courtroom, left open the question of whether this evidence could be used in other trials. As was pointed out by the agent of Bosnia and Herzegovina, Sakib Softić, all the evidence and documents presented in the open hearings remain and can be used in the present case, and therefore '[h]is death will have no effect on this case whatsoever'.[131] Once testimony or evidence has been entered into the records of the Tribunal, it will remain there, and will be available for the parties before the ICJ to refer to in their pleadings.

6.3.4. Disclosure of documents used in the ICTY

The final controversial point concerning evidence from the ICTY has been that of the disclosure of documents which were released to the Tribunal by Belgrade. They contained the minutes of meetings of the Supreme Defence Council, attended by the FRY's military and political leaders, and were handed over only after considerable political pressure from the West.[132] However, Serbia and Montenegro managed to secure a confidentiality order guaranteeing that these documents, if produced, would only be accessible to the Tribunal judges and lawyers following their application

128. The Republika Srpska is the region of Bosnia and Herzegovina occupied predominantly by Bosnian Serbs that, during the political crisis following the secession of Slovenia and Croatia from the SFRY, adopted its own constitution and declared itself autonomous, but considered itself part of the federal Yugoslav state. It formally declared its independence on 7 April 1992.

129. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 48, at 42, para. 74.

130. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 20 April 2006, CR 2006/33, at 42, para. 19 (Franck).

131. Tribunal Update, No. 444, 17 March 2006, 'Milosevic's Death Boosts Serb ICJ Defence', Institute of War and Peace Reporting, available at http://www.iwpr.net/?p=tri&s=f&o=260402&apc_state=henitri200603.

132. M. Simmons, 'Court still Weighing Genocide Case from Milosevic Era', *New York Times*, 18 June 2006, available at http://www.globalpolicy.org/intljustice/icj/2006/0618stillweighing.htm.

under Rule 54 *bis* of the ICTY Rules of Procedure.[133] It was alleged[134] that they contained much valuable information revealing how Belgrade ran the war in Bosnia and Herzegovina, and that therefore Belgrade was reluctant to hand them over because, without the confidentiality guarantee, the documents would have ended up in the hands of the Bosnian legal team in the present case. Parts of the document were blacked out before it was made public. Bosnia and Herzegovina asked the Court to use its powers under Article 49 to order Serbia and Montenegro fully to disclose the document, and to draw inferences from its refusal to do so.[135] For this latter proposition, Bosnia and Herzegovina relied on established practice in other tribunals of drawing inferences from the non-production of evidence,[136] and asked the Court to act in accordance with 'the common practice of other international tribunals'.[137]

Serbia and Montenegro in rebuttal relied on the 'well-known fact that documents of the highest military body are considered as strictly confidential in every state in the world, and no state is willing to make contents of those documents public that easily'.[138] It further said that it was not able to discuss the documents because they had been classified a military secret and a matter of national security interest in Serbia and Montenegro, and, of course, the documents were 'under the protective measures, imposed by the ICTY confidential order, and we are obliged to respect that order',[139] and that to disclose the contents would render them in contempt of the Tribunal, a punishable crime. It said that Bosnia and Herzegovina had not requested the unredacted version of the documents in due time, and therefore no negative inferences could be drawn from a failure to produce them. While the Court does allow states to argue that certain documents must be privileged for reasons of national security and will not draw adverse inferences from their non-production,[140] Serbia and Montenegro's argument in favour of privilege does not seem pressing, given that the documents have already been disclosed in full to another tribunal, and their argument that no negative inferences can be drawn because Bosnia and Herzegovina did not request the disclosure of a document it did not know existed at the time is far from compelling.

133. Rules of Procedure and Evidence of the ICTY, IT/32/Rev.38, 13 June 2006, 'The State, if it raises an objection . . . on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection . . . specifying the grounds of objection. . . . the state . . . (ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the application, including: . . . (b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior state official explaining the reasons for the redaction.' Available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf.
134. See Simmons, *supra* note 132.
135. See ICJ Press Release 2006/9, *supra* note 93, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 130, at 40, paras. 13–14.
136. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 42, at 26, paras. 18–19.
137. Ibid., para. 20.
138. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 8 May 2006, CR 2006/43, at 27, para. 57 (Obradović).
139. Ibid., at para. 59.
140. See *Corfu Channel*, *supra* note 43, at 31–2, in which the United Kingdom refused to provide documentation requested by the court on the basis that it was a matter of naval secrecy and no negative inference was drawn.

