CR 2002/42

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Wednesday 6 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 mercredi 6 novembre 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

en l'affaire de **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

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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 Pančeski, 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 du 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,

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

comme assistants.

Le Gouvernement du Bosnie-Herzégovinie est représenté par :

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comme agent;

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comme agent adjoint;

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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. La séance est ouverte pour le deuxième tour de plaidoiries de la République fédérale du Yougoslavie et je donne immédiatement la parole au professeur Tibor Varady, agent de la République fédérale du Yougoslavie. Vous avez la parole.

Mr. VARADY: Je vous remercie, Monsieur le président. Mr. President, Members of the Court:

1.1. Mr. President, Members of the Court, let me say a few words with regard to the introductory part of the pleadings of our learned colleagues, presented yesterday, which pleadings brought us back to the drama of the 1992-1995 conflict.

I shall not endeavour to discuss the significance or the magnitude of human sufferings, let alone to challenge it. One could say, and actually one should say, however, that there is no judgment whatsoever, national or international, which would have established genocide committed by a citizen of the Federal Republic of Yugoslavia (FRY). The International Criminal Tribunal for the former Yugoslavia (ICTY) did establish genocide in Srebrenica, and established the responsibility of a general of the Bosnian Serb Army. The case is under appeal. It is also a part of the truth that a most thorough investigation of the events in Srebrenica, the one conducted by the Netherlands Institute for War Documentation, came to the conclusion that there was no Yugoslav involvement. It is stated: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of mass murder such a liaison is highly improbable."[1]

There is no doubt, Mr. President, that Sarajevo and Srebrenica remain monuments of senseless destruction. There is no doubt that the great majority of victims were Moslems, that is Bosniacs. It is premature, however, to take the allocation of responsibility for granted.

1.2. Let me also mention that we tried to check the assertion of the Respondent regarding the alleged statement of President Koštunica of 16 September 1994. Attempting to link the present leadership of the FRY to the siege of Sarajevo, the Deputy Agent of the Respondent stated:

> "[O]n 16 September 1994 . . . the current President of Yugoslavia, Mr. Koštunica, who is currently also running for President of Serbia and received a majority of the votes and who is quoted as saying [looking down on Sarajevo from the

[1]NIOD — Srebrenica Report, Epilogue, p. 20, available at: http://www.srebrenica.nl/en/content_epiloog.htm.

> Serb front lines] 'here we can see what the future borders of Serbia should look like'."[2]

No source of this allegation was quoted. We have verified this, and established that Mr. Koštunica never said what was ascribed to him.

1.3. Mr. President, Members of the Court, let me say again, that I cannot — and do not want to — contest or diminish the suffering of any people. I also know, just as counsel for Bosnia and Herzegovina do, that the sufferings of the Bosniac people reached dramatic proportions during the war. But this belongs to the merits. At this point, we are dealing with an Application for Revision of the 1996 Judgment on jurisdiction.

1.4. Dealing with preliminary matters, I would like to say a few words in connection with the allegation that all the FRY is doing is to delay and stall these proceedings.

I understand that if this were true, that all the FRY can do is stall, this would imply that the position of the Applicant must be weak, and that the position of the Respondent is a strong one. It is, of course, for the Court to establish the respective strengths and positions of the Parties. But I would like to make it clear that we are not stalling. We are convinced that the Court has no jurisdiction in this case, and we strongly believe that the conditions for revision set in Article 61 of the Statute have been met. This is why the FRY respectfully submitted its Application for Revision.

1.5. But let us take a look at facts and dates.

— On 5 October 2000, mass demonstrations of hundreds of thousands of Serbian citizens which brought to an end the Milošević régime, forced it to recognize the result of the presidential elections. Mr. Koštunica became President of the FRY, replacing Mr. Milošević.

— A new Yugoslav Government was formed on 3 November 2000.

— New elections in Serbia took place on 23 December 2000.

— After the elections, a new Serbian Government was formed on 25 January 2001. This was the point when a new government was formed on all relevant levels.

— On 18 January 2001 the FRY asked for a stay or a postponement of all of its cases before the ICJ. In the same letter Minister Svilanović indicated the appointment of the new Agent.

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[2]CR 2002/41, p. 12, para. 3 (Phon van den Biesen).

Postponements were granted. However, in the case with Bosnia and Herzegovina, the FRY submitted an Application for Revision on grounds of newly discovered facts, instead of taking advantage of the postponement.

— The new Yugoslav Foreign Minister formally nominated the Agent of the new Government of the FRY in the Bosnia *v.* Yugoslavia case on 26 January 2001 — and this was promptly acknowledged by the Registrar on 29 January 2001

— The Counter-Claim was withdrawn on 20 April 2001.

— The Application for Revision was submitted on 23 April 2001.

— Bosnia sought an extension of the time-limit for the submission of written observations on 2 August 2001.

— The FRY stated on 17 August 2001 that it had no objections against such extension.

— The time-limit for the submission of written observations of Bosnia and Herzegovina was extended on 21 August 2001 until 3 December 2001.

— Having received the Written Observations of Bosnia and Herzegovina, the FRY suggested another exchange of written submissions. This was not accepted, and instead, the present oral hearings were scheduled.

1.6. Let me submit that this sequence of procedural steps is a rather usual sequence. Let me also mention that the task before the new office holders of the FRY — who only took office by the end of 2000 — was momentous, after more than a decade of isolation and decline. Still, the lawsuits before the ICJ received early attention.

1.7. The Respondent has also suggested that this Application for Revision is some sort of a "betrayal" of the idea of reaching an out-of-court friendly settlement. We simply fail to see why this would be the case. I do not see why it would be more difficult to discuss an out-of-court settlement while the proceedings concerning jurisdiction are still pending. At any rate, the FRY did make attempts to reach a friendly settlement: the response was, so far, negative. The FRY is ready at any moment to resume negotiations on ground of its own initiative, or on ground of any other initiative, at any moment.

1.8. Another issue belonging to the general background is the following. The Agent and Deputy Agent of Bosnia and Herzegovina submitted that a "positive outcome" of Bosnia's case

against the FRY on the merits, that is a judgment which would hold the FRY responsible for genocide, would "enable the two States to live in friendship as good neighbours"[3] and it would also "be a tremendous support in the very difficult reconciliation process currently going on in Bosnia itself"[4].

With all respect, this is very difficult to believe. It is difficult to believe that years of proceedings on the merits, with hundreds of witnesses, accusations and recriminations, clashes of views on tragedies would contribute to the reinforcement of the fragile *modus vivendi* between the ethnic groups in Bosnia.

Let us add that within the framework of a conceivable proceeding on the merits before this Court, determinations of guilt or innocence are restricted to guilt or innocence in connection with genocide, which could hardly give an answer to all grievances — let alone bring about reconciliation.

1.9. Furthermore, one has to bear in mind that this lawsuit is not articulated along the same lines as the conflict itself. The dividing lines of the actual conflict were very much ethnic dividing lines. After the Dayton Peace Accord, former adversaries have become citizens of the same State consisting of two entities: the Federation, which is created in response to Bosniac and Croatian legitimate aspirations, and the Serbian Republic (the "Republika Srpska"). This is a lawsuit in which it is alleged that the FRY was "aiding and abetting" the Bosnian Serbs in committing acts prohibited by the Genocide Convention[5]. This could hardly represent "a tremendous support in the very difficult reconciliation process currently going on in Bosnia itself"[6].

1.10. The reconciliation process would quite certainly be seriously hampered by a "positive outcome" of the case for Bosnia, given some specific claims of Bosnia and Herzegovina. In spite of the fact that the "Republika Srpska" is one of the two legitimate entities of the State of Bosnia and Herzegovina as formed by the Dayton Agreement, Bosnia claims in its Reply of 23 April 1998 that: "The creation of 'Republika Srpska' has been imposed through the use of force and

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[3]CR 2002/41, p. 11, para. 15 (Softić).

[4]CR 2002/41, p. 11, para. 16 (Softić).

[5]Memorial of Bosnia and Herzegovina of 15 April 1994, para. 1.3.0.5.

[6]CR 2002/41, p. 11, para. 16 (Softić).

genocide."[7] Further on, it is claimed in the same Reply that: "It appears clearly that the 'Republika Srpska' is the product of both an unlawful use of force and genocide, that is, clearly contradicting the principles prohibiting both the use of force in international relations and genocide."[8]

1.11. Reconciliation and justice appear to be more within reach through the vehicles of individual responsibility.

I would like to ask you, Mr. President, to invite Mr. Vladimir Djerić, who would address exactly this issue. Thank you very much.

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

Mr. DJERIĆ: Thank you, Mr. President.

1.12. Mr. President, Members of the Court, the representatives of Bosnia and Herzegovina yesterday reminded you about the war in Bosnia and Herzegovina and about the tragic events that took place at that time. The events were indeed tragic and massive violations of human rights and humanitarian law indeed took place. To say the least, the tragedy and suffering of Sarajevo and Srebrenica cannot be retold by words and cannot be overstated.

1.13. In 1992, I was among many thousands of citizens of Belgrade who went onto the streets to protest against the war in Bosnia and against the siege of Sarajevo. Both in Bosnia and in the FRY there were those who were against the war and there were those who were for the war.

1.14. But this is not the subject-matter of the present proceedings. The subject-matter of the present proceedings is the legal issue of whether the Court should lay open its 1996 Judgment for revision, in the light of newly discovered facts.

1.15. However, the representatives of Bosnia and Herzegovina used much of their time to speak about the importance of the proceedings on the merits in the case of *Bosnia and Herzegovina* v. *Yugoslavia*. The Agent of Bosnia and Herzegovina said yesterday that the continuation of the proceedings will set the record straight and that the case "will clarify the true,

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[7]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Reply of Bosnia and Herzegovina, p. 789, para. 82.

[8]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Reply of Bosnia and Herzegovina, p. 794, para. 96.

i.e., genocidal nature of the atrocities committed against the non-Serb population of Bosnia and Herzegovina"[9].

