International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Monday 4 November 2002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

in the case concerning **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)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 4 novembre 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

en l'affaire de la **Demande en revision de l'arrêt du 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires* (Yougoslavie c. Bosnie-Herzégovine)**

COMPTE RENDU

Present:	President	Guillaume
	Vice-President	Shi
	Judges	Ranjeva
		Herczegh
		Koroma
		Vereshchetin
		Parra-Aranguren
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	Dimitrijević
		Mahiou
	Registrar	Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Ranjeva
Herczegh
Koroma
Vereshchetin
Parra-Aranguren
Rezek
Al-Khasawneh
Buergenthal
Elaraby, juges
MM. Dimitrijević
Mahiou, juges *ad hoc*

M. Couvreur, greffier

The Government of the Federal Republic of Yugoslavia is represented by:

Mr. Tibor Varady, S.J.D. (Harvard), Chief Legal Adviser at the Federal Ministry of Foreign Affairs of the Federal Republic of Yugoslavia, Professor of Law at the Central European University, Budapest and Emory University, Atlanta,

as Agent;

Mr. Vladimir Djerić, LL.M. (Michigan) Adviser to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia,

as Co-Agent;

Mr. Andreas Zimmermann, LL.M. (Harvard) Professor of Law, University of Kiel, Director of the Walther-Schücking Institute,

as Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, Member of the English Bar, Emeritus Chichele Professor of Public International Law, University of Oxford,

as Adviser;

Mr. Dejan Ukropina, Attorney from Novi Sad,

Mr. Robin Geiss, Assistant at the Walther-Schücking Institute, University of Kiel,

Mr. Marko Mićanović, LL.M. (NYU),

Mr. Slavoljub Carić, Counsellor of the Embassy of the Federal Republic of Yugoslavia in The Hague,

Mr. Miodrag Panèeski, First Secretary of the Embassy of the Federal Republic of Yugoslavia in The Hague,

as Assistants.

The Government of Bosnia and Herzegovina is represented by:

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, van den Biesen Advocaten, Amsterdam,

as Deputy Agent;

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

as Counsel and Advocate;

Le Gouvernement de la République de Yougoslavie est représenté par :

M. Tibor Varady, S.J.D. (Harvard), conseiller juridique principal au ministère fédéral des affaires étrangères de la République fédérale de Yougoslavie, professeur de droit à l'Université d'Europe centrale de Budapest et à l'Université Emory d'Atlanta,

comme agent;

M. Vladimir Djerić, LL.M. (Michigan), conseiller auprès du ministère des affaires étrangères de la République fédérale de Yougoslavie,

comme coagent;

Dr. Andreas Zimmermann, LL.M. (Harvard), professeur de droit à l'Université de Kiel, directeur de l'Institut Walther-Schücking,

comme conseil et avocat;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre de la Commission du droit international, membre du barreau d'Angleterre, professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford,

comme conseiller;

M. Dejan Ukropina, *Attorney* à Novi Sad,

M. Robin Geiss, assistant à l'Institut Walther-Schücking, Université de Kiel,

M. Marko Mićanović, LL.M. (Université de New York),

M. Slavoljub Carić, conseiller auprès de l'ambassade de la République fédérale de Yougoslavie à La Haye,

M. Miodrag Panèeski, premier secrétaire à l'ambassade de la République fédérale de Yougoslavie à La Haye,

comme assistants.

Le Gouvernement de la Bosnie-Herzégovinie est représenté par :

M. Sakib Softić,

comme agent;

M. Phon van den Biesen, van den Biesen Advocaten, Amsterdam,

comme agent adjoint;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

comme conseil et avocat;

Mr. Antoine Ollivier,

Mr. Wim Muller,

as Counsel.

M. Antoine Ollivier,

M. Wim Muller,

comme conseils.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui en application de l'article 61 de son Statut et des articles 99 et 100 de son Règlement pour entendre les Parties en leurs plaidoiries dans l'affaire de la *Demande en revision de l'arrêt du 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires *(Yougoslavie c. Bosnie-Herzégovine)*.

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Avant de rappeler les principales étapes de la procédure en l'espèce, il échet de parachever la composition de la Cour pour cette affaire.

Tout d'abord, je rappellerai qu'en vertu de l'article 100 du Règlement, si l'arrêt à reviser a été rendu par la Cour, comme dans la présente instance, la Cour plénière connaît de la demande en revision.

Trois membres de la Cour, les juges Fleischhauer, Higgins et Kooijmans, ont estimé devoir ne pas participer au jugement de cette affaire déterminée et m'en ont fait part, conformément au paragraphe 1 de l'article 24 du Statut. En outre, le juge Oda m'a indiqué qu'il ne pourrait être présent sur le siège au cours des présentes audiences.

Je rappellerai par ailleurs que la Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire. La Yougoslavie a ainsi désigné M. Vojin Dimitrijević. La Bosnie-Herzégovine avait désigné M. Sead Hodžić; celui-ci ayant démissionné de ses fonctions, la Bosnie-Herzégovine a désigné M. Ahmed Mahiou pour siéger à sa place.

L'article 20 du Statut dispose que «Tout membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.» Cette disposition est applicable aux juges *ad hoc*, en vertu du paragraphe 6 de l'article 31 du Statut. Avant d'inviter MM. Dimitrijević et Mahiou à faire leur déclaration solennelle, je dirai d'abord, selon l'usage, quelques mots de leur carrière et de leurs qualifications.

M. Vojin Dimitrijević, de nationalité yougoslave, est docteur en droit de l'Université de Belgrade et docteur *honoris causa* de l'Université McGill de Montréal. Jusqu'en 1998, il a été professeur de droit international et de relations internationales à la faculté de droit de l'Université de Belgrade et il occupe aujourd'hui le poste de directeur du centre pour les droits de l'homme de Belgrade. M. Dimitrijević est membre de diverses institutions et sociétés savantes, et il est notamment associé de l'Institut de droit international. Il a exercé les fonctions de membre, rapporteur et vice-président du Comité des droits de l'homme des Nations Unies et compte à son actif de nombreuses publications.

M. Ahmed Mahiou, de nationalité algérienne, est docteur d'Etat de la faculté de droit de Nancy et agrégé de droit public et de science politique. Il a rempli des fonctions d'enseignement et de recherche à l'Université d'Alger et dans d'autres pays, notamment en France. Il a représenté l'Algérie dans plusieurs conférences internationales et a été membre de différents organes internationaux, dont la Commission du droit international des Nations Unies, qu'il a présidée lors de la 48e session, en 1996. M. Mahiou est membre de diverses institutions scientifiques ou sociétés savantes. Il a publié de nombreux ouvrages et articles dans divers domaines du droit international.

Je vais maintenant inviter chacun des deux juges *ad hoc* à prendre l'engagement solennel prescrit par le Statut et je demanderai à toutes les personnes présentes à l'audience de bien vouloir se lever.

Le PRESIDENT : Monsieur Dimitrijević.

M. DIMITRIJEVIC : «I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT : Je vous remercie. Monsieur Mahiou.

M. MAHIOU : «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie. Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Dimitrijević et Mahiou et je les déclare dûment installés en qualité de juges *ad hoc* en l'affaire de la *Demande en revision de l'arrêt du 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires *(Yougoslavie c. Bosnie-Herzégovine)*.

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La République fédérale de Yougoslavie a introduit la présente instance par le dépôt au Greffe de la Cour, le 24 avril 2001, d'une requête dans laquelle, se référant à l'article 61 du Statut de la Cour, elle priait celle-ci de reviser l'arrêt rendu le 11 juillet 1996 en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires*. Conformément au paragraphe 2 de l'article 40 du Statut, la requête a été immédiatement communiquée à la Bosnie-Herzégovine et, conformément au paragraphe 3 de cet article, tous les Etats admis à ester devant la Cour ont été informés de la requête.

Par lettres du 26 avril 2001, le greffier a avisé les Parties que la Cour avait fixé au 30 septembre 2001 la date d'expiration du délai pour le dépôt par la Bosnie-Herzégovine des observations écrites sur la recevabilité de la requête visées au paragraphe 2 de l'article 99 du Règlement de la Cour. Par des communications en date du 21 août 2001, les Parties ont été informées qu'à la demande de la Bosnie-Herzégovine, et compte tenu de l'absence d'objection de la Yougoslavie, le président avait reporté ce délai au 3 décembre 2001. La Bosnie-Herzégovine a déposé ses observations écrites sur la recevabilité de la requête de la Yougoslavie dans le délai ainsi prorogé.

Par lettre du 26 décembre 2001, l'agent de la Yougoslavie, se référant au paragraphe 3 de l'article 99 du Règlement, a prié la Cour de donner aux Parties la possibilité de présenter une nouvelle fois leurs vues, par écrit, sur la recevabilité de la requête. L'agent de la

Bosnie-Herzégovine a informé la Cour que son gouvernement n'était pas favorable à un second tour de procédure écrite. La Cour a estimé qu'un second tour de procédure écrite n'était pas nécessaire et les Parties en ont été avisées par lettres du greffier en date du 1er mars 2002.

Je signalerai en outre que, conformément au paragraphe 1 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a fait droit le 6 août 2001 à la demande de la République de Croatie tendant à ce que lui soient communiqués des exemplaires des pièces de procédure et documents y annexés.

Après s'être renseignée auprès des Parties, la Cour a également décidé, en application du paragraphe 2 de l'article 53 du Règlement, de rendre accessibles au public, à l'ouverture de la procédure orale, des exemplaires des observations écrites de la Bosnie-Herzégovine et des documents annexés auxdites observations. Conformément à la pratique, ces observations écrites, sans leurs annexes, seront placées dès aujourd'hui sur le site Internet de la Cour.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Ainsi que les Parties en ont été informées, les audiences se dérouleront de la manière suivante. La Cour entendra tout d'abord la Yougoslavie, en sa qualité de demandeur dans cette affaire; et la Yougoslavie disposera de toute la séance de ce matin. La Bosnie-Herzégovine prendra la parole demain, mardi 5 novembre, à dix heures, et disposera à son tour de toute la matinée pour ses plaidoiries. Un second tour de plaidoiries s'ouvrira le mercredi 6 novembre à dix heures puis le jeudi 7 novembre à dix heures au cours duquel la Cour entendra les deux Parties en leurs répliques; chacune d'entre elles disposera alors, aux fins de sa réplique, d'un temps de parole maximal de deux heures.

Je donne donc maintenant la parole à M. Tibor Varady, agent de la Yougoslavie. Monsieur l'agent, vous avez la parole.

Mr. VARADY: Je vous remercie, Monsieur le Président.

I. INTRODUCTION

1.1. It is my privilege to start by introducing my colleagues. With me are Mr. Vladimir Djerić, Co-Agent, adviser to the Foreign Minister of the Federal Republic of

Yugoslavia, and Professor Andreas Zimmermann, Director of the Walter-Schücking-Institute at the University of Kiel, as advocate and counsel.

1.2. Mr. President, Members of the Court, let me say first that I am truly overwhelmed by this opportunity to address the International Court of Justice. I also very much feel the weight of the fact that this opportunity was bestowed on me in a most intricate case, and in an almost uncharted procedural setting. In earlier phases of these proceedings several learned colleagues have stressed the uniqueness and historic importance of the case. With pathos — but also with justification — it was stated that the allegation at issue, that is genocide, is "the crime of crimes", "the most serious of the most serious". This is true. And this is why it is so extremely important to establish the appropriate legal setting, and to choose the right avenue in dealing with allegations of genocide. The gravity of such issues should inspire more — rather than less — procedural scrutiny.

1.3. A thorough procedural scrutiny is also important because the setting of this lawsuit does not simply mirror the setting of the actual conflict. The dividing lines during the conflict were very much ethnic dividing lines. These dividing lines have not become State borders. This is a lawsuit between States, two multi-ethnic *States*, with Serbs, Bosniacs and Croats on both sides.

1.4. Mr. President, Members of the Court, there have been consequential changes in the background of this lawsuit. The time of devastations is now behind us. Bosnia and Herzegovina is a sovereign State recognized by the Federal Republic of Yugoslavia. In October 2000 hundreds of thousands of demonstrators brought to an end the Milošević régime, compelling it to recognize the results of the election. After these events, diplomatic relations between our two countries were established within two months. An Interstate Co-operation Council was established in May 2001. Rebuilding normalcy is not easy, but results have been achieved. Within two years, travel has become normal between the two countries, trade relations have been gaining momentum, and a number of agreements have been concluded, or have been prepared. Those agreements already concluded include an Agreement on the Promotion of Investments, and a Free Trade Agreement. Just last week, an Agreement on Dual Citizenship and an Agreement on Social Security, Retirement Benefits and Health Insurance was also signed.

1.5. Mr. President, Members of the Court, I do not want to depict an idyllic picture. Tragedies and destruction cannot and *must not* be forgotten. Let me add that there still are some persisting differences of opinion between our two countries, just as there are some persisting problems between the ethnic groups within Bosnia and Herzegovina which fought each other during the years of the conflict. But there is no armed conflict anymore, and the differences are getting reduced to differences emerging between neighbours elsewhere.