It is interesting to note that the Court itself has no power to compel the production or disclosure of evidence. It does, under Article 49 of the Statute, have powers to call on the agents to produce any document or to supply any explanations and also, under Rule 62(1), may call on the parties to produce evidence or give explanations, but it has no way of compelling the parties to do so. In the present case no request was made by the Court to Serbia and Montenegro to produce the documents in question. Despite the lack of coercive powers, under Article 49 the Court may take formal note of any refusal to supply documents or explanations and draw adverse inferences from it. No such formal inferences may be drawn in the present case, since Serbia and Montenegro did not refuse a request of the Court. However, if the power to compel production existed in the arsenal of the Court, it might have been more willing to request the documents, since potentially it was the possibility that Serbia and Montenegro would refuse which deterred it from making the request. Such a power would perhaps mean that situations analogous to the present one could be avoided, and it would be easier for the Court to avail itself of the truth in a certain situation. However, the corollary of this power would be that the Court would have to develop a more considerable body of rules or jurisprudence on the issue of national and military secrets, which may in practice mean that such power would contribute little to the more difficult cases such as the present one.

6.4. Witness evidence in the ICJ

Witness testimony before the Court is clearly not commonplace. In fact, it has only been heard on nine previous occasions,[141] the most recent being the *Elettronica Sicula S.p.A. (ELSI)*[142] case. The Statute of the ICJ, in Article 43(5), states that 'The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.' However, the Court is under no obligation to hear witnesses if a party requests them; it is a matter for its discretion. It therefore has to balance the necessity of fact-finding in such a complex case with the limited time and resources available to it. In this case the Court consented to hearing witnesses, but spent much time considering how testimony could best be heard.

6.4.1. Arrangements for the taking of witness testimony

In a recent speech before the International Law Commission, President Higgins outlined the utility and importance of witness testimony before the Court, and also highlighted some of the difficulties it presents. She said,

> The Court's docket increasingly includes fact-intensive cases in which the Court must carefully examine and weigh the evidence. . . . Such cases have raised a whole swathe of new procedural issues for the Court. In the run-up to the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, the Court anticipated, in particular, many issues likely to arise concerning witness evidence and examination. The Court made preparatory proposals

141. Cf. *Certain German Interests in Polish Upper Silesia, Temple of Preah Vihear, South West Africa, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Delimitation of the Maritime Boundary in the Gulf of Maine Area, Continental Shelf (Libyan Arab Jamahiriya/Malta), Military and Paramilitary Activities in and against Nicaragua, Elettronica Sicula S.p.A. (ELSI)* cases.

142. *ELSI*, *supra* note 99, Judgment of 20 July 1989, [1989] ICJ Rep. 15.

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> on, inter alia, whether witness examination should be preceded with affidavits, how to organize the cross-examination, how to secure the confidentiality of the testimony during the hearings, what type of translation to provide for the witnesses and for the Court, etc. Very particular arrangements had to be made with the Press. The Court put in place plans to deal with the huge, but unequal, number of witnesses originally listed – without totally blocking progress on the rest of its docket. In the event, the number of witnesses called dwindled to entirely manageable dimensions.[143]

The Court's fear as to how a large volume of witnesses would be dealt with prompted it to carry out a detailed study of the practical issues involved.[144] Given that there is no guidance in the Statute or Rules as to how the hearing of testimony should be conducted, the Court has developed only a rudimentary procedure. This 'represents a combination of Anglo-American and civil law procedure',[145] in that the parties examine the witnesses following Anglo-American procedure but the judges may also put questions to them, as in civil systems. The Court's attitude to the taking of oral evidence has been 'very liberal and demonstrably flexible',[146] and it was clear from the hearings in this case that the parties were free in the type of questions they put to a witness or expert, and in the length of time they spent conducting an examination. Cross-examination was then permitted by the other party, but was limited to the same length of time as the examination-in-chief. The president also asked questions clarifying points made by the witnesses during examination. A brief opportunity to re-examine the witness on any new questions arising from the cross-examination was then offered to counsel for the party presenting the witness. The judges then retired, to enable any questions which they had for the witnesses to be collated by the president, which were then asked when the Court returned. Answers could be given orally, or in a written statement at a later date.