1.16. Again, this is not the subject-matter of the present proceedings. But, in any case, to come back to the contention of Bosnia and Herzegovina, only criminal proceedings against individuals are a proper legal avenue for "setting the record straight". In addition, only national and international criminal tribunals have an appropriate and much needed apparatus for dealing with evidence, for questioning hundreds of witnesses and for establishing the full truth. One should just visit the International Criminal Tribunal for the former Yugoslavia (ICTY) here in The Hague and see this institutional machinery and vast resources that are needed in order to conduct such proceedings. Finally, the national and international criminal proceedings against individuals are the only possible way to establish criminal responsibility — which can only be individual — and in this way to bring justice.

1.17. Mr. President, without any wish to judge or take a position on the state of affairs in Bosnia and Herzegovina, one cannot help but notice that the existence of this lawsuit has given rise to a great debate, and more than a debate, in Bosnia and Herzegovina itself. This lawsuit seems to be an added burden on the delicate political fabric of Bosnia and Herzegovina, instead of giving support to the process of reconciliation as claimed yesterday by the Agent of Bosnia and Herzegovina.

1.18. At the same time, a strong incentive and support for the process of reconciliation has come from the context which the FRY sees as the appropriate one for the establishment of responsibility for violations of international humanitarian law. Thus, one of the top leaders of the Bosnian Serbs during the war in Bosnia and Herzegovina, Mrs. Biljana Plavsic, entered into a plea agreement with the ICTY Prosecutor and pleaded guilty for crimes against humanity before the ICTY. At the same time, an important statement was made on her behalf:

> "By accepting responsibility and expressing her remorse fully and unconditionally, Mrs. Plavsić hopes to offer some consolation to the innocent victims — Muslim, Croat and Serb — of the war in Bosnia and Herzegovina. Mrs. Plavsić invites others, especially leaders, on any side of the conflict, to examine themselves and their own conduct.

[9]CR 2002/41, p. 10, para. 13 (Softić).

> The acknowledgement of guilt by Mrs. Plavsić is individual and personal. Legal responsibility can only be borne by persons individually, based upon individual acts and conduct."[10]

1.19. It is clear that the process of reconciliation starts within the framework of individual criminal responsibility, and that only criminal sanctions against the responsible individuals will open the way towards true and full reconciliation.

1.20. Mr. President, Members of the Court, another point made by the Agent of Bosnia and Herzegovina was that the suit against the FRY will "pave the way for the opening of a new chapter in the relations between the two States". I must admit that I am not quite sure what this is supposed to mean. A new chapter in the relations between Bosnia and Herzegovina and the FRY was already opened two years ago, within weeks after the end of the Milošević régime. This has been confirmed less than two weeks ago, upon the visit of the Yugoslav Ambassador in Sarajevo to the presidency of Bosnia and Herzegovina, and I will quote now the statement issued by the presidency of Bosnia and Herzegovina on that occasion, which we translated into English:

> "The progress in relations has been mutually emphasized, which is expressed through the establishment of an Inter-State Council for Co-operation . . .
>
> Until now, a total of eight inter-State treaties and agreements between the FRY and Bosnia and Herzegovina have been signed, which can be considered a good success in strengthening the mutual relations between the two countries."[11]

1.21. In addition to this clear statement, I can assure you that the FRY has good relations with Bosnia and Herzegovina as one of its top foreign policy priorities, with or without this lawsuit pending before the Court. Naturally, the existence of this lawsuit certainly does not help improve these relations, but it has not made them worse either. The only problem is that the existence of this lawsuit has been detrimental for the internal political situation and stability of Bosnia and Herzegovina, which is, of course, not a matter of our interest today.

1.22. Mr. President, Members of the Court, the siege of Sarajevo and the massacre of Srebrenica are clearly abhorrent crimes. No question about it. Mr. van den Biesen was yesterday referring to indictments pending before the ICTY which are related to the atrocities that took place

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[10]Statement on behalf of Biljana Plavsic, The Hague, 2 October 2002, available at www.un.org/icty/pressreal/p697-e.htm.

[11]*Ambasador SR Jugoslavije u Predsjednistvu BiH* [Ambassador of the FRY in the presidency of Bosnia and Herzegovina], press release of 22 October 2002, available at http://www.predsjednistvobih.ba/saop/default.aspx?cid=413&lang=bs.

during the Bosnian war. This was used to imply responsibility of the FRY for these events, and these indictments and their legal assessments were presented as established truths. This, of course, is not correct.

1.23. I first wish to emphasize that indictments are just that — indictments, and they are not final judgments, which establish facts and what really happened. For example, Mr. van den Biesen quoted the indictment against Mrs. Plavsić — I have just mentioned her — and contrary to what he was claiming, in the meantime there was a plea agreement according to which the count of genocide against Mrs. Plavsić was withdrawn, while she pleaded guilty to a crime against humanity.

1.24. Thus, what is in indictments cannot be taken as established fact, as the indictments are obviously always subject to modifications. Finally, and most importantly, if what is contained in indictments were to be taken as an established fact, why would there be a need, at all, for the right to defence that belongs to the accused and why, more importantly even, there would be a need for judicial decisions at all?

1.25. Mr. President, Bosnia and Herzegovina spent much of its time yesterday to show that the FRY is not respecting its international obligations and that it is not co-operating with the ICTY. Bosnia and Herzegovina is invoking the Dayton Peace Agreement in order to say that the FRY has obligation to co-operate with the ICTY. In that regard, I wish to emphasize that the FRY, as a Member of the United Nations, as well as under its own constitution, has unequivocal obligation to co-operate and that the FRY does co-operate with the ICTY. We firmly believe that all individuals responsible for international crimes committed on the territory of the former Yugoslavia must be brought to justice, and that the ICTY plays a crucial role in that respect.

1.26. It is true that the President of the ICTY formally notified the Security Council that there is a lack of co-operation on the side of the FRY. The FRY also admits that there are difficulties and delays in co-operation. This has been true, at various occasions, for all States emerging from the former Yugoslavia. The task of co-operation is novel and is not an easy one. It is burdened with political difficulties as well as with legal issues that arise in the course of co-operation. But what is important is that the commitment of the FRY to honour its international obligations is strong and is unquestionable.

1.27. Therefore, the FRY surrendered its former Head of State, Mr. Milošević, to the Tribunal, and has caused another former Head of State of Yugoslavia to testify in the same case. The FRY has also surrendered to the Tribunal some of its former top military and State officials, for example, the former Chief of the General Staff of the Yugoslav Army, as well as the former Deputy Federal Prime Minister. Yugoslav courts have issued arrest warrants for additional 17 accused whose arrest has been sought by the ICTY and who are believed to be on the territory of the FRY. Also, the FRY co-operates in other ways with the ICTY. For example, it has provided effective assistance to the Prosecutor to locate, interview and obtain testimony from witnesses and suspects.

1.28. Mr. President, Members of the Court, the war in Bosnia and Herzegovina was a tragic and distressing event. We are still coping with the heavy burden and consequences of the war and with the consequences of other wars that took place on the territory of the former Yugoslavia. But I am glad to say that it seems that progress is visible, and as Professor Varady said yesterday, there is no more impunity for crimes committed.

1.29. We thought it necessary to give our view on the issues raised by the Agent and Deputy Agent of Bosnia and Herzegovina. We thought that these were important points to make, although they are not really connected to the present proceedings on revision. Now, perhaps, it is a time to look again at the substance of the present case. I will now thank you for your attention, and, Mr. President, if you could please ask Professor Varady to continue our presentation. Thank you very much.

Le PRESIDENT : Je vous remercie, Monsieur Djerić. Je redonne la parole à M. le professeur Tibor Varady, agent pour la République fédérale de Yougoslavie.

Mr. VARADY:

2.1. Mr. President, Members of the Court, let me turn now to the essence of the matter, and this is the question whether the Application for Revision of the FRY is admissible in the light of Article 61 of the Statute of the Court. We would also like to lend due attention to the points raised by the opposing side which endeavour to refute our arguments. I have to say, however, that much

of what was said yesterday refutes arguments we did not make — sometimes refutes the opposite of what we argued.

2.2. I would like to mention, for example, that in his concluding remarks Professor Pellet states: "le 'fait nouveau' qu'elle invoque à l'appui de sa demande ne répond nullement aux exigences de l'article 61 du Statut; il est postérieur a l'arrêt dont la révision est demandée . . ."[12].

There must be a misunderstanding here, because the facts we are referring to are: that the FRY was not a party to the Statute at the time of the Judgment (which is certainly not "postérieur a l'arrêt"); and that the FRY did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia (which fact is not subsequent to the Judgment either). The Respondent is probably referring to admission to the United Nations, but the FRY is not positing this as a relevant fact.

2.3. In the same paragraph 68 of the Conclusion it is stated, apparently in connection with the new fact, that: "il n'a, au surplus, aucun effet rétroactif ou rétrospectif . . ."[13]. The FRY never argued or contemplated that the newly discovered fact would or could have a retroactive effect.

2.4. There is no doubt, Mr. President, that this is a highly complicated matter, and clarifications may serve a good purpose. Let me try to clarify once again the position of the FRY in the light of the observations of our respected opponents.

The *ratio decidendi* of the 1996 Judgment

2.5. It is beyond debate that the Court held that "its only jurisdiction to entertain the case is on the basis of Article IX of the Genocide Convention"[14]. The question arose what was the actual basis of this legal conclusion. In other words, which were the perceived facts on which the Court relied to reach this determination. Our conclusion was that the Court assumed to be a fact that the FRY remained bound by the Genocide Convention, continuing the personality of the former Yugoslavia. This conclusion is in full conformity with the wording of the Judgment. We have also demonstrated that no other basis was, or could have been relied upon.

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[12]CR 2002/41, p. 55, para. 68 (Pellet).