1.6. What is also new, and most important, *there is no more impunity*. Key individuals who have been singled out as likely culprits have been brought to justice, others will be brought to justice. No individual who committed crimes during the conflict should escape responsibility. The International Criminal Tribunal for the former Yugoslavia (ICTY) is playing a key role in this regard, and it is gaining prominence. Last week discussing the ICTY Report presented to the United Nations General Assembly, Mr. Mirza Kušljugić, Ambassador of Bosnia and Herzegovina to the United Nations stated: "We also underline the role of the Tribunal in individualization of war crimes as precondition of sustainable inter-ethnic reconciliation in the region as a whole."[1]

Mr. President, there may be delays, there may be shortcomings in the co-operation between the ICTY and the States concerned, but the trend is clear and the process is unstoppable. Justice is reaching those persons who committed crimes.

1.7. At a certain distance from the times of destruction, we have also gained a more settled perspective. This also helps in viewing the dissolution of the former Yugoslavia which did not follow, but rather defied established patterns. State identity, continuity or discontinuity, became controversial issues, just as membership in international organizations and treaties. Concepts and perceptions of facts were often challenged and superseded by new perceptions. Only with time and in a new perspective have things crystallized, have became visible, and unequivocal.

1.8. At present, Mr. President, Members of the Court, we are at a procedural juncture where the focus is clear and specific. We are dealing with an Application for Revision concentrating on a Judgment on jurisdiction. In this context, we are faced with the following sequence of facts:

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[1]Statement by Ambassador Kušljugić of 28 October 2002, United Nations General Assembly, Fifty-seventh session, Item 45, Report of the ICTY.

— On 11 July 1996, the Court found that the Federal Republic of Yugoslavia *remained* bound by Article IX of the Genocide Convention, which had been ratified by the former Yugoslavia in 1950. On this ground, the Court established jurisdiction over the Federal Republic of Yugoslavia.

— On 1 November 2000, the Federal Republic of Yugoslavia was accepted by acclamation as a *new Member* of the United Nations, and became a *new party* to the Statute of the Court. Thereupon, on 8 March 2001, following an invitation by the Legal Counsel, the Federal Republic of Yugoslavia deposited an instrument of accession to the Genocide Convention with a reservation to Article IX. This notification of accession was duly taken note of by the Secretary-General of the United Nations as depositary, and the Federal Republic of Yugoslavia became a *new party* to the Genocide Convention, effective 10 June 2001, without becoming bound by Article IX.

1.9. The contradiction is obvious, and it has to be resolved, since it has critical relevance for the jurisdiction of the Court in this case. The Applicant respectfully submits that this contradiction can be resolved within the specific framework of Article 61 of the Statute of the Court. It will be demonstrated that the perceived facts on which the 11 July 1996 Judgment was based have been unequivocally refuted by newly discovered facts. It will be shown specifically that at the time of the Judgment, the Federal Republic of Yugoslavia was *not* a party to the Statute, and did *not* remain bound by Article IX of the Genocide Convention.

1.10. Mr. President, Members of the Court, I would now like to put before you the schedule of our presentations:

— I would first like to identify the *ratio decidendi*, that is, the exact ground on which the Court based its jurisdiction *in personam* over the Federal Republic of Yugoslavia (FRY).

— My colleague Mr. Vladimir Djerić will speak next, and lend attention to the ground on which it was held that the Court was open to the FRY.

— After his presentation I will focus on newly discovered facts, demonstrate that they represent a decisive factor with regard to the actual *ratio decidendi*, and show that they were unknown to both the Court and to the party claiming revision.

— The presentation of my colleague Professor Andreas Zimmermann will follow. He will deal with the issue of estoppel and related questions.

— Finally, I will conclude our presentations today by explaining that the remaining conditions set by Article 61 of the Statute (namely, absence of negligence and the observance of the six months deadline) were met.

1.11. Let me also mention as a technical matter that, in order to facilitate the presentation, headings and references will not be read, but will appear in the transcript. A further technical matter: we shall refer to the Applicant, the Federal Republic of Yugoslavia, under its common abbreviation: the "FRY".

II. THE FINDINGS OF THE COURT ON WHICH THE 11 JULY 1996 JUDGMENT WAS BASED

2.1. Mr. President, Members of the Court, the party seeking revision has to demonstrate the discovery of some facts of such a nature to be a decisive factor. In order to be able to do this, we shall have to identify the findings of the Court which represent the actual basis of the Judgment, since the newly surfaced facts have to be decisive precisely with regard to the findings on which the Judgment of 11 July 1996 was based. What is relevant in this phase of the proceedings are the findings on which the Court *did* rely, and on which it *did* base its jurisdiction.

2.2. What the FRY intends to lay open for revision is jurisdiction *ratione personae* over the FRY. Thus, we shall first have to identify the exact ground on which the Court based its jurisdiction *ratione personae* over the FRY. We shall also identify the basis on which it was held that the Court was open to the FRY within the meaning of Article 35 of the Statute (which is a precondition to the exercise of jurisdiction).

A. Grounds for jurisdiction *in personam* over the FRY in the Judgment of 11 July 1996

2.3. Mr. President, Members of the Court, in the Judgment of 11 July 1996, jurisdiction over the FRY was based on Article IX of the Genocide Convention. The Court considered and then dismissed all other proposed bases of jurisdiction. In paragraph 41 of the 1996 Judgment, the Court concluded — and this is presented in the judges' folder, tab 1, page 6: "It follows from the foregoing that the Court is unable to uphold any of the additional bases of jurisdiction invoked by the Applicant and that its only jurisdiction to entertain the case is on the basis of Article IX of the

Genocide Convention."[2] Accordingly, I shall not deal with arguments and conceivable bases of jurisdiction which were *not* adopted as the *ratio decidendi*, since these are outside the scope of these proceedings — certainly outside the scope of this phase of the proceedings. I shall deal with Article IX on which — according to the Court — "the only jurisdiction to entertain the case" was based.

2.4. With our focus directed to Article IX, the next step is to identify in the 1996 Judgment the actual basis of the conclusion that the FRY was, indeed, bound by Article IX of the Genocide Convention.

2.5. There are three conceivable bases and three conceivable ways in which the FRY could have possibly been considered bound by Article IX at the time of the Judgment:

(1) the FRY may have *remained* a party to the Genocide Convention continuing the personality of the former Yugoslavia;

(2) the FRY may have *become* a party by automatic succession;

(3) the FRY may have *become* a party by its treaty action — either a notification of succession or a notification of accession.

I shall discuss all three conceivable grounds. I shall demonstrate that the Judgment relied only on the first of these grounds, namely on the assumption that the FRY remained bound by Article IX of the Genocide Convention, continuing the personality of the former Yugoslavia. I shall also demonstrate that other grounds are not relevant because they did not and could not represent the actual *ratio decidendi*.

1. The actual *ratio decidendi*

2.6. Let us now look at what exactly the Court said regarding jurisdiction over the FRY — and I am quoting the entire paragraph 17 presented in the judges' folder, tab 1, page 4:

> "The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 621, para. 41.

> 'The Federal Republic of Yugoslavia, *continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia,* shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was a party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993."[3]

2.7. In its Written Observations[4] Bosnia and Herzegovina identifies exactly the same findings, citing and relying on the same full paragraph.

2.8. From the paragraph of the Judgment cited above, it follows without any doubt that the Court found that the FRY *remained* bound by Article IX of the Genocide Convention, finding support in the Declaration and Note of 27 April 1992[5]. The Court first relied on a treaty action of the former Yugoslavia and held that the Genocide Convention was ratified by the former Yugoslavia in 1950. It then established the link, relying on the Declaration of 27 April 1992, which stated that continuing the personality of the former Yugoslavia the FRY would abide by the commitments which the former Yugoslavia assumed internationally.

2.9. Mr. President, Members of the Court, the Declaration and the Note based their pronouncements solely on the perceived fact that the FRY continued the personality of the former Yugoslavia. This is stated explicitly, and this is evidently the central message.

The Court relied on the Declaration, cited it, and also relied on the Note. Both documents asserted that the FRY remained a member of international organizations (including the United Nations) and remained a party to treaties by way of continuing the personality of the former Yugoslavia. No other document or statement of the FRY was relied upon — or could have been relied upon. No other document or statement of the FRY was even mentioned in the Judgment.

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17 — emphasis added.

[4] Written Observations of Bosnia and Herzegovina on the *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)*, 3 December 2001 (hereinafter: Written Observations of 3 December 2001), para. 1.4.

[5] *Declaration* adopted on 27 April 1992 at a joint session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of Montenegro; and *Note* dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, UN Doc. A/46/915.

The only way in which the Declaration and the Note could have linked the FRY to the Genocide Convention was by accepting what these documents, indeed, stated unequivocally — and this was the assertion of continued personality.

2. Jurisdiction was not based on automatic succession

2.10. Mr. President, Members of the Court, turning to the other conceivable grounds, the first and the easiest to eliminate, is *automatic succession*, since the Court stated explicitly that it chose not to rely on this ground. Considering possible premises which could lead to the conclusion that the parties to this dispute were parties to the Genocide Convention, the Court contemplated the proposition of automatic succession, but it opted *not* to rely on it. The Court stated in paragraph 23 of the Judgment — and let me refer again to tab 1 in the judges' folder, page 5:

> "Without prejudice as to whether or not the principle of 'automatic succession' applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties."[6]

3. The Declaration and the Note were neither a notification of accession, nor a notification of succession

2.11. Let us now consider the only remaining theoretical possibility, and let me raise the question as to whether the Declaration and the Note of 27 April 1992 could have established the status of the FRY as a contracting party in any other way than by the assumption of continued personality. The only remaining conceivable hypothesis would have been to perceive the Declaration and/or the Note as a treaty action. That is, either as a notification of accession, or as a notification of succession.

2.12. Mr. President, Members of the Court, let me first of all emphasize that the Court never qualified the Declaration or the Note as instruments of succession or accession. This should be sufficient in itself to discard this hypothesis, since the parameters of the present phase of the proceedings are set by the findings of the 1996 Judgment.

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[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 612, para. 23.

2.13. Beyond this, there are three further independent reasons each of which is in itself sufficient to show that neither the Declaration nor the Note was an instrument of succession — neither were they instruments of accession. These reasons are the following:

— *first*, neither the text nor the context of either the Declaration or of the Note give any support to the proposition that they were declarations of succession or accession. Instead, they *contradict* this hypothesis;

— *second*, the Declaration and the Note were unfit by their form and nature to constitute treaty action; and

— *third*, neither the Declaration, nor the Note were *perceived* as instruments of succession or accession.

(a) *There is nothing in the text or in the context of either the Declaration or of the Note indicating succession or accession*

2.14. My first point is that there is absolutely nothing in either the Declaration or in the Note what would indicate succession or accession. As a matter of fact, the word or notion of "succession" is completely missing from both the text and the context of both the Declaration and the Note. The same goes for the word or notion of "accession". On the other hand, the assertion that the FRY continued the personality of the former Yugoslavia is not only mentioned, it is stressed, it is repeated, it is clearly the central message.

2.15. In the passage cited by the Court — just as in the rest of the text of both the Declaration and of the Note — the FRY is advancing the claim of identity. It states that membership of the former Yugoslavia in international organizations and treaties is directly attributable to the FRY, since it continued the personality of the former Yugoslavia. The Secretary-General, acting as depositary, has confirmed exactly the same meaning of the two documents of 27 April 1992. He states in no uncertain terms — and you may find the quotation in tab 3, page 2 of the judges' folder:

> "Yugoslavia nevertheless advised the Secretary-General on 27 April 1992 that it claimed to continue the international legal personality of the former Yugoslavia. Yugoslavia accordingly claimed to be a member of those international organizations of which the former Yugoslavia had been a member. It also claimed that all those

> treaty acts that had been performed by the former Yugoslavia were directly attributable to it, *as being the same State . . .*"[7]

2.16. It is, thus, abundantly clear that both the Declaration and the Note were political declarations stressing identity. Such assertion of identity led to the perception that the FRY had *remained* a Member of the United Nations, and had *remained* a party to the Statute and to other treaties. The assertion of identity (continued personality) *confirms* a perceived state of affairs, rather than pretending to create commitments, rights and obligations. What was stated in the Declaration and in the Note did not represent treaty action.

(b) ***The Declaration and the Note were unfit to constitute treaty action***

2.17. I am coming now to the *second* reason. Even if the Declaration and the Note had a different text and message, they would not be suitable by their form and nature to be relevant treaty action. Why? Because they simply *did not identify any treaty*. No specific treaty was either mentioned or referred to, and no list of relevant treaties was added or appended, either.

2.18. In order to bring about succession or accession, specific declarations and references to specific treaties are needed, and this has clearly been confirmed by the Secretary-General, acting as depositary of multilateral treaties. Taking a position on "general declarations of succession" in the *1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*[8] the Secretary-General stresses — and this can be found in tab 4 of the judges' folder, on page 3, towards the top, in paragraph 303 of the original text: "Frequently, newly independent States will submit to the Secretary-General 'general' declarations of succession . . . The Secretary-General . . . *does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him . . .*"[9]. The Declaration of 27 April 1992 was certainly a general declaration, not even a "general declaration of succession", it was just a general policy declaration.

