SEPARATE OPINION OF JUDGE KOROMA

Jurisprudence on revision scant — Revision is essentially a matter of determining what Court should do in the light of fresh facts or arguments — Need to elucidate Article 61 and jurisprudence on revision — Revision not to be viewed as a legal challenge to earlier legal conclusion reached by Court on the basis of facts known at the time but a factual challenge — Arguments of Federal Republic of Yugoslavia and Bosnia and Herzegovina — New facts fundamental to Article 61 of Statute — Difficulties with findings of Court — Distinction between "facts" and "consequences" — Federal Republic of Yugoslavia's admission to United Nations on 1 November 2000 a "new fact" from which certain consequences flow — Other possible grounds of jurisdiction

1 It is rare that an application for revision of a judgment comes before the Court, hence the jurisprudence in this area is rather scant See, however, *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* It is therefore important that whilst endeavouring to uphold the integrity of its decisions, the Court should clarify the meaning of Article 61 of the Statute, governing the request for revision, as well as its jurisprudence in this area on those few occasions when the opportunity arises

2 The revision procedure stipulated in Article 61 raises the question as to what the Court ought to do in the light of fresh evidence or fresh arguments which have been discovered or have emerged since its decision in the specific case In other words, the Court is called upon to reconsider a matter which it has already decided in the light of fresh facts or arguments, if these prove of such importance or of such decisive nature that, had the Court known of them, it would have reached a different decision or a different conclusion Revision presupposes that the fact must have existed prior to the Judgment, even though discovered subsequently, and that the lack of knowledge was not due to negligence The revision procedure is thus essentially *about newly discovered facts or arguments* and *not a legal challenge,* as such, *to the conclusion reached* earlier by the Court based on the facts as then known, although the outcome of the challenge may have an effect on the Judgment

3 In its 1996 Judgment, the Court found that it had jurisdiction in the case of the Application presented by Bosnia and Herzegovina on the basis

of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") The Court's finding was based on the fact that the Federal Republic of Yugoslavia (FRY) had on 22 April 1992 formally declared that it remained bound by those treaties to which the former Socialist Federal Republic of Yugoslavia (SFRY) was party The Court also found that the FRY had not denied that it was a party to the Genocide Convention Thus, the Court reached the conclusion that the FRY was a party to that Convention on 20 March 1993, the date on which Bosnia and Herzegovina filed its Application The Court similarly found that Bosnia and Herzegovina was also a party to the Genocide Convention by virtue of the deposit of a notice of succession to the Convention with the United Nations Secretary-General on 29 December 1992

4 In its Application, Yugoslavia contends that the decision of the General Assembly on 1 November 2000 to admit the FRY as a new Member of the United Nations is a "new fact" and that what occurred on 1 November 2000 is a fact of such a nature "as to be a decisive factor regarding the question of jurisdiction *ratione personae* over the FRY" (Application of Yugoslavia, p 38, para 23) Yugoslavia maintains that

> "Since membership in the United Nations, combined with the status of a party to the Statute and to the Genocide Convention represent the only basis on which jurisdiction over the FRY was assumed the disappearance of this assumption and the proof of the disappearance of this assumption are clearly of such a nature to be a decisive factor regarding jurisdiction over the FRY — and require a revision of the Judgment of 11 July 1996 " *(Ibid)*

5 Yugoslavia also submits that "jurisdiction over the FRY could not have been asserted without United Nations membership and without the FRY being a State party to the Statute and to the Genocide Convention at the time of the 11 July 1996 Judgment" *(ibid)* It also points out "Since the 11 July 1996 Judgment based jurisdiction on one ground (Article IX of the Genocide Convention), new facts which show that the FRY was not and could not have been bound by Article IX of this Convention, are decisive " *(Ibid)* Yugoslavia concludes that the assumption of its continued membership in the United Nations and its continued status as party to the Statute of the Court and to the Genocide Convention was critical, because there was no other assumption which could justify jurisdiction over it *ratione personae* (*ibid* , p 50, para 32)

6 Yugoslavia also notes that "[a]ccording to Article XI of the Genocide Convention, it is only open to Members of the United Nations, or to non-Member States to which an invitation to sign or accede has been addressed by the General Assembly" (*ibid* , p 8, para 3 *(c)*) Yugoslavia therefore states that it could not have become a party to the Genocide Convention without being a Member of the United Nations, or without

having received a special invitation of the General Assembly (Application of Yugoslavia, p 48, para 31).