[13]*Ibid.*

[14]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Judgment, I.C.J. Reports 1996*, p. 621, para. 41.

2.6. During its oral argument yesterday, the Respondent raised again the arguments of automatic succession. It also referred to allegations made before the 1996 Judgment, according to which the FRY acquiesced in the jurisdiction of the Court on the basis of Article IX.

It is clear that these allegations are not relevant, certainly not relevant at this phase of the proceedings, because the Court contemplated these suggested bases, but opted *not* to rely on them[15].

This has actually been acknowledged by the Respondent. Professor Pellet has taken the position that these issues have not been settled, and suggested that the Court may return to these issues once the case was laid open for revision[16].

2.7. The Respondent further argues that the 1992 Declaration of the FRY is the basis of the conclusion that the FRY was bound by the Genocide Convention. It is not stated how could the Declaration and/or the Note bring about this result. A State cannot *become* bound by a treaty otherwise but by treaty action. The Respondent does not allege that either the Declaration or the Note was treaty action.

In a further attempt to complicate a rather straightforward issue, the Respondent suggests that the FRY undertook commitments by this Declaration, and that these commitments cannot be conditional, and cannot be derogated retroactively. The FRY never argued that it *undertook* commitments by the Declaration and/or the Note, let alone that these commitments were conditional, or that they should be derogated retroactively.

2.8. The FRY has already demonstrated that the Declaration and the Note were neither meant to be treaty action, nor fit to be treaty action — and they were not perceived as treaty action by either the depositary or by the Court.

2.9. The Note accepts "full commitment" towards the United Nations Charter, and phrases this the following way: "The Federal Republic of Yugoslavia, as a founding member of the United Nations, acknowledges its full commitment to the world Organization, the United Nations Charter . . ."[17].

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[15]Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Judgment, I.C.J. Reports 1996*, pp. 620-621, paras. 40-41.

[16]CR 2002/41, pp. 51–53, paras. 55, 56, 62, (Pellet).

[17]*Ibid.*

2.10. The situation is clear. Neither the Declaration, nor the Note meant to, or were capable to *create* commitments — and they did not create commitments. They stated that the FRY continued the personality of the former Yugoslavia. If this is taken to be as a fact, it clearly follows that the FRY has to acknowledge that it is bound by the United Nations Charter, and that it is also bound by treaty commitments undertaken by the former Yugoslavia. But the basis of the commitment is obviously not the Declaration.

2.11. The FRY certainly did not claim that the Declaration or the Note would *make* the FRY a Member of the United Nations, or would *make* it a party to treaties. As it is precisely stated by the depositary:

> "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 . . .*"[18] (Judges' folder, tab 3, p. 2; emphasis added.)

2.12. Let us reiterate. 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.

2.13. Having clarified this, it becomes clear that the allegation of the Respondent concerning some "conditional commitment" is misplaced. The Respondent stated in its Written Observations — and repeated during its pleadings — that Yugoslavia is trying "now retroactively" to make its commitment (to be bound by the same international conventions to which the SFRY had been a party) "purely conditional". Having advanced this contention, the Respondent speculates, that the condition posed is "that other parties to the same treaties would have to accept Yugoslavia's view regarding its being the sole continuator of the SFRY"[19]. Taking this

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

[19]Written Observations of 3 December 2001, para. 2.22.

assumption, the Respondent comes to the conclusion that there is no basis in law to sustain this alleged position[20].

2.14. But the essence of the matter is that the allegation and construction advanced by Respondent simply does not comport with realities. First of all, the elements of this construction are fictitious. Neither the Declaration, nor the Note nor the Application for Revision speak of "conditional commitments"; the term "sole continuator" is not a term used by the FRY either. But again, and more importantly, *the Declaration and the Note were simply not documents by which any commitment could have been created. They were not meant to create treaty commitments, and they were not fit for such a purpose either*. The only reference in the text to "commitments" was reference to commitments of the former Yugoslavia. The position of the FRY was certainly not to say: we shall abide by treaty obligations of the SFRY if other States accept the FRY as the "sole continuator" of the former Yugoslavia. No condition was stated and it was not perceived that the FRY had any choice in assuming or not assuming commitments, just as it had no choice in being or not being a Member of the United Nations or of other international organizations, short, of course, of resigning from membership or denunciation of a treaty.

2.15. The Declaration and the Note did not endeavour to create some new commitments or facts, but assumed to be an already given fact that the FRY — continuing the personality of the former Yugoslavia — remained a Member of the United Nations, and remained a party to treaties concluded by the former Yugoslavia. This perception of facts was reflected in the treatment of Yugoslavia by the depositary prior to 1 November 2000. The Judgment of 11 July 1996 also relied on this assumption. *Taking as a fact that the FRY continued the personality of the former Yugoslavia was the only possible bridge linking the FRY with Article IX of the Genocide Convention.*

The issue of "retroactive change"

2.16. Mr. President, Members of the Court, in paragraph 1.4. of its Written Observations, speaking of the findings in the Judgment with respect to jurisdiction over the FRY, Bosnia and

[20] *Ibid.*

Herzegovina states: "These findings cannot be changed retroactively."[21] This point was repeated during the oral pleadings. If this assertion were true, revision would simply not exist as a remedy. The essence of revision is, of course, to create an opportunity for *changing* what the Court found to be correct at the time of the Judgment in the light of newly discovered facts of a decisive nature. As a matter of fact, one of the preconditions of admissibility is exactly the potential of the newly discovered fact to *change* the findings of the Court. Otherwise, it would not be decisive. In the *Tunisia* v. *Libya* revision case, the Court held that the newly discovered fact was not decisive, because "*it would not have changed the decision of the Court . . .*"[22]. Revision would be pointless and it would, indeed, not exist as a remedy, if the Court could not change its findings after a case was laid open for revision.

2.17. The FRY certainly does not want to go beyond what is provided for in Article 61 of the Statute. This is not an appeal. We do no challenge legal conclusions. What the FRY submits is that there are newly discovered facts, which would have changed the decision of the Court had they been known and taken as a fact at the time of the Judgment.

There are newly discovered facts of such a nature as to be a decisive factor

2.18. Mr. President, Members of the Court, turning to the issue of the newly discovered facts, and in order to avoid any possible misunderstanding, I would like to reiterate the following. 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 are not the newly discovered facts. These are events which have revealed the following two decisive facts:

(1) the FRY was not a party to the Statute at the time of the Judgment; and

(2) the FRY did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia.

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[21]Written Observations of 3 December 2001, para. 1.4.

[22]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,* p. 214, para. 39.

2.19. 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 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.

2.20. The acceptance of the FRY to the United Nations did not "'modify' the pre-existing situation" as asserted by the Respondent[23]. The acceptance of the FRY to the United Nations on 1 November 2000 certainly did not modify the pre-existing status of the FRY from membership to non-membership. It rather revealed that the FRY was not a Member before — and it also revealed that it did not continue the personality of the former Yugoslavia.

2.21. The facts at the time of the Judgment are that 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.

These 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.

The newly discovered facts were unknown to both the Court and to the Party claiming revision at the time of the Judgment — and this ignorance was not due to negligence

2.22. Mr. President, Members of the Court. I would like to turn now to the issue as to whether the newly discovered facts were unknown to the Court and to the Party claiming revision. In this rebuttal, I would link this issue with the question of negligence.

In its oral pleadings the Respondent suggested that the FRY and the Court knew about the new facts, and that the FRY was simply obstinate in not following Security Council resolution 777, and General Assembly resolution 47/1[24], although it was "à l'origine de cette situation"[25].

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[23]CR 2002/41, p. 34, para. 10 (Pellet).

[24]CR 2002/41, p. 35, para. 14 (Pellet).

[25]CR 2002/41, p. 35, para. 13 (Pellet).

This is simply not true. The position of the FRY vis-à-vis its membership in the United Nations and standing in general, was not — as the Respondent suggests — just irrational. It was not an "everybody knew but Yugoslavia was just obstinate" situation. It was a genuine dilemma, and a difficult one.

2.23. Let me add as a further example of conflicting perceptions that after Security Council resolution 777 was adopted, the United States delegate commented on the provision that the FRY shall not participate in the work of the General Assembly, and concluded: "To state the obvious, a country which is not a Member of the United Nations cannot participate in the work of the General Assembly."[26]

2.24. Taking the floor immediately after the United States delegate, the Chinese delegate had a completely different understanding of the resolution which was just adopted. In his words:

> "Finally, I should like to point out that the resolution just adopted does not mean the expulsion of Yugoslavia from the United Nations . . . The Federal Republic of Yugoslavia will continue its participation in the work of the United Nations bodies other than the General Assembly."[27]

These differences resulted in documents not suited to settle intricate legal issues.

2.25. The situation emerging after resolution 47/1 was characterized by then Professor Rosalyn Higgins with the following words:

> "By its resolution 47/1 of 22 September 1992 the General Assembly determined that the Federal Republic of Yugoslavia should not be allowed to participate in the work of the General Assembly. The Assembly did recommend that the new Federal Republic (Serbia-Montenegro) should apply for membership of the United Nations. But the resolution did not either suspend, or terminate, Yugoslavia's *membership* in the UN. *The outcome has been anomalous in the extreme.*"[28]

2.26. In a cautiously worded characterization the Court stated in its 8 April 1993 Order on Provisional Measures that the solution adopted in the United Nations [by GA resolution 47/1] "is not free from legal difficulties". If you allow me to cite the words of another member of this honoured bench, Judge Kooijmans states in 1999 that this 1993 characterization "must be called an understatement". He adds that:

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[26]Debate, 19 September 1992, 113, UN Doc. S/PV.3116 (1992).

[27]*Ibid.*

[28]R. Higgins, *The New United Nations and former Yugoslavia*, International Affairs, 69, 3 (1993) at p. 479; emphasis added.