2.19. It has been added in the same *1999 Summary of Practice of the Secretary-General . . .* and I quote — it is again in tab 4, page 3:

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[7] See Multilateral Treaties Deposited with the Secretary-General, Historical Information, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp; emphasis added.

[8] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc. ST/LEG/7/Rev.1.

[9] *Ibid.*, p. 90, para. 303; emphasis added.

> "it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty *solely on the basis of a formal document* similar to instruments of ratification, accession, etc., that is, a *notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound*"[10].

The Declaration and the Note failed to specify any treaty or treaties, and they did not emanate from authorities recognized as authorities competent to undertake treaty action under international law. They did not, and could not, represent treaty action.

(c) ***Neither the Declaration nor the Note was perceived as a treaty action***

2.20. I am now coming to the *third* reason. It is important, furthermore, that the Declaration or the Note of 27 April 1992 have *never been treated or perceived as a declaration of succession or accession*. They have never been circulated as a depositary notification, and have never been referred to as such in the publication *Multilateral Treaties*. Instead, the way this issue was treated by the various depositaries lends strong support to the proposition of continued personality.

2.21. At the time when the 1996 Judgment was rendered, "Yugoslavia" was listed by the depositary as a contracting party to the Genocide Convention. In its Memorial of 15 April 1994 Bosnia and Herzegovina refers to this fact, positing it as evidence confirming that the FRY became bound by the Convention together with other successor States, and stresses:

> "It must be stressed in this respect that 'Yugoslavia' — together with the other successor States to the former S.F.R.Y. — is listed as a State party to the 1948 Genocide Convention in the official United Nations publication entitled *Multilateral Treaties deposited with the Secretary-General*; Status as at 31 December 1992."[11]

2.22. Let us now take a closer look and see what this listing in the *Multilateral Treaties* actually demonstrates. If you would kindly take a look at this document presented to you in the judges' folder — it is tab 5 and it is on page 2 — you see the list of participants and you can see two vertical columns added to the list of participants. The first one indicates signatures; the second column indicates dates of ratification, accession or succession, whichever the case was. In this second column, if the date indicates ratification, no remark is added; accessions are — as you see on the top — marked with a small "a", while successions are marked with a small "d". In the

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[10] *Ibid.*, p. 90, para. 304; emphasis added.

[11] Memorial of Bosnia and Herzegovina of 15 April 1994, para. 4.2.2.31.

case of Bosnia and Herzegovina the small "d" indicates, indeed, that this country, as argued by the Respondent, became a Member State on 29 December 1992 by succession. However, contrary to what was argued by Bosnia and Herzegovina, "Yugoslavia" is not treated at all as one of the successor States. The listing refers to "Yugoslavia" — it is on the next page — without indicating succession, but rather stating that the date of signature is 11 December 1948, and the date of ratification 29 August 1950. Precisely the same was recorded in the Judgment as well.

2.23. It is clear that this document contemplates Bosnia and Herzegovina as a successor State, which became a party to the Genocide Convention by way of succession in 1992. On the other hand, the listing of "Yugoslavia" does not confirm, but rather contradicts, membership by way of succession. This listing, stating that "Yugoslavia" became a party on *29 August 1950* by ratification, obviously cannot refer to treaty succession of a State which only came into being on 27 April 1992. How could this designation be extended to the *FRY?* The only way such a listing of "Yugoslavia" could be construed as a reference to the FRY would be by *accepting as a fact that the FRY continued the personality of the former Yugoslavia, in other words, that it is identical with "Yugoslavia", which became a party in 1950 by ratification.*

2.24. This becomes even more evident if one takes a look at a case of dissolution, in which it *was* generally accepted that one unit did continue the personality of the former country, while others did not. This was the case with regard to the USSR. As you can see in tab 8, page 4 or page 2 of the French text, Russia, continuing the personality of the former USSR, is listed as a State party to the Genocide Convention since 3 May 1954 — that is since the date on which the Convention was ratified by the USSR. On the other hand, successor States which did *not* continue the personality of the USSR are listed in accordance with their *own* treaty action. To take an example, Kazakhstan — as you can see in tab 8, on page 3 — is listed as a contracting party since 26 August 1998, the date when Kazakhstan acceded to the Convention[12].

2.25. Let me repeat the key question with regard to the FRY. How could the listing of a party indicated as "Yugoslavia", which is bound by ratification since 1950, refer to the FRY which only came into being in 1992? There is only one answer. This is to assume that the Federal

[12]See Multilateral Treaties Deposited with the Secretary-General, Part I, Chap. IV, available at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty.asp.

Republic of Yugoslavia continued the personality of that "Yugoslavia" which was indicated as a party since 1950. This was the perception endorsed by the depositary — and this was the perception relied upon in the Judgment of 11 July 1996.

2.26. Mr. President, Members of the Court, let me conclude that, within the scope of the Judgment of 11 July 1996, the assumption of continued personality is the only possible ground leading to the conclusion that the FRY was a party to the Genocide Convention prior to 11 July 1996. And this is, indeed, what the plain text of the Judgment says. The Court takes note, in paragraph 17 of the Judgment, that the *SFRY ¾ the former Yugoslavia ¾* "[s]igned the Genocide Convention on 11 December 1948 and deposited its instrument of ratification without reservation on 29 August 1950". This treaty action of the former Yugoslavia only becomes relevant for the FRY, if it is assumed that the FRY continued the status of the former Yugoslavia. And this is exactly what follows in the text of the Judgment.

2.27. In the next sentence the Court takes note of the fact that the FRY adopted a Declaration in which it states that "continuing the State, international legal and political personality of the SFRY" it shall abide by the commitments which were assumed by the former Yugoslavia. The following sentence in the Judgment makes reference to the Note stating that it confirmed the intention of Yugoslavia "to *remain bound*" by treaties to which the former Yugoslavia was a party. There is only one way in which the FRY could have *remained bound* by the Genocide Convention. This is by continuing the personality and treaty membership of the former Yugoslavia.

2.28. The assumption of continued personality — which was plausible, at least, at the time of the Judgment — was relied upon to establish that the FRY remained bound by the Genocide Convention, and that the Court had jurisdiction over Yugoslavia. Other conceivable grounds on which the FRY could have become bound by the Genocide Convention — automatic succession, notification of accession, or notification of succession — were not relied upon, and could not have been relied upon.

2.29. Thus, the Court based its jurisdiction on Article IX of the Genocide Convention, and this conclusion was based on the finding that the FRY, continuing the personality of the former Yugoslavia, remained bound by the Genocide Convention ratified by the former Yugoslavia in 1950. This is the finding we respectfully seek to lay open for revision.

2.30. Mr. President, Members of the Court, we would like now to turn our attention towards another critical element of the 1996 Judgment. This is the issue of precondition to jurisdiction under Article 35 of the Statute. We would like to demonstrate that the Judgment was based on the assumption that the FRY was a party to the Statute — and that this assumption was also reversed by newly discovered facts. I would now like to ask you, Mr. President, to call upon my colleague, Mr. Vladimir Djerić, to elaborate this point. Thank you very much.

Le PRESIDENT : Je vous remercie, Monsieur l'agent. Je donne maintenant la parole à M. Vladimir Djerić.

Mr. DJERIĆ: Mr. President, Members of the Court. May it please the Court. At the beginning I would like to say that it is a great honour for me to appear today for the first time before this honourable Court. I shall deal with the issue of access of the Federal Republic of Yugoslavia to the Court at the time of the 1996 Judgment.

B. Precondition to jurisdiction under Article 35 of the Statute

1. Introduction

2.31. As is well known, being a State party to the Statute of the Court is an essential precondition to the jurisdiction of the Court set in Article 35, paragraph 1, of the Statute. Members of the United Nations are automatically parties to the Statute, while other States may become parties in accordance with Article 93, paragraph 2, of the United Nations Charter. Status of a party to the Statute as a precondition for access to the Court can only be substituted under the terms of Article 35, paragraph 2, of the Statute.

Thus, in order to establish the jurisdiction of this Court over the FRY, the 1996 Judgment must have assumed, in the first place, that the FRY had access to the Court. In my presentation, I shall demonstrate:

— that the 1996 Judgment was based on the assumption that the FRY had access to the Court under Article 35, paragraph 1, of the Statute, as a Member of the United Nations and as such *ipso facto* party to the Statute; and

— that the 1996 Judgment was not based and could not be based on the assumption that the FRY had access to the Court on any other grounds.

2.32. I would like to emphasize that other possible bases for the FRY's access to the Court, save the one relied upon in the 1996 Judgment, should only be discussed once the Judgment has been laid open for revision in accordance with Article 61 of the Statute. However, in response to the claims of Bosnia and Herzegovina, I shall also demonstrate that other conceivable bases for access of the FRY to the Court are not applicable in any case.

2. The 1996 Judgment was based on the assumption that the FRY had access to the Court under Article 35, paragraph 1, as a Member of the United Nations and *ipso facto* party to the Statute

2.33. Mr. President, Members of the Court, as already demonstrated, in order to base the Court's jurisdiction on Article IX of the Genocide Convention, the 1996 Judgment relied on the pronouncements made by the FRY — the Declaration and the Note of 27 April 1992 — which stressed the assumption of continuity and identity between the FRY and the former Yugoslavia. But before establishing jurisdiction, an essential precondition was to be met — that the FRY had access to the Court. The reliance, in the 1996 Judgment, on the pronouncements of continuity between the former Yugoslavia and the FRY, including continued membership in the United Nations, necessarily implied that the Court was open to the FRY on the assumption that it was a Member of the United Nations and as such *ipso facto* party to the Statute.

2.34. This is perfectly consistent with the fact that in the *Yearbook* of the Court of 1995-1996, as well as in all previous *Yearbooks*, "Yugoslavia" is listed within the first group of States "entitled to appear before the Court." This is the group consisting of Members of the United Nations and Yugoslavia is listed as an "original member"[13]. As the Court noted in its decision on jurisdiction in the *Nicaragua* case, official publications such as the *Yearbook* "attest a certain interpretation . . . and the rejection of an opposite interpretation"[14].

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[13] *I.C.J. Yearbook 1995-1996*, p. 66. See also *Yearbook 1991-1992*, p. 58, *Yearbook 1992-1993*, p. 59, *Yearbook 1993-1994*, p. 67, and *Yearbook 1994-1995*, p. 64.

[14] Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 409, para. 37.

2.35. Moreover, it is practically impossible to interpret the 1996 reference to "Yugoslavia" as a reference to former Yugoslavia which ceased to exist in 1992, and could not possibly be entitled to appear before the Court. The listing of "Yugoslavia" as an "original Member" makes, however, perfect sense on the assumption that the personality of this original Member was continued by a State which did exist in 1996, and that State is the FRY.

2.36. The 1996 Judgment did not seek and did not rely on any of the alternative bases for access to the Court, which could have substituted the status of the FRY as a party to the Statute *ipso facto* as a United Nations Member. Neither Article 93, paragraph 2, of the United Nations Charter, nor Article 35, paragraph 2, of the Statute, were discussed or even mentioned in the 1996 Judgment.

2.37. Previously, in its Order of 8 April 1993 the Court considered that proceedings on provisional measures may validly be instituted even if one of the parties was not a party to the Statute, provided it was bound by "a special provision contained in a treaty in force" within the meaning of Article 35, paragraph 2, of the Statute[15].

2.38. This reflection, however, was suggested while the Court was probing whether it had jurisdiction or not with respect to provisional measures. In that regard, the test is whether there is a provision which could conceivably, prima facie, provide a basis on which the jurisdiction *might* be established[16]. The hurdle is not high and, clearly, the finding of prima facie jurisdiction can only be tentative and of a limited weight. For that purpose, reference to Article 35, paragraph 2, of the Statute and Article IX of the Genocide Convention appeared to be sufficient.

2.39. Moreover, and most importantly, the 1993 prima facie finding regarding provisional measures was *not* confirmed in the 1996 Judgment on jurisdiction. In this Judgment, the Court did not rely on Article 35 and contrary to what the Respondent is claiming[17], the Court in 1996 did not "ratify" its provisional position taken in 1993. Rather, it expressly relied on the FRY declarations

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[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19.

[16] *Ibid*., para. 14.

[17] Written Observations of 3 December 2001, para. 5.19.

stressing the assumption of its continuity with the former Yugoslavia — including continued membership in the United Nations[18].

2.40. In conclusion, Mr. President, the only basis for the FRY's access to the Court on which the 1996 Judgment could rely and on which the proceedings could have been validly instituted was *ipso facto* membership to the Statute, on the grounds of continued personality and United Nations membership of Yugoslavia.

3. Other conceivable bases for the FRY's access to the Court are not applicable in any case

2.41. Mr. President, Members of the Court, discussion of other conceivable bases for the FRY's access to the Court, save the one relied upon in the 1996 Judgment, does not belong to this phase of the revision proceedings. Only for the purpose of refuting the claims of Bosnia and Herzegovina, I shall now demonstrate that other conceivable bases for the FRY's access to the Court are in any case not applicable.

2.42. At the outset, the easiest issue is Article 93, paragraph 2, of the United Nations Charter, because it is clear and it has not been contested that Article 93, paragraph 2, is inapplicable in the present case.