6.4.2. Witness, expert, or witness-expert?

Witnesses give evidence on matters of fact within their personal knowledge. Experts express an opinion on certain facts on the basis of their special knowledge. Under Article 64(a) of the Rules of the Court, each witness must make a solemn declaration to speak the truth; a different declaration exists under Article 64(b) for experts. It is for the party calling the person to determine which declaration should be made. A third category of 'witness-expert' also exists, although it is not mentioned in Article 43 of the Statute. It evolved during the *South West Africa* case, in which some persons appeared as both witnesses and experts.[147] When the other party objected to this confusing state of affairs, the president of the Court said,

> It is not possible, it seems to me, for a witness who has been sworn as an expert and also as a witness of fact to, as he goes along, indicate: Now I am speaking as to fact, now I am giving an expert opinion; and it is inevitable that a person who is giving evidence as an expert will both deal with facts and also express his opinions upon the facts. It is

143. Speech by HE Judge Rosalyn Higgins, *supra* note 109, at 9.
144. Speech by President Guillaume to the UN General Assembly: UN Doc. A/56/PV.32, 30 October 2001, at 8.
145. See Sandifer, *supra* note 63, at 307.
146. See Talmon, *supra* note 97, at 1022.
147. See Sandifer, *supra* note 63, at 291.

> not easy, particularly in a case such as this, and that is recognized. There is, moreover, no reason why a person should not give evidence as an expert, notwithstanding the fact that he happens to be a government official. That may bear upon the weight to be given to his evidence, but it does not bear upon the admissibility of his evidence.[148]

It has been said that the term is used to describe experts called by the parties, rather than by the Court, because these are 'more like witnesses than experts in the proper sense of the term, which justifies speaking of these experts as "witness-experts"'.[149] However, the schedule of hearings[150] did not define which category each of the persons appearing fell into, and it is not clear how one would distinguish between an expert, and a witness-expert – because both make the same oath – other than as mentioned above, by applying the distinction of Court-called and party-called experts to create the two different categories. As there were no experts called by the Court in this case, it is to be presumed that the experts were in fact 'witness-experts'.

6.4.3. Witness handling

Despite much time and consideration being given to the organization of the hearings and the method for taking testimony, it was clear to the author, having been present at the hearings, that witness handling remains an issue for the Court to address. As Mr van den Biesen put it,

> Whilst most litigators . . . outside of [*sic*] criminal litigation, do not particularly like the hearing of experts and witnesses and, for that matter, are not really used to this phenomenon it did become clear that criminal litigators do not particularly fit the context of 'civil' litigating either.[151]

He is no doubt referring to the fact that counsel appear to have found it difficult to adapt their style of questioning to suit the context, and had difficulty handling the witnesses. For example, he goes on to describe the testimony given by Vladimir Lukić as 'never very specific and [he] never sought to provide any support for his statements in any additional evidence. . . . [H]e appeared to be mixing personal observations with things that he had heard at the time, with rumours with unspecified information which he may have received'.[152] Perhaps because of the Court's lack of familiarity with hearing witness testimony, the president appeared more hesitant than a municipal judge might have been in intervening to request the witness to answer questions briefly, or to answer what they had been asked. The practice of having witnesses read statements, rather than be led in their evidence by counsel, might have caused the witnesses to think that they could speak at length in response to each question, or that it was required. Counsel for Bosnia and Herzegovina had considerable trouble during her cross-examination of Lukić, since he repeatedly gave lengthy diatribes in answer to questions of which she had requested one-word answers, despite interventions by the president. Counsel for Serbia and Montenegro

148. *South West Africa* cases, *supra* note 84, (1966) ICJ Pleadings, at 123.
149. See Talmon, *supra* note 97, at 1020.
150. ICJ Press Release 2006/10, 16 March 2006, available at http://www.icj-cij.org/docket.
151. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 80, at 44, para. 1 (Van den Biesen).
152. Ibid., at para.18.

was also forced to interrupt his own witness, but since he was not addressing the witness directly, he had to request the president to do so: 'Madam President . . . there are time constraints so if you could explain to our witness that he really must conclude quite soon.'[153]

Another example of unfamiliarity with witness testimony was demonstrated in the lack of rules or guidance about having copies of documents which are referred to available for the witness to look at. During the examination of Andras Riedlmayer, an expert on the destruction of cultural buildings and monuments, counsel for Bosnia and Herzegovina interrupted:

> Ms KORNER: If documents are to be put to witnesses on things they have said, the document must be available in court so that in fairness to the witness he can see what it is that is being said that he said.
>
> The PRESIDENT: You will understand that the questions went to the impartiality of the witness and it was his own writings. So, I think in the particular circumstance he has not been surprised by the references to his own writings.
>
> Ms KORNER: I think the problem, however, is as you saw this morning, that the witness says: can I see that, because I can't remember exactly what I said. And if it is taken out of context we have no way of checking it unless we have the article.
>
> The PRESIDENT: Yes, the Court will take your point into consideration.[154]

Another notable point arising from this discourse is that objections by counsel are not ruled on by the Court, they are merely noted.[155] This practice is a result of the lack of strict rules to be followed by the Court, but it leaves one with the impression that the Court has not taken any action on the objection, although of course they may be taking it into account when deliberating their judgment.