> "The dossier on the controversy with regard to the Federal Republic of Yugoslavia's continuation of the international personality of the Socialist Federal Republic of Yugoslavia is full of legal snags. The decisions taken by the appropriate United Nations bodies are without precedent and raise a number of yet unsolved questions."[29]

2.27. It is clear, Mr. President, Members of the Court, that it was not a situation in which the true state of facts would have been evident, and what caused problems was just the "obstinacy" of Yugoslavia.

If there are two plausible qualifications of the same complex and unorthodox situation, "anomalous to the extreme" (according to one learned expert), or "full of legal snags" (according to another learned expert), no standard of diligence could impose the duty on a party to seek clarification by taking out of the two possible options exactly the one which is *against* its views and convictions. The FRY was not negligent if it did not seek a resolution of the dilemma in the direction opposite to its persuasions.

2.28. The answer to the question as to whether the FRY did or did not continue treaty membership of the former Yugoslavia was not obtainable before the 1996 Judgment was rendered — and it remained unobtainable after the Judgment was given, until 1 November 2000. Authorities identified by the Secretary-General (competent organ of the United Nations, competent treaty organs, or contracting States) which could have settled the issue, failed to do so.

2.29. The FRY did take steps to clarify the situation, endeavouring to confirm one of the two plausible interpretations of its emerging status. Quite naturally, the FRY sought clarification in the direction which was in line with the views expressed in its 1992 Declaration. Seeking confirmation of the assumption that the FRY did continue the personality of the former Yugoslavia, did remain a Member of the United Nations and a party to treaties, the FRY acted as a Member of the United Nations, and sent reports to various meetings of State parties to conventions ratified by the former Yugoslavia. The FRY also responded to solicitations, and paid membership dues to the United Nations, assuming that both the solicitation and the payment confirm the assumption that the FRY did continue the personality and membership of the former Yugoslavia. *But it was not the position, or "change of position" of the FRY which could have determined the matter. Had this been the*

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[29]Case concerning *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Order of 2 June 1999, I.C.J. Reports 1999 (II)*, separate opinion, p. 814, para. 11.

case, the FRY would have obviously remained a Member of the United Nations, continuing the personality of the former Yugoslavia.

2.30. Let me also state here, that for years after the 1996 Judgment was rendered, the Respondent and other States also felt it necessary to affirm one and to rebut the other possible perception of facts. Three years after the Judgment of 11 July 1996 was rendered, on 8 December 1999, Bosnia and Herzegovina, Croatia, Jordan, Kuwait, Malaysia, Morocco, Qatar, Saudi Arabia and Slovenia submitted a draft resolution[30] proposing to the General Assembly to conclude that the FRY did not continue the personality of the former Yugoslavia, and to request the Secretary-General to eliminate practices supporting a contrary position. The proposed two conclusions of the resolution read:

> "*[The General Assembly]*
>
> 1. *Considers* that, as a consequence of its dissolution, the former Socialist Federal Republic of Yugoslavia ceased to exist as a legal personality and that none of its five equal successor States can be privileged to continue its membership in the United Nations;
>
> 2. *Requests* the Secretary-General to take all necessary steps to ensure that the administrative practice of the Secretariat is fully brought into line with the provisions of the present resolution and other relevant Security Council and General Assembly resolutions by the end of the fifty-fourth session of the General Assembly."[31]

Adoption of these conclusions might have clarified the situation, and might have established as a fact that the FRY did not continue the United Nations membership of the SFRY, was not a party to the Statute by way of United Nations membership, and did not continue the membership of the former Yugoslavia in other treaties either.

2.31. However, during the plenary meeting of the General Assembly on 15 December 1999, the Acting President informed the Members "that consideration of draft resolution A/54/L.62 is postponed to a future date"[32]. This was after the European Union appealed to the "successor States" to refrain from tabling their draft resolution. The EU Non Paper does not support the draft resolution, it rather hints clarification in the opposite direction.

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[30]Bosnia and Herzegovina, Croatia, Jordan, Kuwait, Malaysia, Morocco, Qatar, Saudi Arabia and Slovenia: draft resolution The equality of all five successor States to the former Socialist Federal Republic of Yugoslavia, UN Doc. A/54/L.62 (1999).

[31]The text of this draft resolution was submitted with the Application for Revision as Ann. 21.

[32]See 80th Plenary meeting, 54th Session of the General Assembly, 15 December 1999, UN Doc.A/54/PV.80.

2.32. The EU Non Paper states that the draft resolution takes a *"piecemeal approach"*, and that *"this kind of approach was already rejected in the opinion of the Legal Advisor of the UN on 29 September 1992"*[33]. The Non Paper also argues that "In accordance with Article 6 of the UN Charter a recommendation on an expulsion of a member State of the Security Council is required before action can be taken by the General Assembly."[34] (The recommendation is that of the Security Council.) Again — at least implicitly — meaningful support was given to the perception that the FRY remained a Member of the United Nations, and it would remain a member until expelled following proper procedure. This was, again, certainly not conducive to seeking clarification in the opposite direction, i.e., assuming to be a fact that the FRY was not a Member of the United Nations, and seeking admission as a new Member.

2.33. Endeavouring to maintain their initiative, on 3 February 2000, the representatives of Bosnia and Herzegovina, Croatia, Slovenia and the Republic of Macedonia submitted a letter addressed to the President of the General Assembly, reminding the President that "the introduction of an action on the draft resolution was postponed to a future date owing to the need for further consultations"[35]. Consultations never yielded result, the General Assembly never discussed the proposal to take an unequivocal position regarding the issue of continuity. Thus in February 2000, clarification was again postponed.

2.34. It is impossible to say what is the date when the FRY could not have expected any more clarification to the effect that it did, indeed, continue the personality and treaty membership of the former Yugoslavia. It is not even sure whether there was such a date. Initiatives aimed to resolve the dilemmas, and initiatives aiming to refute the proposition of continuity were indeed submitted, but their consideration was repeatedly postponed. Bosnia and Herzegovina actually states in its Written Observations that:

> "The fact of the matter is that Yugoslavia kept to a position, which may even have been defendable if the other new States emerging from the former Yugoslavia

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[33]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.

[34]*Ibid.*

[35]Letter dated 3 February 2000 from the representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the President of the General Assembly, UN Doc. A/54/742 (2000).

> would — sooner or later — have been willing to accept it. In other words: the Yugoslav position could have turned out to be the internationally acceptable one."[36]

2.35. The FRY applied for membership in the United Nations on 27 October 2000. This application did not reveal in itself that the FRY was not a member of the Statute, neither did it reveal in itself that the FRY did not continue treaty membership of the former Yugoslavia. It is not even sure whether the outcome of the application would have been the same had the FRY submitted it say in 1993, or after Dayton, or during the Kosovo crisis and NATO bombing. The solution was not within the disposition of the FRY. The pertinent facts were only revealed after the Security Council opted to follow the procedure for acceptance of new Members — and after the FRY *was* accepted as a new Member of the United Nations. Only when the Legal Counsel invited the FRY to decide whether it would or would not adhere to treaties ratified by the former Yugoslavia, it became clear that the FRY was not a party to these treaties before, and did not remain bound by Article IX of the Genocide Convention.

2.36. For a long time the FRY sought confirmation of its views on continuity in order to be treated as an equal member of the international community. Conflicting signals were coming, the need to find a solution was growing. It is difficult to say whether the FRY followed one given trail for too long, or not long enough. The power to establish one or the other perception was not in the hands of the FRY.

2.37. Mr. President, Members of the Court, before submitting to you our conclusions, I would like to ask you, Mr. President, to invite my colleague Mr. Vladimir Djerić, who will discuss specific issues linked to Article 35 of the Statute. Thank you very much.

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

Mr. DJERIĆ:

The FRY did not have access to the Court at the time of the 1996 Judgment

3.1. Mr. President, Members of the Court, I would like to begin by emphasizing once more that our Application for Revision submits that there are two new facts of a decisive nature that have

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[36]Written Observations of 3 December 2001, para. 2.33.

been discovered and that lay the 1996 Judgment open for revision. I would like now particularly to focus on one fact — that the FRY was not a party to the Statute and did not have access to the Court at the time of the 1996 Judgment.

3.2. As we have stated at the beginning of our pleadings, access to the Court is an essential precondition to the jurisdiction of the Court, which is regulated by Article 35 of the Statute. Access to the Court is one thing, while jurisdiction is another. This has been stated by the Court in the *Fisheries Jurisdiction* case to which I have already referred on the first day of the oral hearings[37]. But it has also been more recently stated by the Court in its Orders in the cases concerning *Legality of Use of Force*: "whereas the Court can therefore exercise jurisdiction only between States parties to a dispute *who not only have access to the Court but also have accepted the jurisdiction of the Court*, either in general form or for the individual dispute concerned"[38].

3.3. Bosnia and Herzegovina claims that the issue of whether the FRY was or was not a Member of the United Nations is irrelevant for the present case. However, apart from its relevance in relation the status of the FRY as a contracting party to the Genocide Convention — which is discussed by my colleagues — the issue of United Nations membership of the FRY is *crucial* for determining whether or not the FRY had access to the Court, in the first place.

3.4. In that regard, reference to the Declaration of 27 April 1992 in the 1996 Judgment can *only* be interpreted as an assumption that the FRY had access to the Court on the basis of continuing membership of the former Yugoslavia in the United Nations. Even in case that one would accept the allegation of Bosnia and Herzegovina that the Declaration unconditionally and irrevocably bound the FRY by all the international commitments of the former Yugoslavia, *quid non*, this still would be inconceivable in relation to the United Nations Charter and the Statute of the Court. A State cannot became a party to the Statute of the Court by a simple general declaration adopted by an organ which is not competent to give undertakings under international law. Therefore, *in relation to access to the Court*, the reference to the 1992 Declaration in the 1996 Judgment can only be interpreted as a reference to continuity of membership in the Statute of the

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[37]See CR 2002/40, p. 28, para. 2.44.