Secondly, Bosnia and Herzegovina claims that the FRY could have appeared before this Court on the basis of Article 35, paragraph 2, of the Statute.

(a) *The FRY could not appear before the Court under Article 35, paragraph 2, of the Statute because the FRY has never made a declaration pursuant to Security Council resolution 9*

2.43. According to this provision, a State non-party to the Statute may appear before the Court under the conditions laid down by the Security Council. These conditions were determined by Security Council resolution 9 (1946).

2.44. It is useful to recall, in this context, that treaties and agreements providing for the jurisdiction of the Court only provide for the submission of disputes to the Court, and leave particular issues of access and procedural equality to the United Nations Charter and the Statute of

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[18]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 610, para. 17.

the Court. This distinction was upheld by the Court in its Judgment on jurisdiction in the *Fisheries Jurisdiction* case between Germany and Iceland:

> "the former [i.e., the agreement between the Governments of Iceland and Germany] is designed to establish the jurisdiction of the Court over a particular kind of dispute; the latter [i.e., Germany's declaration pursuant to Security Council resolution 9] provides for access to the Court of States which are not parties to the Statute"[19].

2.45. Indeed, no State non-party to the Statute has ever come before the Court without previously fulfilling conditions for access to the Court prescribed by the Security Council[20]. It is clear and it is uncontested that the FRY has never made a declaration as required by Security Council resolution 9[21].

(b) ***The Court could also not have been opened to the FRY on ground of other interpretations of Article 35, paragraph 2***

2.46. However, Bosnia and Herzegovina relies on the phrase "subject to the special provisions contained in treaties in force" from Article 35, paragraph 2, of the Statute, in order to claim that a State non-party to the Statute, which has not submitted a declaration required by Security Council resolution 9, may still come before the Court, even if it is a party to *any* treaty in force providing for the jurisdiction of the Court. Accordingly, Bosnia and Herzegovina alleges that the Genocide Convention is such a treaty in force and that the FRY was bound by the Genocide Convention in 1996. Furthermore, Bosnia and Herzegovina alleges that the 1996 Judgment relied on such an interpretation[22].

Mr. President, only if *all* of these allegations were substantiated could Article 35, paragraph 2, be relevant in the present case. I shall demonstrate, however, that *none* of these allegations can be substantiated.

2.47. In relation to the last contention of Bosnia and Herzegovina, I would just like to reiterate what has been demonstrated — under the 1996 Judgment, the FRY could have access to

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[19]*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* p. 53, para. 11.

[20]See *Corfu Channel (United Kingdom* v. *Albania)* (1947-1949); *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States)* (1953-1954); *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (1967-1969); and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* (1972-1974).

[21]Application of the FRY, paras. 25-27.

[22]Written Observations of 3 December 2001, paras. 5.2. *et seq.*

the Court only as an *ipso facto* party to the Statute, on the grounds of continued personality and United Nations membership of Yugoslavia.

2.48. As regards other allegations made by the Respondent, I shall demonstrate:

— *first*, that the drafting history of Article 35, paragraph 2, clearly shows that the "treaties in force" provision should be confined to the treaties that were in force at the time the Statute was adopted;

— *second*, I shall demonstrate that regardless of how the "treaties in force" provision is to be interpreted, all provisions of Article 35, paragraph 2, must be given effect, especially the paramount principle of equality of the parties; and

— *third*, even if, *quid non*, a State non-party to the Statute could appear before the Court as a party to any "treaty in force" containing jurisdictional provision, this still could not lead to establishing the jurisdiction over the FRY, given the facts of the present case.

The phrase "treaties in force" in Article 35, paragraph 2, encompasses only the treaties that were in force at the time the Statute was adopted

2.49. Mr. President, Members of the Court, starting with our first point, we submit that the reference to "the special provisions contained in treaties in force" in Article 35, paragraph 2, should be understood in the context of the preparatory work both of the Statute of the Permanent Court of International Justice and of the Statute of this Court[23].

2.50. These words — "subject to the special provisions contained in treaties in force" — were *specifically* included in Article 35, paragraph 2, of the Statute of the Permanent Court in order to open the Court to those States which were not parties to the Statute but were parties to the Peace Treaties concluded after the First World War.

2.51. Initially, drafts of the Statute of the Permanent Court had envisaged two ways to come before the Court:

— *first*, Members of the League of Nations would have access to the Court; and

[23] Application of the FRY, para. 30.

— *second*, States non-Members would have access to the Court under the conditions to be determined by the Council of the League[24].

However, the Peace Treaties that had already been in force at that time had provided for the jurisdiction of the future Court. Among parties to the Peace Treaties were, of course, also States which were not Members of the League of Nations, such as Germany. Under the initial drafts these States could not come before the Court, unless they became Members of the League or fulfilled the conditions set by the Council of the League. However, the drafters of the Statute considered that the Peace Treaties could not be modified, either by the Statute itself or by the Council of the League. Therefore, they decided that conditions for access to the Court should be revised. In their words: "[a]ccount shall be taken of Parties who may present themselves before the Court by virtue of the Treaties of Peace"[25]. Consequently, the new draft included an important addition: the conditions set by the Council for access to the Permanent Court of States non-Members of the League were to be "subject to the special provisions contained in treaties in force"[26].

2.52. No further changes were made to this provision[27]. Therefore, it clearly follows from the drafting history of the Statute of the Permanent Court, that only the Peace Treaties — and no other treaties — were considered to fall under the expression "treaties in force" in Article 35, paragraph 2.

2.53. The drafters of the Statute of this Court copied the structure and wording of Article 35, paragraph 2, of the Statute of the Permanent Court, with some minor terminological corrections[28]. The intention and meaning of this provision remained the same. Had the drafters of the Statute wished to change its meaning, they would have certainly used a different formula. But they did not.

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[24]See Draft Scheme for the Institution of the Permanent Court of International Justice etc., in League of Nations, *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1921), at p. 54.

[25]*Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1921), at p. 141.

[26]*Ibid.*, at p. 144.

[27]*Ibid.*, at p. 102.

[28]See United Nations Committee of Jurists, *Report on Draft Statute of the International Court of Justice*, 14 UNCIO 821, at p. 839.

2.54. Accordingly, the FRY submits, the "treaties in force" provision of Article 35, paragraph 2, is confined only to the treaties which were in force *at the time the Statute was adopted.* The Genocide Convention is clearly not such a treaty and cannot be a basis for access to the Court under Article 35, paragraph 2.

If the phrase "treaties in force" means "treaties in force at the present moment", *quid non*, its interpretation must not preclude, but must ensure, the application of other provisions of Article 35, paragraph 2, of the Statute

2.55. Mr. President, Members of the Court, even if one were to follow, *quid non*, the interpretation proposed by Bosnia and Herzegovina that the phrase "treaties in force" could mean "all treaties in force at the present moment", Article 35, paragraph 2, would still have to be interpreted in such a way so as to give effect to all of its provisions, including the paramount principle of equality of the parties. This is a standard rule of interpretation.

2.56. I shall demonstrate that the interpretation advanced by Bosnia and Herzegovina is contrary to this very rule. The interpretation of Bosnia and Herzegovina would mean that States non-parties to the Statute could circumvent the requirements of the Charter and Article 35, paragraph 2, of the Statute — including the principle of equality of the parties — and appear before the Court by simply concluding treaties or special agreements. This is a danger that has been noted by scholars a long time ago[29].

2.57. The principle of equality of the parties is considered to be a basic principle governing the functioning of this Court[30]. Accordingly, the principle of equality must always be ensured, including, of course, when conditions for access to the Court are determined. Moreover, this is expressly required by Article 35, paragraph 2, in relation to States non-parties to the Statute.

2.58. I shall also demonstrate that the principle of equality of the parties contained in Article 35, paragraph 2, necessitates that a State non-party to the Statute must, in each case, undertake to observe certain basic conditions of equality.

2.59. Mr. President, in relation to States parties to the Statute, access to the Court is provided by Article 35, paragraph 1. And in that context, first, with regard to Members of the United

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[29]Manley O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943), p. 391.

[30]See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 25-26.

Nations which are *ipso facto* parties to the Statute, the principle of equality of the parties is ensured by their obligations under Article 94 of the Charter and under the Statute of the Court. Second, in that context, with regard to States non-Members of the United Nations, the principle of equality is ensured through the conditions for their membership in the Statute of the Court. In all cases, consistent practice of the Security Council and the General Assembly under Article 93, paragraph 2, of the Charter, has been to require from States non-Members of the United Nations expressly to accept, *inter alia*:

— the provisions of the Statute, and

— all the obligations of a Member of the United Nations under Article 94 of the Charter — including the obligation "to comply with the decision of the International Court of Justice in any case to which it is a party"[31].

2.60. Mr. President, the issue of access to the Court of States non-parties to the Statute is regulated by paragraph 2 of Article 35 of the Statute. Here, the principle of equality of the parties is implemented by Security Council resolution 9 according to which States non-parties to the Statute have to:

— accept the jurisdiction of the Court,

— comply with the decisions of the Court, and

— accept "all the obligations of a Member of the United Nations under [again] Article 94 of the Charter"[32].

States non-Members of the United Nations which are not parties to the Statute have, indeed, given such declarations[33].

2.61. Obviously, what has been required in order to safeguard the principle of equality of the parties in the practice under Article 93, paragraph 2, of the Charter, is fully consistent with what has been required in the practice under Article 35, paragraph 2, of the Statute. *The bottom line is*

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[31]See SC resolution 11 (1946) and GA resolution 91 (I) (Switzerland); SC resolution 71 (1949) and GA resolution 363 (IV) (Liechtenstein); SC resolution 102 (1953) and GA resolution 805 (VIII) (Japan); SC resolution 103 (1953) and GA resolution 806 (VIII) (San Marino); SC resolution 600 (1987) and GA resolution 42 (XXI) (Nauru).

[32]Security Council resolution 9 (1946), para. 1.

[33]Particular declarations were filed by Albania (1947) and Italy (1953), while general ones were filed by Cambodia (1952), Ceylon (1952), the Federal Republic of Germany (1955, 1956, 1961, 1965, and 1971) Finland (1953 and 1954), Italy (1955), Japan (1951), Laos (1952), and Viet-Nam (1952).

See http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicotherstates.htm.

that, in order to have access to the Court, States non-Members of the United Nations must accept all the obligations of United Nations Members under Article 94 of the Charter — both when they wish to become parties to the Statute, and when they appear before the Court under Article 35, paragraph 2, of the Statute.

2.62. This practice is highly relevant for the interpretation of the "treaties in force" provision of Article 35, paragraph 2. Even if one were to accept, *quid non*, the view of Bosnia and Herzegovina that the said provision encompasses all treaties in force, the FRY submits that still, in any case, the fundamental principle of equality of the parties must be safeguarded. In order to do so, one simply has to follow what has been required in similar situations dealing with access to the Court of States non-Members of the United Nations. This means that a State non-party to the Statute which is a party to a treaty in force could appear before the Court *only* upon giving an undertaking that it will accept Article 94 of the United Nations Charter and that it will comply with the decisions of the Court in the case in question.

2.63. Such undertakings were indeed given by States non-parties to the Statute[34]. Particularly important is the example of the Federal Republic of Germany which filed a declaration pursuant to Security Council resolution 9 (1946) after it had become a party to the Genocide Convention[35]. The text of Germany's declaration is reproduced in the judges' folder at tab 6. This declaration indicates that Germany, which was not a party to the Statute at that time, considered Article IX of the Genocide Convention to be an insufficient vehicle for its access to the Court, and

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[34]Thus, Finland filed declarations under Security Council resolution 9 in respect of any dispute that may be referred to the Court under: (1) Agreement of 11 May 1953, between Finland and Norway relating to a Supplement to the Convention of 3 February 1926, for the peaceful settlement of disputes; (2) Agreement of 9 April 1953, between Finland and Sweden relating to a Supplement to the Convention of 29 January 1926, for the peaceful settlement of disputes; (3) Agreement of 24 September 1953, between Finland and Denmark relating to a Supplement to the Convention of 30 January 1926, for the peaceful settlement of disputes. See *I.C.J. Yearbook 1953-1954*, pp. 244-245.

Cambodia, Ceylon, Laos, Japan, and Vietnam filed declarations under Security Council resolution 9 in relation to the Treaty of Peace with Japan of 1951, see *I.C.J. Yearbook 1951-1952*, pp. 213 (Japan & Ceylon) and 214 (Cambodia); *I.C.J. Yearbook 1952-1953*, pp. 200 (Laos) and 201 (Vietnam).

Italy filed a declaration under Security Council resolution 9 "in respect of the disputes referred to under *(b)* of the 'Statement to accompany publication of the Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America . . .' [of] 25 April 1951", *I.C.J. Yearbook 1953-1954*, pp. 246-246. Italy also filed a declaration under Security Council resolution 9 in relation to the Treaty of Brussels of 17 May 1948, as amended, signed in 1955. See *I.C.J. Yearbook 1954-1955*, pp. 217-218.

The Federal Republic of Germany filed declarations under Security Council resolution 9 in respect of six different treaties providing for the jurisdiction of the Court on 18 April 1955, 7 May 1956, 29 April 1961, 18 January 1965, 29 October, and 22 December 1971, respectively. See *C.I.J. Annuaire 1971-1972*, p. 44.