The testimony of General Dannatt[156] was also notable, in that he sometimes appeared to stray outside his area of expertise, and was not asked by counsel to limit himself to that alone. He was appearing to give the Court the benefit of his military expertise, but on several occasions gave his understanding of political events occurring at the time. He also speculated on certain matters, for example, saying, 'I think it begs the question "what was the substance of the discussions at times between Mladić and Milošević"? I do not know, I was not there.'[157] And he also said, 'I have to speculate; I wonder what they talked about.'[158] Quite rightly, Serbia said that for these reasons 'the speculation of General Dannatt about the alleged "overall intent" or the "overall purpose" framed in Belgrade cannot be accepted as relevant in this case'.[159] Had counsel taken a more proactive role in elucidating evidence from

153. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, supra note 100, at 20 (Brownlie).
154. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 17 March 2006, CR 2006/22, at 61.
155. See Talmon, *supra* note 97, at 1025.
156. General Sir Richard Dannatt commanded British troops in Bosnia and Herzegovina between 1994 and 1996.
157. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, 20 March 2006, CR 2006/23, at 22 (General Sir Richard Dannatt).
158. Ibid., at 31.
159. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 118, at 49, para. 15 (Obradović).

the witness by way of a detailed examination rather than a statement, this could perhaps have been avoided.

6.4.4. Affidavit evidence

As the president stated at the opening of the testimony hearings, 'The witness, expert or witness-expert may give his evidence in the form of a statement and/or as replies to questions put to him by the party having called him, at the option of that party.'[160] Some witnesses chose to prepare a statement, and could then be asked supplementary questions on it by counsel. This created a few difficulties with regard to the ability of counsel on the opposite side to make notes in preparation for cross-examination, because of the speed at which the statements were read. For example, during Vladimir Lukić's testimony counsel for Bosnia and Herzegovina interrupted to say that

> The witness is reading his prepared statement at speed. The interpreter clearly has an English translation and is reading that at speed. I am totally unable to take proper notes of what he is saying, some of which may be important. I wonder if it would be possible for me to have a copy of the statement in English?[161]

An English copy was not available, but the president requested the witness to read his statement more slowly.

It is hard to see why the prepared statement could not have been better presented to the Court in advance in the form of an affidavit, in order that the content could be fully examined and any subsequent questioning would be more effective. This would also avoid the problems experienced by opposing counsel in this case. The deputy agent for Bosnia and Herzegovina agreed, saying that the Court and parties would have benefited more from the expert input 'if they would have been asked to submit a report containing their views well before the sessions. This would probably have allowed all sides to engage in a much more satisfying discussion with the experts.'[162] Why this should only be extended to experts, however, seems unclear, since it would perhaps be advisable to have witnesses also prepare a statement in advance, in a similar manner to the method used in municipal civil courts. When hearing the experts and witnesses reading out their statements one had 'more the impression of a lawyer than an independent impartial witness',[163] and that the witnesses were in fact pleading, blurring the roles of the witness or expert and the lawyers in the case. This would be avoided if the written statements were provided in advance and only supplementary questions asked in Court, but the potential remains for witnesses merely to continue the pleadings of the parties.

160. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 154, at 1.
161. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, supra note 100, at 14.
162. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 80, at 44, para. 1 (Van den Biesen).
163. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 154, at 54 (Faveau-Ivanović). Original: 'plus la déposition d'un avocat, que d'un témoin impartial extérieur'.

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6.4.5. Translation difficulties

Given that several of the witnesses spoke only Serbian, difficulties in translation presented themselves. Under the same conditions as apply to oral argument by the representatives of the parties, evidence may be given in a language other than English or French, but, according to Article 70(2) of the Rules of the Court,

> the necessary arrangements for interpretation into one of the two official languages shall be made by the party concerned; however, the Registrar shall make arrangements for the verification of the interpretation provided by a party of evidence given on the party's behalf.