7 For its part, Bosnia and Herzegovina claims that whatever might have been the legal status of Yugoslavia at the time the Judgment was made, that State was, and still is, bound by its own statements In this regard, Bosnia and Herzegovina refers to "a number of unambiguous declarations by which Yugoslavia admitted that it was a Member of the United Nations and a party to the Genocide Convention" (Written Observations of Bosnia and Herzegovina, p 35, para 4 9) Furthermore, Bosnia and Herzegovina argues that the Court and Bosnia and Herzegovina itself have placed reliance on Yugoslavia's assertions and that Yugoslavia is therefore estopped from taking up an inconsistent position vis-à-vis its previous declarations

8 According to the jurisprudence, and as stated above, the discovery of new facts is a strict condition on the availability of revision This condition is also fundamental to the decision on the Application, whether the admission of the FRY to membership of the United Nations which took place on 1 November 2000 is a newly discovered fact within the meaning of Article 61 of the Statute, which fact must have existed, but been unknown, at the time of the Judgment

9 It is against this background that I have difficulty with some conclusions reached in the Judgment One such difficulty is that the Court, without defining what in its opinion will be considered a "new" fact within the meaning of Article 61, stated that if the fact occurred several years after a judgment, this is not a new fact within the meaning of Article 61, irrespective of its legal consequences Although this as a position of law is correct as far as it goes, the issue the Court has to determine involves the question as to whether or not Yugoslavia was a Member of the United Nations before 1 November 2000 The Court itself had earlier acknowledged in its Judgment in 1996, that the FRY's status regarding United Nations membership was not free from "legal difficulties" Accordingly, to dismiss the FRY's admission to membership of the United Nations in November 2000 and its legal consequences as simply a fact occurring several years after the Judgment is a distortion and too superficial That General Assembly resolution 55/12 of 1 November 2000 led to the FRY's membership of the United Nations is not only a fact or an event but this fact or event had certain consequences It is to be recalled that the Court relied for the basis of its Judgment in 1996 on the FRY's declaration of 22 April 1992 that it remained bound by those treaties to which the former Socialist Federal Republic of Yugoslavia had been a party, and the Court assumed for this purpose that the FRY was a Member of the United Nations Unless such assumption was made, the FRY's declaration alone should not and could not legally have been sufficient to serve as a basis for recognition of the FRY as a party to the Genocide Convention — the sole basis on which the Court founded its

jurisdiction Accordingly, the FRY's admission to membership of the United Nations on 1 November 2000 suggests that it was not a Member of the United Nations in 1996 and thus was not a party to the Genocide Convention, therefore, the basis of the Court's jurisdiction no longer exists Unfortunately, the Court chose not to address these critical issues, which were raised in the Application and in the hearings, but rather stated that the consequences which the FRY sought to draw from the facts which occurred in 2000, even if established, "cannot be regarded as facts within the meaning of Article 61" (Judgment, para 69) Far from the consequences not being established, it was because of the FRY's admission to membership of the United Nations that it acceded to the Genocide Convention in March 2001, after having received a letter from the Legal Counsel of the United Nations asking it to undertake any necessary treaty formalities in its capacity as successor State In the face of all this, the Court felt able to conclude that "it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the Judgment was given, unknown to the Court and also to the Party claiming revision'" (Judgment, para 72), and did so notwithstanding the fact that the Court had earlier noted that the difficulties which arose regarding the FRY's status between the adoption of General Assembly resolution 47/1 and its admission to the United Nations on 1 November 2000 resulted from the fact that, while the FRY's claim to continue the international legal personality of the former Yugoslavia was not "generally accepted", the precise consequences of this situation were determined on a case-by-case basis The Court went on to say that "To '*terminate* the situation created by resolution 47/1', the FRY had to submit a request for *admission* to the United Nations as had been done by the other Republics composing the SFRY " (Judgment, para 70, emphasis added) The Court stated that all these elements had been known to it but that what it had not known in July 1996 was when the FRY would apply *for membership* in the United Nations and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1 To say the least, not only is there an inconsistency in this position, but the legal implication is inescapable and seriously affects the present Judgment In the first place, the Court is not in a position to say, as it has implied, that had the FRY submitted a request for membership this would have been automatically approved, for as the Court has said, the consequences of the FRY's situation were determined on a case-by-case basis, further, given the climate which then existed, there could have been no certainty about the outcome The Security Council in resolution 777 (1992) had considered that

> "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations, and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations ".

The proposition that the outcome of such application was known is highly debatable, to say the least On the other hand, it is incontestable that, as the FRY stated in its Application, "[t]he admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention" (Application of Yugoslavia, p 38, para 23)

10 Granted that the issues raised by this case are not easy of solution, but I fear that the answers provided beg the question and cannot withstand scrutiny In this regard the appraisal of Article 61 and its application to this case leave much to be desired, hence my doubts and misgivings as far as the Judgment is concerned

11 In my view, when an application for revision is submitted under Article 61 and where fresh facts have emerged and are of such importance as to warrant revising the earlier decision or conclusion, the Court should be willing to carry out such a procedure. Such an application is not to be regarded as impugning the Court's earlier legal decision as such, as that decision was based on the facts as then known I am of the view that the admission of the FRY to membership of the United Nations in November 2000 does have legal implications for the Judgment reached by the Court on this matter in July 1996

12 In my opinion, the Court's jurisdiction could have been founded on more legally secure grounds

(Signed) Abdul G KOROMA