[35]*I.C.J. Yearbook 1955-1956*, p. 215.

that one more element was needed — a declaration pursuant to Security Council resolution 9 (1946). This is why such a declaration was given and accepted.

2.64. Obviously, this example is directly relevant to the present case. I would like to repeat that the FRY has never been asked to give such an undertaking nor has given one. As has been demonstrated, its access to the Court was rather allowed on the assumption of its continued membership in the United Nations.

Even under the most extensive reading of the "treaties in force" provision of Article 35, paragraph 2, the Court could not be open to the FRY, considering the facts of the case

2.65. Finally, Mr. President, even under the erroneous interpretation proposed by Bosnia and Herzegovina, the FRY could not appear before the Court on the basis of Article 35, paragraph 2, of the Statute, given the facts of the present case. The question is not whether a treaty as such was in force, but whether it bound the parties appearing before the Court. The FRY became a contracting party to the Genocide Convention only on 10 June 2001, with an unequivocal reservation to Article IX of the Convention. The FRY was not and is not bound by Article IX of the Genocide Convention, and could not in any case come before the Court on the basis of that provision.

Mr. President, Members of the Court, let me now thank you for your attention. We could perhaps have a break now and afterwards Professor Varady could continue our presentation. Thank you.

Le PRÉSIDENT : Je vous remercie beaucoup Monsieur Djerić. La Cour suspend son audience pour une dizaine de minutes.

L'audience est suspendue de 11 h 20 à 11 h 30.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise, et je donne la parole à M. l'agent pour la République fédérale de Yougoslavie.

Mr. VARADY : Je vous remercie, Monsieur le président.

C. Conclusion

2.66. Let me summarize, Mr. President, what has been said during the first part of our presentation. Let me identify precisely what are the findings of the Court we seek to lay open for revision:

I would like to reiterate that both the text and the context of the Judgment of 11 July 1996 lead us to the unequivocal conclusion that jurisdiction *in personam* over the FRY was based on the assumption of continued personality and on documents asserting and showing such continued personality. In other words, it was perceived as a fact that the FRY — continuing the personality of the former Yugoslavia — remained bound by the Genocide Convention. It was also assumed that the Court was open to the FRY, it being a party to the Statute. Other possible justifications which could have conceivably replaced these assumptions were not relied upon and could not have been relied upon.

2.67. I shall now further demonstrate that all requirements set by Article 61 of the Statute for laying the case open for revision have been met. It will be demonstrated:

— that there are newly discovered facts;

— that these facts are of such a nature to be a decisive factor;

— that these facts were unknown to the Court and also to the party claiming revision;

— that such ignorance was not due to negligence;

— and that the six-month period set by Article 61 of the Statute was duly observed.

We shall also demonstrate that — contrary to what Bosnia and Herzegovina is claiming — the FRY is not estopped from requesting revision on grounds of theories of estoppel, acquiescence or mistake.

III. THERE ARE NEWLY DISCOVERED FACTS OF SUCH A NATURE TO BE A DECISIVE FACTOR

3.1. In the following part of my presentation I shall deal with the newly discovered facts, and I would like to explain:

(A) which are the newly discovered facts;

(B) how they were revealed; and

(C) why they are a decisive factor.

A. The newly discovered facts

3.2. Mr. President, Members of the Court, as it was demonstrated, the 1996 Judgment held that the Court had jurisdiction *ratione personae* over the FRY on grounds that the FRY remained a party to the Statute *ipso facto* as a United Nations Member, and that it remained bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia.

No other *ratio decidendi* was espoused. Other purported justifications of this result were not relied upon and were dismissed.

Now it is known as a fact:

— that *at the time of the Judgment, the FRY was not a party to the Statute;* and

— that *the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia.*

These two facts are of such a nature to be a decisive factor.

B. How were these decisive facts revealed?

3.3. I am coming now to the question of how these decisive facts were revealed.

It has been known that the single most important test of the proposition of continued personality was the issue of whether the FRY continued the membership of the former Yugoslavia in the United Nations. This was the focal point of the debate on continuity. Only the acceptance of the FRY as a new Member of the United Nations on 1 November 2000 revealed that the FRY did **not** continue the personality, the United Nations membership and treaty membership of the former Yugoslavia.

3.4. At the time of the Judgment of 11 July 1996 we had a different perspective.

Had it been known that the FRY did not continue the United Nations membership of the former Yugoslavia, it would have also been clear that the FRY could not have been *ipso facto* a party to the Statute. Furthermore, had it been established that the FRY did not continue the personality of the former Yugoslavia, it would have also been clear that the FRY could not have continued treaty membership of the former Yugoslavia — and could not have remained bound by the Genocide Convention.

3.5. The acceptance of the FRY as a new member of the United Nations, and *ipso facto* as a new party to the Statute, revealed as a fact that the FRY had not been a Member of the United Nations, and had not been a party to the Statute before — and this brought a new perspective. Before, "Yugoslavia" was listed as an original Member of the United Nations since 1945; now, the FRY is listed as a Member of the United Nations and as a party to the Statute since 1 November 2000.

3.6. Following admission to the United Nations, the Legal Counsel invited the FRY on 8 December 2000 to decide whether or not to assume treaty obligations of the former Yugoslavia. This letter is in tab 7 of the judges' folder. (Unfortunately this item is only available in English.) You can see on page 2 that the FRY was specifically invited: "[to] undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State".

3.7. Mr. President, the letter of the Legal Counsel included, as Annex A, a list of treaties concluded by the former Yugoslavia before 27 April 1992 with respect to which the FRY needs to undertake treaty action in order to become a party. In tab 7 you can find the Non Paper appended to the letter of the Legal Counsel, and on page 6 it is indicated that: "Annex A provides a list of treaty actions undertaken by the SFRY to which the FRY could succeed."[36]

Further on, on page 11 of tab 7, you can see that this list *included the Genocide Convention*[37].

Thereby it became clear that the FRY was not a party to this Convention before. In other words, this letter revealed conclusively the fact that the FRY did not continue treaty membership of the former Yugoslavia and that it had to undertake specific treaty action if it wanted to become a party to treaties to which the former Yugoslavia was a party.

3.8. It should be noted that this was the *first time* that the FRY was invited by the depositary to undertake treaty actions regarding the treaties to which the former Yugoslavia was a party. This

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[36]Non Paper appended to the Letter of the Legal Counsel of 8 November 2000, reproduced in Ann. 27 of the Application for Revision.

[37]Letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 December 2000. (Ann. 27 to the Application for Revision, tab 7 of the judges' folders includes the relevant pages of its Ann. I.)

step taken by the depositary set aside the assumption that the FRY continued (or may have continued) treaty membership of the former Yugoslavia.

3.9. Mr. President, Members of the Court, responding to the appeal of the Legal Counsel, the FRY undertook treaty actions, and submitted to the depositary appropriate notifications of succession or accession. In particular, on 8 March 2001, the FRY sent a Notification of Accession to the Genocide Convention, and it became a Contracting Party to the Genocide Convention by accession on 10 June 2001 — with a reservation to Article IX.

3.10. After it was invited by the Legal Counsel on 8 December 2000 to undertake treaty actions *(including treaty action with regard to the Genocide Convention)*, and after the FRY responded to this invitation, the FRY is now listed by the depositary as a State party to the Genocide Convention since 2001, rather than since 1950[38]. May I turn your attention to tab 8 in the judges' folder, where you can see the present listing. Having drawn conclusions from the newly established fact that the FRY did not continue the personality and treaty membership of the former Yugoslavia, the depositary stopped listing "Yugoslavia" as a State party by ratification since 1950. The last page (page 5) of the present listing shows "Yugoslavia" as a participant that became a party on 12 March 2001 by accession.

3.11. After the FRY was accepted as a *new* Member of the United Nations on 1 November 2000, it became clear that the FRY could not have been a Member before, and could not have continued the personality of the former Yugoslavia. Specifically, it could not have remained a party to the Statute and it could not have remained bound by the Genocide Convention, continuing, as claimed — and as it is quoted in paragraph 17 of the Judgment — "the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia". The letter of the Legal Counsel of 8 December 2000 made certain the discovery that the FRY did not and could not have continued treaty membership of the former Yugoslavia.

Two decisive facts were thus revealed:

— first, *at the time of the Judgment the FRY was not a party to the Statute*, and

[38]Multilateral Treaties Deposited with the Secretary-General, Part I, Chap. IV, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty.asp.

— second, *it did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia*.

C. Why are the newly discovered facts of a decisive nature

3.12. My next point is to explain why are the newly discovered facts of a decisive nature.

Mr. President, Members of the Court, it has been demonstrated that the 1996 Judgment held that the Court was open to the FRY on the basis of the perceived fact that the FRY was a Member of the United Nations (and *ipso facto* a party to the Statute). The Judgment also perceived as a fact that the FRY continued the personality of the former Yugoslavia (and thus remained bound by commitments assumed by the former Yugoslavia). Within the 1996 Judgment these were the only assumptions leading to the conclusion that the Court was open to the FRY within the meaning of Article 35 of the Statute, and that the FRY had remained a party to the Genocide Convention.

3.13. The fact that the FRY was not a party to the Statute (since it was not a Member of the United Nations) is decisive because it shows that the Court could not have been open to the FRY at the time of the Judgment. At least, the Court could not have been open to the FRY without relying on Article 93, paragraph 2, of the United Nations Charter or on Article 35, paragraph 2, of the Statute. These conceivable bases were, however, not relied upon; they were not even mentioned in the Judgment. My colleague Djerić has demonstrated that no alternative bases could have been relied upon.

3.14. Furthermore, the fact that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia, is decisive. It is decisive because it shows that jurisdiction *ratione personae* over the FRY could not have been based on Article IX of the Genocide Convention. At least jurisdiction could not have been based on Article IX without relying on some alternative justification — such as treaty action or the proposition of automatic succession. The Judgment did *not* rely on any alternative justification linking the FRY to Article IX; it rather dismissed them. It is the considered position of the FRY that no substitute ground existed or exists. But in any case, alternative justifications not relied upon in the Judgment could only be discussed after the case has been laid open for revision.

3.15. Mr. President, Members of the Court, the Respondent argues in its Written Observations that "Yugoslavia's readmission to the United Nations on 1 November 2000 does not necessarily mean nor imply that it was not a Member before that date"[39]. If the 1 November 2000 admission were really a "readmission", as qualified by the Respondent, then this could possibly allow the conclusion that the FRY might have been a Member earlier as well. "Readmission" would not have necessarily revealed as a fact that at the time of the Judgment the FRY was not a party to the Statute by way of United Nations membership. But it is clear that this was no readmission. "Readmission" would imply that the FRY was a Member of the United Nations, that it somehow lost its membership, and was readmitted. This was obviously not the case. It is beyond contention that the *FRY* did *not* apply for membership before 1 November 2000, and it was not accepted as a Member before 1 November 2000.

3.16. The only real issue that gave rise to uncertainties and conflicting interpretations was whether the FRY (which came into being in April 1992) did or did not continue the membership of the former Yugoslavia. If it did, the end result of the debate could only have been the *confirmation* of an existing membership, not readmission. If it did not, the end result of the debate would have clarified that the FRY had not been a Member of the United Nations, and that it could only become a Member through the regular procedure of admission of new Members, rather than by readmission.

The Security Council decided to put the application of the FRY on the path of admission of new Members. The FRY was accepted by acclamation as a new Member. This was no readmission.

3.17. *Let me reiterate*. On 1 November 2000 the FRY was admitted to the United Nations as a new Member. On 8 December 2000 the Legal Counsel called on the FRY to take treaty actions if it wished to become a party to treaties to which the former Yugoslavia was a party. These events have revealed the following two decisive facts:

— *the FRY was not a party to the Statute at the time of the Judgment;* and

[39]Written Observations of 3 December 2001, para. 4.6.

— *the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia.*

3.18. The Judgment of 11 July 1996 had relied on the assumption that the FRY *was* a party to the Statute by way of United Nations membership. The 1996 Judgment also relied on the assumption that the FRY had *remained bound* by Article IX of the Genocide Convention continuing the personality (and treaty membership) of the former Yugoslavia. These perceived facts were of a fundamental importance within the Judgment, and, consequently, a refutation of these perceived facts is also of a fundamental importance.

3.19. In other words, the facts that at the time of the Judgment the FRY

— was *not* a party to the Statute, and

— that it did *not* remain bound by the Genocide Convention continuing the personality of the former Yugoslavia,

are newly discovered facts of such a nature as to be a decisive factor. These newly discovered facts are prompting revision of the position taken in the Judgment regarding jurisdiction *ratione personae* over the FRY.

IV. FACTS UNKNOWN TO THE COURT AND ALSO TO THE PARTY CLAIMING REVISION

4.1. I would like to turn now to the following condition set by Article 61 of the Statute, and I shall demonstrate that the newly discovered facts were — and I am quoting from the Statute: "[w]hen the judgment was given, unknown to the Court, and also to the party claiming revision . . .".

4.2. Mr. President, Members of the Court, it has been argued, and it is well known that Security Council resolution 777 stated that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist". It was stated furthermore that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted". It is also known that this was confirmed by General Assembly resolution 47/1. It cannot be contested that one of the possible inferences from this contention was

to perceive as a fact that the FRY was not a party to the Statute, and that the FRY did not continue the personality of the former Yugoslavia.