[38]*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 20; emphasis added; see also *Yugoslavia* v. *Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom, I.C.J. Reports 1999 (I and II)*.

Court and in the United Nations between the former Yugoslavia and the FRY. This, as we have demonstrated, is also evidenced by the *Yearbook* of the Court of 1995-1996 and by earlier editions of the *Yearbook*. Now, however, it has been revealed that the FRY was not a Member of the United Nations before 1 November 2000.

3.5. Mr. President, how else could the FRY come before the Court? It had not become a party to the Statute on the basis of Article 92, paragraph 2, of the United Nations Charter, nor had it submitted a declaration pursuant to Security Council resolution 9 of 1946. The only remaining basis for its access to the Court was the fact that, as a Member of the United Nations, it was *ipso facto* party to the Statute.

3.6. However, yesterday Bosnia and Herzegovina again invoked Article 35, paragraph 2, of the Statute, by claiming that even a State non-party to the Statute could come before the Court, if it is a party to *any* treaty in force providing for the jurisdiction of the Court.

3.7. First, let me reiterate that the applicability of Article 35, paragraph 2, is a matter that can only be discussed in the later phase of the proceedings for revision, once the 1996 Judgment has been laid open. The applicability of the "treaties in force" provision from Article 35, paragraph 2, of the Statute, even under the interpretation of Bosnia and Herzegovina, depends on whether or not the FRY was bound by the Genocide Convention, on any other ground than continuity with the former Yugoslavia. This necessitates that parties address further issues of treaty succession that have not been addressed in this phase of the proceedings. In any case, I wish to refer the Court to our earlier submissions concerning these issues, in particular the issue of automatic succession of treaties. Finally, the FRY once more wishes to underline that it could not be bound by the Genocide Convention on any other ground before its accession to the Convention in 2001, and that in any case it has never become bound by Article IX of the Convention.

3.8. Now, coming back to the contention of Bosnia and Herzegovina that the FRY could come before the Court under the "treaties in force" provision of Article 35, paragraph 2, of the Statute, we have already demonstrated that this contention is untenable and that it actually does not correspond to the practice of the Court and is contrary to the attitude of States. I wish to repeat: there is not even one case in which a State non-party to the Statute has come before this Court without previously fulfilling conditions prescribed by the Security Council. Therefore, reference to

earlier precedents made by Professor Pellet is not very well placed, because the real precedents all point in one and the same direction: there was a total of four cases before this Court in which States non-parties to the Statute came before the Court and in all of them such States followed prescriptions of the Security Council[39]. However, the FRY, as is well known, has never given, nor has it been asked to give, such an undertaking.

3.9. The precedents quoted by Professor Pellet — the *S.S. "Wimbledon"*[40] and the case concerning *Certain German Interests in Polish Upper Silesia*[41] — actually do not change but confirm this picture. Our point was that, at the time of the Permanent Court, the "treaties in force" provision was considered to be confined only to the treaties establishing peace after the First World War. Although in these two cases the Permanent Court did not make any explicit pronouncement on the applicability of Article 35, paragraph 2, the factual pattern in both of them corresponded to the intention of the drafters of the Statute of the Permanent Court — one of the parties in cases was a State not party to the Statute and the cases were brought under the jurisdictional provisions in the legal instruments establishing peace after the First World War.

3.10. Bosnia and Herzegovina also contends that there has been no need to resort to preparatory works of Article 35, paragraph 2, because the meaning of the provision is sufficiently clear from its text and context[42]. We cannot subscribe to this view. There have indeed been disagreements over the meaning and scope of the "treaties in force" provision in Article 35, paragraph 2, such as for instance when the Permanent Court was revising its Rules of Procedure in 1926, and to which Bosnia and Herzegovina has also referred.

3.11. But even then, it is not correct to say, as the Respondent does in its Written Observations, that during the 1926 debate on the revision of the Rules of Procedure "the discussion proved entirely inconclusive"[43]. On the contrary, Judge Anzilotti, with the support of

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[39]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).

[40]The *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*.

[41]Case concerning *Certain German Interests in Polish Upper Silesia, 1925, P.C.I.J., Series A, No. 6*.

[42]CR 2002/41, p. 50, para. 52 (Pellet).

[43]Written Observations by Bosnia and Herzegovina, para. 5.16.

President Huber, challenged the view espoused in the initial draft submitted by the Registrar. According to this draft when one or more parties were not Members of the League a case might be brought before the Court "in virtue of a general treaty in force between the Parties". However, different interpretation, interpretation supported by Judge Anzilotti and President Huber — that the "treaties in force" provision applied only to the peace treaties —, was obviously conclusive, as no alternative interpretation was voiced by any other judge[44].

3.12. Finally, the interpretation proposed by the FRY is confirmed by the preparatory works[45]. According to the preparatory works, *only the treaties that were in force at the time the Statute was adopted* would fall under the expression "treaties in force" in Article 35, paragraph 2 — and this is also our position. All other treaties do not come within the ambit of this provision. Therefore, parties to such treaties which are not parties to the Statute would have to submit an undertaking of basic conditions of equality.

3.13. Mr. President, I will conclude with one last point. Bosnia and Herzegovina claims that it fails to see why the exception under which a State non-party to the Statute could come before the Court on the basis of any treaty in force providing for the jurisdiction of the Court, why this exception would be destructive for the principle of equality[46]. In that regard, Bosnia and Herzegovina claims that Article 94, paragraph 1, of the Charter only reiterates what is already said in Article 59 of the Statute.

3.14. However, if, *arguendo*, Article 94, paragraph 1, of the United Nations Charter would simply reaffirm Article 59 of the Statute, and if Article 94, paragraph 2, would apply in any case, why has it been a decades-long consistent practice of the General Assembly and the Security Council to require from non-Members of the United Nations wishing to come before the Court to accept *expressly* Article 94 of the Charter? Obviously, simple acceptance of a treaty which would provide for the jurisdiction of the Court is and cannot be the same as the acceptance of the Statute and of Article 94 of the Charter.

3.15. Mr. President, Members of the Court, in my presentation I have demonstrated:

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[44]*P.C.I.J.*, Series D, *Acts and Documents concerning the Organization of the Court*, Addendum to No. 2, Revision of the Rules of Court (1926), pp. 105-107.

[45]Article 32, paragraph 1, of the Vienna Convention on the Law of Treaties.

[46]CR 2002/41, p. 51, para. 54 (Pellet).

— that Article 35, paragraph 2, was not a basis on which the FRY could come before the Court in 1996, and

— that the FRY had access to the Court only on the basis of its continuity with the former Yugoslavia, including in the United Nations, which enabled it to be a party to the Statute *ipso facto* as a United Nations Member.

Mr. President, Members of the Court, thank you very much for your kind attention. Mr. President, I would now like to ask you to call upon our counsel, Professor Zimmermann.

Le PRÉSIDENT : Je vous remercie, Monsieur Djerić, et je passe maintenant la parole au professeur Andreas Zimmermann.

Mr. ZIMMERMANN : Merci, Monsieur le président.

I. INTRODUCTION

4.1. Mr. President, Members of the Court, before addressing the arguments made by the other side which relate to estoppel and connected issues, let me first make some more general remarks.

4.2. In the current case, the Court is dealing with most tragic events that have taken place on the territory of Bosnia and Herzegovina, and I can assure you that I am, like everybody in this room — but coming from Germany maybe even more so —, well aware of the historic dimensions of the horrendous crimes that have taken place in the past on the territory of the former Yugoslavia.

Still this Court, whose function is to decide international disputes in accordance with international law and those presenting their arguments before you should limit — and indeed must limit — themselves to legal arguments. As was stated by this Court in the past:

> "[I]t has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. *It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.*"[47]

4.3. Moreover, one should always diligently distinguish the issue of the Court's jurisdiction and the questions of access to the Court on the one side and substantive questions of international

[47] South West Africa Cases, Second Phase, I.C.J. Reports 1966, p. 34, para. 49, (emphasis added).

law on the other. As was recently stated by this Court: "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law"[48].

4.4. Mr. President, Members of the Court, we have heard from the other side many factual allegations which however only belong to the merits stage of this case. Currently we are dealing with a request for revision whereby the FRY — exercising its rights granted to it by virtue of Article 61 of the Statute of this honourable Court — is respectfully asking the Court to lay its 1996 Judgment open for revision. Indeed we are solely and exclusively dealing with the question of admissibility of the request — nothing more and nothing else.

4.5. I will now address one by one the arguments brought forward by my learned colleague Professor Pellet and demonstrate that they can and must be refuted.

4.6. Let me start with the issue that — according to allegations of Bosnia and Herzegovina — the FRY might very well have been a Member of the United Nations, even before it was admitted to the United Nations in November 2000.

II. THE FEDERAL REPUBLIC OF YUGOSLAVIA HAS NOT BEEN A MEMBER OF THE UNITED NATIONS BEFORE IT WAS ADMITTED TO THE ORGANIZATION ON 1 NOVEMBER 2000

4.7. Mr. President, Members of the Court, I have to admit that — even stretching my legal imagination to its limits and even beyond — it is simply not conceivable that a State, that is in our case the FRY, that is admitted as a *new* Member to the United Nations might have already been a Member beforehand.

4.8. Indeed, Article 4 of the Charter of the United Nations itself presupposes that a State that is *admitted* to the organization is beforehand not such a Member. The formerly disputed fact that the FRY only became a Member of the United Nations on 1 November 2000 is also confirmed by the circumstance that with regard to the Charter of the United Nations the FRY is listed by the Secretary-General of the United Nations with the entry date "November 1, 2000" in the "Multilateral treaties deposited with the Secretary-General".

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[48] Case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 10 July 2002*, para. 93.