Each witness had a translator who translated from Serbian into either French or English, which was then simultaneously translated by the Registry interpreters. On several occasions the independent interpreters provided by the Registry felt it necessary to intervene to correct certain interpretations where words had been omitted or the meaning of the testimony had changed slightly in translation. Each time this resulted in some confusion as the correct version was established and communicated to all concerned. However, more problems arose with regard to documents which the witnesses asked to see, or were asked to look at. Frequently only the English or French translations were available, which either left the witness unable to read the original for himself or counsel scrabbling around for the original document.[164] This illustrated a lack of foresight on the part of the legal teams, given that if they intended to show a witness the document or anticipated the need to do so, it ought to have been provided in their language. This could easily be rectified and ought to be noted by the Court the next time witnesses are heard.

6.4.6. Power to subpoena witnesses

The final issue regarding witness testimony in the ICJ highlighted by the present case was that the Court has no powers to subpoena witnesses; in the same way it has no power to compel the production of documents.[165] Article 48 of the Statute gives the Court the power to make orders for the conduct of the case and make all arrangements for the taking of evidence, and under Rule 62(2) may make arrangements for the attendance of a witness or expert to give evidence, but it does not have any powers to compel their attendance. These powers are similar to subpoenas in that the Court is able to request the witnesses to attend, but differ in that there is no penalty attached if a witness fails to do so. Serbia and Montenegro intended to call the former president of the FRY, Zoran Lilić. However, at the last minute Lilić decided that for political reasons he did not want to appear.[166] An entire day had been set aside for his testimony, and as a result a day of the Court's time was wasted. The last-minute decision left a rather bad impression of the Belgrade legal team's organization and

164. For example, Vladimir Lukić requested a copy of the Serbian budget upon which he was being questioned, but counsel only had an English translation of the document, which then had to be translated back to the witness by the interpreter, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Oral Pleadings, *supra* note 100, at 22.

165. See *supra* section 6.3.4.

166. 'Lilic Won't Testify', 22 March 2006, B92, available at http://www.b92.net/eng/news/old_archive-article.php?yyyy=2006&mm=03&dd=22&nav_category=2&nav_id=34109.

preparation; his failure to appear also left one wondering what it was that he had to hide or fear, acting as a reminder of the huge importance of this case in both countries.

7. Conclusion on the oral proceedings

The volume and complexity of the procedural issues arising in this case would seem to be almost unprecedented in the history of the Court. The parties have both presented detailed arguments on the procedural issues as well as the substantive merits of the case, roughly half of the pleadings being spent on these topics, demonstrating the relative importance of these issues for the parties, and for the presentation of their cases. The fact that in past cases the Court has not chosen to consider issues of evidence and procedure in any detail, preferring to assess them on a case-by-case basis, has not helped the parties when making their pleadings to predict whether the Court will be receptive to particular lines of argument. This case, raising as it does so many such points, would be an ideal opportunity for the Court to demonstrate how it will treat such situations in the future and, indeed, to clarify the rules on existing evidentiary and procedural doctrines, for example the frequently raised issue of the standard of proof which the Court employs. The opportunity to elaborate on the precise operation of *res judicata* and estoppel must also be seized by the judges to create guidance for the future on how it will treat evidence emanating from another court or tribunal when it is brought before them. In addition, it is an excellent time to attempt to resolve the difficulties concerning witness evidence in order to avoid problems in future cases, particularly given that in the present case there were only seven witnesses and experts; in future cases there could be considerably more. For example, it is anticipated that the *Croatia Genocide* case, if it proceeds to the merits phase,[167] will give rise to many of the same points. If the Court can clarify these now it will save the parties and the Court spending considerable time and expense rehashing the same debates as have been heard in the Peace Palace in this case.

The judgment, when it is delivered, is likely to be far-reaching and to have an effect on many doctrines of the ICJ. When one considers the complex legal points which are presented by the parties, it is clear that the resulting judgment could prove to be the most groundbreaking the Court has ever given. In the paragraphs above I have attempted to illuminate some of the difficulties which the parties presented in their pleadings, and on which the Court must now give judgment. It remains to be seen whether the ICJ will go into detail on the procedural and evidential issues, given the highly complex task it has before it in deciding on its jurisdiction, and potentially also on the merits, but it is hoped that it will seize this opportunity to elaborate its jurisprudence.

167. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Application of 2 July 1999.

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