4.3. But this was not the only possible inference. The process of dissolution of the former Yugoslavia was not a process following established patterns and yielding unequivocal inferences. As a matter of fact, the FRY was the only part of the former Yugoslavia

— which endeavoured to continue the statehood of the former Yugoslavia,

— which did not issue a declaration of independence but issued instead a declaration of continuity, and

— which kept the name "Yugoslavia".

It was plausible to assume that the FRY continued the personality of the former Yugoslavia.

4.4. Furthermore, there were authoritative signals and contentions suggesting that the FRY did continue the personality, United Nations membership and treaty membership of the former Yugoslavia. It is well known that — discussing General Assembly resolution 47/1 — the Under-Secretary-General and Legal Counsel stated in his letter of 29 September 1992 that, while in accordance with the resolution the FRY can no longer participate in the work of the General Assembly — and you can follow the highlighted text in tab 9, on page 2 — "the resolution neither terminates nor suspends Yugoslavia's membership in the Organization"[40].

4.5. Out of many other examples of such signals, which were already referred to in the course of these proceedings, let us just recall that "Yugoslavia" was listed in the relevant documents of the United Nations and of the Court as an original Member of the United Nations and of the Statute. Since Security Council resolution 777 stated that the former Yugoslavia had ceased to exist, it was difficult to understand continued reference to Yugoslavia as an original Member, except through the assumption that the personality of the former Yugoslavia was continued by the FRY. Furthermore, the United Nations sought membership dues from the FRY, and the FRY kept paying membership dues to the United Nations. Thus, the FRY was counted as a Member State under Article 17 of the Charter.

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[40]Letter dated 29 September 1992 from the United Nations Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, United Nations Doc. A/47/485.

4.6. Various highly respectable and independent actors, including the Court and the Secretary-General, have recognized that the situation triggered by the dissolution of the former Yugoslavia yielded legal difficulties — and took positions which certainly did not refute the proposition that the FRY continued the personality of the former Yugoslavia.

4.7. The Respondent is contesting that the new facts stated were unknown to the Court and also to the party claiming revision, and argues in its Written Observations[41] that the debate about Yugoslavia's United Nations membership was well known, and that Yugoslavia was well aware of this debate. This is, of course, common ground. The *debate* was known to the Court and to the FRY. What was *not* known in 1996 and for some time later was the future outcome of this debate. It was not known that the FRY did not continue "the State, international legal and political personality" of the former Yugoslavia. As a matter of fact, at that time there were quite plausible reasons allowing and leading the FRY to maintain its view.

4.8. As far as the Court is concerned, it is impossible to assert that it was known to the Court that the FRY had not continued the personality of the former Yugoslavia, that the FRY was not a Member of the United Nations, was not a party to the Statute, and had not remained bound by treaties ratified by the former Yugoslavia.

4.9. The evidence with regard to the facts at issue (continuity or no continuity) was a matter of public record, equally accessible to both the Court and to the parties. What was *not* brought before the Court was Bosnia's interpretation of this evidence.

What was presented to the Court by the parties was a rather straightforward situation. The FRY maintained its view that it continued the personality of the former Yugoslavia. Had this perception been challenged, the debate would have been brought before the Court. There was no challenge. Dilemmas were not brought before the Court.

4.10. The FRY naturally did not articulate a challenge to continuity, because this was its own perception asserted since its Declaration of 27 April 1992. The position taken by the FRY before this Court, was perfectly consistent with steps taken and declarations made outside the proceedings.

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[41]Written Observations of 3 December 2001, para. 3.7.

Bosnia and Herzegovina, on the other hand, emphatically opposed the proposition of continued personality outside the Court, but failed to phrase this as an issue, and failed to challenge this before the Court. Let me illustrate this.

4.11. In its Application of 20 March 1993 Bosnia and Herzegovina simply takes the position that the FRY *is* a Member of the United Nations and *is* a party to the Statute. It is stated in paragraph 88 of the Application under the title "Jurisdiction of the Court": "As Members of the United Nations Organization, the Republic of Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro) are parties to the Statute which forms an integral part of the Charter."

4.12. In the same vein, the Application of Bosnia and Herzegovina alleges in paragraph 135 that the FRY violated "its charter and treaty obligations under Article 2 (4) of the United Nations Charter . . .". This allegation obviously supposes that the FRY was a Member of the United Nations, and was bound by its Charter.

4.13. Let me add that in its Memorial of 15 April 1994 this position is somewhat adapted, but leads to the very same conclusion. Bosnia and Herzegovina now states that in its own opinion the FRY has no right to continue the membership of the former Yugoslavia in the United Nations, but hastens to add that continuity was nevertheless accepted by the international community.

4.14. The Respondent stressed: "On his part, the Secretary General has also kept on treating Yugoslavia (Serbia and Montenegro) as a State Member."[42] In the following paragraph of its Memorial the Respondent added: "While, in the opinion of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has no right to continued membership and should apply to membership like all other successor States to the former S.F.R.Y., *the international community has accepted this situation.*"[43]

4.15. Mr. President, Members of the Court, it is understandable why Bosnia and Herzegovina did not contest the underlying assumption of the Declaration of 27 April 1992, and why it conceded that the international community accepted the situation. It is understandable because an open challenge to the proposition that the FRY continued the personality of the former Yugoslavia might have eliminated the path leading towards the establishment of jurisdiction.

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[42]Memorial of Bosnia and Herzegovina of 15 April 1994, para. 4.2.3.16.

[43]Memorial of Bosnia and Herzegovina of 15 April 1994, para. 4.2.3.17; emphasis added.

4.16. Let me summarize that since 1992, both within and outside the United Nations, there was a difficult ongoing debate regarding the issue as to whether the FRY continued the "international legal and political personality of the SFRY". The focal point of this debate was the issue of (continued) United Nations membership of the FRY. This debate did not yield a conclusion before the Judgment was rendered (neither did it yield a conclusion for some time thereafter). There were positions taken, there were signals coming from various authorities, but these positions and these signals were not only inconclusive, they were actually contradictory. Bosnia and Herzegovina contested the perception of the FRY before various authorities; however, before the Court it opted not to challenge it, but rather embraced it.

At the time when the Judgment was given neither the Court nor the FRY knew or could have taken as a fact that the FRY was not a party to the Statute and that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia.

Mr. President, Members of the Court, the next prerequisite set by Article 61 I would like to deal with is the absence of negligence. But before addressing this question, the FRY would like to address a contention of Bosnia and Herzegovina, which represents a preliminary issue. This is the contention that beyond the specific prerequisites of absence of negligence set by the Statute, a further condition — not set by the Statute — also needs to be satisfied. This alleged added condition is the absence of estoppel. Bosnia and Herzegovina claims that — irrespective of whether there was negligence or not — the FRY is allegedly barred from claiming that it had not been a Member of the United Nations and had not been a party to the Genocide Convention. I would like to ask you, Mr. President, to invite our counsel, Professor Andreas Zimmermann, who will address this and related questions. Thank you very much.

Le PRESIDENT : Je vous remercie, Monsieur l'agent. Je donne maintenant la parole au professeur Andreas Zimmermann.

Mr. ZIMMERMANN : Merci, Monsieur le Président.

V. ESTOPPEL AND RELATED ISSUES

A. Introduction

Mr. President, honourable Members of the Court, may it please the Court.

5.1. Since this is the first time I am addressing the International Court of Justice, let me first express my feeling of gratitude and of honour to appear before you, the principal judicial organ of the United Nations, and before you personally, honourable Members of the Bench.

B. Structure of my presentation

5.2. Mr. President, Members of the Court, in my part of the presentation I shall now demonstrate — contrary to the claims submitted by Bosnia and Herzegovina in its written observations — that

— *first,* declarations of the FRY which were solely and exclusively based on an assumed identity of the FRY with the former Yugoslavia cannot create commitments based on a contrary assumption;

— *second,* that the FRY is neither barred from claiming that it had not been a Member of the United Nations and that it had not been a party to the Genocide Convention due to concepts of acquiescence, estoppel or because its original position later proved to be wrong;

— *finally,* I will demonstrate that it is *Bosnia and Herzegovina* which is estopped from arguing that the Court's jurisdiction could be based on the idea of identity or on the declaration issued by the FRY on 27 April 1992.

5.3. Let me now first address the argument brought forward by Bosnia and Herzegovina that the FRY should be considered bound by Article IX of the Genocide Convention on the basis of its own prior declaration.

C. Declarations which were solely based on an assumption of continued personality cannot create commitments for the FRY as to Article IX of the Genocide Convention

5.4. In that regard, I will first demonstrate — contrary to Bosnia and Herzegovina's allegations[44] — that prior declarations which were exclusively based on an assumption of continued personality cannot create commitments for the FRY as to Article IX of the Genocide Convention.

[44] Written Observations of 3 December 2001, paras. 4.9. *et seq.*

5.5. While it is first true — as indeed stated by Bosnia and Herzegovina[45] — that the FRY is by now a Member of the United Nations and a contracting party to the Genocide Convention, the FRY is not subject to the jurisdiction of this honourable Court with regard to the Genocide Convention, given that it has entered a valid reservation with regard to Article IX of said Convention when it *acceded* to the Convention.

5.6. It is obviously also true, as argued by Bosnia and Herzegovina[46], that the Court could *in 1996* only decide in line with the then prevailing situation which included the declarations made by the FRY. Those declarations were however — as is admitted by Bosnia and Herzegovina itself — firmly based on the idea of continued personality[47].

5.7. Indeed it may not be argued that a declaration based on a bona fide claim of continued personality should be characterized as something different, i.e., a notification of *succession*. In that regard it is quite telling what counsel for Bosnia and Herzegovina argued before this Court concerning a possible reinterpretation of a notification of succession as a notification of accession — and I quote from the statement made on behalf of Bosnia and Herzegovina in 1996 to be found in tab No. 10 of the judges' folder, and I would kindly request you to have a look at it. Counsel for Bosnia and Herzegovina stated: "On ne voit pas pourquoi la notification de succession, *acte qualifié comme tel par un État souverain*, devrait être considérée comme une notification d'adhésion."[48]

5.8. Thus, Bosnia and Herzegovina itself submitted that one may not second-guess the intent of a State and turn a notification of succession into an act of accession. Similarly, one should then not treat a declaration — clearly based on the *notion of identity and* characterized *as such* by a sovereign State — as a notification of succession against the will of the State making this declaration.

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[45] *Ibid.*, para. 4.10.

[46] *Ibid.*

[47] See Written Observations of 3 December 2001, e.g. para. 2.9.

[48] Pleading of Prof. Brigitte Stern, counsel for Bosnia and Herzegovina, case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, CR 1996/9, pp. 32-33; emphasis added.

5.9. Accordingly, the FRY is not bound by its prior declaration, said declaration being exclusively based on the notion of continued personality. This is even more true since it had been unknown — as demonstrated by my learned friend — to both, the FRY and the Court itself, that the FRY was

— not identical with the former Yugoslavia;

— accordingly not a Member of the United Nations;

— nor a Party to the Statute of the Court;

— nor a contracting party to the Genocide Convention.

5.10. Therefore the 1996 Judgment was based on facts of a decisive nature which later proved not to be correct ones and which accordingly must now give rise to a revision of the 1996 Judgment.

5.11. In a next step I will now demonstrate that the FRY is not barred from requesting revision due to concepts of estoppel, acquiescence or because its original position later proved to be wrong.

D. The FRY is neither barred from claiming that it had not been a Member of the United Nations and a party to the Genocide Convention due to concepts of estoppel, acquiescence or because its original position later proved to be wrong

5.12. Mr. President, Members of the Court, contrary to the position taken by Bosnia and Herzegovina, Article 61 of the Court's Statute does *not* leave room for applying general concepts of international law such as acquiescence or estoppel with regard to the party claiming revision. Neither is there room for arguing that the FRY is barred from claiming that it had not been a Member of the United Nations nor a party to the Genocide Convention because its position later proved to be wrong. This is due to the fact that Article 61 of the Court's Statute contains an exhaustive description of the requirements which the application for revision must meet, and thereby at the same time precludes the applicability of general principles of international law.

1. Article 61 of the Court's Statute contains an exhaustive description of the requirements for revision and precludes the applicability of related general principles of international law

5.13. Once the conditions of Article 61 — i.e., ignorance of new facts not due to negligence — are fulfilled, as they are in our case, other closely-related and even overlapping rules

of *general* international law relating to acquiescence, estoppel or mistake may *not* hinder a party in a case before the Court to request revision.

5.14. This is due to the fact that Article 61 of the Statute positively and exhaustively prescribes the conditions under which a party in a given case may request a revision of a judgment. Article 61 thereby serves as a procedural *lex specialis* to the principles of estoppel and acquiescence. It also excludes — contrary to the observations of Bosnia and Herzegovina — the possibility to rely on general principles relating to the issue of mistake.

5.15. Accordingly there is no room for applying *general* rules of international law since applying such general concepts would in turn contradict the result positively prescribed by the Court's Statute itself.