4.9. More importantly, Bosnia and Herzegovina itself did participate in the decision to admit the FRY. Besides, Bosnia and Herzegovina had in the past *frequently* denied that the FRY had already beforehand been a Member of the organization. This is, *inter alia*, demonstrated by the fact that a letter by the Permanent Representative of Bosnia and Herzegovina stated: "[T]he Federal Republic of Yugoslavia (Serbia and Montenegro) also has to follow the procedure for admission of *new* Member States to the United Nations . . ." [49]

4.10. This obviously implies that it had always been the considered view of Bosnia and Herzegovina itself that the FRY had *ex ante* not been a Member of the organization before it was admitted on 1 November 2000. Accordingly, Bosnia and Herzegovina may not claim during these current proceedings — as it did once again yesterday[50] — that the FRY had already been a Member of the United Nations before it was admitted on 1 November 2000.

4.11. And indeed it has been demonstrated by my colleagues both on Monday and today that — contrary to what Bosnia and Herzegovina argued yesterday — the 1996 Judgment *was based* and *must have been based* on an assumed *ex ante* membership of the FRY in the United Nations, since otherwise the Court would not have been open to the FRY. And this assumed membership in the United Nations must in turn have necessarily been based on the assumed fact that the FRY was — erroneously — considered to be identical with the former Yugoslavia — an assumed fact that later proved to be wrong and which now must give rise to revision of the 1996 Judgment.

4.12. Mr. President, Members of the Court, let me now turn to the issue of estoppel and connected issues. But before doing so I will first, once more, elaborate on the question whether concepts of estoppel, acquiescence and mistake are — as such — applicable in revision proceedings.

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[49]UN Doc. A/51/564-S/1996/885 (Annex 5 of the Annex to the Application for Revision).

[50]CR 2002/41, para. 11 (Pellet); see also para. 3.7. of the Written Observations of Bosnia and Herzegovina of 3 December 2001.

III. GENERAL PRINCIPLES OF INTERNATIONAL LAW ARE NOT APPLICABLE IN REVISION PROCEEDINGS TO THE EXTENT THAT ARTICLE 61 ITSELF CONTAINS SPECIFIC REQUIREMENTS TO THE CONTRARY

4.13. With regard to procedural questions, this Court has first and foremost to apply its own Statute. Thus, to the extent *that the Statute contains an exhaustive regulation of certain procedural issues*, any application of more general rules of international law is not admissible and not necessary because the Statute itself absorbs those principles. Obviously that would not hinder the Court — as the other side seems to mistakenly imply — from applying generally Article 38 of its Statute or general rules of interpretation[51].

4.14. But where and to the extent that Article 61 of the Court's Statute prescribes a certain result — such as by providing that any ignorance not due to negligence does *not* hinder a State to apply for revision — Article 61 also implies that more general rules which would yield a different result cannot be and should not be applied.

4.15. Mr. President, Members of the Court, let us take an example: the provision in Article 61 that an application for revision is inadmissible where the ignorance is due to negligence is obviously nothing but a more specific expression of the general principle of good faith. So why would it then be appropriate to — besides Article 61 of the Statute — also apply the more general principle of good faith? It is already incorporated in Article 61. Instead, one should then simply and solely apply Article 61 itself.

4.16. Mr. President, Members of the Court, let me now come to my next point.

Even if one was to take the position that the application of general notions of mistake, estoppel and *forum prorogatum* is *not* precluded by virtue of Article 61 of the Court's Statute, those party-oriented principles of international law cannot be applied with regard to questions regulating the access of a State to the Court, that is, the relationship between a State and the Court.

[51] But see CR 2002/41, paras. 20 *et seq.* (Pellet) for such a proposition.

IV. REQUIREMENTS AS TO THE ACCESS OF STATES TO THE COURT AS CONTAINED IN ARTICLE 93 OF THE UNITED NATIONS CHARTER AND IN ARTICLE 35 OF THE COURT'S STATUTE ARE BY THEIR VERY NATURE MANDATORY AND CONSTITUTE OBJECTIVE NORMS AND THEREFORE PRECLUDE THE APPLICATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW RELATING TO MISTAKE, ESTOPPEL AND ACQUIESCENCE

4.17. The question as to whether this Court has jurisdiction to entertain a given case only becomes relevant once a party has access to the Court under Article 93 of the Charter and Articles 34 and 35 of the Court's Statute. The question of access to the Court is however not subject to the discretion of the parties as is clearly demonstrated by Article 34 of the Statute.

4.18. Let me again give you an example: Could an entity which is not a State, let us say an international organization, could such an entity by entry into a treaty provide for the jurisdiction of the Court and then bring a contentious case before this Court? Certainly not, since Article 34, paragraph 1, of the Court's Statute expressly provides that only States may be parties to cases before the Court. If, therefore, not even by way of treaty — the most evident proof of consent — the requirements for access to the Court may be circumvented, how should it then be possible to provide for such access by even more informal forms of consent, that is, through principles of estoppel, *forum prorogatum* or mistake?

4.19. But Article 34 of the Statute only partially regulates the issue who may appear before this Court. Other aspects of that very same question — that is, who has access to the Court — are governed by Article 93 of the Charter and Article 35 of the Statute, which provide for which States and under what conditions the Court shall be open.

4.20. Accordingly — just as the question of statehood is one to be objectively determined by this Court regardless of the position taken by the parties — other questions regulating the access to the Court as a precondition — as a precondition — for the exercise of jurisdiction are similarly not questions to be decided by the parties. Therefore neither estoppel, nor *forum prorogatum* nor mistake, nor any other party-oriented mechanism can "contract away" these mandatory requirements of access to the Court.

4.21. These limitations were clearly and convincingly outlined by Professor Thirlway when he stated with regard to the concept of *forum prorogatum*: "*Forum prorogatum* only operates to provide the element of agreement constitutive of jurisdiction; thus it cannot make up for a

jurisdictional or procedural defect which cannot be cured by the agreement of the parties — e.g. lack of status as a party to the Statute."[52]

4.22. And quite similarly, Professor Schwarzenberger takes the position that: "if a party to a dispute is a State to which the Court is closed, this suffices to prevent the case from receiving consideration by the Court"[53].

4.23. Thus, only after a party's access to the Court has been established could then general principles of estoppel, *forum prorogatum* or acquiescence or mistake be invoked with regard to the scope of jurisdiction *ratione personae* and *ratione materiae* given that the scope of the Court's jurisdiction — unlike issues of access to the Court — is subject to the consent of the parties as evidenced by Article 36 of the Statute.

4.24. In our case, the FRY could thus in 1996 — as not being a party to the Statute and as not being a party to a treaty in force within the meaning of Article 35, paragraph 2, of the Court's Statute — not appear before the Court and in the words of Professor Thirlway, this jurisdictional or procedural defect could not be cured, neither by way of estoppel, nor by committing a mistake, nor finally by way of *forum prorogatum*.

4.25. In case the Court should *not* follow the approach just outlined, I will now demonstrate that — even when applying general concepts of mistake — the FRY would still not be barred from requesting revision.

V. THE FRY IS NOT BARRED FROM APPLYING FOR REVISION DUE TO CONCEPTS OF MISTAKE

4.26. Bosnia and Herzegovina claims that it was the FRY which — through its own fault — made a mistake in claiming identity with the former Yugoslavia and that it should for that reason not be able to now claim the contrary[54].

4.27. But let me just remind you that — as mentioned by my colleague earlier this morning[55] — it was this Court which stated in 1993 with regard to the membership of the FRY in

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[52]H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *BYBIL 1998*, 1 at p. 27.

[53]G. Schwarzenberger, *International Law as applied by international courts and tribunals*, Vol. IV, p. 434.

[54]CR 2002/41, para. 14 (Pellet).

[55]CR 2002/42 (Varady).

the United Nations that the solution found by the United Nations organs is not "free from legal difficulties"[56] and that other Members of this honourable Court went even further in describing the legal uncertainties involved in the decision[57].

4.28 Besides, if one looks at the record leading to the adoption of both, Security Council resolution 777 and General Assembly resolution 47/1, it is quite striking that a considerable number of States including *inter alia* China[58], Romania[59], the Russian Federation[60], Tanzania[61], Zambia[62], and Zimbabwe[63] stated that the membership of the FRY in the United Nations had not been terminated by said decisions.

4.29. Moreover, — as was again demonstrated earlier by my colleagues — even Bosnia and Herzegovina had during proceedings before this Court taken the position that the FRY had remained a Member of the United Nations when claiming that the FRY had committed a violation of Article 2, paragraph 4, of the United Nations Charter[64]. I therefore find it indeed rather surprising when counsel for Bosnia and Herzegovina now states that Bosnia and Herzegovina has not taken a position as to the situation of the FRY with regard to its continued membership in the United Nations. Instead it seems that Bosnia and Herzegovina had — at least for the purposes of our case — committed the same mistake, when claiming a violation of Article 2, paragraph 4, by the FRY — committed the same mistake it now claims should preclude the FRY from requesting revision[65].

4.30. Furthermore, I have already demonstrated during my last intervention — relying on the jurisprudence of this Court in the *Temple of Preah Vihear* case — that a State may not, by simply

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[56]*I.C.J. Reports 1993*, p. 14, para. 18.

[57]R. Higgins, The New United Nations and former Yugoslavia, International Affairs, 69, 3 (1993), p. 479; case concerning *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, separate opinion, para. 21.

[58]S/PV.3116, p. 14.

[59]A/47/PV.7, p. 192: "We appreciate the fact that the resolution does not provide for either the suspension or the exclusion of Yugoslavia from the United Nations."

[60]S/PV.3116, p. 3.

[61]A/47/PV.7, p. 177, stating that the "remaining entities were not required to reapply and *their existence was never questioned*".

[62]A/47/PV.7, p. 172.

[63]A/47/PV.7, p. 163, referring to Serbia/Montenegro as the "remaining part".

[64]Application of Bosnia and Herzegovina, para. 135.

[65]CR 2002/41, para. 14 (Pellet).

making a mistake, accept the jurisdiction of the Court, where the mistake relates to a fundamental legal requirement[66]. Bosnia and Herzegovina tries to refute this by referring to the 1962 Judgment in the same case which deals with the merits of the case[67].