5.16. This characterization of Article 61 of the Court's Statute as a procedural *lex specialis* vis-à-vis the general principles of acquiescence, estoppel and mistake is the only possible one, since the *specific* requirement in Article 61 that the party requesting revision was not ignorant due to its own negligence in itself identifies a specific situation of *venire contra factum proprium non valet.* This in turn is however the general legal principle Bosnia and Herzegovina attempts to rely on[49].

5.17. In addition, the negligence standard deliberately chosen by the drafters of Article 61 would be rendered meaningless if — as is claimed by Bosnia and Herzegovina — every mistake, even if not due to negligence, would exclude revision.

5.18. Accordingly, applying general principles such as acquiescence, estoppel, or the notion of mistake — alongside the already narrow requirements of Article 61 — would lead to results which are contrary to the very concept of revision and specifically contrary to Article 61 of this Court's Statute. This is due to the fact that otherwise an application for revision — even where the ignorance of the new fact by the requesting party was *not due to negligence* — could still be inadmissible.

5.19. This line of argument is supported by the approach followed by this Court when it decided upon the Tunisian request for revision and interpretation of the Judgment of

[49]See Written Observations of 3 December 2001, para. 4.7.

24 February 1982 in the case concerning the *Continental Shelf*. In that case — as is well known — the question arose whether the party claiming revision, that is Tunisia, had been in possession of information concerning the boundaries of a concession granted by Libya.

5.20. What is important is that in its decision the Court addressed the issue *exclusively* from the angle whether Tunisia had exercised normal diligence in trying to gather the relevant information, that is whether Tunisia had been negligent or not[50].

5.21. And even more importantly, it is worth noting that the Court did not perceive the issue as being one of estoppel despite the fact that Tunisia had in the past — while contesting the concession as such — not sought more specific information about its limits[51].

5.22. Thus, whenever a request for revision is made, triggering the application of Article 61, no room is left for the application of general principles of international law such as acquiescence, estoppel or mistake.

5.23. The FRY is however also ready to demonstrate at a later stage, that — should one consider that such general principles may come into play in revision proceedings regardless of the detailed requirements of Article 61 *quid non* — the necessary prerequisites of estoppel or acquiescence are *not* fulfilled in our case.

5.24. Bosnia and Herzegovina also attempts to rely on the behaviour of the FRY in other cases currently pending before this Court where the FRY is the Applicant and argues that the FRY should accordingly be estopped from requesting revision in this case. Bosnia and Herzegovina may however *not* rely on the behaviour of the FRY in other cases before this Court.

2. Bosnia and Herzegovina may not rely on the behaviour of the FRY in other cases before this Court

5.25. Mr. President, honourable Members of the Court. *First*, an essential condition for applying the principle of estoppel is — as was indeed stated by a Chamber of this Court in the *Land, Island and Maritime Frontier Dispute* case — and I refer to a quotation you may find in

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[50]Case concerning *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 205–206, paras. 23–28.

[51]*Ibid*., paras. 24 and 27.

tab 11 of the judges' folder: "a statement or representation [is] made *by one party to another* and reliance upon it by *that other party to his detriment* or to the *advantage of the party making it*"[52].

5.26. Thus, since the parties in the various cases concerning *Legality of Use of Force* are not identical to the Parties in this case, in our case, any action taken by the FRY in the past before this Court against certain member States of the North Atlantic Treaty Organization cannot be relevant for the purposes of this Application for Revision in the case between Bosnia and Herzegovina on the one side and the FRY on the other.

5.27. *Secondly*, even if one was to consider such action undertaken by the FRY vis-à-vis third States to be relevant, it has to be noted that any such action undertaken by the FRY in those other cases was again based on the idea of identity and thus can no longer be held against the FRY after the new facts underlying this Application for Revision became known.

5.28. The FRY is thus not estopped from requesting revision based on its behaviour in other cases currently pending before this honourable Court.

5.29. Bosnia and Herzegovina further argues — in trying to rely on the jurisprudence of this Court in the *Temple of Preah Vihear* case — that the FRY made a mistake in claiming identity with the former Yugoslavia and that therefore its request for revision should for that reason alone not be entertained[53]. Such attempt must however be similarly refuted.

3. The FRY is not barred from requesting revision because its original position later proved to be wrong

5.30. In that regard it has to be first reiterated that the whole concept of "mistake" as put forward by Bosnia and Herzegovina is *per se* not applicable in revision proceedings under Article 61 of the Court's Statute since otherwise Article 61 of the Statute would be meaningless. This is due to the fact that said provision, Article 61 itself presupposes that both, the party claiming revision and the Court itself, were not aware of the existence of a decisive fact which was unknown to both of them at the time the original decision was rendered. Thus, Article 61 itself presupposes

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[52]Case concerning *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras), Application to Intervene, Judgment of 13 September 1990, I.C.J. Reports 1990,* p. 118.

[53]Written Observations of 3 December 2001, paras. 4.11.–4.13.

the very existence of an error. Accordingly the existence of any such error cannot bar a party from requesting revision.

5.31. In addition, applying the avoidability standard proposed by Bosnia and Herzegovina would also run counter to the more specific negligence standard as contained in Article 61 of the Court's Statute. Indeed, if one was to follow *arguendo* the approach suggested by Bosnia and Herzegovina, even a State like the FRY which had indeed exercised due diligence and had not acted negligently could still be barred from requesting revision and thereby reach a result contrary to both the object and the purpose of Article 61 itself.

5.32. Furthermore, the Court acknowledged in the *Temple of Preah Vihear* case that — even where a State had submitted itself to the jurisdiction of the Court — such submission may still be nullified by some defect. The FRY has however not even accepted the jurisdiction of this honourable Court. But even if one was to agree *arguendo* that it did, it is still important to note that the Court had stated in the *Temple of Preah Vihear* case that such submission to the Court's jurisdiction would be null and void where it can be demonstrated that — and I may again kindly refer you to tab 12 in the judges' folder — "this defect was so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement"[54].

5.33. In that case, the Court then continued that such defects are indeed relevant and make the submission invalid where they "affect . . . the substance of the matter"[55] and where the respective instrument by which the State under consideration is trying to submit itself to the jurisdiction of the Court runs counter to some mandatory requirement of law[56].

5.34. Mr. President, Members of the Court, there can be no doubt that such a situation clearly exists with regard to the FRY given that the most basic preconditions for the exercise of jurisdiction *ratione personae* were lacking vis-à-vis the FRY, since at the time when the case was brought by Bosnia and Herzegovina, the FRY, as we know now,

— first, had not been a Member of the United Nations;

— second, accordingly had not been a party to the Statute of this Court; and

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[54]Case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, p. 34.

[55]*Ibid.*

[56]See *ibid.*

— third, had neither been a contracting party to the Genocide Convention.

5.35. Accordingly the most mandatory legal preconditions for the exercise of the Court's jurisdiction vis-à-vis the FRY as contained in Article 93 of the Charter of the United Nations and in Article 35 of the Court's Statute were *objectively* missing. It is indeed hard to imagine — as is claimed by Bosnia and Herzegovina — that a State could by simply making a mistake circumvent the most basic preconditions of the Charter of the United Nations and the Statute with regard to the exercise of the Court's jurisdiction.

5.36. I will now come to my last point and demonstrate that it is Bosnia and Herzegovina itself which is estopped from arguing that the Court's jurisdiction could be based on

— either the idea of continued personality

— or on the declaration issued by the FRY on 27 April 1992.

E. Bosnia and Herzegovina is estopped from arguing that the Court's jurisdiction could be based on the idea of continued personality or on the Declaration by the FRY of 27 April 1992

5.37. In its written observations Bosnia and Herzegovina argues that the FRY had stated that it considered itself a Member of the United Nations and a party to the Genocide Convention and that it would by now be precluded to change its position retroactively[57] — an argument that I have already addressed.

5.38. It has to be noted, however, that — quite to the contrary — Bosnia and Herzegovina itself is estopped from now claiming — as it does during the current proceedings — that the jurisdiction of the Court can be based on either the idea of identity or on the Declaration issued by the FRY of 27 April 1992.

5.39. Bosnia and Herzegovina has in the past consistently (and indeed successfully) opposed the claim of the FRY to be identical with the former Yugoslavia. It is largely due to that position taken by the other successor States of the former Yugoslavia — and namely Bosnia and Herzegovina itself — that the original claim of the FRY to be identical with the former Yugoslavia failed to gain acceptance by the international community.

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[57] Written Observations of 3 December 2001, para. 4.36.

5.40. In addition, Bosnia and Herzegovina has similarly also denied on various occasions in the past that the Declaration by the FRY of 27 April 1992 could amount to or be understood as a declaration of succession[58]. Bosnia and Herzegovina has thus over time acted inconsistently.

5.41. Furthermore, the behaviour and approach of Bosnia and Herzegovina was also inconsistent in yet another way. For purposes of these proceedings and in order not to put into question the jurisdiction of the Court vis-à-vis the FRY, it accepted that the FRY was identical with the former Yugoslavia. Yet — as mentioned — outside this courtroom, Bosnia and Herzegovina always argued that the FRY cannot continue the international legal personality of the former Yugoslavia. Thus Bosnia and Herzegovina again blew hot and cold.

5.42. Bosnia and Herzegovina has thereby caused a detriment to the FRY, i.e., has prevented the FRY for years from participating in the work of certain United Nations organs and from attending meetings of contracting parties of various human rights treaties[59].

5.43. Moreover, accepting the claim by Bosnia and Herzegovina that the FRY had remained a Member of the United Nations and had also remained bound by the treaty commitments of the former Yugoslavia brought forward for purposes of these proceedings — and contrary to its own prior position taken outside the Court — would provide Bosnia and Herzegovina with even a further advantage and cause once more detriment to the FRY.

5.44. Accordingly, Bosnia and Herzegovina itself is estopped from now arguing that the Court's jurisdiction could be based on either the idea of identity or on the assumption that the Declaration of 27 April 1992 could be considered a declaration of succession — *quid non*.

F. Summary of argument

5.45. Mr. President, honourable Members of the Court, before concluding my argument let me briefly summarize the main points I made:

— *first*, I have demonstrated that prior declarations which were solely based on an assumption of continued personality cannot create commitments for the FRY as to Article IX of the Genocide Convention;

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[58]Application for revision, paras. 10 *et seq.*

[59]See Application for Revision, paras. 10 *et seq.*

— *second*, the FRY is *not* barred from requesting revision due to concepts of *acquiescence*, estoppel or mistake;

— *finally*, it is Bosnia and Herzegovina which in turn is estopped from arguing that the Court's jurisdiction could now be based on either the idea of identity or on the Declaration of 27 April 1992.

5.46. Mr. President, Members of the Court, let me thank you for your kind attention and may I now kindly ask you, Mr. President, to call upon my colleague, Professor Varady to continue the argument of the FRY.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à M. le professeur Varady, agent de la République fédérale de Yougoslavie.

Mr. VARADY : Je vous remercie, Monsieur le président.

VI. THE ISSUE OF NEGLIGENCE

6.1. It has been demonstrated so far that in the 1996 Judgment, jurisdiction over the FRY was based on the perceived facts that the FRY was a party to the Statute, and that it had remained bound by the Genocide Convention, continuing the personality of the former Yugoslavia.

It has further been demonstrated that the 1 November 2000 acceptance of the FRY to the United Nations as a *new* Member and the letter of the Legal Counsel of 8 December 2000 revealed that the FRY was *not* a party to the Statute at the time of the Judgment, and that the FRY did *not* remain bound by the Genocide Convention.

We have also shown that, at the time of the Judgment, the true facts were not known by either the Applicant or by the Court.

My colleague, Professor Zimmermann, demonstrated that the specific standard of diligence and fair dealing set by Article 61 *with regard to the party claiming revision* is that of the absence of negligence. The general procedural standard of estoppel does not apply. Even if it were applicable, its requirements were not met with regard to the FRY.

6.2. With that in mind, let me turn now to the issue of negligence.

One of the conditions for laying the case open for revision is that ignorance of the critical fact was not due to negligence of the party claiming revision. I shall demonstrate that this

condition was, indeed, met. I shall deal first with two preliminary questions: what is the relevant moment in time, and what is the appropriate standard of negligence.

A. The relevant moment in time and the appropriate standard of negligence

1. The relevant moment in time

6.3. The first preliminary question which arises concerns the relevant moment in time for assessing whether there was negligence. Article 61 of the Statute, setting specific procedural standards, provides an answer to this question. It states that the newly discovered fact which is a decisive factor, has to be unknown (to the Court and to the party claiming revision) *"when the Judgment was given"* (emphasis added) — and now I quote again, "always provided that such ignorance was not due to negligence". In other words, the relevant moment in time is the time "when the Judgment was given". It follows that "such ignorance", that is, ignorance of the fact at the time when the Judgment was given, should not be due to negligence.

6.4. This is also logical because the relevant state of affairs for an application of revision is the state of affairs at the time when the Judgment was given. The FRY will demonstrate that it was not due to negligence that it failed to perceive as a fact that the FRY did not remain a party to the Statute and a party to treaties ratified by the former Yugoslavia. There was no negligence prior to the Judgment. It is the position of the FRY that under Article 61 of the Statute the period after the Judgment was rendered is not relevant; but even if the Court were to take a different position, *quid non*, the result would be the same, because there was no negligence at a later moment either.

2. The appropriate standard of negligence

6.5. Mr. President, Members of the Court, the second preliminary issue is that of the applicable standard of negligence. This standard was set in the only case prior to this one dealing with an application for revision. In the *Tunisia* v. *Libya* case, what represented the critical fact were the boundary co-ordinates of a concession. Approaching the issue as to whether ignorance of the pertinent facts was or was not due to negligence, the Court set the following standard — and you may follow this in tab 13 of the judges' folder starting at the bottom of page 4:

> "the fact that the concession boundary co-ordinates were *obtainable* by Tunisia, and the fact that it *was in its own interests to ascertain them, together* signify that one of the essential conditions of admissibility of a request for revision laid down in

> paragraph 1 of Article 61 of the Statute, namely ignorance of a new fact not due to negligence, is lacking"[60].

It follows that negligence can only be established if two factors combined *together* yield this result. These factors are:

— that the newly discovered facts were *obtainable* (at the time of the Judgment); and

— that it was in the applicant's *own interest to ascertain them.*

6.6. Neither of these two conditions was met in our case, let alone their combination. The fact that the FRY did not continue the personality and treaty obligations of the former Yugoslavia was not obtainable at the time of the Judgment. Furthermore, it was certainly *not* in the FRY's *"own interest"* to bring about clarification in the direction opposite to the principles it espoused.

B. No negligence when the Judgment was rendered

1. The pertinent facts were not obtainable

6.7. Having identified the standard, I would like now to further explain that *there was no negligence when the Judgment was rendered*. Addressing the issue of negligence in its Written Observations, the Respondent argues that what we have had in this case is a simple change of position by the FRY.

The Respondent also argues that the FRY should have applied for United Nations membership, and that it was negligent for not doing so before 2000, since Security Council resolution 777 (and General Assembly resolution 47/1) contemplated already in September 1992 that the FRY should apply for membership in the United Nations.

6.8. Mr. President, Members of the Court, let me first stress that Yugoslavia's position, or "change of position", cannot be equated with the relevant facts. Whether the FRY was or was not in fact a party to the Statute, whether it did or did not continue the personality and treaty membership of the former Yugoslavia, were not facts simply determined by the position of the FRY. Had they been, the FRY would have obviously remained a Member of the United Nations with full rights.

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[60] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 28; emphasis added.

6.9. Moreover, the fact that the FRY was not a party to the Statute by way of United Nations membership, and that the FRY did not remain a party to treaties continuing the personality of the former Yugoslavia, were not obtainable.

The response of the United Nations and of other international actors to the intricacies of the dissolution of Yugoslavia was neither clear nor unequivocal, and did not yield readily obtainable facts. Had it really been clear and visible and easily ascertainable that the FRY was not a Member of the United Nations, and that it did not continue the international legal personality of the former Yugoslavia, this would have certainly not remained outside the scope of considerations in the Judgment, all arguments being a matter of public record.

6.10. Let me mention here that the Respondent itself does not contest that the situation was unclear. In its Written Observations the Respondent itself points out that during the meeting of the General Assembly of 22 September 1992, which lead to the adoption of resolution 47/1 "no clarity was given by any State nor obtained — although requested — by any State about the precise legal status of Yugoslavia vis-à-vis its membership of the United Nations"[61]. Moreover, as we stated earlier, in its Memorial[62] Bosnia and Herzegovina even asserted that the Secretary-General kept treating the FRY as a Member State of the United Nations, and that "the international community has accepted this situation".

6.11. Mr. President, it is beyond contention that Security Council resolution 777 does say that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted". It is also beyond contention that General Assembly resolution 47/1 did contemplate that the FRY should apply for membership in the United Nations. This was stated and repeated.

6.12. But it was also stated and repeated that in his letter of 29 September 1992, explaining the effects of General Assembly resolution 47/1, the Legal Counsel stressed that — and you can follow this again in tab 9 on page 2: "the resolution neither terminates nor suspends Yugoslavia's membership in the Organization". The Legal Counsel added — and this is again in tab 9, starting

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[61]Written Observations of 3 December 2001, para. 2.3.

[62]Memorial of Bosnia and Herzegovina of 15 April 1994, paras. 4.2.2.16 and 4.2.3.17.

on the bottom of page 2 of the English text, (and it is on page 3 of the French text): "The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies."[63]

6.13. Mr. President, Members of the Court, let us now see how the depositary has explained and characterized the ensuing situation. In the present revised version of the publication "Multilateral Treaties Deposited with the Secretary-General", in the section "Historical Information", it is now made clear that resolution 47/1 did *not* settle the issue as to whether the FRY did or did not continue the personality and treaty membership of the former Yugoslavia. It has also been made clear that it was *not* the FRY who should have or could have established the true facts. Let me quote the explanation given by the Secretary-General; you may find this in the judges' folder at tab 3, page 3:

> "General Assembly resolution 47/1 did not specifically address the question of the status of either the former Yugoslavia or of Yugoslavia with regard to multilateral treaties that were deposited with the Secretary-General. The Legal Counsel took the view in this regard that the Secretary-General was not in a position, as depositary, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to the contrary either by a competent organ of the United Nations directing him in the exercise of his depositary functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depositary functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise."[64]

6.14. One cannot be more convincing than this. The fact that the FRY did not continue the personality of the former Yugoslavia was simply not obtainable. Moreover, let me note that the actors from whom clarification was expected by the Secretary-General are:

— a competent organ of the United Nations, or

— a competent treaty organ created by treaty, or

— contracting States, or

— a competent organ representative of the international community of States.

Not the FRY.

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[63]See Letter of the Legal Counsel of 29 September 1992 — UN Doc. A/47/485.

[64]See Multilateral Treaties Deposited with the Secretary-General, Historical Information, at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp.

There *were* authorities which could have established whether the FRY did or did not continue treaty membership of the former Yugoslavia. They failed to do so. The answer was not obtainable.

2. Standards of diligence do not require fact finding by way of seeking admission to the United Nations

6.15. The question was also raised as to whether standards of diligence required the FRY to establish the facts by way of applying for United Nations membership.

Mr. President, Members of the Court, let me repeat that the FRY was not in control of the decision as to whether it was or was not a Member of the United Nations and a party to the Statute. Clarification was not up to the FRY. Taking a clear-cut position, and sending an unequivocal signal was a matter to be handled by United Nations organs. Adopting a resolution which considers that the FRY should apply for membership in the United Nations, and explaining at the same time that this resolution "neither terminates nor suspends Yugoslavia's membership in the United Nations" was just not such a signal.

Let me add that both Security Council resolution 777 and General Assembly resolution 47/1 ended with a note stating that the intention of the Security Council was "to consider the matter again". This did not take place.

6.16. The course of action taken by the FRY, and by other actors, was not evident either. Applying for United Nations membership would not have made much sense had the FRY already been a Member.

6.17. Moreover, Article 61 of the Statute sets standards of diligence regarding ascertainment of facts, and these standards may require a party to take steps to establish obtainable facts. There is no standard of diligence, however, which would require a party to influence a controversy, or to shape facts. Furthermore, *applying for United Nations membership as a new State ¾ as a new State ¾ would not have been a step in diligent fact finding, but a major shift in policy orientation. This cannot be imposed on a sovereign State.*

6.18. Mr. President, Members of the Court, at the time when the Judgment was rendered it was not a known fact whether the FRY did or did not continue the personality of the former Yugoslavia. The FRY asserted that it did. This was supported by some authorities, while

contradicted by others. No formal contestation was raised before this Court. The Court relied on this assumption. It was plausible. The FRY was not negligent for not being aware of a fact that was not obtainable.

6.19. Let me conclude that within this unique sequence of events without precedent — and most unlikely to get repeated — lack of diligence or negligence of the FRY was not the reason why, at the time of the Judgment or later, the FRY did not perceive as a fact that it was not a Member of the United Nations, and thus it was not *ipso facto* a party to the Statute. Likewise, lack of diligence or negligence of the FRY was not the reason why, at the time of the Judgment or later, the FRY did not perceive as a fact that it did not continue the personality of the former Yugoslavia, and thus did not remain bound by the Genocide Convention.

VII. THE ISSUE OF SIX MONTHS

7.1. Mr. President, Members of the Court, I would finally like to deal with the issue of six months. In its Written Observations[65] Respondent states that in September 2000 Mr. Koštunica, as one of the leaders of the then opposition, pledged, among other things, to make every effort "persistently and patiently to see our country as a member of the OSCE, as one of those that created it, and rejoin the United Nations and leading world financial institutions".

Respondent also cites a 9 October 2000 news analysis stating that newly elected President Koštunica was invited by the United Nations Secretary-General to apply for United Nations membership. According to this news analysis, President Koštunica's position was that Yugoslavia should do so. Respondent concludes on the grounds of these data that the discovery of the new fact took place before 23 October 2000 and thus the prescription period was not met[66].

7.2. Mr. President, let me first mention that the controversy regarding continuity between the former Yugoslavia and the FRY did not only yield a debate in the United Nations and outside Yugoslavia, but, quite naturally, there was a debate within the FRY as well. Different positions were advocated. There were differences within the opposition as well. A position taken within the opposition — which position was also part of the election campaign — was only a part of the

[65] Written Observations of 3 December 2001, para. 3.17.

[66] *Ibid.*

debate, rather than its resolution leading to conclusive discoveries. Also, the September statement of Mr. Koštunica about "rejoining the United Nations" does not lend clear support to the position of the Respondent.

Moreover, and most importantly, only acts of office holders of the FRY can be ascribed to the FRY — positions taken within the opposition cannot. This is confirmed by Article 4 of the ILC Draft Articles on State Responsibility under which only the conduct of State organs shall be considered as an act of State[67]. In September 2000, Mr. Koštunica was just a private citizen whose acts cannot be attributed to the FRY.

7.3. As far as the 9 October news analysis is concerned, it is just that: a news analysis of a Belgrade media centre. It cannot be the foothold of relevant conclusions. But even taken at face value, it is only indicative of intentions ("readiness to apply" — as stated), rather than of actual relevant action. It was not the *readiness or the intentions* of one or another President of the FRY that established as a fact that the FRY was not a party to the Statute in 1996, and that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia.

7.4. The FRY submitted its application for membership in the United Nations on 27 October 2000. This *is* relevant action — and this *is* within the six months' period. It is the position of the FRY, however, that in itself even the application was not, and could not have been, conclusive. It did not in itself end the debate, just as numerous earlier initiatives also failed to end the controversy. Being or not being a Member of the United Nations and a party to the Statute was not within the disposition of the FRY. The application of 27 October 2000 itself did not bring about a change of perspective.

7.5. What led to the discovery that at the time of the Judgment the FRY was not a party to the Statute by way of United Nations membership was the *decision of the General Assembly of 1 November 2000 to accept the FRY as a new Member.* Likewise, only this decision of the General Assembly established that the FRY did not continue the personality of the former Yugoslavia. The inferences of the decision regarding treaty membership of the FRY, and

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[67]Draft Articles on Responsibility of States for Internationally Wrongful Acts — Report of the ILC Fifty-third session, *GAOR, Fifty-sixth session No. 10* (A/56/10).

specifically regarding its status with regard to the Genocide Convention, were clarified and confirmed by the letter of the Legal Counsel of 8 December 2000.

7.6. The Application for revision *was* submitted within the time-limit set by Article 61 of the Statute.

VIII. CONCLUSIONS

8.1. Mr. President, Members of the Court, permit me to submit to you our conclusions. The Court held that it had jurisdiction over the FRY on ground of assumptions which were prevailing at the time of the Judgment. It was assumed to be a fact that the FRY remained a party to the Statute, and that it remained a party to the Genocide Convention continuing the personality of the former Yugoslavia. This was the essential and the only *ratio decidendi.*

8.2. It is clear and evident that the very foundation of the 11 July 1996 Judgment has been disproved. What was assumed to be a fact turned out to be an appearance of a fact. What is now known to be the reality is the opposite of what was assumed to be the reality. The change is decisive. Today it is clear that *the FRY was not a party to the Statute at the time of the Judgment*; it became a party to the Statute on 1 November 2000. Today it is also clear *that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia*; it became bound by the Convention as a new party on 10 June 2001, and never became bound by Article IX.

8.3. Let me also reiterate that — as it has been demonstrated — the newly discovered facts, which are decisive, were unknown to both the Court and to the party claiming revision. These facts were not obtainable at the time of the Judgment. The FRY was not negligent, and the Application was submitted within the time-limit of six months since the new decisive facts were revealed. It has also been demonstrated that the FRY is not estopped from seeking revision.

Since the basic premises of the 1996 Judgment have been altered, the FRY is respectfully asking the Court to lay the case open for revision.

Mr. President, Members of the Court, this brings me to the end of my remarks. I truly appreciate your attention. Thank you very much.

Le PRESIDENT : Je vous remercie, Monsieur l'agent. Ceci met un terme au premier tour de plaidoiries de la République fédérale de Yougoslavie. Demain matin à 10 heures nous entendons le premier tour de plaidoiries pour la Bosnie-Herzégovine. La séance est levée.

L'audience est levée à 13 heures.

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