4.31. I indeed did not quote this latter decision — but on purpose. Why? Because latter reference deals with a matter of substance, while it was the 1961 Judgment which more specifically dealt with issues of jurisdiction. And besides the 1961 Judgment expressly addressed the issue of mistakes related to fundamental issues, which are not subject to the disposition of the parties. That means in other words that a State — like the FRY — which in 1996 was not a party to the Statute — may not by simply making a mistake provide for the jurisdiction of the Court.

4.32. Besides I have also already demonstrated that it was far from obvious — to say the least — that the FRY was wrong at the time when it claimed to have continued the Yugoslav membership in the United Nations and to be identical with the former Yugoslavia. And besides, one may indeed not force a sovereign State to give up what we believe was a bona fide claim of continued personality.

4.33. Mr. President, Members of the Court, I will now demonstrate in a next step that, even if this Court takes the position that the principle of estoppel could come into play in revision proceedings or in situations dealing with access to the Court, *quid non,* the specific requirements of estoppel are not fulfilled in the case at hand.

VI. EVEN IF AS A MATTER OF PRINCIPLE ESTOPPEL MAY APPLY, *QUID NON*, THE FRY IS STILL NOT ESTOPPED FROM REQUESTING REVISION SINCE THE REQUIREMENTS OF ESTOPPEL ARE NOT FULFILLED

4.34. It has to be first noted, however, in that regard that Bosnia and Herzegovina itself has admitted in its Written Observations that with regard to the Yugoslav request for revision it is "not useful to refer to the doctrine of estoppel"[68].

4.35. Besides, the requirements for applying the concept of estoppel are not fulfilled. As already stated by this Court in the *North Sea Continental Shelf* case[69] and reiterated in the *Military Activities* case:

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[66]CR 2002/40, paras. 5.32–5.33.

[67]CR 2002/41, para. 17 (Pellet).

[68]Written observations by Bosnia and Herzegovina, para. 4.14.

> "estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, *detrimentally to change position or suffer some prejudice*"[70].

4.36. It has to be noted, however, that Bosnia and Herzegovina has not demonstrated in what respect did it *detrimentally* change its own position or *suffer prejudice* due to the behaviour of the Federal Republic of Yugoslavia.

— First, Bosnia and Herzegovina has until today continuously taken the position that the FRY could not and did not continue the legal personality of the former Yugoslavia and that the FRY was instead a simple successor of the former Yugoslavia.

— Secondly, the FRY had consistently asserted both before and outside this Court that it continued the identity of the former Yugoslavia which led to conclusions regarding its continued treaty membership until the new fact, which lead to this request for revision, became known. This assertion by the FRY did not, however, force Bosnia and Herzegovina to *detrimentally* change its own position or suffer prejudice — quite to the contrary.

4.37. Indeed, had Bosnia and Herzegovina not accepted this approach for the sake of the proceedings before this Court as it did[71], it would have been necessary for Bosnia and Herzegovina to

— first demonstrate that a case can be brought before this Court against a State which is not a Member of the United Nations and thus not a party to the Court's Statute;

— besides, it would have also been necessary for Bosnia and Herzegovina to furthermore demonstrate that the FRY had either automatically succeeded to the Genocide Convention or that the official Note of 27 April 1992 emanating from the FRY could be considered a valid and effective notification of succession.

4.38. Accordingly, the previous perception of the relevant facts did indeed *not constitute a disadvantage* for Bosnia and Herzegovina but instead did work in favour of Bosnia and Herzegovina's own legal position.

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[69] *I.C.J. Reports 1969*, p. 26, para. 30.

[70] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 414-415, para. 51; emphasis added.

[71] See Written Observations of Bosnia and Herzegovina, paras. 4.16-4.17.

4.39. Furthermore, as admitted by Bosnia and Herzegovina itself in its Written Observations[72] and as stated by this Court in the *Military Activities* case[73], estoppel stems from the general principle of good faith in international law. Thus as has already been demonstrated in our Application[74], the FRY did not act in bad faith, when it claimed to be identical with the former Yugoslavia, given that the solution adopted within the framework of the United Nations — as stated by this Court, and let me repeat it —

— was not free from legal difficulties[75] and that besides

— different organs of the United Nations, as well as the Secretary-General, in its function as depositary, had taken action that could be interpreted as supporting the idea of identity between the former Yugoslavia and the FRY.

4.40. Bosnia and Herzegovina may neither in that regard rely on the decision of 11 July 1996 where the Court had indeed observed that it had not been contested that Yugoslavia was a party to the Genocide Convention, because — as was already demonstrated by my colleague Professor Varady — this Judgment itself was based on the assumption of identity. Besides, as stated by Judge Weeramantry in an earlier decision of this Court "revision *necessarily* involves an alteration or modification of the previous Judgment"[76], taking into account the newly discovered fact previously unknown to the Court.

Mr. President, Members of the Court, I will now address the issue of acquiescence.

VII. THE FEDERAL REPUBLIC OF YUGOSLAVIA HAS NOT ACQUIESCED IN THE JURISDICTION OF THE COURT

4.41. Bosnia and Herzegovina has further argued that the jurisdiction of the Court can be based on the fact that the FRY has acquiesced in the jurisdiction of the Court[77]. This proposition cannot be entertained, however, since the Court had found that it was unable to uphold any of the

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[72]Written Observations of Bosnia and Herzegovina, para. 4.1.5.

[73]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 414-415, para. 51.

[74]See in particular paras. 34-35.

[75]*I.C.J. Reports 1993*, p. 14, para. 18.

[76]*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, I.C.J. Reports 1995*, p. 288; dissenting opinion of Judge Weeramantry, p. 320, Introduction (emphasis added).

[77]CR 2002/41, paras. 60 *et seq.* (Pellet).

additional bases of jurisdiction[78], and since this finding was accepted by Bosnia and Herzegovina itself in its Written Observations where it stated: "It is certainly not the intention of Bosnia and Herzegovina to question these findings at this stage."[79]

4.42. Besides — as was demonstrated —, the Judgment of 11 July 1996 was *solely*, and could *solely* based on the assumption that the FRY was a Member of the United Nations, a party to the Court's Statute and also bound by Article IX of the Genocide Convention as being identical with the former Yugoslavia — an assumption that has, however, *ex post facto*, proved to be erroneous and which thus has given rise to our Application for Revision. Indeed after dealing with various other additional bases of jurisdiction invoked by Bosnia and Herzegovina[80], including the concept of acquiescence the Court concludes[81] — and it is worth noting it again — that it "is unable to uphold *any* of the additional bases of jurisdiction invoked by the Applicant"[82]. Accordingly the Court found in 1996 that "its only jurisdiction to entertain the case is on the basis of Article IX of the Genocide Convention"[83].

Thus, it is the considered view of the FRY that the issue of acquiescence has already been definitely settled by the Judgment of the Court of 1996.

4.43. Should the Court, however, find otherwise it is submitted that the issue would then not belong to the current phase of the proceedings dealing with the admissibility of the request for revision, but that it should then instead be discussed at a later stage after the Court has first decided, in accordance with Article 61, paragraph 2, of the Statute, that the Application was admissible.

4.44. Bosnia and Herzegovina in that regard proposes that the Court, should it find that the requirements of Article 61 of the Court's Statute are fulfilled — as they are, as we believe —, should immediately decide whether alternative bases for the Court's jurisdiction would exist[84].

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[78] *I.C.J. Reports 1996*, p. 620, para. 41.

[79] Written Observations of Bosnia and Herzegovina, para. 4.31.

[80] *I.C.J. Reports 1996*, pp. 619 *et seq.*, paras. 37 *et seq.*

[81] *Ibid.*, p. 620, para. 40.

[82] *Ibid.*, p. 620, para. 41 (emphasis added).

[83] *Ibid.*

[84] CR 2002/41, para. 46 (Pellet).

4.45. Mr. President, Members of the Court, Article 61, paragraph 2, of the Court's Statute expressly provides that the proceedings for revision shall be opened by a judgment of the Court declaring the application to be admissible. The proposal submitted by Bosnia and Herzegovina thus runs counter to the very structure of Article 61 and can for that very reason alone not be entertained. Moreover, once the case has been laid open for revision in accordance with Article 61, paragraph 2, of the Statute difficult legal questions would have to be addressed by both, the Parties and the Court, including *inter alia* the issue of automatic succession to the Genocide Convention. It is therefore respectfully submitted that any such approach proposed by Bosnia and Herzegovina is inadmissible given the bold wording, structure and purpose of Article 61, paragraph 2, of the Statute.

4.46. Should the Court however not follow that course of action and decide to deal with that issue already at this stage, the FRY will now demonstrate that it indeed never acquiesced in the exercise of jurisdiction by the Court in a manner that could be now held against it. This is once more due to the fact that the whole approach by the FRY had clearly been based on the understanding that it was identical with the former Yugoslavia and that it could accordingly only be considered bound by treaties previously entered into by the former Yugoslavia on the basis of said assumption which however, by now, has proved to be an erroneous one.

4.47. Besides, the Court itself has frequently made explicit reference to the Yugoslav Declaration of 27 April 1992, which in turn, as we know, was based on the idea of continuity, thereby putting Bosnia and Herzegovina on notice that the idea of identity formed indeed the very core and sole basis for the jurisdiction of the Court.

4.48. This is also demonstrated by the fact that the FRY withdrew its counterclaims once the new facts leading to the Application for Revision became known, since it thereby became evident that the Court could no longer exercise its jurisdiction vis-à-vis the FRY, the FRY not having access to the Court under Article 35 of the Court's Statute and the FRY besides not being bound by Article IX of the Genocide Convention.

Mr. President, Members of the Court, before concluding, let me address the question whether the jurisdiction of this honourable Court may be based on the concept of *forum prorogatum*. It may not.

VIII. THE JURISDICTION OF THE COURT MAY NOT BE BASED ON THE PRINCIPLE OF *FORUM PROROGATUM*

4.49. Bosnia and Herzegovina argues in that regard that, by making certain statements before this Court, the FRY has implicitly accepted the jurisdiction of the Court as to Article IX of the Genocide Convention. There are however four reasons each of which is in itself sufficient which must necessarily lead to the conclusion that any such argument is not well-founded.

4.50. First, the FRY has never unequivocally indicated that it accepts the Court's jurisdiction. This Court has consistently held — starting with its decision in the *Corfu Channel* case[85] — that in order to provide for the jurisdiction of the Court under the principle of *forum prorogatum*, a State must have voluntarily and indisputably accepted said jurisdiction in the course of the proceedings. The FRY has however never acted that way. Indeed it was the Court which held during the previous course of the proceedings in this case that "Yugoslavia consistently contended during the subsequent proceedings that the Court lacked jurisdiction — whether on the basis of the Genocide Convention or on any other basis"[86].

And it was on that basis that the Court rejected the notion of *forum prorogatum* as an additional basis for jurisdiction in its 1996 Judgment[87]. And after the 1996 Judgment had been handed down, the FRY was left with no other choice than to take a position regarding the substance of the claim, even if the position of the FRY with regard to the Court's jurisdiction had not changed.

4.51. Second, any counterclaims were presented by the FRY only after the Court had previously found in 1996 that it has jurisdiction. Said determination was — as we have demonstrated — however based on an assumed identity of the FRY with the former Yugoslavia. Once new facts were revealed which proved that this assumption was erroneous, the case was laid open for revision and this result cannot now be circumvented by the fact that the FRY itself had previously relied on said Judgment — indeed it had no other choice but to rely on it.

4.52. Moreover, even if one takes the position — *quid non* — that the FRY had accepted the exercise of jurisdiction by the Court, it would have still not paved the way for the Court to exercise

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[85] *Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27.

[86] *I.C.J. Reports 1996*, pp. 620-621; see also as to the provisional measures stage of the case, *I.C.J. Reports 1993*, pp. 341-342.

[87] *I.C.J. Reports 1996*, pp. 620, 621.

jurisdiction. This is due to the fact — as we have demonstrated beforehand — that there are certain minimum requirements for the Court to exercise jurisdiction with regard to a State which is neither a party to the Statute nor has been invited by the Security Council under resolution 9 (1946) to appear before the Court. The argument advanced by Bosnia and Herzegovina — if taken seriously — would mean that States could circumvent the most basic requirements contained in both the Charter of the United Nations and the Statute of the Court with regard to the issue of access of States to the Court — a result definitely not contemplated by the Statute, nor the Charter.

4.53. Finally, the argument brought forward by Bosnia and Herzegovina is — once again — not in line with the very structure of Article 61 itself. At this stage of the proceedings we are solely dealing with the question as to whether the Application for Revision is admissible or not and we believe it is. It is only after that stage has been passed that the Court could then discuss whether there are alternative bases in order to provide for the Court's jurisdiction. In that regard the situation is parallel to the question whether Article 35, paragraph 2, of the Statute can apply in our case — *quid non* — an issue that may be only properly addressed once the case has been laid open for revision.

Mr. President, Members of the Court, it is for all of the foregoing reasons that we believe that any arguments based on the notion of *forum prorogatum* should be also dismissed. Merci, Monsieur le président, Membres de la Cour.

Le PRÉSIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole au professeur Tibor Varady en tant qu'agent de la République fédérale de Yougoslavie.

Mr. VARADY: Merci, Monsieur le président.

CONCLUSIONS

5.1. Mr. President, Members of the Court, let me present our conclusions. Revision is an exceptional remedy. Only most unorthodox cases, which elude all patterns, can give rise to revision. This is such a case. The dissolution of the former Yugoslavia did not follow any model or pre-established pattern. It yielded more controversy than clear-cut situations. One of the most consequential emerging dilemmas was whether the FRY continued the personality of the former

Yugoslavia, or whether it was one of the newly independent States emerging as successors of the former Yugoslavia.

In the first hypothesis, the FRY would have continued the membership of the former Yugoslavia in the United Nations, and it would have remained bound by treaties ratified by the former Yugoslavia. In the second hypothesis, the FRY could only have become a Member of the United Nations by applying as a new Member. Likewise, in this second hypothesis, the FRY could only have become bound by treaties by its own treaty action. Conceivably, the theory of automatic succession could also have been relied upon, but the Court opted explicitly not to rely upon the theory of automatic succession.

5.2. We have demonstrated that neither the Declaration nor the Note of 27 April 1992 was a treaty action. They did not endeavour to *create* commitments, they rather expressed a view of the dissolution of the former Yugoslavia, stating that the FRY was identical with the former Yugoslavia — which meant, of course, that it also had identical commitments. This perception was also confirmed by the fact that the depositary never considered these documents as treaty actions. The letter of the Legal Counsel of 8 December 2000 obviously does not consider the Declaration and/or the Note as treaty action. Instead, it invites the FRY to undertake treaty action if it wishes to become bound by relevant treaties. This invitation explicitly pertained to the Genocide Convention as well.

5.3. It is clear that the Judgment of 11 July 1996 could only have been based on the first hypothesis, that is, on the assumption that the FRY continued the personality and treaty membership of the former Yugoslavia. Had the Court adopted the second hypothesis, it would have had to establish how did the FRY *become* bound by the Genocide Convention. This was not established. Instead, taking continued personality as a fact, the Court concluded that the FRY *remained* bound by Article IX of the Genocide Convention. (At the same time, with regard to Bosnia and Herzegovina — and consistent with the concept of State succession — the Court held that it *became* bound by the Convention[88].)

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[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 611, para. 20.

The depositary offered support to this perception. Until 1 November 2000 "Yugoslavia" was listed as an original Member of the United Nations since 1945, and it was listed as an original party to the Statute. Furthermore, "Yugoslavia" was listed as a party to the Genocide Convention since 1950. The assumption of continued personality was the only bridge linking the *FRY* with the status of a listed participant which became a party to the Genocide Convention by ratification in 1950.

5.4. Today it is clear that the FRY did not continue the personality of the former Yugoslavia. But this was not clear before 1 November 2000. The letter of the Legal Counsel of 8 December 2000 explains, and makes it crystal clear, that before 1 November 2000 the FRY was *not* treated as one of the newly independent States emerging as successors of the former Yugoslavia. Instead, it was exactly the admission of the FRY to the United Nations on 1 November 2000, that triggered the new perception. It was in the light of the admission of the FRY to the United Nations on 1 November 2000 that the FRY was perceived as a "Newly Independent State"; and from this point on the depositary started treating the FRY as a "Newly Independent State" which does not continue treaty membership of another subject, but has to undertake specific treaty action if it wishes to be bound by treaties.

5.5. The Legal Counsel stated: "In the light of the circumstances of the FRY's admission to membership of the United Nations on 1 November 2000, it would be proper for the depositary to treat the Federal Republic of Yugoslavia as a 'Newly Independent State'."[89]

5.6. As clearly confirmed by the Legal Counsel, it was the admission of the FRY to the United Nations on 1 November 2000 that revealed the actual facts. This was the turning point in perception. Even the depositary who has been first and foremost qualified to ascertain and observe treaty membership, or continued treaty membership, was not ready to take a conclusive position before 1 November 2000 — when he took a position "in the light" of the admission of the FRY to the United Nations on 1 November 2000. Drawing conclusions from these newly discovered facts, the Legal Counsel invited the FRY to undertake treaty action, including treaty action with regard to the Genocide Convention.

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[89]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.

Since admission to the United Nations, and in the light of this admission, the FRY is treated as one of the newly independent States.

5.7. Mr. President, Members of the Court, what we have here, is a clear case for revision. A fundamental change took place with regard to the premises of the 1996 Judgment. The change is not in the realm of law or legal deductions. The FRY is not questioning the legal reasoning of the Court. The change pertains to what was perceptible and what was perceived as the factual basis of the legal determination of jurisdiction.

Jurisdiction *in personam* over the FRY was based on the perceived fact that following the break-up of the former Yugoslavia, the FRY continued the personality and treaty membership of the former Yugoslavia. The legal conclusion that the Court has jurisdiction had its only basis in this perceived fact.

5.8. Today it is clear that the FRY did not continue the personality of the former Yugoslavia, and did not remain bound by Article IX of the Genocide Convention. This essential assumption on which jurisdiction was based has been reversed. The legal reasoning is not at issue. On the ground of what was perceived as a fact in 1996 no other legal determination was possible. The FRY respectfully submits that the newly established facts lead to a new legal conclusion which remains to be drawn — and which can only be drawn after the case is laid open for revision.

Mr. President, Members of the Court, with your permission I will submit to you now our submissions.

SUBMISSIONS OF THE FEDERAL REPUBLIC OF YUGOSLAVIA

For the reasons advanced in its Application of 23 April 2001 and in its pleadings during the oral proceedings held from 4 to 7 November 2002, the Federal Republic of Yugoslavia respectfully requests the Court *to adjudge and declare:*

— that there are newly discovered facts of such a character as to lay the 11 July 1996 Judgment open to revision under Article 61 of the Statute of the Court; and

— that the Application for Revision of the Federal Republic of Yugoslavia is therefore admissible.

Mr. President, Members of the Court, concluding my presentation, let me say that appearing before this Court is an exceptional honour and a great privilege. I truly appreciate this honour and this privilege, and I very much appreciate your attention. Thank you very much.

Le PRESIDENT : Je vous remercie, Monsieur l'agent. Ceci met un terme au second tour de plaidoiries de la République fédérale de Yougoslavie. La Cour a pris note des conclusions finales de la République fédérale de Yougoslavie. Elle se réunira à nouveau demain à 10 heures pour le deuxième tour de plaidoiries de la Bosnie-Herzégovine.

L'audience est levée à 12 h 5.

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